

UGANDA / JUDGMENT

Mabirizi Kiwanuka v Attorney General (MISCELLANEOUS CAUSE NO. 239 OF 2019) [2020] UGHCCD 169 (10 June 2020) [2020] UGHCCD 169

COURT

HC: Civil Division (Uganda)

BEFORE

Mugambe, J

CASE / FILE NUMBER

MISCELLANEOUS CAUSE NO. 239 OF 2019

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT KAMPALA (CIVIL
DIVISION) MISCELLANEOUS CAUSE NO. 239 OF 2019**

MALE H. MABIRIZI K. KIWANUKA ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: LADY JUSTICE LYDIA MUGAMBE

RULING

- 1. This application is brought under paragraphs I, II(i), XXVI, XXIX(a) & (f) of the National Objectives and Directives Principles of State Policy, articles 8A, 17(1) (i), 20, 21(1), 28(1), 44(c), 126(1), 128(1) & (2), 139 (1) of the Constitution, sections 33, 36(1), 38(1) & (2) and 39 of the Judicature Act, section 18(4) of the interpretation Act, rules 3 and 6 of the Judicial Review Rules seeking:
 - i. A declaration that the Constitution (Recusal of Judicial Officers) (Practice) Directions, 2019, Legal Notice No.7 of 2019 (herein after the Practice Directions) were made *ultra vires* the administrative functions of the Chief Justice under article 133(1) (b) of the Constitution.
 - ii. Certiorari quashing the practice directions.
 - iii. In the alternative, a declaration that paragraphs 5, 7(1), 8(1),(4) and 9 of the practice directions were made *ultra vires* under an improper procedure, contravene the principal laws, are irrational and unreasonable.

- iv. Certiorari quashing paragraphs 5, 7(1), 8(1) (4) and 9 of the Practice Directions.
- v. General damages.
- vi. Costs of this application.
- 2. The application is supported by the affidavit of the Applicant. The grounds for the application are briefly that recusal processes and procedures are not matters of administration over which the Chief Justice has power under article 133(1) (b) of the Constitution. Recusal processes are matters of law which go to the root of the non-derogable right to a fair hearing hence not within the ambit of the administrative powers of the Chief Justice. The Practice Directions abolish the time-immemorial recusal procedure which had all the safe-guards of a fair hearing, protecting the integrity of a judicial officer as well as giving confidence to parties. Members of the public and litigants were not given an opportunity to participate in the making of the Practice Directions, it makes it optional for a judicial officer to recuse themselves even after establishing their impartiality to be in question. The procedure of an open letter or an oral application without first discussing the matter in chambers puts the integrity of a judicial officer at risk.
- 3. The Respondent opposes the application through the affidavit in reply of Mr. Ayebare Tumwebaze, an assistant Registrar in the Judiciary charged with administrative duties of day-to-day operations of courts. He averred that under Article 133(1)(b) of the Constitution, the Chief Justice is empowered to issue orders and directions necessary for the proper and efficient administration of justice to the courts. The process of handling an application for recusal has both administrative and legal aspects for which the Chief Justice is empowered by the Constitution. Prior to passing the Practice Directions, both judicial officers and advocates found it difficult to bring forth such applications, a number of them confronting each other in court, took to social media to complain among others. This made the Practice Directions necessary.
- 4. Further that the Practice Directions do not negate the right to a fair hearing nor do they violate any non-derogable right. They instead enhance the right to a fair hearing and illuminate the processes and consequences. There were meticulous and purposive consultations made with relevant stakeholders prior to their enactment. The Practice Directions do not contradict each other but elaborate the different circumstances under which recusal may be called for. The Directions were made in the interest of the right to a fair hearing and participatory justice and deserve the protection and nurturing by this court. The application for judicial review in a matter of this kind is misconceived and an abuse of court process in so far as the Applicant's complaint is a challenge to the constitutionality of the Practice Directions and/or its provisions and the exercise of the Chief Justice's constitutional mandate. This would properly fall under article 137 of the Constitution which stipulates constitutional interpretation by the Constitutional court.

- 5. In rejoinder, the Applicant averred that the recusal procedures have for long been part of our laws through decided cases which is common law and to change this needed objective justification. The old procedure which was well tested was double-edged in protecting the integrity of the judicial officer at the same time protecting the right to a fair hearing which the new guidelines fall short of. The Directions distort and derogate the right to a fair hearing which has an impartial and fair judicial officer as one of the cornerstones. There is nothing for constitutional interpretation in the instant case and what is required is to determine whether the Chief Justice did not exceed his powers and whether the directions are not irrational or unreasonable, which are within the ambit of judicial review.
- 6. The Applicant raised three issues for resolution:
 - i. Whether the making of the impugned Practice Directions was **ultra vires** the administrative powers of the Chief Justice.
 - ii. In the alternative, whether the contents of the Practice Direction are illegal, unreasonable and irrational.
 - iii. What remedies are available to the parties.
- 7. In **Rosemary Nalwadda v. Uganda Aids Commission HCMA No. 0045 of 2010** it was held that it is trite that judicial review can be granted on three grounds namely; illegality, irrationality and procedural impropriety. See also **Council of Civil Service union v. Minister for the civil Service [1885] Ac 374**.
- 8. In **Stream Aviation Ltd v. The Civil Aviation Authority Misc. Application No. 377 of 2008 (Arising from Misc. Cause No. 175 of 2008)** Justice V. F. Musoke Kibuuka held that the prerogative order of **certiorari** is designed to prevent the excess of or the outright abuse of power by public authorities. The primary object of this prerogative order is to make the machinery of Government operate properly, according to law and in the public interest.

Analysis

- 9. Article 133 outlines the administrative function of the Chief Justice. In their preamble paragraph, the Directions are said to be under article 133 (1) (b) of the Constitution. This article empowers the Chief Justice to issue orders and directives necessary for the proper and efficient administration of justice to the courts. Under paragraph three of the directions, their objectives are listed as; (a) to promote adherence to Article 28 of the Constitution which enjoins the right to an independent and impartial hearing; (b) to promote the application of all cardinal principles of natural justice; (c) to promote uniformity and consistency on recusal among judicial officer; (d) to promote harmony between the Bar and the Bench, even where a member of the Bar alleges bias against a member of the bench; (e) to avoid confrontations between counsel and judicial officers; and (f) to give guidance on recusal to judicial officers, counsel and unrepresented litigants.

- 10. The Applicant claims that recusal processes are matters of law but points to no specific law for this court to consider derogation of the same by the Directives. It is true that the previous recusal process developed from jurisprudence and practice required a request for recusal to first be made informally to the judicial officer in Chambers. If such officer was not satisfied and refused to recuse at that stage then he or she would direct the party concerned to formally make an application for recusal. The other party would respond and there would be a rejoinder and a formal hearing like for any other application concluding with the ruling of the judicial officer in which he or she gives reasons whether or not to recuse.
- 11. The procedure is slightly different under the Directives. They exclude the initial process of first raising the recusal informally and usually orally before the judicial officer only in chambers and not open court or in the presence of the registrar. In paragraph 8(1) under recusal at the instance of parties, a party who seeks recusal does so by letter copied to all parties and the registrar or orally in open court in the presence of all the parties.
- 12. There's a difference I see in paragraph 8(2) where it provides that a judicial officer against whom recusal is sought shall be given an opportunity to respond to the concerns raised by the parties. Under the old process, a judicial officer did not have this right of response explicitly provided. Only he/she would give his/her reasons for the non-recusal or recusal in the ruling in the formal recusal application. One may also wonder how the judicial officer responds save in his or her ruling.
- 13. The other difference in the directions is that the party in the suit that does not file for recusal was formally given a right to respond to the recusal application. This response is not specifically provided in the recusal directions. However this alone does not deprive such party from responding or being heard if they so wish to be heard. All they have to do is seek court's leave to respond or be heard.
- 14. Having said that, it is also true to say that recusal applications usually concern one and not all the parties before the judicial officer. This might have been the wisdom that informed the inclusions and exclusions in parts of the procedure in the directives.
- 15. The argument that the informal process in chambers protected the integrity of a judicial officer can be made. However it alone does not make the construct of the Directives illegal or null and void. The argument that an applicant who does not first raise his recusal in chambers can fear or fail to raise the same in open court is largely unsubstantiated and speculative.
- 16. The Applicant takes issue with the directive saying that litigants and members of the public were not given an opportunity to participate in their making before they came into force. There is no requirement for public involvement in passing directives of this nature which are internal to the working of the judiciary.

- 17. The Applicant takes issue with paragraph 5 of the directives which makes it optional for the judicial officer to recuse themselves. He makes it appear like the previous practice or standard made it compulsory for the judicial officer to recuse him or herself in some instance. This is not necessarily true. I find the provision in the Directions in this regard exactly the same as the previous practice and procedure. It remains the judicial officer's discretion to determine whether he or she is so biased that he/she should recuse him or herself or not.
- 18. The Applicant claims that paragraph 7 limits the instances when the judicial officer may recuse him or herself at the instance of parties yet paragraph 6 does not limit instances when the judicial officer may recuse on his or her own motion. My understanding here is that the grounds listed for recusal for parties are limited. Even if I considered this to be the case, the most there can be to rectify this is a proposal for a modification of paragraph 7 to have a general clause at the end to open up the grounds for recusal there listed already. Apart from this, there is nothing discriminative in substance or illegal about the construct of paragraphs 6 and 7 of the directives.
- 19. While it is not specifically provided, nothing under the directives bars a party that wishes to adduce evidence from adducing it. The normal rules of evidence and procedure can be invoked. A party can indicate the same at the beginning of their filing or seek leave of court to adduce evidence during the hearing.
- 20. The Applicant contends that paragraphs 8(4) and 9 of the Directions deprive an Applicant in a recusal matter of the immediate right of appeal. However this is not true. These paragraphs do not in any way remove the right of appeal. They only provide that where the judicial officer denies the recusal application, such right of appeal shall be made after the matter has been determined. In my discernment, this does not fetter the right of appeal or to a fair hearing at all. Rather it serves to avert any delays of justice through unnecessary interim appeals that can be handled after the full trial of the substantive matter before the judicial officer. It serves to protect the integrity of the trial from scrupulous litigants who may raise recusal applications and interim appeals therefrom simply to defeat the hearing and justice for the other parties in the trial. There is nothing illegal about this.
- 21. After analyzing all the aspects forming the basis of this application, I am inclined to consider that the Applicant may not be happy with the new recusal procedure in the Directions which is slightly different from the previous one. However this alone does not make the Directions defective to be challenged through judicial review. With all due respect, the applicant must learn to adapt to change without being unnecessarily antagonistic.
- 22. It appears that although there was an established procedure for recusal applications from the jurisprudence, there remained confusion amongst judicial officers and litigants alike in the application. Both groups did not adhere to this procedure and this in some cases resulted in altercations and embarrassment amongst lawyers, judicial officers and the parties. This was the mischief the Directions came to avert. The Chief Justice had a

committee consult internally and this culminated in the Directions, to streamline and provide a common approach for recusal in the courts.

- 23. The Directions were necessary to enhance the proper and efficient administration of justice in the courts as envisaged in Article 133 of the Constitution. I therefore have no basis to say they were **ultra vires** the Chief Justice's power. Neither do I have any basis to say they are illegal unreasonable or irrational. Accordingly, issues one and two are resolved in the negative.

24. Accordingly the application is dismissed. Each party shall bear its own costs.

I so order.

Lydia Mugambe. Judge. 10 June 2020.

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