

UGANDA / JUDGMENT

Tibasiima and Another v Kasangaki and Another (Miscellaneous Cause No. 20 of 2021) [2022] UGHCLD 114 (31 March 2022)

[2022] UGHCLD 114

COURT

HC: Land Division (Uganda)

BEFORE

Byaruhanga Rugyema, J

CASE / FILE NUMBER

Miscellaneous Cause No. 20 of 2021

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MASINDI MISCELLANEOUS CAUSE NO. 20 OF 2021

1. TIBASIIMA GILBERT**2. RWAHWIRE SELEMOTH :.....: APPLICANTS****VERSUS****1. KASANGAKI KAIJA DINAH****2. BULIISA DISTRICT LOCAL GOVERNMENT :.....: RESPONDENTS****RULING****Before: Hon. Justice Byaruhanga Jesse Rugyema**

- [1] This is an application by way of Notice of Motion pursuant to **Sections 14, 33, 26 and 39 of the Judicature Act and Rules 3A, 4, 5 and 6 of the Judicature (Judicial Review) Rules, S.9 CPA, O.52 rr. 1 and 3 CPR and S.56 of the Local Government Act** for the following prerogative orders and judicial reliefs:
 - 1. A declaration that the former L. CV of Buliisa District, Agaba Kinene Simon illegally appointed the 1st Respondent to the position of Chairperson District Service Commission.

- 2. A declaration that the issuance of appointment letter and swearing in of the 1st Respondent as the Chairperson District Service Commission by the Chief Administrative Officer of Buliisa was illegal as it emanated from an illegal appointment.
- 3. A declaration that the 2nd Respondent's decision to appoint the 1st Respondent as the Chairperson Buliisa District Service Commission did not follow proper procedure and hence is ultra vires, void and illegal.
- 4. A declaration that the decision of the Public Service Commission as contained in the letter dated 4th May 2021 to approve the

appointment of the 1st Respondent as the Chairperson of the Buliisa District Service Commission is unfair, irrational, ultra vires and illegal as it emanated from an illegal appointment.

- 5. An Order of Certiorari quashing the decision of the 2nd Respondent appointing the 1st Respondent Chairperson of the Buliisa District Service Commission.
- 6. An Order of Prohibition prohibiting the 1st Respondent from occupying and or exercising the powers and duties of the office of the Buliisa District Service Commission.
- 7. An Order of Mandamus requiring/directing the Buliisa District Council/Local Government to appoint a person competent and qualified as provided in the Local Government Act to exercise the powers and duties of the office of the Chairperson Buliisa District Service Commission.
- 8. Damages.
- 9. Costs of the Application.
- [2] The grounds of this Application are contained in the accompanying affidavits of the applicants; **Tibasiima Gilbert** and **Rwahwire Selemoth** wherein briefly the grounds are:
 - *1. The 1 st Respondent was illegally appointed to the position of Chairperson District Service Commission without following proper procedure and hence acted ultra vires.*
 - *2. The 1 st Respondent was not legible for appointment.*
 - *3. The 2nd Respondent did not comply with and or implement the provisions of sections 56 of the Local Government Act which requires that for any person to be appointed to the position of Chairperson of a District Service Commission, such person must ordinarily be resident in that District.*
 - *4. The 2nd Respondent's decision to appoint and the decision of the Public Service Commission to approve the appointment of the 1st Respondent is ultra vires, illegal, unconstitutional and irrational as person, who is not ordinarily resident in Buliisa District was appointed and approved to occupy the said office.*

- *5. Several persons within the district objected and petitioned various offices to wit the office of inspector General of Government and the Public Service Commission to no avail.*
- *6. That it is just, equitable and in the interest of justice that the application is granted.*

Counsel legal representation

- [3] The Applicants were represented by Counsel **Lou Jarvis** of **KMA Advocates, Kampala** while the 1st Respondent was represented by Counsel **Zemei Suzan** of **Zemei, Aber Law Chambers, Masindi** and the 2nd Respondent was represented by **Nyeko Joseph** of Attorney General's Chambers. All counsel filed their respective written submissions as permitted by court.

Brief facts of the Application

- [4] The 1st Applicant is a District Councilor in Buliisa District and chairperson of the Health Education and Community Committee and Resident of Ndandamire village, Kigwera Sub County, Buliisa District while the 2nd Applicant is a resident of Kizikya village in Buliisa Town Council, Buliisa District.
- [5] On 22nd December 2020, the 1st Respondent was through a council meeting by the 2nd Respondent nominated and appointed Chairperson of Buliisa District Service Commission and her name/appointment was to be submitted to the Public Service Commission for approval.
- [6] On the 28th of January, 2021, the District Chairperson, **Agaba Kinene Simon** himself wrote to the **Secretary Public Service Commission** submitting for approval the appointment of the 1st Respondent as a chairperson District Service Commission, Buliisa.
- [7] A number of stakeholders, citizens and residents of Buliisa District who included the applicants and the current District Chairperson of Buliisa District **Mr. Lukumu Fred** forwarded their objections to the inspectorate of Government and the Public Service Commission challenging the appointment of the 1st Respondent to the office of the Chairperson Buliisa District Service Commission.
- [8] The 1st Respondent was subsequently on 30th April, 2021 approved for the office and upon approval of appointment, the 1st Respondent was sworn in and assumed office of the Chairperson Buliisa District Service Commission.
- [9] It is the contention of the Applicants that the appointment of the 1st Respondent as Chairperson of District Service Commission was not in compliance with **S.56 (1) (c) of the Local Government Act** and hence is illegal, ultra vires, unconstitutional, irrational and null.
- [10] In particular, on the 9/3/2021, the 1st Applicant wrote to the Ministry of Public Service wherein he raised a number of anomalies at the district and affairs of the District Service Commission, inter alia;

"a) That the District chairperson had usurped the powers of the Chief Administrative Officer as enshrined in Section 64 of the Local Government Act and signed a letter indicating that the District Council had approved Madam Dinah Kasangaki as chairperson District Service Commission yet she is not ordinarily resident of Buliisa."

[11] The 1st Respondent on her part, denied the allegations of the applicants and contended that she was eligible for appointment as she is ordinarily a resident of Buliisa District. She denied the allegations of any irregularities committed during the process of her appointment by the 2nd Respondent and prayed for dismissal of the application.

Issues for trial

- [12] It was the consensus of all counsel for the parties that issues for trial of this application are as follows;
- 1. Whether the 1st Respondent is an ordinary resident of Buliisa District.
- 2. Whether the 1st Respondent was eligible for appointment to the position of Chairperson Buliisa District Service Commission.
- 3. Whether the process, procedure and appointment of the 1st Respondent was tainted with illegality, irrationality, unfairness and procedural impropriety.
- 4. What remedies are available to the parties.

ISSUE NO.1: Whether the 1st Respondent is an ordinary resident of Buliisa District.

- [13] Counsel for the Applicant submitted that the 1st Respondent is not an ordinary resident of Buliisa District. That her National Identity Card **marked 3** on her affidavit in reply indicates that she is a resident of **Katasenywa, Nyangahya Division, Masindi Municipality, Masindi District**. That the L. C1 chairperson of **Kigoya village** where the 1st Respondent alleges she is a resident, in a letter dated 14/5/2021 categorically denied knowing and or the 1st Respondent to be a resident of Kigoya village.
- [14] Counsel for the Respondent on her part submitted that as per the introduction letter by the L. C1 chairperson **Kigoya village** dated 14/4/2021, the 1st Respondent was introduced as born and a resident of Kigoya village in Buliisa district where she has a family. That it is by virtue of her marriage that she became a resident of both Buliisa and Masindi.
 - [15] I have carefully perused the Applicants' 2 supporting affidavits of the application and the 1st Respondent's affidavit in reply, the following facts appear undisputed by the parties.
- a) As clearly explained by the letter of **Asimwe Mereki**, the L. C1 chairperson Kigoya village, Buliisa sub county, Buliisa District, annexure "C" to the application dated 14/5/2021, the 1st Respondent is a born of **Kigoya village** but married to a resident of Masindi District. This is confirmed by the 1st Respondent herself in **para 10** of the 1st Respondent's affidavit in reply, she deposed thus:

*"That I have a home and residence in Buliisa as well as Masindi where my matrimonial home is"

- b) Masindi District is a separate and distinct district from Buliisa District. This is a well-known fact, Masindi district is different and separate from Buliisa and I take judicial notice of the same. In any case, this fact was never disputed by the Respondents in any affidavit in reply.
- c) Prior to the 1st Respondent's impugned appointment as the Chairperson of the Buliisa District Service Commission, she had served in the same capacity on appointment from November 2016 until November 2020. This fact was never disputed by the applicants in the affidavit in rejoinder.

[16] **Section 56(1) (c) of the Local Government Act** provides for qualifications of a member of a District Service Commission. It provides thus:

***"Qualifications of a member of a district service commission"**

*(1) A person shall not be appointed a member of District Service Commission unless that person-

*(c) is ordinarily resident in that district"

The rationale for this provision is to be found in the **Public Service Commission Guidelines to the District Service Commissions, 1st Revised Edition 2011 at P.14;**

- **"3.4 THE NEED FOR THE CHAIRPERSON AND MEMBERS OF THE DISTRICT SERVICE COMMISSION TO RESIDE IN THE DISTRICT"**
- ***3.4.2** To ensure that cases submitted to District Service Commission are handled and brought to a satisfactory conclusion within a reasonable time frame, Section 56(1) (c) of the Local Government Act Cap. 243 must particularly be observed/adhered to. A number of advantages can be reaped out of this legal provision, viz;*
- ***(a)** It saves time in the sense that all the members of the District Service Commission including the Chairperson are all within reasonable reach. When a need arises, they can easily be located and contacted for a meeting.*
- ***(b)** The fact that the chairperson is full-time in office and always available, conducting of District Service Commission business becomes an easy task to accomplish. This would be difficult to achieve if the chairperson and members of the District Service Commission were to commute from outside the District.*
- ***(c)** The availability of the Chairperson of the District Service Commission in the District enables him or her to keep abreast of the Human Resource management developments*

taking place on the ground, rather than being informed by a second or third party. Being armed with the facts at the finger tips enhances speedy and quality decision making.

- *(d) It is cost-effective ie less money is spent on transporting the chairperson, payment of subsistence allowance and other expenses. Consequently, the expenses on meeting the allowances or entitlements of the members will cause little if any, constraints on the resources of the District. Money saved in this manner can be used for other Human Resource productive purposes."*
- [17] The need for the chairperson and members of the District Service Commission to reside in the district as per the foregoing need not therefore be emphasized for it's self-explanatory.
- [18] In the instant case, it is the applicants' case that the 1st Respondent is not ordinarily resident of Buliisa District where she has been appointed as the Chairperson Buliisa District Service Commission. To prove the allegations, the applicants presented the L. C1 chairperson of Kigoya village, Buliisa Subcounty, Buliisa District letter dated 14/5/21(annex "C" to the applicants' affidavit) indicating that the 1st Respondent though a born of **Kigoya village** stays in Masindi District where she is married to a resident of there. She always goes to Kigoya only to visit her relatives.
- [19] Counsel for the 1st Respondent attacked the above L. C1 Kigoya letter dated 14/5/21 to be alien and an afterthought, that it was never pleaded by the applicants. This is however not correct because the letter in question is **annexture "C"** to both the Applicants' affidavit in support of the application and is referred to in **para 3** of their affidavits. Instead it is counsel for the Respondent who submitted on and attached another

letter from the same L. C1 chairperson dated 14/4/2021 which is to the effect that the 1st Respondent is a resident of Kigoya village. Neither the 1 st Respondent nor the 2nd Respondent pleaded this letter. Counsel for the 2nd Respondent instead attached it to his submissions as **Annexture "A"**. This is not permissible in law as it amounts to counsel adducing evidence from the bar. Court cannot in the premises rely on it as evidence.

- [20] As correctly put by counsel for the applicants in his submissions in rejoinder, the 1st Respondent's submissions that she is a Mugungu born in Buliisa district with family and a voter there does not per se make her ordinarily resident in Buliisa for purposes of **S.56 LGA**. The person to be appointed must be ordinarily in the district at all time as clearly indicated in the **Guidelines from the public Service Commission to the District Service Commission**.
- [21] Further evidence and concern by the stakeholders in the district that the 1st Respondent is not ordinarily resident in Buliisa District could be read from the District Council meeting minutes of 22/12/2020 (minute COU/4/12/2020/2021), **annexture 2 to the affidavit in reply** by the 1st Respondent wherein when her name was presented for approval of renewal of term of office as Chairperson of the District Service Commission,

"members required DEC to inform Madam Dinah Kasangaki to always ensure she attends council at least once in a while" This was the crux of the effect if one holds the office when not ordinarily resident in the district.

[22] Lastly, in her affidavit in reply, paragraph 10, the 1st Respondent deposed thus;

"That I have a home and residence in Buliisa as well as

Masindi where my matrimonial home is."

A "matrimonial home" is a place "ordinarily occupied" by the spouses as their "family residence". To qualify as a matrimonial home, the residence must be "ordinarily occupied" as a "family residence". The term "ordinarily occupied" means "in the course of regular family life". Matrimonial home therefore means the dwelling where a married couple ordinarily resides; See also the definition in the **Mortgage Act 2009 Section 2**. A matrimonial home carries its marital and family obligations and therefore require regular presence and not lip service visits.

[23] In this case, the 1st Respondent having admitted that Masindi is her matrimonial home, it follows this the heart where her family life unfolds and therefore her ordinary residence. As a result of the foregoing, I find that though the 1st Respondent was born in Buliisa, by virtue of her marriage to a resident of Masindi district thus forming her matrimonial home there, she ceased to ordinarily reside in Buliisa, her place of birth. As held in **Lanyero Ketty Vs Okare Richard & Anor H. C. C. A No.29/18**,

> "a person is deemed to be ordinarily resident at such a place where in the settled routine of his or her life he or she regularly, normally or customarily lives. It is contrasted with special or occasional casual residence or deviatory residences."*

[24] In this case, I find it clear that the 1st Respondent is not an ordinary resident of Kigoya village Buliisa District. She only goes there to visit her relatives who stay in Kigoya village thus occasionally resides in Buliisa District which does not satisfy the requirements of **S.56 (1)(c) of the L. G. A**. The issue is in the premises found in the **negative**.

Issue No.2: Whether the 1st Respondent was legible for appointment to the position of chairperson of Buliisa District Service Commission.

- [25] Following the resolution of the 1st issue and finding that the 1st Respondent is not an ordinary resident of Buliisa, it follows that she is not legible for appointment to the position of Chairperson District Service Commission as required by **S.56(1)(c) of the L. G. A**. This issue is therefore in the premises found in the negative.
- **Issue No.3: Whether the process, procedure and appointment of the 1st Respondent was tainted with illegality, irrationality, unfairness and procedural impropriety.**
- [26] In the case of **Fr. F. Bahikirwe Muntu Vs Kyambogo University H. C. M. A No. 643/2005** Justice Remmy Kasule (as he then was) held that the grounds, a combination or any one of them that an applicant must satisfy in order to succeed in a judicial Review application are; **illegality, irrationality and procedural impropriety.**

Illegality

- [27] This is when the decision making authority commits an error of law in the process of making a decision, **Fr. Bahikirwe Muntu (Supra)**.
 - [28] In the instant case, it is the express provision of the law as contained in **S.56 (1) (c) of the L. G. A** that a person appointed to the position of Chairperson District Service Commission must be ordinarily resident in the district. It has been proved in the instant case that the 1st Respondent is not ordinarily resident in Buliisa and hence her appointment is contrary to the provisions of **S.56 (1) (c) of the L. G. A**. Her appointment is therefore in the premises, illegal and it is declared so.
- [29] It also follows therefore, the issuance of the appointment letter and swearing in of the 1st Respondent as the Chairperson District Service Commission by the Chief Administrative Officer was equally illegal as it emanated from an illegal appointment.

Irrationality and procedural impropriety

- [30] 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 law before it would have made such a decision.
- [31] Procedural impropriety is when the decision making authority fails to act fairly in the process of its decision making; **See Wanyama Vs Busia District Local Government H. C. M. A No.225 OF 2011**.
- [32] In the instant case, the applicants complain that the chairperson L. CV flouted the procedure in the nomination and appointment of the 1st Respondent and pushed through his one agenda by usurping the powers of the Chief Administrative Officer and wrote to the Public Service Commission to approve the appointment of the 1st Respondent.
- [33] According to **Section 64(1) (2) (a) and (g) L. G. A**, the Chief Administrative Officer is the head of public service in the District and the head of the administration of the district council. He/she shall-
 - *"(a) be responsible for the implementation of all lawful decisions taken by the district council" and*
 - *"(b) act as a liaison officer between the district council and the Government;"*

In the instant case, the decision of the District Council was not implemented by the Chief Administrative Officer but by the chairperson L. CV who signed a letter dated 28/1/2021 indicating that

the District Council had approved **Madam Dinah Kasangaki** (1st Respondent) as Chairperson District Service Commission. It is the contention of the applicants that the L. CV chairperson's flouting of procedure was intended to defeat the applicants' protestations against the nomination of the 1st Respondent for holding the office of the chairperson District Service Commission.

- [34] 2ndly, the liaison between the District Council and the Government was not done by the Chief Administrative Officer but by the chairperson L. CV who in his personal interest, hastily caused for the 1st Respondent's appointment ie, the council and proceeded to write to the public service commission to approve the appointment of the 1st Respondent as the chairperson of the District Service Commission amidst protestations and objections of the applicants as stakeholders who were not accorded a right to be heard.
- [35] It is trite that applications for judicial review for orders of mandamus, prohibition, certiorari and or an injunction are directed at the legality, reasonableness and fairness of the procedures employed and actions taken by the public decision makers ie the lawfulness of the decision making process and not the decisions themselves; **Lamwaka Alice Vs Amuru D. L. B & Anor H. C. M. C. No.131/2012**.
- [36] In this case, there was an exercise of power that was not vested in the decision making authority. The former L. CV chairperson of Buliisa District, **Agaba Kinene Simon** presided over the District Council meeting, nominated and caused for the appointment of the 1st Respondent as the Chairperson Buliisa District Service Commission when she was not an ordinary resident of Buliisa thereby, flouting the law. Everything therefore springing from the appointment was irrational and illegal. The 1st Respondent's prior service in the office of

the chairperson District Service Commission from Nov. 2016 to Nov.2020 cannot be viewed as justification for her current impugned appointment as she appeared to show. The chairperson usurped the powers of the Chief Administrative Officer by assuming C. A. O's role and write to the Public Service Commission to approve the appointment of the 1st Respondent thus exhibited irrationality and procedural impropriety. The 3rd issue is found in the affirmative.

Issue No.4 What remedies are available to the parties

- [37] The Applicants having proved their case against the Respondents, they are entitled to the reliefs claimed:
- 1. A declaration that the former L. CV chairperson of Buliisa District, **Agaba Kinene Simon** illegally nominated and caused the appointment of the 1st Respondent to the position of Chairperson District Service Commission.
- 2. A declaration that the issuance of appointment letter and swearing in of the 1st Respondent as the Chairperson District Service Commission by the Chief Administrative Officer of Buliisa was illegal as it emanated from an illegal appointment.

- 3. A declaration that the 2nd Respondent's decision to appoint the 1st Respondent as the Chairperson Buliisa District Service Commission did not follow proper procedure and hence is ultra vires, void and illegal.
- 4. An Order of Certiorari quashing the decision of the 2nd Respondent appointing the 1st Respondent Chairperson of the Buliisa District Service Commission.
- 5. An Order of Prohibition prohibiting the 1st Respondent from occupying and or exercising the powers and duties of the office of the Buliisa District Service Commission.
- 6. An Order of Mandamus requiring/directing the Buliisa District Council/Local Government to appoint a person competent and qualified as provided in the Local Government Act to exercise the powers and duties of the office of the Chairperson Buliisa District Service Commission.

No order as to damages as no evidence was led by the Applicants to justify any and no order as to costs because the 1st Respondent was holding a public office in the 2nd Respondent Local Government.

Dated at Masindi this 31st day of March, 2022.

Byaruhanga Jesse Rugyema JUDGE.

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