

UGANDA / JUDGMENT

Kimpi v Attorney General & Anor (MISCELLANEOUS CAUSE NO.23 OF 2017) [2018] UGHCCD 92 (17 August 2018)

[2018] UGHCCD 92

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

KIMPI ISABIRYE----- APPLICANT

VERSUS

1. ATTORNEY GENERAL

2. DR. MEDARD BITEKYEKEREZO----- RESPONDENTS

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for enforcement of rights under Article 50(1) & (2), Article 119 (4) (C) of the 1995 Constitution and Section 98 of the civil Procedure Act and sections 2, 3, (3) and 5 of the National Drug Policy and Authority Act, Sections 14(2) (b) and 33 of the Judicature Act. Rules 3 & 6 of the Judicature (Fundamental Rights and Freedoms) (Enforcement Procedure) SI No. 26 of 1992. Section 36 of the Judicature Act as amended, Rules 3, 6, 7 and 8 of the Judicature (Judicial Review) Rules, 2009 for the following Declarations and Orders;

1. A declaration that the decision of the Minister of health to appoint the 2nd Respondent as the Chairman of National Drug Authority, on 27th January 2017 when the 2nd respondent was operating an illegal and substandard pharmacy inside Mbarara Medical Specialist Clinic which was also operating illegally without a license was done in error.

2. A declaration that the 2nd respondent was/is not a fit and proper person to be Chairman of National drug Authority which is a regulatory body in charge of enforcing standards and provisions of the National Drug Policy and Authority Act cap 206 due to conflict of interest.
3. A declaration that the 2nd respondent's travel to inspect OMAB Group drug manufacturing factories in the United Arab emirates was/is an abuse of office.
4. An Order directing the Minister of Health to revoke and /or cancel the 2nd respondent's appointment as a Chairperson of the National Drug Authority.
5. An Order directing the minister of Health to appoint a new Chairperson of National Drug Authority.
6. A permanent injunction restraining the respondent from performing the duties of the chairperson of National drug Authority.
7. An Order that the respondents jointly and severally pay the applicant 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 but generally and briefly state that;

1. The 2nd respondent on the 27th day of January 2017 was appointed as the Chairperson of the national drug Authority by the Minister of Health.
2. At the time of his appointment as the chairperson of the National Drug Authority by the Minister of Health, the 2nd respondent was operating an illegal and substandard pharmacy inside Mbarara Medical Specialist Clinic which was also operating illegally without a licence which is contrary to the law.
3. The core functions of the Chairperson of the National drug Authority is to implement and enforce full compliance with the provisions of the National Drug Policy and Authority Act.
4. The 2nd respondent was notified vide letter ref;06/PSU/2017 dated 17th March 2017 by the Secretary Pharmaceutical Society of Uganda that he was operating an illegal and substandard pharmacy inside Mbarara Medical Specialist Clinic owned by the 2nd respondent as per records from Uganda Medical Practitioner's Council.
5. By operating a clinic which is/was not registered or licensed to operate by March 2017 was in breach of the provisions of the Medical and Dental Practitioner's Act cap 272.
6. Further by operating a pharmacy that was neither registered nor licensed by National Drug Authority, the regulator, the 2nd respondent breached provisions of the National Drug Policy & Authority Act cap 206.
7. The unlicensed pharmacy is/was selling prescription drugs contrary to the provisions of the National Drug Policy and Authority Act cap 206.

8. The 2nd respondent's actions put him in a position of conflict of interest and therefore cannot investigate himself. This renders the 2nd respondent incapable of executing the functions of the Chairperson of the National drug Authority.
9. The 2nd respondent in an apparent act of influence peddling and abuse of office on the 21st day of March 2017 invited the Council members of the Pharmaceutical Society of Uganda and made promises to the in-exchange for them to drop their request to have him investigated.
10. The 2nd respondent has breached the law and therefore he is not a fit and proper person to enforce the implementation of the same law hence his appointment ought to be revoked by the Minister for Health.

The respondents opposed this application and the 1st respondent filed an affidavit in reply through the Acting Commissioner Pharmaceutical Services in the Ministry of Health and a Board member of the National Drug Authority and the 2nd respondent filed her affidavit.

The 1st respondent contended that the appointment of the Chairperson was an exercise discretion vested in the Minister of Health as the National Drugs Policy and Authority provides.

The appointment of the 2nd respondent was preceded by an elaborate vetting process that culminated in his appointment and approved by the Cabinet and above all there is no eligibility criteria set out under the law.

The Ministry of Health established that the 2nd respondent does not operate any illegal pharmacy inside or within the vicinity of his Mbarara Specialist Clinic and that none of the records of National Drug Authority or the Council of the Pharmaceutical Society of Uganda reveal that he is a registered owner of any pharmacy in Uganda. They also retracted an earlier letter written against the 2nd respondent.

The 2nd respondent's trip to inspect drug manufacturing companies in the Middle East was not an abuse of office as alleged because the 2nd respondent acted on behalf of the Government of Uganda in his official capacity as Chairperson of National Drug Authority with a view of attracting foreign investment in the Pharmaceutical jobs for Ugandans and access to affordable medicines. This culminated in signing of a memorandum of Understanding between the Government of Uganda and an investor (OMAB Group).

The 2nd respondent in his affidavit denied all the allegations set in the application and clarified on some of the key issues as hereunder;

* That under the Medical and Dental Practitioners Act, a health unit is able to control medicines within its premises so long as the same does not amount to stock piling, retailing or wholesaling.

* That many health units store limited amount necessary medicines for emergency purposes as well as preliminary treatment and this does not in any way fall in the constraints of a pharmacy as prescribed by the National Drugs Policy and Authority Act. It is as a result of this that his clinic stores those drugs.

* That it is true Mbarara Medical and Specialist Clinic is registered in his name and Dr Mulyowa Kitunzi and it holds an operational License of Health Services for the year 2017 and they held Practising licence for the year 2017. The registration and license status of the said clinic has been confirmed by the Uganda Medical and Dental Practitioners Council by a letter dated 21st August 2017, and any theories of illegal activities within the premises have been dispelled by the same.

* That the visit to OMAB Group Dubai was as inspection of two world class Pharmaceutical manufacturing facilities that were to be launched in Uganda and it was within his powers to attend for inspection.

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.

Three issues were proposed for court's resolution;

1. *Whether the failure by the 2nd respondent to renew his annual operating licence and practising certificate by 1st January 2017 fettered the Minister's discretion to lawfully appoint the 2nd respondent as the Chairperson, National drug Authority on 27th January while the 2nd respondent was operating an illegal and substandard pharmacy and clinic?*
2. *Whether the 2nd respondent is a fit and proper person to be the Chairman of the National Drug Authority due to conflict of interest?*
3. *What remedies are available to the applicant?*

I shall resolve this application in the order of the issues so raised but the 2nd respondent counsel has raised some preliminary objections which will have to be addressed first. The applicant was represented by *Mr Kituuma- Magala* whereas the 1st respondent was represented by *Mr Richard Adrole* and the 2nd respondent was represented by *Ms* *Katusiime Lelia* assisted by *Aliyo Galindo*.

Preliminary Objections

According the notice of motion this application was brought under Articles 50(1) & (2) and Articles 119(4)(c) of the Constitution and rules 3 & 6 of the Judicature (Fundamental Rights and Enforcement Procedure) Rules SI No. 26 of 1992.

The 2nd respondent's counsel has submitted that this action is therefore deemed to be one which falls in category of Public Interest Litigation. *Black's Law Dictionary 8th Edition* defines Public Interest Litigation as “*the general welfare of the public that warrants recognition and protection”*

It is also defined as something in which the public as a whole has a stake. Campbell C. J in ***R v Bedfordshire 24 L. J. G. B 84*** said a matter of Public or General Interest;

“...does not mean that which is interesting as gratifying curiosity or love of information or amusement; but that in which a class of community have a pecuniary interest, or some interest by which their rights or liabilities are affected.”

In light of the above the respondent raised an objection that the said application does not disclose any cause of action under Article 50 of the Constitution. He submitted that a cause of action under ordinary suit and one under Public Interest Litigation are very distinct. A matter under Public Interest Litigation must require a legal remedy and be a public interest, which means it must;

- * Affect a significant number of people not just the individual or;
- * Raise matters of broad public concern or;
- * Impact on disadvantaged or marginalised groups, and;
- * It must be a legal matter which requires addressing **pro bono publico** (for the common good)

The applicant's counsel submitted that a subtle distinction between a cause of action in an ordinary civil suit and a cause of action in constitutional matters was made Mulenga JSC (as he then was) in the case of ***Ismail Serugo vs Kampala City Council & Another Constitutional Appeal No. 2 of 1998*** “ **it is not an essential element for the petitioner's right to have been violated by the alleged inconsistency or contravention.....**”

The Constitutional court ruled that in the course of handling Article 137 matters, the Constitutional Court could deal with Article 50 matters. However, unless the action requires interpretation of the Constitution, the court of first instance should be the High Court.

He contended that the applicant has proved that the 2nd respondent was in illegal practice and is not a fit and proper person to be appointed to such a national drug regulator.

The applicant brought this application under **Article 50 (1) & (2) of the Constitution** which provides;

“*Any person who claims that a fundamental or other right or freedom guaranteed under this Constitution has been infringed or threatened, is entitled to apply to a competent court for redress which may include compensation.*

****Any person or organisation may bring an action against the violation of another person's or group's human rights****”

I have perused the entire application before this court and I have not come across any right or freedom which the applicant alleges was violated or was threatened to be violated.

In order to proceed or bring actions under Article 50 of the Constitution, the matter must relate directly to fundamental rights and freedoms guaranteed under the constitution.

The applicant is seeking to challenge a decision of the Minister of Health to appoint the 2nd respondent as a Chairperson of the National Drug Authority. What right or freedom was violated or threatened to be violated by this appointment?

In the case of ***Pastor Martin Sempa vs Attorney general High Court Miscellaneous Application No. 71 of 2002***, an action was brought to object to new electricity tariffs that had been imposed without giving the members of the public a hearing and accordingly the applicant's right to fair treatment under Article 42 of the Constitution had been infringed. The learned trial judge struck out the action on ground that it does not disclose violation of a constitutional right. He ruled

"It is not enough to assert the existence of a right. The facts set out in the pleadings must bear out the existence of such a right and its breach would give rise to relief."*

Similarly, in another case of ***Ogago Brian Abangi vs Uganda Communications Commission High Court Miscellaneous Application No. 267 of 2013***; The Court held that the applicant did not cite any Articles of the Constitution which had been violated to assist the court come to a conclusion that the applicant seeks enforcement of constitutional rights. See also ***Human Rights Network for Journalists & Another vs Uganda Communications Commission Miscellaneous cause No. 219 of 2013***

The applicant in this matter has not cited any infringement of any right or freedom guaranteed under the Constitution as the basis of filing this application. The applicant should have filed an application for judicial review challenging the decision of the Minister which ought to have been done within three months from the date the cause of action arose rather than filing an application for enforcement of rights where no single right is mentioned or Article of the Constitution is cited.

On this preliminary objection, the application is incompetently before this court and is struck out.

In the interest of justice and for completeness, I will consider the rest of the issues that were raised for determination.

ISSUE ONE

1. ***Whether the failure by the 2nd respondent to renew his annual operating licence and practising certificate by 1st January 2017 fettered the Minister's discretion to lawfully appoint the 2nd respondent as the Chairperson, National drug Authority on 27th January while the 2nd respondent was operating an illegal and substandard pharmacy and clinic?***

The applicant's counsel submitted that since the 2nd respondent had not renewed his licence by 1st January 2017, then that implied that he was erroneously or illegally appointed by the Minister for Health as the chairperson of national drug Authority. That the applicant has only attached a license for the year 2016 and yet he was appointed on 27th January 2017.

The registrar of the Uganda Medical and Dental Practitioner's Counsel-(Dr Katumba Edward) in his supplementary affidavit stated that;

“ A grace period of three months, between January and March is routinely given, by the Uganda Medical and dental Practitioner's Council within which applicants are permitted to renew their licences for that year. A fine is often made if the application is made after the grace period.”

That Mbarara Medical Specialist clinic has been issued with a licence since 28th May 2005, and the same has remained in conformity with the standards based on the continued renewal of the said license.

This evidence was uncontroverted by the applicant and it ably responds to the applicants allegations set out in the affidavit in support.

The above evidence is buttressed by *Section 19 (2) of Medical and Dental Practitioner's Act cap 272*

In addition, the appointment of a person is a process which may be done for a given period before the actual appointment. This implies that a person who is to be appointed is vetted prior and actions or omissions that may arise after vetting may not be known since it has occurred afterwards.

The law under which the Chairperson of the National Drug Authority is appointed does not set any eligibility criteria and what the applicant is attempting to do is to fill the void by evoking the exercise of discretion.

The Minister could not refuse to exercise her discretion by relying on allegations which are unsubstantiated and the exercise of discretion was not fettered in any way by such allegations.

It is true that discretionary power conferred upon legal authorities is not absolute, even within its apparent boundaries, but is subject to general legal limitations. Therefore discretion must be exercised in the manner intended by the empowering Act or legislation. The limitations to the exercise discretion are usually expressed in different ways, i.e discretion must be exercised reasonably and in good faith, or that relevant considerations only must be taken into account, that there must not be any malversation of any kind or that the decision must not be arbitrary or capricious.

In the case of ***R v Commission for Racial Equality ex p Hillingdon LBC [1982] QB 276*** Griffiths LJ has said;

“Now it goes without saying that Parliament can never be taken to have intended to give any statutory body a power to act in bad faith or a power to abuse its powers. When the court says it will intervene if the particular body acted in bad faith it is but another way of saying that the power was not being exercised within the scope of the statutory authority given by Parliament. Of course it is often a difficult matter to determine the precise extent of the power given by the statute particularly where it is a discretionary power and it is with this consideration that the courts have been much occupied in the many decisions that have developed our administrative law since the last war.”

It can therefore be deduced from the above decision that where Parliament confers power upon some Minister or other authority to be used in discretion, it is obvious that the discretion ought to be that of the designated authority and not the court. Whether the discretion is exercised prudently or imprudently, the authority’s word is to be law and the remedy is to be political only.

On the other hand, Parliament cannot be supposed to have intended that the power should be open to serious abuse. It must have assumed that the designated authority would act properly and responsibly, with a view to doing what was best in the public interest and most consistent with the policy of the statute. It is from this presumption that the courts take their warrant to impose legal bounds on even the most extensive discretion.

In the case of ***Sharp v Wakefield [1891] AC 173*** court observed that;

“ ‘discretion’ means when it is said that something is to be done within the discretion of the authorities that something is to be done according the rules of reason and justice, not according to private opinion: Rookes case; according to the law and humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.”*

The applicant in this matter has not set out circumstances or plausible facts upon which the exercise of discretion to appoint the 2nd respondent could be challenged on grounds of wrongful exercise of discretion by the Minister of Health within the parameters set out in the above decisions.

This issue is resolved in the negative.

ISSUE TWO

Whether the 2nd respondent is a fit and proper person to be the Chairman of the National Drug Authority due to conflict of interest? or

Whether there is a conflict of interest in the 2nd Respondent’s appointment as the Chairperson of National drug Authority?

The applicant challenged the 2nd respondent’s appointment on the basis of there being a possibility of conflict of interest in execution of his duties as the Chairperson of the National Drug Authority.

The ***8th Edition of Black's Law Dictionary*** defines a Conflict of Interest as a real or seeming incompatibility between one's private interest and one's public or fiduciary duties.

In the case of ***Uganda vs Patricia Ojangole Criminal Case No. 1/2014*** Justice Gidudu held that;

*“ *Conflict of interest has also been generally defined as any situation in which an individual or corporation is in position to exploit a professional or official capacity in some way for their personal or corporate benefit”**

This issue is directly related to the 1st issue since it is also premised on the same allegations that the 2nd respondent was not a licensed Medical and Dental Practitioner and also that he allegedly operated of an illegal clinic and pharmacy.

This court has already found that the 2nd respondent had a medical practising licence and his clinic was equally licenced to operate. This therefore implies he was a fit and proper person to hold the position of chairperson.

In addition, the law did not set any qualifications for eligibility for the said position. Even if the respondent was not a practising Medical Doctor and or did not have a Practising licence or was not operating any clinic, he would still have been eligible to be appointed.

The law does state that a person who is operating a Pharmacy cannot be eligible to be appointed a Chairperson. In case any such issues arose, it would imply that such a person would not sit in the meeting where the Authority would be discussing his or her pharmacy.

The issue of conflict of interest cannot arise in respect of the facts before this court. It is merely speculative and even if the 2nd respondent had had a pharmacy, it is also possible that his pharmacy may not have any issues that would make him or her get in conflict of interest.

It is important to note that there is a representative of the Pharmaceutical Society of Uganda to National Drug Authority. Such a person may indeed have a private pharmacy, should that mean there is a conflict of interest at all times when the board is sitting? I don't think.

This issue also fails and the 2nd respondent was/is a fit a proper person to be in the position of Chairperson NDA and there is no conflict of interest.

ISSUE THREE

Whether remedies are available to the applicant?

Having upheld the above preliminary objection that this application was incompetently filed before court and resolution of the above issues in the negative, the applicant is not entitled to the declarations sought.

The application is dismissed with costs to the respondents.

SSEKAANA MUSA

JUDGE

17th /08/2018

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