

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[*Coram: Owiny-Dollo, DCJ., Egonda-Ntende & Tuhaise, JJA*]

Civil Appeal No. 281 & 286 of 2017

(Arising from High Court Miscellaneous Application No.186 of 2017)

BETWEEN

National Drug Authority=====Appellant No. 1
Donna Asiimwe Kusemererwa=====Appellant No. 2

AND

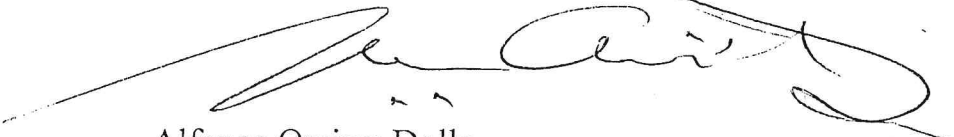
Nakachwa Florence Obiocha=====Respondent

*(On appeal from the ruling of the High Court [Musota, J. (as he then was)]
delivered on 3rd July 2017)*

JUDGMENT OF ALFONSE OWINY-DOLLO, DCJ

- [1] I have had the opportunity to read in draft the judgment of my brother, Egonda-Ntende, JA. I agree that this appeal should be dismissed with costs.
- [2] As Tuhaise, JA also agrees, this appeal is dismissed with costs.

Dated, signed and delivered at Kampala this ¹⁴29 day of Aug 2019


Alfonse Owiny-Dollo
Deputy Chief Justice

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1. NATIONAL DRUG AUTHORITY
2. DONNA ASIIMWE KUSEMERERWA

APPELLANT
APPELLANT

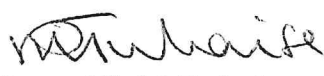
VERSUS

NAKACHWA FLORENCE OBIOCHA.....RESPONDENT

Judgment of Percy Night Tuhaise, JA

I have had the benefit of reading in draft the judgement of Hon. Mr. Justice Egonda-Ntende, JA. I agree with his analysis of evidence, decision and conclusion that this appeal substantially fails and should be dismissed with costs.

Signed and dated at Kampala this29th.....day ofAug.....2019


Percy Night Tuhaise
Justice of Appeal

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AND

Nakachwa Florence Obiocha=====Respondent

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JUDGMENT OF FREDRICK EGONDA-NTENDE, JA

Introduction

- [1] This is an appeal from the decision of the High Court in Miscellaneous Cause No.186 of 2017 instituted by the respondent against the appellants seeking various orders in judicial review.
- [2] The back ground of this case is that on 20th April 2015, National Drug Authority (appellant no.1) advertised jobs in New Vision. Appellant no.2 and the respondent applied for the position of Executive Director and Head Drug Assessment and Registration respectively and were awarded the positions. The respondent was granted a fixed term contract of four years effective 29th February 2016 to 28th February 2020 while appellant no.2 was granted a contract of five years effective 5th January 2016 to 4th January 2021. Later on, appellant no.1 decided to change

the substantive appointment of the appellant no.2 from that of the Executive Director to Secretary without advertising the position of Secretary.

- [3] The board of appellant no.1 also reviewed the organisational structure of the Authority in March 2017 and came up with a new National Drug Authority Macro Organisation Structure which the respondent claimed contravened the National Drug Policy and Authority Act, Cap 206. Upon passing the new organisation structure, the board directed appellant no.2 to advise all staff on contract to reapply for their positions in the new structure with the exception of herself. It is on this basis that the respondent's contract was terminated through a directive from appellant no.2. Being aggrieved with the manner in which her contract was terminated, the respondent instituted judicial review proceedings against the appellants seeking a multiplicity of orders of certiorari, mandamus, injunction and declarations in relation to the appointment of the appellant no.2, the new Macro Organisation Structure for the appellant no.1, and the employment of the respondent.
- [4] The learned judge ruled in favour of the respondent and granted her, in part, some of the orders she had sought.
- [5] Dissatisfied with the decision of the High Court, the appellants appealed to this court. The appellant no. 1 set forth the following grounds.

‘(1) The learned Trial Judge erred in law and fact when he entertained the Respondent's claim, arising from an employment dispute, under Judicial review proceedings and granted her prerogative orders when the Respondent had alternative remedies under the law of employment.

(2) The Learned Trial Judge erred in law and fact when he held that actions of public bodies whether relating to employment or not are always amenable to Judicial Review.

(3) The Learned Trial Judge erred in law and fact when he failed to properly evaluate the evidence regarding the advertised roles and job description of the Executive Director and the roles of the Executive Director of the Appellant upon appointment and thereby came to the wrong conclusion that Ms. Donna Kusemererwa did not accept the legally provided for Job of Secretary to the Authority.

(4) The Learned Trial Judge erred in law and fact when he failed to apply the test of substance over form thereby arriving at the wrong conclusion that the appointment of the head of the Appellant under the position/title of Executive Director was not a misnomer but an outright illegality and null and void.

(5) The learned trial judge erred in law and fact when he granted the declaration that Ms. Donna Kusemererwa was holding out as Secretary to the Authority.

(6) The Learned Trial Judge erred in law and fact when he descended into the arena and held that the Appellant was in quiet contempt of the law based on grounds that were neither pleaded nor raised as issues in the matter.

(7) The Learned Trial Judge erred in law and fact when while determining the issue in respect of the Appellant's organogram, he held that "*this court is not pleased with the structure that completely leaves the legal officer out of senior management.*" whereas the matter of the Legal Officer was neither raised in pleadings, in issues nor submitted upon by the parties.

(8) The learned Trial Judge erred in law and fact when he declared that the decision of the Appellant directing the Respondent to cease her contract and reapply for the same job was unlawful, unjustified, null and void.

(9) The learned Trial Judge erred in law and fact when he granted an order of Mandamus directing the Applicant to advertise the position of its Secretary within 60 days from the date of his ruling.

(10) The Learned Trial Judge erred in law and fact when he issued an order of certiorari quashing the Appellant's Directives communicated by Ms. Donna Asimwe Kusemererwa as contained in the email dated 21st April 2017.

(11) The Learned Trial Judge erred in law and fact when he issued an order of Certiorari quashing the letters to wit, Ref 290/NDA/03/2017 dated 17th March, 2017, Ref. 328/NDA/ADM.05/2017 dated 2nd May, 2017 directing that the Respondent to cease performing her duties in accordance with her employment contract and offering a temporary

assignment with the Drug Assessment and Registration Department.

(12) The Learned Trial Judge erred in law and fact when he granted the order of injunction restraining Ms. Donna Asimwe Kusemererwa from acting in the position of Secretary to the Appellant.

(13) The learned Trial Judge erred in law and fact when he failed to properly evaluate evidence and thereby arrived at wrong conclusions.'

[6] The appellant no.2 set forth the following grounds,

'(1) The Learned trial Judge erred in law and fact when he misdirected himself and found that the Respondent's contract of employment was amenable to judicial review yet these were private rights under an ordinary contract of employment thereby reaching a wrong conclusion.

(2) The Learned trial Judge erred in law and fact when he misdirected himself and found that the Respondent's contract of employment had not be terminated thereby fettering the exclusive right of the employer to terminate a contract of employment at any time and for any reason.

(3) The Learned trial Judge erred in law and in fact when he misdirected himself by disregarding the evidence of the Appellant with regard to the advert for the position of Secretary to the National Drug Authority to which the Appellant was appointed thereby reaching a wrong conclusion that she applied for a non-existent job.

(4) The Learned trial Judge erred in law and fact when he misdirected himself and totally disregarded the substance of the advert and the appointment of the Appellant as Secretary to the National Drug Authority and found that the appointment was a nullity based on mere technicalities thereby reaching a wrong conclusion.

(5) The Learned trial Judge misdirected himself by failing to properly evaluate and analyse the evidence on record and thereby coming to a wrong conclusion.'

[7] The respondent opposes the appeal.

Submissions of Counsel

- [8] At the hearing, the appellants were represented by Mr. Lumonya Andrew, Ms. Joanita Bushara Mugerwa, Ms. Kyalimpa Olivia Matovu and the respondent was represented by Mr. Kyagaba Isaac Newton, Mr. Akantorana Kobusingye, Mr. Okiror Bosco and Mr. Ikirai Ben. Counsel for the appellants opted to adopt their skeleton arguments on record in addition to their submissions.
- [9] With regard to grounds 1, 2 and 8, counsel for the appellants submitted that the learned trial judge erred in law and fact when he considered and determined the respondent's employment dispute under judicial review proceedings. Counsel for the appellants argued that the dispute arose out of an employment contract where rights and obligations thereunder are matters of private law. Counsel contended that disputes arising out of employment contracts are handled under the employment laws of Uganda and that the learned trial judge erred in law when he held that all actions of public bodies whether relating to employment or not are amenable to judicial review.
- [10] Counsel for the appellants submitted that the essence of the respondent's dispute was the termination of her contract and the advice to re-apply for a new position under the new structure of appellant no.1 that was communicated by appellant no.2. Counsel for the appellants submitted that the whereas the respondent commenced her employment contract with appellant no.1 in March 2016, she never complained about appellant no.2 holding the position of Executive Director/Secretary until her contract was terminated. The appellants' counsel also contended that the respondent's claim revolves around termination of her contract because her main contention was that she was not given a hearing prior to the termination. Counsel for the appellants contends that the Employment Act provides redress under sections 66, 70, 72, 77 and 78 of the Employment Act and that the Act also recognises the principles of natural justice more so the right to a fair hearing and under section 94 of the Act, an aggrieved party in instances of breach of the rules of natural justice can appeal to the Industrial Court.
- [11] Counsel for the appellants further submitted that judicial review is a procedure that is available to parties seeking prerogative remedies against administrative bodies or statutory bodies who have made decisions against the aggrieved parties in the course of performing public duties. The appellants contend that where a public body has made a decision based on its powers and rights under a contract, judicial review does not apply as there would be no public law element involved. Counsel

for the appellants quoted Sir William Wade and Christopher Fordyth's remarks in their book titled Administrative Law, 8th Edition at page 594 to support this proposition. They also relied on R v Berkshire Health Authority [1984] 3 All ER 425 for the proposition that employment by a public authority does not per se inject any element of public law to seek prerogative remedies.

- [12] Further, the appellants also relied on Republic v Professor Mwangi S. Kimenyi & Others Court of Appeal Civil Appeal No.160 of 2008 (unreported) where the Court of Appeal of Kenya was of the view that the legality or otherwise of termination of contracts of employment that have no statutory elements are matters of private law and the remedies available are under private law. Counsel for the appellants submit that Ugandan jurisprudence on judicial review has emphasized the restrictive application of the grant of prerogative orders especially in instances where parties have alternative remedies. They cited Classy Photo MART Ltd v The Commissioner of Uganda Revenue Authority [2010] UGCOMM 2, Catherine Amal v Equal Opportunities Commission [2016] UGHCCD 123 and Uganda Taxi Operators and Drivers Association v Kampala Capital City Authority & Anor [2012] UGHC 14.
- [13] Counsel for the appellants submitted that while determining whether an application is suitable for judicial review, courts should consider if there is an alternative remedy. This is more so where the matter involves facts or its subject matter that are better considered by a specialist body. They cite Brian Thompson's book titled Constitutional Administrative law, 2nd Edition pages 422-423. The appellants also relied on Uganda Revenue Authority v Rabbo Enterprises (U) Ltd & Anor [2017] UGSC 20 and Uganda Broadcasting Corporation v Ruthura Agaba Kamukama [2015] UGHCCD 121 where the courts noted that the intention of Parliament in setting up specialized bodies like the Industrial court and the Tax Appeals Tribunal must be respected and such bodies must be put to good use.
- [14] The appellants aver that the reason why judicial review is not the appropriate procedure to deal with disputes arising out of employment is that the prerogative remedy of certiorari quashing the termination of the respondent's employment contract is in absolute disregard of a long settled principle of law that the termination of a contract is effective even when wrongful because courts cannot force an employer to keep an employee forever. The appellants relied on Stanbic Bank Ltd v Kiyemba Mutale [2011] UGSC 18 for this proposition. The appellants prayed that this court finds that the learned trial judge erred in law when he determined employment issues under judicial review proceedings and issued

orders of certiorari quashing the termination of the respondent's employment contract. The appellants also prayed that the orders regarding the respondent's employment are set aside and the respondent's claim relating to her employment and termination be dismissed.

- [15] With regard to grounds 3, 4, 5, 9, 10, 11 and 13, counsel for the appellants submitted that the learned trial judge erred in law and fact when he failed to properly evaluate the evidence regarding appellant no.2's job as advertised and the roles she was required to perform, thereby arriving at a wrong conclusion that she applied for and was appointed to a non-existent job. It was the appellants' counsel submission that the learned trial judge erred in law when he failed to apply the principles of substance over form. The appellants aver that the titles Executive Director and Secretary to appellant no.1 were used interchangeably as can be seen in the National Drug Authority Macro-Organization Structure dated March 2019 (annexure F). Counsel for the appellant submits that the title "Executive Director" does not invalidate the role appellant no.2 was interviewed and recruited to perform.
- [16] Counsel for the appellants' submitted that under section 54 of the National Drug Authority, a secretariat was created which was to be headed by the secretary to the authority. Counsel for the appellants aver that section 54 of the act makes it explicit that whoever would head the institution had to be the person serving as secretary to the authority and this section did not provide the criteria for qualification for this position. Counsel for appellants further submit that the title of the office holder is not the issue but the roles that the office holder performs. It is the appellants' submission that the evidence on record indicates that appellant no.2 who served as Executive Director/ Secretary to the Authority was recruited to perform the roles stipulated in section 54 of the Act. She was recruited to serve as the technical head of the institution, accounting officer and Secretary to the Authority and it is not in dispute that she served under those roles.
- [17] Counsel for the appellants submits that the authority of National Drug Authority v Dr. Frank Mwesigye Court of Appeal Civil Appeal N0. 74 of 2012 (unreported) which the learned trial judge relied on in reaching the decision that appellant no.2 did not accept the legally provided for job of Secretary to the Authority is distinguishable from this instant case. Counsel for the appellants contended that the roles which were to be performed by appellant no.2 as advertised were within the scope of the roles of the Secretary to appellant no.1 under the National Drug

Policy and Authority Act 1993. Counsel for the appellants argued that by missing out on this crucial distinction, the learned trial judge failed to apply the substantive analysis of this case but rather restricted himself on the form and came to the wrong conclusion.

[18] Counsel for the appellants further submitted that the learned trial judge erred in law and fact when he quashed the directives in the letters 2017 dated 17th March 2017 and 2nd May 2017 and the directives communicated by appellant no.2 as contained in the email dated 21st April 2017 to the respondent. Counsel for the appellants argued that section 54(4) of the National Drug Authority and Policy Act empowers appellant no.1 to determine which officer to employ and under their own terms. This empowered appellant no.1 to determine the employment structure, when to hire and when to terminate employment contracts. Counsel for the appellants submitted that it is on this basis that appellant no.1 made resolutions and decisions which were communicated by appellant no.1 through appellant no.2. The appellants contended that there is no legal requirement that the decisions of appellant no. 1 must be communicated to the staff by its Secretary as it can use any of its official. It was therefore counsel for the appellants' submission that the issue of whether appellant no.2 was legally acting in the position of Secretary should not have an impact on the decisions that she communicated. The appellants prayed that this court sets aside the orders of certiorari quashing the decisions and communications by appellant no.2 to the respondent.

[19] With regard to the 6th and 7th grounds, it was counsel for the appellants' contention that the learned trial judge erred in law and fact when he found that appellant no.1 acted in contempt of the law on the ground that he did not find any evidence on record showing that the appellant had consulted lawyers in the process of preparing the organogram. Counsel for the appellants aver that these matters were neither in issue and nor where the parties given an opportunity to address themselves on these matters during the hearing.

[20] The appellants prayed that this court allows this appeal and sets aside the orders of the High Court.

[21] In reply, counsel for the respondent submitted that appellant no.2 was hired by appellant no.1 for the position of Executive Director not Secretary to the Authority as provided by section 54 of the National Drug Policy and Authority Act 1993. Counsel for the respondent avers that appellant no.2's offer letter shows that she

was offered the position of Executive Director and that her employment contract confirms this position. Mr. Kyagaba submitted that the Executive Director cannot perform the functions of the Secretary and Section 54 of the Act does not make provision for the position of Secretary/ Executive Director. Mr. Kyagaba further submitted that the law does not make provision for hiring someone in another position to take on the role of a secretary. Counsel further submitted that the creation of the position of Executive Director taking on the powers of the Secretary was not a misnomer but rather it was in effect amending the Act which authority appellant no.1 lacks. He concluded that the actions of appellant no.1 were illegal.

[22] Counsel for the respondent submitted that judicial review deals with decision making process of public bodies and the question that came before court in High Court Miscellaneous Cause No. 186 of 2017 was whether appellant no.2 had authority to terminate the respondent's contract. The respondent submitted that this does not fall under private law because appellant no.2 was exercising a public duty provided by the law without power to do so. Counsel for the respondent submitted that the power that appellant no.2 was exercising in relation to the affairs of the authority and the termination of the respondent were statutory and therefore not a matter of private law that can be handled by a labour office. He further argued that it was an illegality for a person to exercise a statutory power that they do not have authority to exercise.

[23] Counsel for the respondent relied on the case of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR (viewed at <http://kenyalaw.org/caselaw/cases/view/29601/>) for the submission that a statutory body is subject to the laws and rules under which it is created and that if it purports to act outside the powers granted by the law, then like all public bodies created by Parliament, it becomes amenable to the supervisory jurisdiction of the High under judicial review. M. Kyagaba contended that appellant no.1 is a public body that purported to create a position of Executive Director that is not provided for in the law and by virtue of this illegality, every action done by the Executive Director including the termination of the contracts of the employees is subject to judicial review.

[24] Mr. Kyagaba argued that on the other hand, had the Executive Director been properly appointed and acting in the position of Secretary to the Authority when she terminated the respondent's employment contract, this matter would have been a private matter which is not the case. He relied on the English decision of R v

Berkshire Health Authority [1984] 3 All ER 425 where it was held that employment by a public authority does not per se inject any element of public law. He contended that this meant that it is not absolute that all employment matters are private law matters but there are instances where there are elements of public law in employment contracts of individuals by public bodies and this is one of the cases. Mr. Okiror submitted that the case of Republic v Professor Mwangi S. Kimenyi & Others Court of Appeal Civil Appeal No.160 of 2008 (unreported) states employment matters that have a statutory underpinning are amenable to judicial review and that the authority of R v Berkshire Health Authority [1984] 3 All ER 425 is distinguishable from this instant case. He also cited section 1 of the National Drug Policy and Authority Act to define an authorised person to mean an authorised person under the Act and submits that appellant no.2 was not an authorised person under to act to perform the duties of the Secretary.

- [25] In conclusion, counsel for the appellant submitted that learned judge did not err in his finding that this matter was subject to judicial review. He prayed that this court dismisses the appeal and uphold the ruling and orders of the learned judge.

Analysis

- [26] The pertinent issues in this appeal are whether this was a proper case for judicial review and whether appellant no.2 was clothed with authority to terminate the respondent's contract.
- [27] Judicial review is not concerned with determining the merits of the decision the applicant is aggrieved about, but the decision making process itself. The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he or she has been subjected. It is a legal process of subjecting to judicial control, the exercise of powers affecting people's rights and obligations enforceable at law by those in public office. See Republic Vs Secretary of State for Education and Science, ex parte Avon County Council [1991]1 ALL ER 282.
- [28] It should be noted that grant of prerogative remedies is discretionary and court must consider whether they are the most effective given the circumstances of the case. In the instances where there exists alternative remedies, prerogative remedies may not be granted. Judicial review is in the ambit of public law. It is not applicable

in a strict master and servant relationship based on private contract of employment as there is no element of public law involved. See R v British Broadcasting Corporation – Ex Parte Lavelle [1983] 1 All ER 241. In such contracts, if the employer terminates the contract, the employee cannot obtain orders of certiorari because courts cannot force an employer to keep an employee. This would be contrary to the policy of law and against public interest. If the employer wrongly ends the contract, the employee can claim damages in an ordinary suit. See Stanbic Bank Ltd v Kiyemba Mutale [2011] UGSC 18

[29] However, there are instances in which remedies of judicial review are available in contracts of employment. These remedies can be available in instances where the contract of employment has a statutory underpinning.

[30] In Republic v Professor Mwangi S. Kimenyi & Others, Court of Appeal Civil Appeal No.160 of 2008 (unreported), the Court of Appeal of Kenya stated:

‘17. This is not to say that judicial review remedies cannot be available in contracts of employment. There are instances when such remedies are available. One such instance is when the contract of employment has statutory underpinning and where there is gross and clear violation of fundamental rights. In the case of CHIEF CONSTABLE OF NORTH WALES POLICE – V- EVANS (1982) 1 WLR 1155, Lord Hailsham pronounced himself thus:

“the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority after according fair treatment reached on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court” (See also Commissioner of LANDS – V- KUNSTE HOTEL LIMITED 1995-1998 1E.A. 1 (CAK))

18. In the case of ERIC MAKOKHA & OTHERS – V- LAWRENCE SAGINI & OTHERS CA No. 20 of 1994 at NRB, this court defined statutory underpinning. It was stated:

“the word statutory underpinning is not a term of art. It has no recognized meaning. If it has, our attention was not drawn to any. Accordingly, under the normal rules of interpretation, we should give it its primary meaning. To underpin is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help. As a concept, it may

also mean the employees removal was forbidden by statute unless the record met certain formal laid down requirements. It means some employees in public positions may have their employment contract guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed. It is possible that this is the true meaning of what has become the charmed words "statutory underpinning". The statute makes it mandatory that a certain procedure must be observed in some contracts of employment before termination. Examples are constitutional office holders such as judges and the Attorney General".'

- [31] It is evident that the respondent's employment did have a statutory underpinning to warrant remedies of judicial review. However, the circumstances in this case are quite unique. In as far as the matter relates to the termination of the employment of the respondent, it is a private matter that can be handled under the employment laws. Private rights ordinarily should not be pursued by judicial review but this case is a mixture of both public law and private law. The respondent's main complaint is that appellant no.1, a statutory body did not comply with the law in hiring appellant no.2 who exercised powers she did not have to terminate the respondent's contract. This is a matter of public law that is amenable to judicial review.
- [32] The respondent challenges a new employment structure represented by a new organigram on the grounds that in some respects this is inconsistent with Act that sets up appellant no.1. This new structure was the basis for cancelling her contract and being required to apply for a new job in that structure. Given that this was challenged as being illegal and it is closely intertwined with the respondent's loss of employment it appears to me one cannot divorce the respondent's employment from public law issues. The learned trial judge committed no error, in my view, in considering all these issues together given their relationship.
- [33] Even if the respondent had not been an employee of the appellant no.1 and was a complete stranger to the organisation she would have been within her rights to commence an action for judicial review to challenge the appointment of the appellant no.2 as being inconsistent with the law that set up appellant no.1. Such an action could have been brought by any one as this would be a matter of public interest.

[34] In light of the foregoing I would reject appellants no. 1's grounds 1 and 2 and appellants no.2's grounds 1 and 2.

[35] I now turn to the issue whether appellant no.1 actions while hiring the appellant no.2 were within the law.

[36] Section 54 of the National Drug Policy and Authority Act 1993 cap 206 states:

'54. Secretariat.

(1) The drug authority shall have a Secretariat which shall be responsible for the day-to-day operations of the drug authority.

(2) The Secretariat shall be headed by the secretary to the drug authority who shall be appointed by the drug authority on terms and conditions that the drug authority may determine.

(3) In addition to any other functions that may be conferred upon him or her by the drug authority, the secretary shall—

(a) have custody of the seal of the drug authority;

(b) be responsible for taking the minutes of the drug authority and the commission and for keeping the records of the transactions of the drug authority.

(4) There shall be other officers and employees of the drug authority as the drug authority may determine.

(5) An employee of the drug authority shall not, in his or her personal capacity, be liable to any civil or criminal proceedings in respect of any act done or omission made in good faith in the performance of his or her duties under this Act.'

[37] On 20th April 2015, appellant no.1 advertised in New Vision for the position of Executive Director. Accordingly, the main purpose of the job was stipulated as follows:

'Main Purpose of Job

The Executive Secretary/Registrar will provide overall strategic leadership and direction over the management and operation of the NDA Secretariat.

Account for the performance of the Secretariat before the Authority or any prescribed legal organ.

Responsible for execution of the Policy decisions of the Authority.

Serve as the Accounting Officer and Secretary to the Authority as well as technical head of NDA Secretariat which is responsible for implementation of NDA strategic plan.’

[38] The key responsibilities of the holder of the position were stated as follows:

‘Key Responsibilities

- Serve as the Chief Executive and Accounting Officer of the Authority and ensure the maintenance of Accounts of the NDAS income and expenditure as required and approved by the Authority and other laws and legislation.
- The holder is the Secretary to the authority and thus is responsible for recording, timely circulation and custody of all Authority minutes.
- Coordinates authority activities and work plans as well as communication between the authority and management. Advise the authority on operational issues while communicating and implementing Authority decisions.
- Providing overall leadership, motivates and inspires heads of departments to deliver best value and manage their departments, people and budgets.
- Prepare and submit for Authority approval strategic plans, annual budgets and work plans, financial statements and other relevant documents.
- Direct the proper management and accountability for the overall performance of NDAs human, fiscal, and other resources according to authorized policies, procedures and, provide regular reports about their utilization, to the Authority to guide effective decision making.
- Develop an efficient and effective internal management structure and enhance maximum productivity of the organization.
- Provide leadership on policy matters, strategy development, resource mobilization, strategic partnerships development and an advocate on all key issues pertaining to the development of drug regulation.
- Review and recommend relevant corporate policy changes to the Authority from time to time in order to keep them aligned with new developments in the regulatory environmental.
- Constantly review the effectiveness of systems and procedures steering them to improve and uphold organizational effectiveness, and efficiency.
- Responsible for public relations, crisis management and legal affairs.

- Be the custodian of the seal, and assets of the Authority.
- Register all medicines and healthcare products in the country.
- Authorize the licensing of importation, manufacture, distribution and sale of medicines and mandated health products.
- Ensure the preparation of final financial statements and liaise with the office of the Auditor General to have annual external audits.
- Represent the Authority before Parliament the Sector Ministry of Health and other legally gazette bodies and other relevant for a as required for the interest, effective performance and visibility of the National Drug Authority.'

[39] Appellant no. 2 applied for the position and upon undergoing an interview, she was offered the position. In the offer letter dated 22nd December 2015, she was offered the position of Executive Director / Secretary to the Authority to which she accepted. The employment contract stated that she had accepted employment with appellant no.1 in the position of Executive Director. It appears that following external and internal threats of legal action on the legality of the job title of Executive Director, appellant no.2 sought counsel from the Commission that had resolved that the Executive Director is the Secretary to the Authority and the head of the Secretariat as stipulated under Section 54 (2) of the Act. However, the legal department advised to seek further guidance from the Solicitor General as the Commission was not clothed with such authority to make the aforementioned changes.

[40] The Solicitor General advised the Authority to amend the contract of the Executive Director and change the title to Secretary considering the fact that the person recruited was to perform the duties of the Secretary as set out under the Act. Upon completion of the probationary period of 6 months, appellant no.2 was confirmed as Secretary to the Authority in a letter dated 15th August 2016.

[41] It is evident that appellant no.1 appointed appellant no.2 as Executive Director with the intent of her performing the duties of the Secretary to the Authority as envisaged by the Act and indeed appellant no.2 was performing those duties. Section 54 of the National Drug Policy and Authority Act creates a Secretariat that is headed by a Secretary who is appointed specifically for that purpose. It is clear that appellant no.1 appointed the appellant no.2 to the position of Executive Director to perform, among other things, the duties of the Secretary of the Authority. Did the Authority have power to do so?

- [42] Parliament in its wisdom created the Authority and in section 54 a Secretariat for the Authority which was to be headed by a Secretary. The duties of the Secretary were defined under the Act. It may be the Authority was inclined to the view that Parliament had given the wrong name or designation to the head of the Secretariat. It decided to find an appropriate name and advertise for that post. It decided to grant that new office it created the duties of the Secretary under the Act. This cannot simply be a matter of form. It is assuming power that the Authority did not have.
- [43] Under the Act the Authority could only recruit and place at the head of its Secretariat, a Secretary. It had no right to usurp the authority of Parliament to re-designate the head of the Secretariat. It had to operate within the existing law. As a creature of law it could only do that which was authorised by law. This is simply not a matter of form as was argued by the appellants. It is a matter of substance. Section 54 and indeed all other provisions of the Act had to be complied with.
- [44] Having acted outside the law or in direct contravention of the Act that created the Authority and authorised it to carry out the functions and duties set out, subsequent attempts to cure the illegality could not do so. I am unable to fault the learned trial judge for holding that the Authority acted illegally in recruiting an Executive Director and then assigning that person the duties of the Secretary of the Authority. The duty of the Authority was to recruit a Secretary to head the Secretariat and carry out the statutory duties as set out in the Act. The Authority had power to create other offices but only in a manner that was consistent with the Act, not outside it.
- [45] In light of the foregoing I would reject the appellant no.1's grounds 3, 4, 5, 9, 10, 11 and 12 and appellant no.2's grounds 3, 4 and 5.
- [46] Turning to grounds 6 and 7 of the appeal by the appellant no.1 the matters complained of were not essential for the decision of the main points in contention and were just surplusage. They do not affect the outcome in relation to the actual matters in controversy. They have no bearing on the outcome of this appeal.

[47] Ground 13 is too general and repetitive. I would strike it out for failing to comply with Rule 66 of the rules of procedure of this court.

[48] I would reject these appeals with costs.

Signed, dated and delivered at Kampala this 29th day of Aug, 2019


Fredrick Egonda-Ntende
Justice of Appeal

