THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

MISCELLANEOUS APPLICATION NO.67 OF 2020

(ARISING FROM CIVIL SUIT NO.50 OF 2020)

MRS. NAKACHWA FLORENCE OBIOCHA---------- APPLICANT

VERSUS

1. **ATTORNEY GENERAL**
2. **DR. MEDARD BITEKYEREZO---------- RESPONDENTS**

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

The Applicant brought this application by way of Chambers summons against the respondent under Section 33,38(1)(3)(a)(b), 39(2) of the Judicature Act cap 13 and Section 98 & 64(c) of the Civil Procedure Act, and Order 41 r 1(a),(b), &2(1) (2) of the Civil Procedure Rules, for orders that;

a) A temporary injunction to issue against the Minister of Health restraining her from renewing the contract of the 2nd Respondent as a member of the 7th Authority at the National Drug Authority or appointing the 2nd Respondent as the Chair of the 7th Authority at the National Drug Authority till the determination of the main suit.

b) A temporary injunction to issue against the 2nd Respondent restraining him from holding any position in the 7th Authority at the National Drug Authority and/or to be the Chair of the said Authority because he is not a fit and proper person to hold such an office.

c) This Honourable Court stay the letter dated 27th November 2019 denying the Applicant to renew her contract.

d) Costs of this application.

The grounds in support of this application are set out in the affidavits of Nakachwa Florence Obiocha and a supplementary affidavit of Kamanzi Joseph which briefly states;

1. That the 2nd respondent has by his omissions and commissions as Chair of the 6th Authority has expended public funds of the authority to his benefit and has also rendered himself dishonest and deceitful that it makes him unfit and proper person for his contract to be renewed nor to be appointed the chair of the 7th Authority.

2. That the 2nd respondent during his tenure as the chair of the 6th Authority has refused to honour court Orders arising out of Miscellaneous Application No. 186 of 2017 and Miscellaneous Application No. 391 of 2017 which has resulted in the Authority paying out colossal sums of money for legal services and costs.

3. That the 1st respondent has failed to advise the appointing Authority regarding the renewal and appointment of the 7th Authority which amounts to breach of his statutory duties.

4. That the applicant filed Civil suit No. 50 of 2020 against the respondent has high chances of success.

5. That if this honourable court does not issue restraining orders against the Respondents the main suit shall be rendered nugatory.

6. That if this honourable Court does not issue restraining, injunctory Orders the applicant will suffer irreparable injuries as her contract is expiring on 28th February 2020.

In opposition to this Application the Respondent through *Ms. Clare Kukunda* a State Attorney in the Attorney General chambers filed an affidavit in reply wherein she vehemently opposed the grant of the orders being sought briefly stating that;

1. This application is misconceived, frivolous, vexatious, an abuse of court process and does not merit the orders sought.

2. That I know that the Minister is not estopped by law from reappointing the 2nd respondent as the chairperson of National Drug Authority.

3. That I know that if the temporary injunction is issued against the Minister, the same shall curtail her powers as prescribed by the law.

4. That I know to issue this temporary injunction would be speculative since the applicant seeks to halt a future possible occurrence and not a current one.

5. That I know the applicant has not adduced any evidence to prove that the 2nd respondent is not a fit and proper person.

6. That the applicant does not disclose any plausible ground for the grant of temporary injunction i.e prima facie case, irreparable injury and balance of convenience.

The 2nd respondent also opposed this application and filed an affidavit in reply stating briefly as follows;

1. That the decisions taken in regard to the issues raised by the applicant where taken by the Authority collectively and the applicant cannot continue to isolate the 2nd respondent, especially where the same was done as Chairperson to the 6th Authority in execution of NDA duties.

2. That the applicant attributes the increase in legal matters against NDA to the 2nd respondent, but does not substantiate the same precisely linking the alleged abdication of my duties to the matters brought against NDA and in fact it the applicant who has filed frivolous suits against NDA.

3. That the increase in case load against NDA (if any) is attributable to the failure by the parties like the applicant to follow the proper grievance procedures as set out in the Human Resource Manual of NDA.

4. That the 2nd respondent is not the accounting officer of NDA and as such any payments referred to by the applicant are determined by the 6th Authority Collectively, approved by the Minister and processed through stipulated procedures.

5. That the applicant has not established a prima facie case for the grant of this application and shall not suffer any irreparable damages. The applicant's non-renewal of her contract of employment cannot be determined under this application or the suit from which it is derived.

6. That I have been reappointed as Chairman to NDA under the 7th Authority and as such the application has been overtaken by events.

7. That the applicant has not shown any danger that is orchestrated by the respondent to warrant a grant of a temporary injunction.

In the interest of time the respective counsel were directed to file written submissions and i have considered the respective submissions. The applicant was represented by *Mr Kituuma Magala* whereas the 2nd respondent was represented *Ms Katusiime Lelia and Mr Galindo Ariyo* while the 1st respondent was represented by Mr Natuhwera Johnson-State Attorney.

The applicant's counsel submitted that according to *East African Court of Justice Application No. 5 of 2012 (arising from Reference No. 1 of 2012)* ***Timothy Alvin Kahoho v. The Secretary General of the East African Community*** their Lordships

of the East African Court of Justice at Arusha had this to say at page 7 of their ruling the last paragraph starting with the 2nd line and I quote,

> *"The purpose a temporary injunction is to maintain the status quo. The conditions for the grant of a temporary injunction are well settled in our jurisdiction although they have been stated in various terms over the years. We state them below:*
>
> *For a temporary injunction to issue, the applicant must show to the satisfaction of the court that he has a prima facie case with a probability of success.*
>
> *An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.*
>
> *If the Court is in doubt, it will decide the case on the balance of convenience. (see:* ***Giella v. Cassman Brown & Co. Ltd (1973) EA 358.****"*

They further stated at page 8 4th paragraph and I quote,

> *"The conditions for granting an interlocutory injunction are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt the third one can be addressed. (See:* ***Kenya Commercial Finance Co. Ltd. v. Afraha Education Society [2001] EA 86****."*

Counsel further submitted that the Plaint read together with the Applicant's affidavit and the supplementary affidavit of Mr. Mark E. Kamanzi clearly raise triable issues and serious questions of law which this Honourable Court has to inquire into therefore constituting a *prima facie* case.

The applicant contended that the application inter alia raises issues which include the 2nd Respondent abusing his office during his tenure as the chair of the 6th Authority at National Drug Authority, changing the original organizational chart of the Authority and coming up with the illegal Macro Organization Scheme contrary to some provisions of the National Drug Policy and Authority Act Cap. 206, expending huge sums of Authority money in matters of a personal nature which

do not concern the Authority, defying lawful court orders which has led to the Authority paying unnecessary costs and engaging in unprofessional personal grudges with employees of the Authority for example by misleading other members of the 6th Authority to deny the Applicant her medical benefits and right to practice her profession.

He also contended that in an application for a temporary injunction as a practice Court has to be persuaded before granting the order that the Applicant will suffer irreparable injury/damage and if it is in the affirmative Court ought to grant the order as was observed in the *classicus* case of ***Giella v. Cassman Brown & Co. [1973] EA 358.***

Further my Lord irreparable damage refers to an injury or damage which is substantial and material such that it cannot be atoned for in damages as it was held in ***NITCO Ltd. V. Hope Nyakairu [1992-1993] HCB 135***.

The instant application was partly brought under public interest in view of the fact that the National Drug Authority as an entity 100% executes its functions in interest of the public at large on behalf of the Ministry of Health. It is for this reason that the Applicant is seeking a temporary injunction to stop and/or stay the 2nd Respondent from participating in the functions of the 7th Authority.

The 1st respondent in their submission contended that that the main suit has no iota of a prima facie case with any possibility of success. It is frivolous, tainted with bad faith and personal vendetta against the Respondents, and just an abuse of Court process.

It was also their submission that from the provisions of National Drug Policy and Authority Act in particular Section 3(3), it is clear that the power to appoint the National Drug authority Chairman is vested into the Minister of Health by an Act of Parliament. And under section 3(4), it is clear that nothing bars the Minister of health to reappoint the members of the board.

The current status Quo is that the 1st Respondent has already appointed the 2nd Respondent in the said position and Court should maintain the status quo until the main suit is determined.

It was therefore their submission that the Applicant has failed to establish a prima facie case against the Respondents in the main suit with any chance to success as explained above to warrant any remedy to the applicant.

The granting of an injunctive relief is an equitable remedy and such power can be exercised when judicial intervention is absolutely necessary to protect the rights and interests of the Applicant.

After all, the power to appoint the chairperson only lies with Minister. Circumventing such procedure and use Court to eliminate people they don't want to be their bosses would be quite absurd for this Court to entertain.

The 2nd respondent's counsel submitted that the 2nd respondent has been reappointed as Chairman of the 7th Authority of the National Drug Authority and this application has been overtaken by events.

Determination

The parties have raised several preliminary objections and I have not found it necessary to resolve them in this application for temporary injunction. The parties will be at liberty to raise them at the determination of the main suit.

This application for a temporary injunction was premised on the prospective actions of the minister of health who was in the process of considering the renewal of 2nd respondent's new term as chairperson of National Drug Authority.

In public law disputes, adequacy of damages as a remedy will rarely determine whether or not it is appropriate to grant or refuse a temporary injunction. The main ground for determination of temporary injunction in matters of this nature which ought to be brought by way of judicial review is that there must be a serious issue to be tried or the proposed issue for determination concerns the establishment of propriety of decision.

A court should not restrain;

> "……a public authority by interim injunction from enforcing an apparent authentic law unless it is satisfied that the challenge to the validity of law is,

prima facie, so firmly based as to justify so exceptional a course being taken" **See *R v Secretary of State for Transport, ex p. Factortame Ltd (No.2) 1991 1 AC 603 at 674***.

The courts will normally need to consider the balance of convenience and in doing so, the courts must take the wider public interest. The temporary injunction could play an important role in public law, particularly in restraining the implementation of decisions or proposals which are potentially illegal, procedurally improper or irrational.

The purpose of a temporary injunction is to maintain the status quo pending hearing and disposal of the main suit on merits or till further orders are made by the court.

It is well-settled proposition of law that an interim injunction can be granted only if the plaintiff will suffer irreparable injury which cannot be compensated in terms of money. Even if a prima facie case is made out and the balance of convenience be in favour of the plaintiff, no injunction can be granted if the injury is such which can be compensated in damages.

However, in public law cases, balance of convenience must take account of public interest and cannot be measured simply in terms of financial consequences to the parties. Damages are not likely to be relevant so far as the public body is concerned. An applicant may not be in a position to be able to give worthwhile undertaking.

Where the result of an interim injunction would be to prevent a public body enforcing a decision or other measure, and stopping the applicant from doing a particular act, it may be difficult to identify individuals who would suffer damage if the applicant was able to ignore the measure or take a wrong or erroneous decision. The courts will be placed in the difficult position of trying to place a value on the public interest, and balancing that financial or other consequences suffered by the individual.

The guiding principles or norm for the grant of temporary injunctions or interim injunctions as can be deduced from the different authorities can be summarized as follows;

1) Extent of damages being an adequate remedy;

2) Protect the plaintiff's or applicant's interest for violation of his/her rights though, however, having regard to the injury that may be suffered by the defendants by reason therefore;

3) The court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the other's;

4) No fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case the relief being kept flexible.

5) The issue is to be looked at from the point of view as to whether on refusal of the injunction, the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;

6) Balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant.

7) Whether the grant or refusal of injunction will adversely affect the interest of the general public which cannot be compensated otherwise.

A temporary injunction is pre-eminently a discretionary remedy, and the applicant cannot claim it as of right, but the court has to exercise its discretion judicially. An injunction is more in the nature of an equitable relief/remedy rather than a legal remedy. The court grants the relief according to the above legal principles and *ex debito justitiae*. The court must keep in mind the principles of justice and fair play and should exercise its discretion only if the ends of justice require it.

The granting of a temporary injunction is an exercise of judicial discretion as was discussed in the case of ***Equator International Distributors Ltd vs Beiersdorf East Africa Ltd & Others Misc.Application No.1127 Of 2014.*** Discretionary powers are to be exercised judiciously as was noted in the case of ***Yahaya Kariisa vs Attorney General & Another, S.C.C.A. No.7 of 1994 [1997] HCB 29***.

The court's power to grant a temporary injunction is extraordinary in nature and it can be exercised cautiously and with circumspection. A party is not entitled to this relief as a matter of right or course. Grant of temporary injunction being equitable remedy, it is in discretion of the court and such discretion must be exercised in favour of the plaintiff or applicant only if the court is satisfied that, unless the respondent is restrained by an order of injunction, irreparable loss or damage will be caused to the plaintiff/applicant. The court grants such relief *ex debitio justitiae*, i.e to meet the ends of justice. See ***Section 64 of the Civil Procedure Act***.

In the present case, the applicant claims to bring an application for temporary injunction in a public interest and yet the same was not brought by way of judicial review but rather by way of ordinary action or suit. The nature of the dispute ought to have been brought in the known public law procedures of judicial review or enforcement of rights.

These procedures are intended to protect the public interest in ensuring that public bodies and third parties are not kept in suspense as to the validity of a decision and the extent to which it could be implemented or relied upon. There is protection accorded to public interest cases brought in a specialized procedure like limitation of disclosure or cross examination.

The intended injunction would basically be like a disposal of the suit since the injunction may prevent the public body from being properly constituted and may not effectually execute its mandate under the law. Once the injunction issues against the National Drug Authority, the court may not be able to know when the main suit may be disposed of since it is an ordinary suit that must take the usual procedure and the same may involve delays through disclosures and cross examination of witnesses.

It is an abuse of the process of court to seek an injunction against a public body in a public law matter where the claim is commenced by way of ordinary suit rather than judicial review. In the case ***O'Reilly v Mackman [1983] 2 AC 237*** Lord Diplock giving a unanimous judgment of the house, held that it would;

> *"….as a general rule be contrary to public policy, and as such an abuse of the process of the court to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of ordinary action and by this means to evade the provisions of Ord.53 for the protection of such authorities."*

In the present case, the applicant sought an injunction in public law in order to ensure that the 2nd respondent does not take another term or that the Minister for Health does not renew 2nd respondent's contract to the new term. Immediately after filing the application, it is an established fact, that the Minister had renewed the contract of employment on 18th February 2020, 7 days after the applicant filed the application for temporary injunction.

The appointment of the 2nd respondent in effect rendered the application for temporary injunction nugatory and or overtaken by events or moot. Be that as it may, even if the court had proceeded to determine the application on its merits, the application could not satisfy the guiding principles enunciated in this case. The suit does not raise any serious triable issues except for the applicant's concern of having her contract renewed since it was about to expire. It appears there has been several suits between the applicant and the National Drug Authority Board and this is another of such a case.

In the result for the reasons stated herein above this application fails and is dismissed with costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
18th/03/2020.