

UGANDA / JUDGMENT

Kaala v Attorney General & Anor (MISCELLANEOUS CAUSE NO.23 OF 2017) [2018] UGHCCD 84 (28 August 2018) [2018] UGHCCD 84

COURT

HC: Civil Division (Uganda)

BEFORE

Musa Ssekaana, J

CASE / FILE NUMBER

MISCELLANEOUS CAUSE NO.23 OF 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO.23 OF 2017

HAJ KAALA IBRAHIM ----- APPLICANT

VERSUS

1. THE ATTORNEY GENERAL

2. THE COMMISSIONER GENERAL OF URA----- RESPONDENTS

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Section 36 of the Judicature Act as amended, Rules 3, 6, 7 and 8 of the Judicature (Judicial Review) Rules, 2009 for the following Judicial review orders;

1. An order of Certiorari doth issue against the respondents quashing their decision of banning the importation of all fishing gears into the country.

2. An order of Certiorari be issued against the respondents, quashing the arbitrary banning of the importation of all fishing gears in the Country which was communicated through a press release by the 1st respondent on the 6th April 2017 through the New Vision newspaper and implemented by the 2nd respondent through an internal memo issued on the 14th day of July 2017.
3. An order of Prohibition be issued prohibiting the respondents, their agents or servants or any other person from enforcing and implementing of the impugned order issued by the Minister of Trade, Industries and Cooperatives.
4. An order of Injunction be issued to restrain the respondents, their agents or servants and any other public bodies, institutions and personalities from enforcing the impugned order of the Minister of Trade, Industries and Cooperatives banning the importation of all fishing gears in Uganda.
5. A declaration that the 1st respondent's actions of banning the importation of fishing gears without hearing the licensed importers is unlawful.
6. A declaration that the 1st respondent acted ultra vires in banning the importation of fishing gears into the country.
7. An order of Exemplary and punitive damages.
8. An Order for General damages

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavits in support of the applicant-Hajj Kaala Ibrahim but generally and briefly state that;

1. The applicant was licensed to import fishing gears into the country to wit; fishing gillnets, fishing hooks, fishing lines among others having been licensed by the Ministry of Agriculture, Animal Industry and Fisheries for a period of one year ending 31st December 2017.
2. That on the 4th day of April 2017, the Minister of trade, Industries and Cooperatives Hon. Ameria Kyambadde issued an Order through a press statement published in New Vision newspaper banning importation of all fishing gears in the country.
3. That basing on that press statement; the 2nd respondent implemented the said ban by directing all its officers at all entry points not to clear any goods into the country in the category of fishing gears.
4. That as a holder of a valid license/permit to import fishing appliances into the country the applicant was not consulted by the Minister in a bid to be heard before the ban of the importation of items for which he was licensed to do for period of one year would be made and was therefore not accorded a chance to be heard and thus his right to fair hearing was abrogated.

5. That Hon Ameria Kyambadde quoted the presidential directive as the basis for her banning of all fishing gears but the same was never availed to the applicant but they were showing only the presidential working paper issued by President for cabinet discussion without resolutions for banning importation of fishing gears.
6. The Minister of Trade, Industries and Cooperatives acted illegally as she did not base her decision on any known legislation and the power to ban and or revoke a fish importation license was only a reserve of the Minister of Agriculture, Animal Industries and Fisheries under the Fish Act and the regulations thereunder. The actions of the minister were therefore ultra vires the Fish Act.
7. That the decision of banning the importation of all fishing nets was irrational and illogical.

The respondents opposed this application and the 1st respondent filed an affidavit in reply through its Permanent Secretary/Accounting Officer-Ambassador Julius Onen and the 2nd respondent filed an affidavit in reply Abel Kagumire-Manager Enforcement in the Customs Department.

The 1st respondent contended that the Head of State embarked on vigorous campaign to promoting fishing industry due to the dwindling fish as a result of poor fishing methods and exportation of fish that is not fit to be on the market.

The President took personal interest to rectify the problem with the stakeholders who included; Ministry of Agriculture, Fisheries & Animal Husbandry, Ministry of Trade, Industry and Cooperatives and the Fishers themselves through their Association.

That the President issued a Presidential Directive for purposes of strict administrative measures to curb illegal fishing and methods on all waters in Uganda.

That before and After Ministry of Trade, Industry and Cooperatives implemented the Presidential Directive, all the stakeholders were consulted and or/ engaged in several meetings (Minutes shall be availed at the hearing) However they were never produced at the trial.

That the applicant ignored or refused to attend any stakeholders meetings and that the 12 month suspension of importation of all fishing nets into the country was in accordance to the Presidential Directive. The suspension targeted only already made fish nets save for net twines and hooks for the Industries.

The 2nd respondent opposed the application and contended that they received an order from the ministry of trade, Industry and cooperatives to implement the ban on importation of fishing nets and related gear.

That the 2nd respondent informed all its customs officers to ensure that the ban is implemented to ensure that its purpose is achieved.

That in September 2017, the Ministry of trade, Industry and Cooperatives emphasized the Implementation of the ban with another letter to all government agencies with capacity to comply and effect the ban.

The 2nd respondent contended that the application was time barred and ought to be dismissed and that the decision to ban was not taken by them and they cannot be subjected to judicial review.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

Four issues were proposed for court's resolution;

1. Whether this application is out of time?
2. Whether the decision to ban importation of all fishing nets and related imports in Uganda for 12 months was illegal?
3. Whether the 1st respondent can revoke the applicant's license without being accorded a hearing?
4. Whether the applicant has a cause of action in judicial review against the 2nd respondent?
5. What remedies are available to the parties?

I shall resolve this application in the order of the issues so raised. The applicant was represented by Mr Mudiobole Abed Nasser whereas the 1st respondent was represented by Mr Natuhwera Johnson and the 2nd respondent was represented by Daniel Kasuti.

In Uganda, the principles governing Judicial Review are well settled. 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 may fall. It is pertinent to note that the orders sought under Judicial Review do not determine private rights. The said orders are discretionary in nature and court is at liberty to grant them depending on the circumstances of the case where there has been violation of the principles of natural Justice. The purpose is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. ***See; John Jet Tumwebaze Vs Makerere University Council & 2 Others Misc Cause No. 353 of 2005, DOTT Services Ltd Vs Attorney General Misc Cause No.125 of 2009, Balondemu David Vs The Law Development Centre Misc Cause No.61 of 2016.***

For one to succeed under Judicial Review it is trite law that he/she must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

The dominant consideration in administrative decision making is that public power should be exercised to benefit the public interest. In that process, the officials exercising such powers have a duty to accord citizens their rights, including the right to fair and equal treatment.

ISSUE ONE

Whether this application is out of time?

This issue arose from the 2nd respondent, however, they seem to have abandoned it and the 1st respondent has equally not addressed it in their submissions. I take it that they have abandoned it.

Even the record does not have any evidence to support it and the only letter the 2nd respondent has attached indeed shows the implementation of the decision was in a letter dated 01/08/2017.

This application was filed in time and all the communications show that the ban was communicated to the enforcement agencies much later.

ISSUE TWO

Whether the decision to ban importation of all fishing nets and related imports in Uganda for 12 months was illegal?

Illegality as a ground of review looks at the law and the four corners of the legislation i.e its powers and jurisdiction. When power is not vested in the decision maker then any acts made by such a decision maker are ultra vires.

In the present case the applicant contends that the Minister of Trade, Industry and Cooperatives was not vested with the power to ban the importation of the fishing gears and related items.

Mr Mudiobole for the applicant submitted that the power to revoke a fish importation licence was only a reserve of the Minister of Agriculture, Animal Husbandry and Fisheries. Therefore the Minister for trade, Industries and Cooperatives did not possess such powers thus acted ultra vires of the law relating to Fish Act.

The 1st respondent on the hand has cited the External Trade Act as the basis of the decision of the Minister of trade to ban the Importation of the fishing gears in Uganda. ***Section 7 of the External Trade Act*** provides;

The Minister may cancel any import or export licence if it appears to him or her necessary in order not to prejudice any agreement or arrangement relating to trade or currency entered into or approved by or on behalf of the Government subsequent to the granting of the licence.

Section 8 of the External Trade* Act further provides;

1. *Notwithstanding any other provisions of this Act or any other written law, the Minister may by statutory order prohibit absolutely, or reserve exclusively to any person, the import or export of any goods or limit the import or export of any goods from or to any country if in his or her opinion such action is in the interest of Uganda or, as the case may be, any other part of the Commonwealth and may, for the same reason, make, statutory order, any such imports or exports subject to such conditions as he or she may think fit.*
2. *.*****
3. *Where, in any case, any import or export licence has been granted in respect of any goods the subject of an order under subsection (1), the licence shall be deemed to be cancelled from the date of the order, and the Minister shall issue fresh licences which conform with the provisions any such order*.

The applicant obtained a licence under section 13 of the Fish Act and or Permit for Fishing Appliance Manufacture and Importation from 20/03/2017 to 31/12/2017.

The External Trade Act is a general legislation on all forms of trade while the Fish Act is a specific legislation for the control of fishing, conservation of fish, the purchase, sale, marketing and processing of fish and matters connected therewith.(Long title to the Act)

The principle of legislative interpretation is that once there is a specific legislation on any subject matter, it overrides a general legislation. In this case the Fish Act overrides the External Trade Act.

It is also clear from the facts that the Ministry of Trade, Industry and Cooperatives did not issue any licence to the applicant and the issue at hand about the control of illegal fishing and not illegal trade.

The activity which was the subject of regulation and concern did not fall in the docket of the Ministry of Trade, Industry and Cooperatives. The actions of the Minister of Trade, Industry and Cooperatives were ultra vires.

In the case of ***R v Lord President of the Privy Council, ex parte Page [1993] AC 682*** Lord Browne-Wilkinson* noted;

*“ *The fundamental principle(of judicial review) is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all cases...this intervention....is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a Wednesbury sense, reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is wednesbury unreasonable, he is acting ultra-vires his powers and therefore unlawful.”**

The 1st respondent’s counsel has also alluded to the Presidential Directive as the basis of the decision to ban importation of all fishing nets and related inputs into the country.

The said Presidential directive does not direct any banning of the importation of fishing nets but highlights the general problem of depletion of fish in the Ugandan waters.

*“I am now ***directing*** that the Fisheries Act should be ***amended*** to provide for 7 years mandatory imprisonment for anybody involved in illegal fishing.”*

To be criminalised are all the acts of fishermen who do illegal fishing, transporters by boats or vehicles of illegally caught fish, marketers of such fish, the makers of illegal fishing gear and sellers of it (nets etc). Three special courts should be set up to quickly try and sentence these criminals. One could be in Masaka, the other one in Busia and the third one could be in Fort Portal. These courts should be dedicated to be expeditiously handling illegal fishing so that the parasites that have invaded our lakes are legally but quickly weeded from our lakes.”

It can be seen from the Presidential directive that his concern was genuine and he believed in a long term solution embedded in the law. The solution should be as directed by the President to amend the law (Fish Act) instead of making haphazard decisions which are ultra vires and are not addressing the long term solution to illegal fishing.

The Ministers could not hide under Presidential Directive to act illegally and irrationally as Ambassador Julius Onen has stated in his affidavit that the ban on the importation of all fishing nets into the country is in accordance with the Presidential directive.

It also appears the President was directing the Minister responsible for Fish in Uganda and not the Minister of Trade, Industry and Cooperatives. The actions of the said Minister are illegal and ultra vires.

The fishing rules provide for the prohibited nets and regulates the nets to be used in the fishing activity in Uganda and therefore the Minister of trade cannot know the types of fishing nets that are prohibited and that is why her decision was irrational since ***it banned importation of all fishing nets and related inputs into the country for a period of 12 months.***

Irrationality/unreasonableness has been defined to mean when there has been such gross unreasonableness in the decision taken or act done, that no reasonable authority addressing itself to the facts and law before it would have made such a decision. Such a decision is said to be in defiance of logic and acceptable moral standards. ***See: Council of Civil Unions Vs Minister of the Civil Service [1985] AC 374.***

The question that this court must answer is whether the impugned decision of the respondent was tainted with gross unreasonableness given the circumstances of this case as presented and discussed above.

It is true that the Minister’s decision was unreasonable and that is why after the decision had been made she tried to meet the stakeholders who had been affected by her irrational decision.

This issue is resolved in the positive.

ISSUE THREE

Whether the 1st respondent can revoke the applicant's license without being accorded a hearing?

This issue is premised on the fact that the applicant was never consulted or heard before the ban was enforced or implemented. The applicant as a holder of a valid licence ought to have been heard even if the Minister had had the power to cancel/revoke such licence or had it been done by the proper Ministry of Agriculture, Animal Husbandry and Fisheries.

The 1st respondent in answer contended that before and after the Ministry of Trade, Industry and Cooperatives implemented the Presidential Directive, all stake holders were consulted and or engaged in several meetings. He was to avail the minutes at the trial but the same were not availed.

He also contended that the applicant ignored and /or refused to attend any stakeholders meetings.

I wish to note that there is no evidence of invitation of the applicant to the alleged meetings which he refused to attend.

The 1st respondent's counsel has attached some attendance lists for meetings that were held after the Minister of Trade had made the illegal ban and it is not clear how the persons in attendance were invited or contacted.

In the case of ***Twinomuhangi vs Kabale District and others [2006] HCB130*** Court Held that;

*“*Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in the non-observance of the rules of natural justice or to act with procedural fairness towards one affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision*.”*

The applicant indeed legitimately expected to be heard as a holder of the licence and this was not done and the individual ought to be able to plan his or her action on the basis that the expectation will be fulfilled.

The principle of legitimate expectation is concerned with the relationship between public administration and the individual. It seeks to resolve the basic conflict between the desire to protect the individual's confidence in expectations raised by administrative conduct and the need for the administrators to pursue changing policy objectives. The principle means that expectations raised as a result of administrative conduct may have legal consequences. Either the administration must respect those expectations or provide compelling reasons why the public interest must take priority.

Therefore the principle of legitimate expectation concerns the degree to which an individual's expectations may be safeguarded in the face of a change of policy which tends to undermine them. The role of the court is to determine the extent to which the individual's expectation can be accommodated within the changing policy objectives.

The origins of this ground of review is traced in the case of **Schmidt vs Secretary of State for Home Affairs [1969] 1 All ER 904**. Lord Denning noted that;

*"*It all depends on whether he has some right or interest or, I would add, some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say*"*

Applying this principle to the facts of the case, Lord Denning said:

*"*A foreign alien has no right to enter this country except by leave, and if he is given leave to come for a limited period, he has no right to stay for a day longer than the permitted time. If his permit is revoked before time expires, he ought, I think, to be given an opportunity of making representations; for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right-and, I would add, no legitimate expectation-of being allowed to stay. He can be refused without reasons given and without a hearing. Once his time has expired, he has to go*"*

In the case of **AG of Hong Kong vs Ng Yuen Shiu [1983] 2 All ER 346**, the Privy Council held that, in light of the statement by the Government, the respondent had a legitimate expectation of being accorded a hearing.

It can be deduced from the above cases that legitimate expectations may include expectations which go beyond legal rights, provided that they have some reasonable basis. Secondly, the legitimate expectation may be based on some statement or undertaking by, or on behalf of, public authority which has the duty of making the decision, if the authority has through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied an inquiry. Thirdly, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it would act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.

See also *World Point Group Ltd vs AG & URA HCCS No. 227 of 2013*

One of the requirements for a legitimate expectation to be effective is that the promise, the representation that gave rise to the expectation, should be clear, unambiguous and unqualified.

When the applicant was issued a licence on 20th March 2017, he expected to carry on the business of importing fishing nets but the abrupt change of policy substantively affected him. The applicant never expected the change of policy to affect his licence and therefore the licence could not be revoked without a hearing.

This issue is therefore resolved in the negative.

ISSUE FOUR***Whether the applicant has a cause of action against in judicial review against the 2nd respondent?***

Under Judicial review the principles of what is a cause of action do not apply. Applications for judicial review are about challenging decisions of public bodies and correcting public wrongs. This means that it is to a great extent public interest litigation intended to challenge decision makers.

In the present case the 2nd respondent is an implementer of the decision under challenge and it is prudent that they are added as nominee parties for effective implementation of the decision of court. I find guidance in the case ***Lukwago Erias Lord Mayor vs Attoorney General , The tribunal Investigating A Petition for the removal of the Lord Mayor, Kampala Capital City; High Court Miscellaneous Cause No. 281 of 2013*** where Justice V. T Zehurikirize when a similar issue was raised held at page 10 there of as follows;

*“*In my view, I find that any order in judicial review is directed at the decision maker. It is the decision making process of the public body or official that is being contested.**

I think it is good practice to join the decision maker with the Attorney General”

The 2nd respondent was properly added since was the key implementer of the decision of the Minister.

ISSUE FIVE***What remedies are available to the parties?***

The ever-widening scope given to judicial review by the courts has caused a shift in the traditional understanding of what the prerogative writs were designed for. For example, whereas ***certiorari*** was designed to quash a decision founded on excess of power, the courts may now refuse a remedy if to grant one would be detrimental to good administration, thus recognising greater or wider discretion than before or would affect innocent third parties.

The grant of judicial review remedies remains discretionary and it does not automatically follow that if there are grounds of review to question any decision or action or omission, then the court should issue any remedies available. The court may not grant any such remedies even where the applicant may have a strong case on the merits, so the courts would weigh various factors to determine whether they should lie in any particular case. See ***R vs Aston University Senate ex p Roffey [1969] 2 QB 558, R vs Secretary of State for Health ex p Furneaux [1994] 2 All ER 652***

The decision of the Minister of Trade was illegal, irrational and procedurally improper but the said decision was made for a period of one year which has since expired.

The orders if given would not serve any purpose except that it would guide the 1st respondent in future conduct of its activities.

I decline to issue any Orders of Certiorari, Prohibition or Injunction against the decision of the Minister.

I would make a declaration that the decision of the Minister of Trade, Industry and Cooperatives banning importation of all fishing gears into the country was illegal.

General damages

Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak, throw them at the head of the court, saying, "This is what I have lost, I ask you to give these damages" They have to prove it.
See ***Bendicto Musisi vs Attorney General HCCS No. 622 of 1989 [1996] 1 KALR 164 & Rosemary Nalwadda vs Uganda Aids Commission HCCS No.67 of 2011***

The applicant did not guide court on the nature of the loss apart from stating that the banning of all fishing gears endangered his livelihood. This court awards the applicant a sum of 20,000,000/= as damages for the revocation of the licence and abrupt change of policy to his detriment.

Punitive Damages

The applicant has not set out any evidence to justify the award for punitive and exemplary damages.

The application is allowed with costs against the 1st respondent only.

I so Order

SSEKAANA MUSA

JUDGE

28th/08/2018

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