

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISCELLANEOUS CAUSE NO. 250 & 305 OF 2019

NTEGE FAROUQ:.....APPLICANT

VERSUS

1. KAMPALA CAPITAL CITY AUTHORITY

2. THE LORD MAYOR:.....RESPONDENTS

AND

HIS LORDSHIP LUKWAGO ERIAS:.....APPLICANT

VERSUS

THE MINISTER FOR KAMPALA CAPITAL CITY AND

METROPOLITAN AFFAIRS:.....RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The two applications were brought under the same law Section 36 of the Judicature Act and Rules 3,4 and 6 of the Judicature (Judicial review) SI No.11 of 2009, Judicature (Judicial review) (Amendment) Rules, 2019. The applicant seeks the following judicial review orders:

- 1. A declaration that the applicant is duly sitting member of the Kampala District Land Board herein after referred to KDLB by virtue of his appointment by the line Minister vide his communication dated 4th February, 2016 on the advice of the Attorney General and Solicitor General.*
- 2. A declaration that the applicant has a valid and subsisting running tenure as a member of the Kampala District Land Board expiring on the 1st February 2021.*

3. *A declaration the decision by the 2nd respondent purporting to execute the orders of the 1st respondent to terminate, require the applicant to reapply for the membership on KDLB before the expiry of his term without raising any grounds under the law or his employment offer letter is irrational, irregular and riddled with procedural impropriety.*
4. *An order of Certiorari doth issue to set aside that purported decision and recommendation of the 1st respondent as set out in the letter dated 12th August 2019 by the 2nd respondent to the applicant terminating and ordering him to relinquish membership on KDLB in the face of a valid subsisting term ending 1st February 2021 is null and void.*
5. *An order of Prohibition/Permanent Injunction doth issue restraining the respondents from requiring the applicant to reapply and or commence the process of filling the perceived vacancy that is occupied in law by the applicant on membership on KDLB until the expiry of his tenure ending 1st February 2021.*
6. *A declaration that the respondents have no powers under the law to terminate members of District land board members under the law of Uganda and any decision to that effect is illegal, null and void but also ultra-vires the laws of Uganda.*
7. *A mandamus issues compelling the respondent to keep him as a member of the KDLB until the end of his tenure and also to pay all the emoluments and remuneration due to the applicant from the time of his membership unto the KDLB until when his contract expires as and when it falls due.*
8. *An order for general and exemplary/punitive damages be awarded to the applicant as against 1st and 2nd respondents respectively.*
9. *Costs of the application be provided for.*

In response to this application the Lord Mayor also filed another case challenging appointment process and involvement of the Minister for Kampala Capital City and Metropolitan Affairs seeking the following orders;

- a) *A declaration that the appointment of members of the District Land Board is by the Kampala Capital City Authority upon recommendation by the Executive of the Kampala Capital City Authority.*

- b) A declaration that the respondent is not mandated by law to participate in the appointment of members of Kampala District Land Board.*
- c) A declaration that the decision of the respondent contained in her letter dated 6th September 2019 to the applicant purportedly vetoing the resolution by the Authority that Mr. Ntege Farouq was irregularly appointed as a member of the Kampala District Land Board is illegal, irrational and unreasonable.*
- d) An order of Certiorari quashing the decision of the applicant contained in her letter dated 6th September 2019 to the applicant.*
- e) An order that the respondent pays costs of the application.*

These applications were supported by affidavits which were responded but briefly they can be summarized as below;

1. The Applicant's case is that he is a member of the Kampala District Land Board(KDLB) who was on 4th day of February 2016 reappointed in accordance to 1995 Constitution as amended and the Land Act as a member of the KDLB on a 5-year tenure ending 1st February 2021 by the line minister of KCCA, the board membership is a constitutional office under Article 240 of the Constitution, Section 58 of the Land Act and the line minister vested with powers to appoint members of the KDLB and that all the other members of the current KDLB were appointed by the line minister.
2. The applicant was reappointed a member of Kampala District Land Board for a term of 5 years due to expire in 2021 February having previously served on the board when he was appointed to replace a member of the Board that had been elevated to Position Chairperson, midterm following the death of the then chairperson the Applicant was recommended to be appointed midway the tenure of the then existing board replacing **Mr. Yusuf Nsibambi** who had been elevated to the position of chairman following the death of the then Chairman of KDLB, the late **Mr. Yunus Mpagi Balitema Kajubi**, the Applicant's five-year tenure as a member of the board doesn't run concurrently with that of the other board members, but to his utter shock and total dismay he was informed by the 2nd respondent through letter dated 12th August 2019 purporting and or threatening terminate his membership on the **KDLB**.

3. The applicant petitioned the line minister seeking the for guidance in respect to the decision of the 1st respondent and 2nd respondent, the line minister through her letter dated 6th September 2016, vetoed the decision and emphasized that the appointment of the Applicant was proper and legal and the decision seeking that he regularizes his membership on the **KDLB** was highly irregular.

The entire letter by the minister dated 6th September, 2019 vide M/KCCA/030/09/19 addressed to the 2nd Respondent and copied to the Applicant, setting aside and or vetoing the impugned decision by the respondents under section 76 (2) of the KCCA Act, 2010 is reproduced. The Minister wrote as follows; -

*The Lord Mayor
Kampala Capital City Authority
KAMPALA*

RE: PETITION AGAINST THE ALLEGED ILLEGAL INTENTION TO TERMINATE MR. FARUQ NTEGE'S MEMBERSHIP ON KAMPALA DISTRICT LAND BOARD.

The above subject matter refers.

I am in receipt of a petition from Mr. Faruq Ntege premised on your letter to him dated 12th August, 2019 ref: LM/KCCA/19.

The petitioner states that you declared his membership on the board illegal for allegedly having been renewed without a council resolution/ and or recommendation. Based on the above declaration, the petitioner avers that you advised him to re-apply for his membership on the Board, failure of which would be deemed disinterested in the position.

This is to advise as follows:

1. *There is no specific provision in Kampala Capital City Authority Act 2011 that provides for the appointment of the Kampala District Land Board.*
2. *Clause 4 of Article 5 of the constitution confers a special status upon Kampala as the capital city of Uganda that is supposed to be administered by the central Government.*

3. *Subsection 5 of subsection 4 of the Kampala Capital City Authority Act provides that any enactment that applies to a district shall “subject to this act and with the necessary modifications apply to the Authority.*
4. *Whereas article 240(1) provides that there shall be a district land board for each district, it is silent on how a district land board is established in a district. However, article 240(2) provides that parliament shall prescribe the membership, procedure and terms of service of a district land board.*
5. *That Local Government Act in section 17 paragraph (d) provides that: ‘The District Executive Committee shall recommend to the council persons to be appointed members of the district service commission, Local Government public accounts committee, district tender board, district land board or any other boards, commissions or committees that may be created’.*
6. *Section 16(2) of the Local Government Act provides that a district executive committee shall consist of; -
The Chairperson
The Vice Chairperson
Such number of secretaries, not exceeding five as the council may determine to the minister.*
7. *A district executive committee as constituted above does not exist in KCCA, which would have recommended the re-appointment of the petitioner to the Minister.*
8. *The relevant provisions of section 57 of the land Act cap 227 are applicable to Kampala Capital City Act.*
9. *The minister for Kampala at the time; duly exercised his power in accordance with Article 240 of the Constitution, section 58 of the Land Act and section 7(4) of the KCC Act to re-appoint the petitioner on the Kampala District Land Board.*

This is to therefore advise that the petitioner was lawfully re-appointment into office any action to remove him from office will be highly irregular and unlawful.

The resolution by council recommending for the petitioner to supposedly “regularize” his re-appointment is vetoed in accordance with section 79(1) and (3) for being unlawful.

Thank you for your usual cooperation.

The applicant in the first application was represented by *Mularila Faisal Umar and Nakajubi Justine Mufumbya* while the respondent was represented by *Timothy Isiko, Ogomba Issa Mpenje Nathan and Robert Bautu* for the 2nd respondent while the 1st respondent was represented by *Byaruhanga Dennis*. In the 2nd application the applicant was represented by *Robert Bautu* while the respondent was represented by *Johnson Natuhwera*

Agreed Issues for Determination

- 1. Whether the 2nd respondent could instruct a private lawyer to represent him when sued in official capacity.***
- 2. Whether the Application is proper for judicial review.***
- 3. Whether the Minister acted lawfully in appointing the Applicant.***
- 4. Whether the decision to require the Applicant to regularize his membership on KDLB is legal.***
- 5. Whether there are remedies available to the parties.***

When the court gave directives to file the submissions the parties duly filed their submissions and the court had set a date for a ruling. The court discovered that there was another matter arising out of the same facts and it required a consolidation of the two applications.

The parties were yet to agree on the consolidation and this matter lost track due to the covid-19 lockdown. It is the court's view that the 2 matters should be or ought to have been consolidated and heard or determined at the same time.

Whether the 2nd respondent could instruct a private lawyer to represent him when sued in official capacity.

The applicant's counsel submitted that according to the pleadings (the notice of motion and the affidavit in support of the notice of motion) that the 2nd respondent was sued in his official capacity as Lord Mayor and not in his private capacity.

Section 24 and the fifth schedule of KCCA Act 2010 creates the directorate of legal affairs and its fully functioning, in this particular case it is the one representing the 1st Respondent, the 2nd Respondent as the office in charge of political affairs within KCCA is a creature of statute and a public office irrespective of the personal wishes of the office bearer, having been as a public office it in law ought to have sought legal representation of the Directorate of legal affairs of KCCA.

It's very unclear as to how the services of private lawyers were procured by the 2nd Respondent. The 2nd Respondent is legally supposed to obtain legal services from the Directorate of Legal Affairs of KCCA and a need for private counsel arises its upon the clearance of the accounting officer that the procurement of such services would ensue, for it derives its recurrent expenditure from the consolidated fund.

Counsel for the applicant submitted the above provisions required procurement procedures for the procurement of private services was not followed in procuring the services of **M/S Arcardia Advocates, Turinawe, Kamba & Co. Advocates, Lukwago & Co. Advocates** and **M/S Kongai & Co. Advocates**. There is nothing on court record or the record of the 1st Respondent detailing the procurement process followed to hire private counsel for purposes of this matter, neither did the 2nd respondent furnish evidence that the said law firms were pre-qualified on the list of service providers, noteworthy is that the 1st respondent has a dully constituted directorate of legal affairs that is representing the 1st Respondent.

The 2nd respondent's counsel made no meaningful response to the preliminary objection save for the contention that the objection of the applicant is a matter of evidence and the applicant has not demonstrated by affidavit or otherwise the law chambers or firms were sourced illegally.

Analysis

The 2nd respondent was sued in official capacity as the **Lord Mayor** which is a position established under the Act-Kampala Capital City Act.

Section 6 of the Act provides for the Composition of Authority:

(a) The Lord Mayor

(b) The Deputy Lord Mayor

Therefore, for any action brought against of the persons who are the composition of Authority in official capacity must be defended by the Directorate of Legal Affairs of KCCA or Legal services for a private law firm must be procured through Public Procurement.

The Lord Mayor hired 4 private law firms to represent him in this matter to wit; ***M/S Arcardia Advocates, Turinawe, Kamba & Co. Advocates, Lukwago & Co. Advocates*** and ***M/S Kongai & Co. Advocates***.

Under **Section 3(f) of the PPDA Act** and **Section 64 and 70 of the KCCA Act 2010**, KCCA is a procuring and disposing entity and therefore any procurement by KCCA is subject to the procurement procedures stipulated under the PPDA Act 2003 and the regulations made there under.

Section 55 of the PPDA Act is coined in mandatory terms for all public procurement and disposal by public entities to be done in accordance with the rules, regulations and guidelines set out under the Act. Further the KCCA Act of 2010 under section 64 the 2nd Respondent is subject the PPDA Act as a public procuring entity.

The Lord Mayor (Lukwago Elias) has no luxury or slightest authority to appoint his cronies to represent the Lord Mayor or himself to represent the office of the Lord Mayor outside the stipulated legal regime and any such act would be an abuse of office or authority and it is illegal.

The question of whether the public entity or body can or cannot retain private legal services was settled in the case of ***Attorney General and Peter Nyombi vs Uganda Law Society HCMA No. 321 of 2013***. Wherein the *Hon. Mr. Justice Musota (as he then was)*; *held that the procurement of Kampala Associated Advocates by the Attorney General to represent him was subject to the procurement law and because the law was not followed it was irregular. The same position is fortified in the cases of M/s. Ssendege, Senyondo and Co. Advocates v KCCA HCCS No. 147 of 2016 and Finishing Touches Ltd vs Attorney General HCCS NO. 144 OF 2010*

The effect of not following the set procurement procedures by the 2nd respondent in procuring private counsel or law firms and yet he was sued in official capacity can be deduced from the decision of ***Justice Bashaija K. Andrew in Hon. Amogin Aporu Christine Hellen & Anor vs Attorney General & Anor Misc Cause No. 36 of 2019*** “

1. *The services being rendered by private counsel ought to have been procured in accordance with the provisions of the PPDA Act and the rules and regulations thereto.*
2. *The private lawyers in the absence of the proper procurement procedures have no locus in the matter and all documents filed by them for and on behalf of the 2nd Respondent are improperly on court record.*
3. *Procuring of services in such a manner by the 2nd Respondent is illegal and a breach of law.*
4. *The replies made by private counsel are illegal, invalid and not worthy of being relied upon as legitimate responses to the Applicant's claim.*

This court appreciates that the current Lord Mayor is a lawyer/advocate and a strong proponent of the rule of law in Uganda. He should be alive to the above position of the law in order to uphold the principles of rule of law and distinguish the office of the Lord Mayor and himself as a person-Erias Lukwago (Advocate).

Therefore, the pleadings filed by private counsel (law firms) as instructed by the 2nd respondent are struck off the record.

Whether the supplementary affidavits or affidavits in rejoinder were properly filed on court record?

It appears both parties engaged in filing of several affidavits after the main affidavit in support or affidavit in reply had been filed.

The general law on applications is ***Order 52 of the Civil Procedure Rules*** which provides;

Rule 3; *Every notice of motion shall state in general terms the grounds of application, and, where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion.*

Rule 7: *All applications by summons shall be in chambers and, if supported by affidavit, a copy of any affidavit or affidavits relied upon shall be attached to each copy of the summons directed to be served.*

It can be deduced from the above provisions that the law does not envisage filing of an affidavit in rejoinder to an application. Therefore a party who intends to use additional affidavits must seek leave of court to file a supplementary affidavit in support of their application. The above position of the law is fortified by the decision of Justice Egonda Ntende (as he then was) in the case of ***Samuel Mayanja v Uganda Revenue Authority HCMC No. 117 of 2005 (Commercial Court)*** where he observed that;

“Where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served with the notice of motion. The rule does envisage any further affidavits to be filed by the applicant. Where the applicant wants to file a further affidavit, he ought in my view, to seek the leave of the court, otherwise the proceedings may turn simply into unregulated game of ‘ping pong’. As the affidavit was filed without leave of the court, and it was objected to by the respondent, I shall not have regard to the same.”

Similarly, ***Rule 7 of the Judicature (Judicial Review) Rules, 2009*** provides as follows;

- (1) The Court may, on hearing of the motion, allow the applicant to amend his or her motion, whether by specifying different additional grounds or reliefs or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with new matters arising out of any affidavit of any other party to the application.*
- (2) Where the applicant intends to ask to be allowed to amend his or her motion or to use further affidavits, he or she shall give notice of his or her intention and of any proposed amendment, to every other party.*
- (3) Any respondent who intends to use any affidavit at the hearing shall file it with the registrar of the High court as soon as practicable and in any event, unless the court otherwise directs, within sixty days after service upon the respondent of the documents required to be served by subrule (1).*

It can further be seen from the above rules that the law does not provide for filing of the so called affidavits in *rejoinder*, *rebutter*, *surrejoinder* or *surrebutter*. Any additional or further affidavits shall be filed with leave of court.

According to ***Black’s Law Dictionary 11th Edition, 2019***; *Rejoinder* refers to common-law pleading: Defendant’s answer to the plaintiff’s reply.

Surrejoinder refers to common-law pleading: means the plaintiff’s answer to the defendant’s rejoinder.

Rebutter refers to Common-law pleading: the defendant's answer to the plaintiff's *surrejoinder*; the pleading that followed the *rejoinder* and *surrejoinder*, and that might in turn be answered by the *surrebutter*.

Therefore, it is clear that the above refers to pleadings and not evidence as presented to court. Any party who files an affidavit under any of those headings would be wrong since an affidavit is not a pleading within the meaning of applications and the same should only be filed as supplementary affidavit with leave of the court. ***See Dr Wilberforce Wandera Kifudde v National Animal Genetic Resource Centre and Data Bank (NARC & DB) & 2 Others HCCM No. 82 of 2020***

The affidavits filed without leave by whatever name they were 'baptized' shall be ignored and will not be relied upon and or are struck off the record.

This court has by way of preliminary consideration decided to consider whether this application is not overtaken by events.

Whether this application is overtaken by events and therefore moot?

The applications were made in respect of a term of office of the applicant which had been brought into question and the same was due to expire in February 2021. The said term expired and the applicant is no longer a holder of office.

Secondly, the Minister for Kampala Capital City and Metropolitan Affairs has since changed and the new office bearers have not encountered the same challenges. A new Kampala District Land Board was appointed and they are currently in full operation.

Analysis

The present application falls in the mootness doctrine which bars court from deciding moot cases; that is cases in which there is no longer any actual controversy. The exercise of judicial power depends upon existence of a case or controversy.

The function of a Court of law is to decide an actual case and to right actual wrongs and not to exercise the mind by indulging in unrewarding academic casuistry or in pursuing the useless aim of jousting with windfalls. The applicant's term of office has since expired and is no longer in office. There are new office bearers who may be affected by this court's decision and yet they are not parties to this application. It would be unfair to make a determination which may or would affect new office bearers without

according them a hearing or just treatment. This would be an exercise in futility or it is useless to waste court's time in hearing this application without the current office bearers as parties.

The doctrinal basis of mootness is that courts do not decide cases for academic purposes because court orders must have a practical effect and be capable of enforcement. *Ref: High Court Civil Suit No 248 of 2012: Abdu Katuntu -vs- MTN Uganda Limited and Others*

Similarly, Justice Musota (as he then was) in the case of *Julius Maganda vs NRM*. H.C.M.C No. 154/2010, held that;

"Courts of law do not decide cases where no live disputes between parties are in existence. Courts do not decide cases or issue orders for academic purposes only. Court orders must have practical effects. They cannot issue orders where the issues in dispute have been removed or merely no longer exist."

Additionally, in the case of *Pine Pharmacy Ltd and 8 others v National Drug Authority* Misc. Application 0142 of 2016 Hon. Justice Stephen Musota cited *Joseph Borowski vs Attorney General of Canada (1989) 1 S.C.R.* in which it was held that;

"The doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An appeal is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. Such a live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. Accordingly, if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot."

A suit is academic where it is merely theoretical, makes empty sound, of no practical utilitarian value to the parties even if judgment or ruling is given in his favour and if it is not related to practical situation of human nature and humanity.

Therefore, when the term of office of the applicant expired the two applications became moot or academic. This application was therefore overtaken by events upon expiry of the applicant's term of office as a member of Kampala District Land Board.

The two applications stand dismissed with no order as to costs.

I so Order.

SSEKAANA MUSA

JUDGE

31th March 2023