

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISC APPLICATION NO. 205 OF 2008

(Arising out of Misc. Cause No. 94 of 2008)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

1. NESTER BYAMUGISHA

2. MICHAEL AKAMPURIRA ::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

THE LAW DEVELOPMENT CENTRE ::::::::::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE ELDAD MWANGUSYA

RULING

The Applicants, Nester Byamugisha and Michael Akampurira, with leave of Court, brought this application under Section 36 of the Judicature Act and Order 40A of the Civil Procedure Rules.

They seek for the following Orders:

- i. An order of certiorari quashing the decision of the Respondent unlawfully and/or wrongly suspending the Applicant from duty with immediate effect communicated to the Applicants by the Respondent's Director of Letter Ref. LDC/D/P/C.28 dated 13th March, 2008 and setting up of a fresh sub-committee appointed on 13th March 2008.
- ii. An order prohibiting the Respondent or any of its servants, agents, sub-committees from proceeding with the inquiry and/or carrying out any disciplinary action against the Applicants.
- iii. A declaration that the Respondent's decision to suspend the Applicants is void, unlawful, arbitrary, malicious and/or irregular and an abuse of discretion in as far as it is.

- a. Inconsistent with and/or contradictory to and does not arise from the report of the Committee of inquiry into examination malpractice at LDC contrary to Standing Order No. 19(1)(a) of LDC Standing Orders
 - b. Contrary to the express provisions of the Respondent's Standing Orders 2003-Nos. 17(2) (b), (3), (18)(i), (3), 4(e), 19(i)(a); (2), (3) an (4)
 - c. Not based on any reason.
- iv. An order that the Respondent pays to the applicants general and aggravated and/or punitive damages for its said actions interalia including:
- a. Unlawfully suspending the Applicants
 - b. Recklessly and/or unjustly and/or maliciously publishing and/or causing to be published in the print media and radio thereby defaming the Applicants.

The grounds of this application are:

1. The Respondent is a statutory body capable of suing and being sued pursuant to Section 2 of Chapter 132 Laws of Uganda 2000.
2. The Applicants are very senior members of academic/professional staff of the Respondent and advocates of High standing, repute and integrity in Uganda.
3. On 23rd April, 2007 the Director of the Respondent appointed a Committee to inquire into examination malpractices at the Respondent institution.
4. On 31st May 2007, the Director of the Respondent in a supplementary memo mandated the Committee to specifically investigate allegations against the Applicants of seeking indulgence of the Civil Procedure oral examinations panel "B" to assist one Sheeba Kassami who was to sit supplementary examinations
5. On 21st February 2008, the committee having investigated the general and specific allegations submitted the report of finding which did not find the Applicants guilty as alleged
6. On 13th March 2008, the Management Committee of the Respondent considered the report but nonetheless directed the Director of the Respondent to suspend the applicants with immediate effect on half pay to pave way for further investigations by a sub-committee of the Management Committee which was set up by Notice dated the 13th March 2008.
7. The Applicants learnt of their suspension in an article carried in the New Vision's page 3 of the 14th March 2008 and reports carried by radio following which they were called on telephone to receive their suspension letters
8. The decision to suspend the Applicants was void for contravening Standing Order No. 18(i) and (3) of the Respondent's Standing Orders.
9. The decision to suspend the Applicants was inconsistent with and contradictory to and against, findings, conclusions and recommendations of the Committee of inquiry which did not find the applicants guilty.
10. The decision to suspend the applicants was not based on any reason whatsoever.

11. The decision to suspend the Applicants was also arbitrary, unreasonable and unfair and an abuse of discretion and contrary to the express provisions of the Respondents Standing Orders.
12. The decision offended the rules of Natural justice and is malicious, biased and unjust.
13. The decision to suspend the Applicants was also inequitable and unjust.
14. The decision of the Respondent to publish the unlawful and void suspension in the Newspapers and on radio was malicious and defamatory of the applicants.
15. The sub-committee set up cannot meet the ends of justice since it performs all functions of investigating, prosecuting and finally determining the fate of the Applicants.
16. The decision to suspend the applicants unlawfully has grave consequences on the Applicants and their profession.

The applicants swore and filed affidavits each in support of the application dated the 28th day of April 2008, and affidavits in rejoinder dated 3rd July 2008. They were also cross-examined on oath as the record shows.

Mr. Elijah Muwanga Wante the Director of the Respondent swore an affidavit in reply dated 16th June 2008. He defended the action of the Respondent to suspend the two applicants given the circumstances under which they originated an 'sms' message trying to assist a student ostensibly flying to South Africa when she had no visa or ticket.

BACKGROUND:

One Sheeba Kassami a student who was to do supplementary Civil Proceedings Oral Examination requested the 2nd applicant Mr. Michael Akampurira, A senior Lecturer and a lecturer interalia in Civil Proceedings to assist her to be interviewed earlier to enable her travel to South Africa.

The 2nd Applicant sent and 'sms' to the 1st Applicant who was chairing Civil Proceedings Oral Examination to assist her.

The 1st Applicant happened not to be chairing the panel because he had excused himself to travel to Entebbe to attend a personal matter. The 1st Applicant forwarded the request to the members he had left on panel "B" for their consideration.

In the end, the said student appeared before panel “A” before which she after all was scheduled to appear but the “B” members expressed concern to the 1st applicant that such a request smacked of influence peddling but he explained to them how he had received the request from the 2nd Applicant and that the request explanation to him was forwarded to them in good faith.

Apparently the matter reached Mr. James Nangwala, the Head of Department of Post Graduate Studies, who asked the 1st applicant about the text and he (1st applicant) made full disclosure as in paragraphs 7, 8&9 of his affidavit in support of the application.

Mr. James Nangwala wrote to the Director LDC to take action (see Annexure NR1 to the affidavit in rejoinder of the 1st applicant).

The applicants did not respond as requested but without any reply to them the Director LDC in a supplementary memo mandated the Nkurunziza Committee which had been appointed by him to generally inquire into examination malpractices at LDC to specifically investigate the allegations against the applicants for seeking indulgence of the Civil Procedure oral examinations, the Nkurunziza Committee investigated the matter and submitted a report to the Director, whereby they exonerated the two applicants of wrong doing.

The Management Committee considered the report without any statement/defence concerning the 1st applicant.

It resolved to suspend the applicants and constituted a Committee of its own members who had sat to consider the report, to further investigate the applicants and surprisingly the decision of the Management Committee to suspend the applicants was carried in the New Vision of 14th March 2008 and reported on radio shows that morning.

The applicants were aggrieved by the decision of the Management Committee and successfully applied for judicial review of the decisions of the respondent and the Court issued an order restraining the respondent from taking any further disciplinary actions against the applicants, pending the final disposal of the main application, hence this application.

The suspension was lifted by letter dated 23rd April 2008.

On 24th day of November 2008, before the cross-examination of witnesses commenced, Prof. Ssempebwa counsel for the respondent informed Court that

“.....the Respondent admits that the disciplinary process commenced against the applicants, after the letter of suspension dated 13th March 2008 did not comply with LDC Standing Orders particularly Standing Orders No.s 17(2) & (3), 19(3) & (4).”

The following facts were agreed:-

1. Applicants are employees of LDC/Respondent
2. The Nkurunziza Committee was initially a General Committee
3. In a letter dated 31.05.2007 the allegations of exam malpractice against applicants were referred to the Nkurunziza Committee.
4. The Nkurunziza Committee made findings and made a report.
5. The Management sat and considered the Nkurunziza Report without 1st applicant's statement and defence.
6. The management Committee decided that the applicants be suspended based on the Nkurunziza Report and the Director suspended the applicants, on 13.03.2008.
7. The decision to suspend was carried in New Vision newspaper, dated 14.03.2008.
8. Applicants obtained an order of stay against Respondent restraining it from taking any further disciplinary action against the applicants.
9. Suspension was lifted by letter dated 23.04.2008
10. Respondent has not paid the relieved applicants the half pay which they are entitled to during the period on suspension.
11. First applicant was relieved of his responsibility of Deputy Head of Post Graduate Studies, and Head Civil Proceedings subject and Secretary Bar Course Advisory Board.

Issues Agreed upon:

1. Whether or not the suspension was illegal, and contrary to LDC Standing Orders.
2. Whether or not the suspension was malicious, unreasonable and unjust.
3. Whether or not the Respondent is liable in defamation to the applicants.

At the hearing of the application the applicants were represented by Mr. Blaze Babigumira while the respondent was represented by Prof. Ssempebwa. They filed written submissions in support of their respective cases. In his final submissions Professor Ssempebwa raised a preliminary point before addressing the issues framed for determination by this court.

In his submissions Professor Ssempebwa contended that for an order of certiorari to be issued there must be a decision to be quashed because a Court cannot issue a superfluous or ineffective order. In this case it was an agreed fact that the suspension had been lifted. The applicants also acknowledged this fact during cross-examination which according to counsel indicates that there is no decision to quash and therefore an order of certiorari cannot issue. In response to this submission Mr. Blaze Babigumira opined that the suspension was by the operation of the law and the personal files of the applicants still contain the stain.

On the order of prohibition “prohibiting the respondent or its servants/agents from proceeding with an inquiry and/or carrying out any disciplinary action against the applicants” Professor Ssempebwa submitted that deriving from his submissions on the prerogative order of certiorari the order of prohibition does not lie. He submitted further that the applicants cannot argue that as employees of the respondent they shall never be subject to standing orders or that they shall be immune from disciplinary proceedings. In response to this submission Mr. Blaze Babigumira submitted that Court is supposed to determine the issue whether, on the pleadings, the law and submissions, the process was unlawful and if Court found in the negative it would issue an order of prohibition.

In the case of **DOTT SERVICES LTD Vs ATTORNEY GENERAL & ANOTHER (High Court Misc Cause No. 125 of 2009)** His Lordship Justice V.F Musoke Kibuuka made the following observation as far as the orders of certiorari and prohibition are concerned:-

“It is indeed, trite law that certiorari and prohibition are both prerogative orders designed to control decisions of inferior Courts, tribunals and administrative and statutory authorities. Inland Revenue Commissioners, Exparte National Federation of self employed and Small Business Ltd [1962] AC 617. They are tools of the supervisory jurisdiction of the High Court through which it ensures that the machinery of Government operates in a proper manner or according to the law. Certiorari issues to quash decisions which are ultra vires or which are vitiated by error on the face of the record or which are arbitrary, oppressive or outrightly illegal. Prohibition serves to prevent the happening of some act or the taking or implementing of a decision that would be ultra vires, arbitrary, or outrightly illegal. Both prerogative orders are discretionary and court will grant only judicially. In Re: An Application by Bukoba Gryinkana Club [1963] EA 473.

In considering an application for judicial review such as the instant one the Court is concerned mainly with the process through which the impugned decision was made. It is concerned more with whether the decision making authority lacked or exceeded jurisdiction, committed an error in law, or acted illegally or breached the rules of natural justice. It is not concerned with the merits of the decision.....”

I agree with the above statement on the position of the law regarding the prerogative orders of certiorari and prohibition. In my view if like in this case the decision making authority realizes that it has made a mistake and goes ahead to reverse its own decision it is no longer necessary for Court to intervene using its supervisory jurisdiction to issue an order of certiorari. The reversal of the decision to me would mean that the decision ceases to exist and I agree with professor Ssempebwa that there would be nothing for Court to quash. Secondly even if there was a quashable decision it does not follow that the prerogative of prohibition would issue.

Rule 10 the subrule 4 of the Judicature Act provides that:-

“where the relief sought is an order of certiorari and the High Court is satisfied that there are grounds for quashing the decision to which the application relates, the court may, in addition to quashing the decision remit the matter to the lower court, tribunal or authority concerned, with a direction to reconsider it and reach a decision in accordance with the findings of the High Court.”

In this case the respondents ‘audited’ its own decision so to say and lifted the suspension of the applicants. They were entitled to do this after acknowledging that the applicants were subjected to disciplinary proceedings before a wrong committee. This Court would not go as far as issuing an order of prohibition that would amount to granting the applicants a blanket immunity from disciplinary action against them. Why wouldn’t the allegations of influence peddling leveled against the applicants be properly investigated so that they are cleared of them instead of the allegations being left without any investigations given their serious nature. I would therefore find that the order of prohibition like the one of certiorari would not be available to the plaintiffs but I will still go ahead to resolve the framed issues in case I am wrong.

The first issue that had been framed for consideration by this court was as to whether or not the suspension of the applicants was illegal and contrary to Standing Orders. The second issue was as whether or not the suspension was malicious, unreasonable and unjust. The two issues have been stated together in this ruling because counsel for the applicants argued them together and they are closely related. From the outset counsel for the respondent conceded that the disciplinary process commenced against the applicants, after the letter of suspension dated 13th March 2008, did not comply with the LDC Standing Orders No.s 17(2) & (3), 19(3) & (4). In his final submissions he stated as follows:-

“The Director of LDC the respondent had to suspend under Standing Order 17(3). The suspension need not be preceded by a hearing. The power of the director to suspend an employee is conferred by Standing Order 19(1). By Standing Order 19(3) an employee who is suspended

must be given an opportunity to defend himself/herself within fourteen days of the suspension clearly the suspension does not have to be preceded by a hearing (Misc. Application 851 of 2004 CHEBORION BARISHAKI Vs ATTORNEY GENERAL).

The proper disciplinary process was deviated from only after the suspension when, instead of the Director referring the allegations to the Appoints Committee, they were referred to an adhoc committee, the Nkurunziza Committee. The process is the subject of an admission. Therefore we submit that all submissions of the applicants on the irregularity of the process need not engage Your Lordship's prolonged attention. That our submission, covers issue number one. The suspension itself was not illegal."

In view of the above concession the first issue is answered in the positive. As to whether the suspension was malicious, unreasonable and unjust I do not see what else the Director of the LDC faced with the allegations that two of his senior members of staff were involved in a malpractice in respect of one student supposed to sit an exam was supposed to do. A letter from Mr. James Nangwala, Head Bar course to the Director about the allegations was adduced at the trial. The last paragraph of this letter sums up what the Director was faced with:-

"I find the above conduct, if true to be despicable and stinking. I see no reason why Mr. Nester Byamugisha and Mr. Michael Akampurira sitting in their respective panels if they can perpetuate and/or abet such malpractice. This memo therefore serves to officially bring this information to your attention and to request you to take appropriate action. I would be renegeing on my duties if I just kept mum about such information. You may consider whether Mr. Nester Byamugisha had moral authority to continue serving as the Deputy Head of the Department."

The tone of Mr. Nangwala's letter is admittedly very strong and so was the letter from the Director LDC that communicated the suspension to the applicants. In fact the one from the Director appeared convicting. Counsel for the applicants in his final submissions quoted his thus:-

".....your said conduct did not only amount to examination malpractices but was very shocking. By forwarding such a text message to the panelists you did not only abdicate your duties in your capacity, but you condoned and perpetuated the said examination malpractice."

From the tone of the two letters the matter facing the Director was not one that would be swept under the carpet. It had to be investigated. The Director was not the one going to investigate it

and neither was he the decision making authority envisaged in a judicial review trial as stated in the case of **DOTT SERVICES LTD Vs ATTORNEY GENERAL** (supra). His views however strong were irrelevant if only he had forwarded the matter to the correct committee before which the applicants would be expected to be afforded an opportunity to be heard and adduce evidence. It is only if the relevant committee flouted the rules of natural justice that court would evoke its supervisory jurisdiction. The decision of the Director who apart from forwarding the matter had no other authority cannot be subject of judicial review.

On the issue as to whether or not the respondent was liable in defamation to the applicants the evidence available as to the circumstances under which the information reached the press is insufficient to link the publication of the story to the respondent. The Director of the respondent was cross-examined on this point and this is what he stated:-

“..... the minutes do not necessarily come out on the same day. At the time 13.03.2008 there was no spokesperson. The committee does not sit with the press. Some decisions are communicated to staff. The following day the New Vision carried the story. We were all shocked to see the story in the press. We do not know who communicated the facts to the press.”

In my view this court exercising its jurisdiction in a supervisory manner cannot delve into the circumstances under which the said article was published in order to determine the role of the respondent in its publication. It would also entail investigation into the article itself to determine as to whether or not it was defamatory of the applicants which is beyond the scope of Judicial Review which on the authority already cited is exercised in a supervisory manner and not to vindicate rights so on the above consideration this court finds that the liability of the respondent to the applicants in defamation is not determinable in this application but in an ordinary suit where evidence would be adduced to determine as to whether the source of the article rather than the publisher would be liable in defamation if Court was to find that the article is defamatory.

The last issue as to whether the applicants are entitled to damages for having been subjected to a disciplinary process without following the right disciplinary procedure which the respondent's counsel concedes. In his final submissions he proposed minimal damages of shs 3.000.000= for each of the applicants. This is what he stated:-

“General damages be awarded for failure to follow the right procedure. We pray that, in the circumstances if this case, the damages be minimal. The suspension was lifted before the proceedings were commenced. The Applicants, by their own admission in cross-examination continued to be members of staff of the respondent. Whatever half pay was retained remains payable. We suggest an amount not exceeding UGX shs 3.000.000= for each of the applicants.”

In my view for anybody to be subjected to a disciplinary process due care should always be taken to ensure that the process is properly handled otherwise before that person clears his or her name he has suffered a lot of stress. In this case the applicants were first subjected to the Nkurunziza Committee which was not the right committee which should have been avoided. Although the applicants remained staff at the respondent the stigma of being associated with an examination malpractice must have remained. I do not think that the proposed shs 3.000.000= would atone for what the applicants went through. In the circumstances this court will make an award of shs 10.000.000= for each of the applicants as general damages.

As far as costs are concerned, this application has partly succeeded on a matter that the respondent had conceded to. Recognising that the applicants have suffered costs on a matter that should have been handled better than it was, the applicants will be awarded half the taxed costs of this application.

Eldad Mwangusya

J U D G E

01.02.2013

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