THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[CIVIL DIVISION]

MISCELANOEUS CAUSE NO. 342 OF 2021

MUKIIBI EDWARD:: APPLICANT

VERSUS

1. **WAKISO DISTRICT SERVICE COMISSION**
2. **WAKISO DISTRICT LOCAL GOVERNMENT:::::::::::::::::::::::::::RESPONDENTS**

BEFORE: HON JUSTICE MUSA SSEKAANA

RULING

The Applicant brought this application under Rule 3, 5, 6(1) of the Judicature (Judicial Review Rules) SI No.11 of 2009 as Amended by SI 32 of 2019, S33, 36, 37& 38 Judicature Act), S11 of the Public Service Standing Orders, O52 r 1 CPR. The application is by Notice of Motion for orders that;

a. A declaration that the decision by the Respondents of refusal to approve the Applicant's transfer within service to Makindye Ssabagabo Municipality as Senior Planner made on 14/9/2021 without giving the Applicant an opportunity to be heard and without assigning any reason and dismissal of the Applicant's submission was illegal, irrational and tainted with procedural impropriety.

b. An order of Mandamus be issued to compel the Respondents to approve the Applicant's transfer within service to Makindye Ssabagabo Municipality as a Senior Planner.

c. An order of Certiorari issues calling for the decision of the Respondents/proceeding of their 657th meeting minute 203, refusing to

approve the applicant's transfer within service made on the 14 /9/2021 and quashing the same together with the same decision dismissing the applicant's appeal/ submission for transfer within service.

d. An order of Prohibition be issued prohibiting the Respondent or any other person acting on their behalf from advertising and giving to any other person the job of a Senior Planner, Makindye Ssabagabo Municipality, currently occupied by the Applicant.

e. An order of permanent injuction prohibiting, restraining, preventing and stopping the Respondents or any person acting on their behalf from executing, implementing and enforcing or in any way giving effect to the decision, order of the Respondent's refusing to approve the applicants transfer within service and dismissing his appeal/submission.

f. An order that general damages be paid to the applicant.

g. Costs for this application be paid to the Applicant.

The application is supported by the affidavit of Mukiibi Edward deponed on the 9/12/2021 and the grounds of this application are as follows;

a) The applicant is employed by Wakiso district local government as senior development officer on pensionable establishment of public service.

b) By letter dated 28/6/2019, Makyinde Ssabagabo Municipal Council of Wakiso district requested the Chief Administrative Officer to second an officer with requisite qualifications to take the role of an Economic Planner at Makyinde Ssabagabo Municipal Council.

c) By letter dated 25/7/2019 the applicant was seconded to Makindye Ssabagabo municipal council as an economic planner, the role the applicant has performed exceptionally well as he possess the requisite qualifications and practical experience for the job and the town clerk was requested to

make arrangements for the final transfer before the end of the financial year 2019/2020.

d) On 22/1/2020 the town clerk Makyinde Ssabagabo municipality wrote to Wakiso district service commission requesting them to consider the applicant's re-designation from senior community development officer to senior planner but the respondents refused to approve the transfer within service during a meeting which took place between 3rd to 5th march 2020 and the decision was communicated to the applicant on 8/5/2020.

e) The respondent didn't assign any reason for rejecting to approve the applicants transfer within service.

f) The chief administrative officer and the permanent secretary, ministry of public service have allowed the applicant's transfer within service but the respondents have refused to transfer the applicant within service without assigning any reason and without any justifiable cause.

g) The town clerk Makyinde Ssabagabo municipality resubmitted the applicant's file to the respondents to re consider their decision to transfer the applicant within service on 8/6/2020 but the respondent refused to retable the submission which prompted the applicant to apply to the public service commission.

h) The applicant's appeal to the public service commission was allowed and the respondent was directed to re table the applicant's submission.

i) On 14/9/2021 the respondent retabled the submission and dismissed the applicant's transfer within service without assigning any reason and without giving the applicant any hearing and instead ordered that the applicant's job be advertised.

j) The applicant has exhausted all the administrative and legal remedies and the only left is judicial review of the respondent's decision.

k) The decision of the respondent's refusal to approve the applicant's transfer within service and dismissal of his appeal is therefore illegal, improper, ultra-vires, unfair, irrational and riddled with procedural impropriety and ought to be quashed.

In reply the respondents filed an affidavit in reply sworn by Annet Kasozi the secretary of Wakiso District Service Commission which was deponed on 28th/06/2020, who stated that the application is misconceived and an abuse of court process.

1. That in the meeting of 3rd-5th 2020the first respondent considered the applicant, invited him for a meeting and found him not qualified for the role of economic planner.

2. That the reason forming the decision was that whereas the applicant had the necessary academic qualifications he lacked the necessary working experience as a planner/ statistician/economist or population officer a requisite for the position of senior planner U3.

3. That the outcome /decision taken was also communicated to the town clerk Makindye Ssabagabo Municipal Council and upon receipt of the decision of the public service commission on 13th August 2021, the 1st respondent sat in a meeting on 14th September 2021 to reconsider the applicants application and still found him unsuitable for the post.

4. That the communication regarding the outcome of the meeting was communicated to the town clerk on 23rd September 2021.

In response the applicant submitted a supplementary affidavit in rejoinder that the contents of the applicant's affidavit in reply are totally false.

1. That in paragraph 4 of his affidavit stated that he was invited for the meeting of the 1st respondent which took place between 3rd – 5th March 2020 and that he was not interviewed as alleged but he was instead told the outcome of the meeting.

2. That from the minutes of the 1st respondent annexed to the affidavit in reply, at page 4, the 1st respondent observed that the applicant had academic qualifications for the job of Senior Planner but made a wrong observation that he lacked the 3 years working experience as a planner/ statistician /economist or population officer a requisite for the position of a senior planner, scale U3 which is not a requirement as per the job description. That contrary to the 1st respondent's wrong observation, the job description of senior planner requires one to have 3 years working experience in the area of planning in the public or reputable organization but does not require 3 years working experience as a planner/statistician /economist/population officer.

3. That the 1st respondent has refused to approve my transfer within service without any justifiable cause and without giving me an opportunity to be heard.

4. That the only remedy left is redress from court by way of judicial review to examine, review the decision and the process of reaching the decision of refusal to approve my transfer within service.

Counsel Maxim Mutabingwa for the applicant and *Counsel Katono James* represented both respondents.
The court has considered the submissions of both counsel.

Whether the application is a proper case for judicial review?
Applicant counsel submitted that section 3 of the Judicature (judicial review) rules, SI No. 11 of 2009 an application for mandamus, prohibition or certiorari,

an application for a declaration or an injunction shall be made by way of an application for judicial review.

Counsel further submitted that according to Section 1(a) of the judicature (judicial review amendment) rules 2019 the object of judicial review is, among others:-

a) To ensure that individuals receive fair treatment by the authorities to which they have been subjected to.
b) To ensure that public powers are executed in accordance with the basic standards of legality, fairness and rationally.

Counsel for the Applicant relied on the case of **Wilberforce Wandera Kiffude Vs National Animal Genetic Resource Centre and Data Bank (Misc. cause No. 82 of 2020)**, where it was held thus:

> *"Judicial review per the judicature (judicial review)amendment rules, 2019 means the process by which the high court exercises it supervisory jurisdiction over proceedings and decisions of the subordinate courts, tribunals and other bodies or persons who carry out quasi judicial functions or who are charged with the performance of public acts and duties."*

That in the instant case, the applicant is employed by the second respondent. Upon the request of Makindye Ssabagabo Municipal council, the applicant was seconded by the Chief Administrative officer to Makindye Ssabagabo Municipal Council as the Senior planner which role the applicant assumed as done exceptionally well and is still doing very well and has qualifications and experience for the job.

That the Town Clerk of Makindye Sssabagabo wrote to the first respondent requesting them to consider the re-designation of the applicant from the position of Senior Community Development Officer to Senior Planner but the 1st Respondent refused to approve the transfer within service of the applicant without hearing the applicant and without assigning any reason.

Counsel for the applicant submitted that the Chief Administrative Officer, Wakiso District and the Permanent Secretary, Ministry of Public Service all gave a go ahead

of the transfer within service but the 1st Respondent refused to approve it. That the applicant even made an appeal against the 1st respondent's refusal to retable and consider the decision but upon retabling the applicant's request, the 1st respondent still refused to approve the applicant's transfer within service. That the actions and decisions of the 1st respondent being a public body in refusing to approve the applicant's transfer within service without giving any reason and without giving the applicant the opportunity to be heard which is amendable to judicial review.

Applicant's counsel relied on the case of **Francis Bahikire Muntu & 15 Ors V Kyambongo University(supra)** where it was held that the grounds, a combination or any of them that the applicant must satisfy in order to succeed in a judicial review application are Illegality, Irrationality and Procedural Impropriety.

That the applicant's application with its affidavit in support and the affidavit in rejoinder discloses grounds of illegality, irrationality and procedural impropriety and that the facts disclosed in the application are not disputed by the respondent.

Applicant's counsel cited **Section 11 of the Public Service Standing Orders, 2010** which states that;

> *"A public officer holding a pensionable office in a Local Government, once appointed to a post in another Local Government such appointment shall be referred to as, appointment on transfer from a particular Local Government to another Local Government. The Local Government concerned shall provide the officers open and confidential files, particulars of service and other relevant documents like, local last pay certificate to another local Government."*

Counsel for the applicant submitted that the applicant has a right to be transferred within service from Wakiso to Makindye Ssabagabo Municipal Council as a senior planner. The Applicant's counsel submitted that the process of making the decision of refusal to approve the applicant's transfer within service is tainted with procedural impropriety and that the decision making authority failed to act fairly in the process of taking the decision to refuse to approve the applicant's transfer within service.

That when the issue of the applicant's transfer within service was tabled to the 1st Respondent, the 1st respondent merely refused to approve the transfer within service and did not give the applicant a chance to appeal before the 1st respondent to answer any queries which could have been heard.

The Applicant's counsel contends that if his client was given an opportunity to answer the queries raised, he would have been able to show that he is exceptionally good for the job following **Annexture A** to the Affidavit in reply. Counsel further submitted that the experience required by the 1st respondent in their affidavit in reply is not the one provided by the approved job description and it was illegal for the 1st respondent to require the experience which is contrary to the job description of public service and which is contrary to the law with an intent of refusing to approve the applicant's transfer within service. And that the respondent cannot be allowed to invent their own job description.

Counsel for the applicant submitted that the applicant deponed and confirmed that he has the requisite working experience of more than three years in the area of planning in a public or reputable organization as explained in the Affidavit of Support of the application. The same was also proved in the affidavit in rejoinder where he stated his Academic qualifications and job experience.

Counsel for the applicant submitted that the decision by the 1st respondent to refuse to approve the applicant's transfer within service was irrational in that no reasonable/ sensible decision making authority can make such a decision given the facts and the law. That the 1st respondent's decision defies logic and acceptable moral standards. This is because the CAO Wakiso District seconded the applicant to Makindye Ssabagabo Municipal Council as a senior planner upon the request of the town clerk, the accounting officer hence the applicant did not second himself.

That the applicant not only qualified but also had experience and also demonstrated exceptional performance in the job he is already doing hence it defeats anybody's understanding why the first respondent refused to redesign the

applicant despite the submission by the Town clerk, the Accounting Officer. It is therefore clear that from the facts and evidence, the applicant has academic qualifications for the job of senior planner, has the requisite experience as per the job description. That the applicant was also seconded to the municipal council and is doing and has also performed the job so well. It is therefore defeats common sense and logic why the 1st respondent has refused to approve the applicant's transfer to the job he is qualified for that he is doing and has done exceptionally well. The 1st respondent's decision therefore defeats logic.

Counsel for the applicant submitted that the process of reaching the decision of the 1st respondent in refusing to approve the applicant's transfer within service was illegal. That as earlier submitted, illegality is when the decision making authority commits an error of law in the process of taking a decision. The first respondent being established by Section 54 of the Local Government Act Cap 243, the functions and powers of the District Service Commission are spelt out in Section 55 of the LGA which states that; "the power to appoint persons to hold or act in any office, in the service of a district or urban council, including the power to confirm appointments, to exercise disciplinary control over persons holding or acting in such offices and to remove those persons from offices is vested in the District Service Commission."

Public Standing Orders are clear about transfer within service and the Permanent Secretary; Ministry of Public Service gave guidelines concerning the applicant's transfer within service in a letter dated June 20th. and that the 1st respondent however, disregarded the Local Government Act and Public Standing Orders and disregarded the specific guidance of the Permanent Secretary, Public Service Ministry and refused to approve the applicant's transfer within service which amounts to an Illegality because the 1st respondent acted in contravention of the law and contrary to the clear standard and guidelines in Public Service Standing Orders.

The respondents' counsel contended that the 1st respondent was wrongly joined as a party to the proceedings and that the applicant has not exhausted the available remedies of appealing to the Public Service Commission. It was further submitted that the applicant was heard or vetted him and was not found suitable for the

position because he lacked the 3 year working experience referred to in the job description.

In rejoinder, counsel for the applicant replied to Preliminary Objection concerning corporate capacity of the 1st respondent, that Section 7A of the Judicature (Judicial Review Amendment) Rules SI No 32 of 2019, Rule 7(4) provides that, in considering an application for judicial review, the court shall satisfy itself that the matter involves an administrative public body or official and that judicial review is not concerned with corporate bodies but administrative public bodies or officials. And hence, the 1st respondent is an administrative public body and its decisions are amendable to judicial and thus concluded that the respondent's objection lacks merit.

Analysis

Preliminary Objections

In relation to the Preliminary Objection in the Affidavit in Rejoinder raised concerning the capacity of the 1st respondent, **Article 198(1)** of the Constitution Part iv of the the Local Government Act establishes the District Service Commision however its not stipulated in any law that the commission is a body cooperate.

Section 6 of the Local Government Act provides that

"*Local Government shall be a body corporate with perpetual succession and a common seal, and may sue or be sued in its corporate name."*

Order 1 rule 9 of the Civil Procedure Rules SI 71-1 states that;

"No suit shall be defeated by reason of misjoinder or non-joinder of parties and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."

In the case of ***Nampala & Ors vs Iganga District Local Government (Civil Suit 101 of 2007)*** it was observed that the commission is created as a body of persons to carry out specific functions on behalf of the Local Government. The commission is not necessarily independent of the Local government although provision is made

for the independence of the commission under the LGA which is restricted to the part but not all administrative functions.

In judicial review applications, necessary parties and proper parties must be impleaded. A necessary party is one against whom relief is sought, and without whom no order can be made effectively by court. The court ought not to decide a matter in judicial review without the presence as respondents of those who would be vitally affected by its decision.

A proper party is one in whose absence, an effective order can be made, but whose presence is considered proper for a complete and final decision on the question involved in the judicial review. A proper party is one whose presence is considered to be proper in order effective relief to the applicant and for avoiding multiplicity of litigation. A proper party is one whose presence is considered appropriate for effective decision of the case, although no relief may have been claimed against him.

Secondly, the applicant exhausted the available remedies when he appealed to Ministry of Public Service and they wrote a guidance which the District Service Commission refused to heed to. It would be unfair to insist on the applicant making a second appeal where the 1st respondent failed in their statutory obligation.

An application for judicial review is can only be rejected because there is an alternative remedy and that such remedy is efficacious. If the alternative remedy is ill-suited, onerous and burdensome, then it could not be regarded as adequate and the court may take cognizance of the matter. The alternative remedy should not be a bar to maintaining an application for judicial review if the remedy is illusory.

Therefore, the rule of exhaustion of alternative remedy is not an absolute or inflexible rule. The courts practice some flexibility in its application depending upon the circumstances of the case in which the jurisdiction for judicial review is invoked. It has been repeatedly emphasized judicially that existence of an alternative remedy does not oust the High Court's jurisdiction as such. It is not as though the

courts lack inherent jurisdiction to look into the matter where the alternative remedy is available to the applicant; but that it is only a factor to be taken into consideration by the courts in exercising their discretion whether to entertain an application or not. It is primarily a matter of discretion of the court. It is a rule of practice rather than that of jurisdiction.

Therefore it's this Court's decision that the preliminary Objections are both overruled.

Basis for Judicial review

For one to succeed under judicial review, it is trite law that he must prove that the decision made was tainted either by illegality, irrationality or procedural impropriety. Similarly, in ***Francis Bahikirwe Muntu & 15 Ors v Kyambogo University*** **(supra),** court defined;

> Illegality as when the decision making authority commits an error of law in the process of taking a decision.
>
> Irrationality is when the decision making authority acts so unreasonably that in the eyes of the court no reasonable authority addressing itself to the facts and the law before it would have made such a decision. It also involves failure by the administrative authority to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

In the instant case, the applicant contends that he was not heard by the 1st respondent and that the refusal to grant the applicant transfer within service was irrational and improper, however it should be noted that the decision of the 1st respondent was not a matter of wrongful procedure but an exercise of their statutory mandate.

Judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is rather concerned with the courts' supervisory jurisdiction to check and control the exercise of power by

those in Public offices or person/bodies exercising quasi-judicial functions by the granting of Prerogative orders as the case my fall.

The applicant challenges the decision of the 1st respondent for legality contending that the decision not to approve his transfer to Makindye Ssabagabo Municipal Council. The court is bound to determine the legality of the decision by considering the powers conferred to the decision maker (Wakiso District Service Commission).

Legality requires officials to act within the scope of their lawful powers. The courts ensure that official decisions do not stray beyond the 'four corners' of a statute by failing to take into account 'relevant' considerations (that is, considerations that the law requires), or by taking into account 'irrelevant' considerations (that is, considerations outside the object and purpose that parliament intended the statute to pursue). This exercise is a clear instance of implementation of the rule of law, whereby the courts act as guardians of Parliament's intent and purpose.

It is a requirement that decision-makers take into account all those factors which are relevant to the matter at hand, and forbidding the consideration of irrelevant factors. The relevancy doctrine aims to uphold the quality of administrative decisions by regulating the evidence upon which they are based.

If it be shown that an authority exercising a power has taken into account as a relevant factor something which it could not properly take into account in deciding whether or not to exercise the power, then the exercise of the power, normally at least, is bad. Similarly, if the authority fails to take into account as a relevant factor something which is relevant, and which is or ought to be known to it, and which it ought to have taken into account, the exercise of the power is normally bad. However, there may be situations or cases where the factor wrongly taken into account, or omitted, is insignificant, or where the wrong taking into account or omission, actually operated in favour of the person who later claims to be aggrieved by the decision. See ***Hanks v Minister of Housing and Local Government [1963] 1 QB 999 at 1020***

The 1st respondent noted & decided in 600th-602nd Meeting as follows;

"The Commission noted that although the Candidate had the required academic qualification, he lacked the 3 years working experience in related discipline such as Planner/Statistician/Economist/Population Officer, to enable him transfer service.

1. *His roles as Senior Community Development Officer, were quite different and could not enable him head a planning Unit at the Municipality level. The planning role as Senior Community Development Officer were general roles performed by any officer in a given department. Whereas the roles of a planner/Statistician are specific planning roles of the entire administrative unit.*
2. *The postgraduate qualification i.e Postgraduate Diploma in Monitoring and Evaluation and Masters in Economic Policy Management are managerial general disciplines not planning.*
3. *Based on that background the Commission did not find him suitable for the post of Senior Planner, Scale U3.*
4. *The candidate was advised to seek a waiver from the Ministry of Public Service, if he was not in agreement with the decision."*

The 1st respondent in the 667th meeting decided as follows;

"The commission reviewed his appeal against its decision of not granting him appointment on transfer within service as Senior Economic Planner U3.
PSC guided that the guidance given by the Ministry of Public Service be followed.

Members made the same observation as in the deliberation before, although Mukiibi Edward, had the necessary academic qualifications he lacked the 3 years working experience as a planner/statistician/Economist or population officer as a requisite for the position of Senior Planner, Scale U3
Reference was made to the Job description of the position under review."

The principles of procedural fairness require the decision-maker to listen to the views and evidence of the person who will be affected by the decision in question. Therefore, the relevancy doctrine insists that once a fair procedure has yielded such information to the decision-maker, it must actually be taken into account when the decision is finally made.

The 1st respondent yielded information about the applicant upon recommendation by the Chief Administrative Officer and guidance given by the Ministry of Public Service but the same was not considered. The applicant has further adduced evidence before this court that he worked in a similar position while working in Ministry of Defence, but this information was never considered as a relevant factor. This available information was indeed relevant and ought to have been taken into account, but the 1st respondent seemed to have ignored all the available information and evidence before it.

This court has assessed the actual and potential importance of the factor that was ignored by the 1st respondent by not recommending the applicant for transfer as Planner. The factor of having been employed prior as Assistant Programmes Officer (Research and Planning) in Ministry of Defence (Mubende Rehabilitation Centre of Uganda People's Defence Forces for quite some time ought to have been considered in their exercise of discretion to recommend the applicant for transfer or not to transfer him to Makindye Ssabagabo Municipal Council. The question of relevancy may relate not to specific factors that need to be taken into account by the decision-maker, but to the decision-maker's approach to the evidence before it. See ***CREEDZ Inc v Governor General [1981] 1 NZLR 172; Re Findlay [1985] AC 318***

The decision of the 1st respondent was tainted with illegality for failure to consider the relevant factors.

What remedies available?

The legal consequence of the decision-maker taking into account an irrelevant consideration or failure to take into account relevant consideration is that the courts will not necessarily invalidate an administrative decision. The practical consequence of finding irrelevancy is crucial in considering the extent to which the irrelevant consideration doctrine impinges upon the autonomy of the decision-maker.

If the inevitable result of a decision-maker taking into account irrelevant consideration was that the decision must be quashed, such strict approach while providing a strong affirmation of the rule of law, could nonetheless cause a great deal of unnecessary administrative disruption, as the decision-maker may not have placed much weight on the factor and may well have reached the same decision even if they had ignored the impugned consideration. The courts must in their approach to the remedies available, ought to strike a balance between vigilance against arbitrary decision-making and preservation of administrative interests.

In the case of ***R (FDA) v Secretary of State for Work and Pensions [2012] EWCA Civ 332, [2013] 1 WLR 444***, *Lord Neuberger MR* helpfully summarized the relevant principles. He stated that;

> *"Where the decision-maker takes into account an irrelevant consideration the normal principle is that the decision is liable to be invalid unless the factor played no significant part in the decision making exercise. However, even if the factor did play a significant part in the decision, the decision may nonetheless exceptionally be saved from invalidation where the court is satisfied that the same decision would have been made if the irrelevant consideration had not been taken into account."*

In the present case, the irrelevant consideration played a significant or substantial part of the decision since the 1st respondent rigidly considered the applicant work experience at the current employment and yet the work experience was never confined to the present experience, therefore the decision is liable to be invalidated. The direct consequence is that the decision is quashed and the 1st respondent must reopen the matter and take the decision again.

The 1st respondent as a decision-maker should avoid being vindictive in the new process and must apply its mind in order to avoid exercising their power for improper purposes and in abuse of authority. Such decision will be fundamentally at odds with basic reasons why Parliament conferred the power in the first place.

The legal consequence of a decision-maker taking into account irrelevant consideration or failure to take into account relevant consideration is that the decision may be quashed or rendered invalid.

The decision of the 1st respondent's is accordingly quashed and the 1st respondent is prohibited from advertising the job of Senior Planner, Makindye Ssabagabo Municipality before considering the applicant's case request for transfer within service.

The applicant is awarded costs of the application.

I so order.

MUSA SSEKAANA
JUDGE
24th OCTOBER 2022