

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**HCT-00-CV-MA- No. 0002 OF 2013**

1. HON. MUKASA FRED MBIDDE }  
2. HON. MICHAEL MABIKE } ::::::::::: APPLICANTS

- VERSUS -

1. LAW DEVELOPMENT CENTRE ::::::::::: RESPONDENT

**BEFORE: HON. MR JUSTICE V.T. ZEHURIKIZE**

**RULING:-**

By way of Notice of Motion the Applicants brought this application under S. 33 of the Judicature Act, S. 98 of CPA and Articles 21, 28, 30, 40 (2), 42, 44, 45, 50 of the Constitution and Judicature (Judicial Review) Rules 2009 seeking a series of reliefs but mainly that;

1. A declaratory judgment be made that the Report of the Forensic Audit of the Bar Course Examination for the period of 2004/2005 to 2010/2011 made by an Audit Committee appointed by The Director of the Law Development Centre (LDC) is null and void because the said committee was not dully constituted.
2. An order of certiorari be made against the LDC to quash the Report of the Forensic Audit of the Bar Course Examination of the aforesaid period and all decisions and recommendations made therein.

3. A declaratory order to be made to expunge the said Report from the records of the LDC.
4. An order of prohibition does issue against the LDC to prohibit the Committee slated to execute its functions from 1<sup>st</sup> January to 28<sup>th</sup> February 2013 set up to further examine suspected exam malpractices and review the recommendations of the Report of the Forensic Audit as it is out of irregular proceedings.
5. A permanent injunction does issue against the LDC to restrain it and any other committee appointed by it from conducting a detailed inquiry into specific cases of suspected exam malpractices and to review the recommendations of the Forensic Audit Report.
6. The applicants also sought general and punitive damages and costs.

The grounds upon which this application is based are mainly a detailed account of the fact that the applicants are Advocates of the High Court of Uganda having obtained Bachelor of Laws, Diplomas in Legal Practice and formally enrolled as Advocates.

It is further stated that the Director of the LDC appointed an Audit Committee comprised of Dr. Rose Nakayi, Dr. Ronald Kakungulu Mayambala, M/S Miriam Achieng and Mr. Evarist Turyahikayo who produced the impugned Report of the

Forensic Audit of the Bar Course Examination for the period 2004/2005 to 2010/2011 which was submitted to the LDC.

The complaints against the Committee are twofold namely that it was not properly constituted and that it did not accord the applicants a fair hearing.

It is further stated that the said report recommends criminal prosecution and withdraw of the applicants' Diplomas in Legal Practice which are a pre-requisite for one to practice Law in Uganda.

The application is supported by the affidavit of Hon. Michael Mabikke the 2<sup>nd</sup> applicant, a supplementary affidavit by the same deponent and an affidavit in rejoinder by Hon. Mukasa Fred Mbidde the 1<sup>st</sup> applicant.

The respondent filed an affidavit in reply sworn by Mrs. Joyce Werikhe who is its Secretary.

At the hearing the application Mr. Justin Semuyaba appeared for the applicants while Mr. Tibaijuka Charles represented the respondent.

The following issues were agreed for determination by the court.

1. Whether the Audit Committee that made the impugned Report was properly constituted.
2. Whether the LDC management committee became functus officio after awarding the Diplomas to the applicants.
3. Whether the Audit Committee in its proceedings observed the Rules of natural justice.
4. Whether the Kania Committee is properly constituted.
5. What remedies are available to the applicants.

Both counsel made rigorous and lengthy submissions, but the main focus appears to have been on whether the Audit Committee afforded the applicants a right to a fair hearing and whether both the Audit Committee and what is termed the Kania Committee were properly constituted.

I will, however, dispose of this matter in the order of the issues raised. But before doing so I beg to set out a short background to this application.

Both applicants are Advocates of the High Court having satisfied all the requirements, including obtaining Post Graduate Diplomas in Legal Practice from the Respondent, to be enrolled as Advocates.

The respondent is a Legal teaching Institution charged among other things with the function of organising and conducting courses for the acquisition of Legal knowledge, professional skill and experience by persons intending to practice as attorney. (See S. 3(1)(a) of The Law Development Centre Act).

It is under this function that the respondent conducts courses leading Post Graduate Diploma in Legal Practice. The applicants were awarded such Diplomas by the respondent.

It appears in the course of time there arose allegations and or complaints of exam malpractices at this institution, which prompted the Director Law Development Centre to appoint the Audit Committee on 8/8/2012 to carry out a forensic audit of examination scripts at the Department of Postgraduate Legal Studies for the period 2004-2011.

The appointment was in accordance with the decision of the management Committee of LDC during its meeting held on 7/6/2012. The Committee consisted of the members already stated above.

The Committee made its report to the Director LDC in which among others, the applicants were faulted for having been involved in exam malpractices.

Upon receipt of the Report the respondent appointed another Committee chaired by Hon. Justice Augustine Kania (Rtd), referred to as the Kania Committee, to carry out a detailed inquiry into specific cases of suspected exam malpractices and to review the recommendations made by the Audit Committee.

When the applicants got wind of these developments they filed this application seeking the aforesaid orders/reliefs.

**WHETHER THE AUDIT COMMITTEE WAS PROPERLY  
CONSTITUTED:**

On the first issue Mr. Semuyaba counsel for the applicants argued to the effect that since the Audit Committee was not appointed in accordance with the provisions of

S. 16 of the Law Development Centre Act it was not properly constituted and consequently all its findings and decisions are a nullity.

On the other hand Mr. Tibaijuka counsel for the respondent who preferred to argue the 1<sup>st</sup> and 4<sup>th</sup> issues together contended that the Audit Committee was not a sub-committee of the management committee of the respondent and that as such section 16 of the Act did not apply.

Instead counsel argued that this Audit Committee was appointed under S. 4 of the Act read together with S. 23 of the Interpretation Act.

The reason for this, counsel asserted, was that the respondent wanted an independent committee which was not under the control of the management committee as would be the case if it had been appointed under S. 16 of the Act. They did not want to be accused of being a judge in their own cause.

He concluded saying that the Audit Committee and the Kania Committee were separately and validly appointed and constituted by virtue of S. 4 of the LDC Act and S. 23 of the Interpretation Act.

I have considered submission by both counsel. I will follow the approach taken by Mr. Semuyaba and disposed of the 1<sup>st</sup> issue separately from the 4<sup>th</sup> issue.

From the pleadings and arguments by counsel it is agreed that the Audit Committee was not appointed in accordance with the provisions of S. 16 of the Act which states:

**“16.           *Establishment of sub-committees:***

**(i)           *The Committee may -***

- (a)           *Appoint sub-committees from among its members and may refer to any such sub-committee any matter for investigation and report to the Committee.***
- (b)           *Co-opt any person on any sub-committee appointed under this section.***
- (c)           *Subject to any directions of the Committee, a sub-committee appointed under this section may regulate its own procedure and fix a quorum for its meetings.”***

Section 4 of the Act also relied on by Counsel for the respondent provides for the Powers of the respondent. It states:



*“The Centre shall have Power to do all such things as are calculated to facilitate, or as are incidental or conducive to, better carrying out its functions and may in particular, but without prejudice to the generality of the foregoing-*

- (a) acquire, take on lease, purchase, hold and enjoy any property and sell, let or otherwise dispose of the property;*
- (b) subject to section 20, borrow or otherwise raise money on such security as may be necessary and, for that purpose, charge all or any of the property of the centre;*
- (c) conduct examination and confer diplomas, prizes and certificates in accordance with any law in force or as may be required by the Law Council;*
- (d) charge such fees for any examination, courses, seminars or conferences conducted or held as may be approved by the committee;*
- (e) charge such amounts for any publications sold and distributed as may be approved by the committee;*
- (f) charge such amounts for accommodation or other services provided as may be approved by the committee.*

Section 23 of the Interpretation Act which was also invoked by counsel provides:

**“23 Implied Power:**

***Where any Act confers a power on any person to do or enforce the doing of any act or thing, such powers shall be understood to be also given as one reasonably necessary to enable the person to do or enforce the doing of the act or thing.”***

I have not come across any document or instrument, and none was availed to me, showing under what legal authority the respondent appointed the Audit Committee.

But I do find that under S. 4 and S. 8 of the Act the respondent has wide powers to do any act or enforce the doing of any act or thing for the better carrying out of its functions and exercising of its powers.

It is in this spirit that I find the contents of paragraph 12 of the affidavit in reply by Mrs. Joyce Werikhe quite instructive. It is averred as follows:

***“12. THAT the intention of the Management Committee was to set up the Audit Committee as a purely internal administrative entity, not as a judicial or quasi-judicial body; and it was intended that –***

- (a) the Audit Committee would sieve through thousands of examination scripts and attendant documents with the eye of a forensic expert, and identify problem areas, which would narrow the scope of a subsequent detailed inquiry;*
- (b) the Audit Committee's Report and recommendations would also be subjected to the subsequent detailed inquiry aforesaid; and*
- (c) a candidate (or former candidate) suspected of any malpractice would be heard at the subsequent detailed inquiry, not at the early stage of gathering evidence by the Audit Committee.*

The above summarises the nature of this Committee.

This was purely an internal administrative arrangement for purposes of gathering information or data in reaction to the Judiciary and public concern on allegations of impropriety in the respondent's examination process and examination results.

The report of the audit would then form the basis of a subsequent formal inquiry. It was merely a fact finding expedition. It was general and could not have been an inquiry directed at any individual.

The respondent was entitled to do this internal soul searching exercise in a bid to find out whether the allegations levelled against the institution had any basis.

The respondent did this exercise by appointing the aforesaid committee which they considered independent and probably would have nothing to hide. The respondent was under the Act entitled to conduct such exercise with the help of personalities of their choice.

The respondent, instead of a committee, could have called in aid the services of Police or any other body of investigators to do the job.

I find the first issue in the affirmative. The Audit Committee was properly constituted by the respondent under Ss 4 and 8 of the Act.

It follows therefore that the order for declaratory judgment that the Report made by the impugned Audit Committee is null and void is not sustainable.

In the same vein the prayers for certiorari to quash the report and declaration that it be expunged from the records of the LDC are rejected.

Further I do not find any basis for an order prohibiting the establishment of any investigations or inquiry committee into specific cases dug out by the Audit Committee.

It should be noted that judicial review has its root in Administrative Law.

The purpose of judicial review is to ensure that lawful authority vested in a tribunal or body of persons is not abused by unfair treatment. That the machinery of government operates in a lawful and fair manner. See ***Ridge Vs Baldwin [1964] AC 40*** and ***Lex Uganda Advocates and Solicitors Vs A.G., HCC Misc. Appl. No. 322 of 2008.***

If courts were, under the guise of judicial review, to start issuing orders of prohibition or permanent injunction blocking investigation in public offices it would defeat the very purpose for which this supervisory jurisdiction of the courts was intended to serve.

Orders in judicial review are discretionary. No court well advised on the law and facts would issue orders calculated to pervert the course of justice, undermine

proper functioning of government machinery and the enforcement of good governance and the maintenance of the rule of law.

It is for this reasons that I find the orders for prohibition and permanent injunction prayed in this application are misplaced. They cannot be granted. They would undermine proper functioning of the respondent.

This leads me to the 2<sup>nd</sup> issue of whether the LDC Management Committee became functus officio after awarding the Diplomas to the applicants.

#### **ISSUE OF FUNCTUS OFFICIO:**

Counsel for the applicants contended that once the respondent has awarded a Diploma it has no power to recall it. He explained that the principle is that once the committee has sat in a meeting and made a decision it is functus officio and cannot revisit it. That they cannot approbate and reprobate.

Counsel relied on *Verschures Creamaries Ltd Vs Hull & another [1921] 2 SCR 484* and *Chandler Vs Alberta Association of Architects [1989] 2 SCR 484* to fortify his arguments.

On the other hand Mr. Tibaijuka for the respondent contended that the respondent is not functus officio. That if at any time it comes to the attention of the respondent that an award was improperly made it is within its power and mandate to investigate the circumstances under which it was made.

He was of the view that the Common Law Principles of approbation and reprobation does not apply because here we are talking about the exercise of Statutory Powers. That Statutory Provisions take over the Common Law Principles.

He cited *Ddegeya Trading Stores (U) Ltd Vs URA 1997 Vol. 111 KARR 108* and *Hyabene Vs Attorney General [1996] 3 KARR 23*.

I have considered submissions by counsel and perused the cases cited to me.

In *Chandler Vs Alberta Association of Architects* (supra) the facts were that the tribunal took a decision in the matter after conducting a hearing. It levied fines, imposed suspensions and ordered the firm of architects to pay costs.

The aggrieved parties appealed against the findings and sanctions. The appeal was allowed.

Then the trial Board notified the appellants that it intended to continue the original hearing to consider certain matters.

The intended fresh proceedings were successfully challenged. The reason for this was that:

***“As a general rule, once such a tribunal has reached a final decision in respect of the matter that is before court in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within its jurisdiction or because there has been a change in circumstances. It can only do so if authorised by statute or if there has been a slip or error....”***

I entirely agree with the above decision. In the instant case no final decision has been reached whether the applicants obtained their diplomas improperly or not. The respondents have just embarked on a process to resolve that issue. The above case is distinguishable from the instant case.



I agree with counsel for the respondent that the mere fact that the respondent awarded the diplomas to the applicants is no ground to prevent them from inquiring into allegations of exam malpractices or other allegations of impropriety leading to the award of such diplomas.

It is only after a properly constituted tribunal or body of the respondent has made a final decision on such allegations that matters of functus officio can arise.

The mere award of a Diploma to a student on the strength of the results as presented to the respondent's examination board is not a decision that cannot be revisited if it is found that the award was made in error, on false misrepresentation of results or any other reason for which no such award would have been made in the first place.

To hold otherwise would be extremely dangerous to the integrity and quality of such qualifications as it would open door for exam malpractices to be committed with impunity. In any case there is no legal basis for such decision and it would be devoid of any logic or sound reasoning.

In the premise I find no merit in counsel for the applicants' submission. The 2<sup>nd</sup> issue is answered in the negative. The respondent is entitled to investigate any questioned awards.

### **THE RULES OF NATURAL JUSTICE:**

The 3<sup>rd</sup> issued is whether the Audit Committee in its proceedings, observed the Rules of Natural Justice.

It was contended for the applicants that the committee never invited them to state their side of the case.

It was pointed out that although a number of people were interviewed, the applicants were not among them thereby denying them the right of a fair hearing.

I have already found that this committee was an internal informal body which went on fact finding expedition to ascertain whether indeed there were cases of exam malpractices.

There is no way such a committee could have foreseen that the applicants would be part of those involved in the examination scam so as to have summoned them and afforded them a hearing.

I do observe that there is a list of eight people who were interviewed by the committee. These are some of the academic and administrative staff of the respondent. They were interviewed in order to throw some light on the alleged examination malpractices. These could be easily identified by the committee simply because they were one way or the other connected with the conduct and administration of exam scripts. They were interviewed for purposes of obtaining information and not for self defence.

It was from those interviews that the applicants and other former students/lawyers of the respondent were mentioned in the exam malpractices warranting the appointment of an investigative or inquiry committee to investigate the specific alleged culprits including the applicants.

I find that the so called Forensic Audit Committee was merely an eye opener did not conduct an investigation in which the applicants could have been afforded a hearing.

Its mandate was to merely carry out what they called a Forensic Audit of examination scripts at the Department of Postgraduate Legal Studies for the period of 2004-2011.

Its duties were specified in the Terms of Reference namely:

- (i) To review examination scripts at the said department from 2004 -2011.
- (ii) To verify examination scripts from the Bar Course from 2004 – 2011.
- (iii) To compare and contrast compiled results by the Board of Examiners and the results on the original mark sheets for Bar Course for the years 2004-2011.
- (iv) Examine all students' petitions for missing results and how the petitions were handled.
- (v) To carry out any other task related to this assignment.
- (vi) To make recommendations of its findings and submit a report to the Director LDC by 15/11/2012.

The committee duly accomplished its work and submitted its report.

The report prompted the appointment of the Kania Committee.

I find that the Forensic Audit Committee was not under a legal duty to afford any hearing to anybody and by mere looking at the terms of reference no sensible hearing was possible.

In the premise all the orders sought against the Committee are sheer misconception. There is nothing to quash to or to declare null and void. The report is apparently a useful raw material upon which an investigation or inquiry can be based. It is at this stage that the applicants are entitled to a hearing.

This leads me to the 4<sup>th</sup> issue of whether the Kania Committee is a body with the capacity to utilise the raw materials unearthed by the Forensic Audit Committee.

**THE KANIA COMMITTEE:**

According to paragraph 14 of Mrs. Joce Werikhe's affidavit in reply the Committee chaired by retired Hon. Justice Augustine Kania is to carry out a detailed inquiry into examination malpractice and to review the recommendations made by the Audit Committee.

According to the attachment (annexture “A”) which includes the terms of reference the Kania Committee is-

- (1) to review the recommendations by the Forensic in relation to 15 Bar Course Graduates recommended for cancellation of diplomas and investigate the allegations of examination malpractices by the said graduates.
- (2) To carry out further investigations concerning two bar course graduates recommended by the Audit Committee for further investigation.
- (3) To investigate the case of a bar course graduate who apparently gained admission to the bar course fraudulently using a “mercenary” lawyer to sit the LDC pre-entry examinations and subsequently completed the course.
- (4) To make appropriate recommendations for action by the management committee.
- (5) To carry out any other task incidental to and necessary for executing these terms of reference.

It is clear that this committee is charged with an important duty of conducting an inquiry or investigation with a view of making recommendations, affecting the rights of the citizens.

As correctly described in paragraph 15 of the said affidavit in reply, it is “a quasi-judicial entity”. For this matter it must be constituted in accordance with the law if it is to assume such important jurisdiction.

The relevant law is The Law Development Act (Cap. 132). It is specifically stated by the respondent that the Kania Committee like the earlier Audit Committee is not appointed under S. 16 of the Act. That it is appointed pursuant to the provisions of S. 4 of the Act.

According to counsel for the applicant, a committee not appointed under S. 16 is not properly constituted.

I have already set out the provisions of S.4 and S. 16 of the Act.

I am of the humble view that S.4 provides for general powers to the respondent. It has powers to do all such things for the better carrying out of its functions.

It further spells out specific powers which are stipulated as “a” to “f” already set out in this ruling. These specific powers do not include the power to carry out investigations by the management committee.

The power to carry out investigations is clearly provided for under S. 16 of the Act. The investigations may be done by a sub-committee appointed by the management committee under S. 16 (1)(a) and may co-opt other members under paragraph (b) of that Section.

S.7 of the Act spells out the composition of the management committee which I need not set out here.

Suffice to say that the management committee consists of important but fully engaged personalities in their respective offices.

In my view it is for this reason that some of its important functions such as investigations are carried out by sub-committees with the assistance of co-opted persons.

It is clear to me that it is only the management committee and inevitably through its sub-committees which is vested with power to conduct an investigation or inquiry into matters of this nature.



While under its general powers the respondent can appoint anybody to do the preliminary investigations to establish whether there is substance in the allegations levelled against it to warrant a formal inquiry, it is not at liberty to appoint anybody of persons however prominent they might be to carry out investigations of the nature the Kania Committee was entrusted to do.

Such a committee must derive its mandate and jurisdiction from the express provisions of S. 16 of the Act.

It must be such a body that can be scrutinised for purposes of determining whether it acted legally or with procedural impropriety, arbitrarily or without jurisdiction or in excess of jurisdiction.

In short it must be a body that is amenable to the supervisory powers of this court by way of judicial review.

The Kania Committee fell short of this test since its status is not different from the original Audit Committee which was appointed under general powers vested in the respondent for the better carrying out of its functions.

There is no doubt that the Kania Committee is composed of very prominent citizens of this country. But none of them is a member of the management committee.

The reason advanced by the respondent is that the management committee wanted to avoid possible conflict of interest and being seen as judges in their own cause.

The explanation is not convincing. Members of the management committee as detailed in S. 7 of the Act are mainly high ranking personalities who are not employees of the respondent. They are essentially ex-officio members. They have the capacity to exercise a high degree of independence.

In any case such an explanation can ever be a ground to violate the clear and specific provision of the law.

For the above reasons I find that the Kania Committee is not properly constituted as it was appointed in violation of the provisions of S. 16 of the Act. It lacks jurisdiction to carry out investigations. It is not competent to discharge the duties entrusted to it.

If the respondent is still interested in carrying out the investigations the only option is to appoint a committee as provided for under S.16 of the Act. The prominent personalities would find their way in as co-opted members.

To this extent the 4<sup>th</sup> issue is answered in the negative.

**REMEDIES:**

Having found that the appointment of the Audit Committee cannot be faulted, I have already held that all the orders directed against it are not sustainable.

Although I have found that the Kania Committee is not properly constituted, I cannot make an injunctive order or any order prohibiting the respondent from legally constituting a committee to carry out the investigations which are the subject of this application. I have already given my reasons for this holding. The respondent is legally entitled to appoint a Committee to investigate the matter.

Since the application has succeeded only as regard the propriety of the Kania Committee, I order that each party meets its own costs.

**VINCENT T. ZEHURIKIZE**

**JUDGE**

Delivered at Kampala by the Deputy Registrar this .....13th..... day of February 2013.

Delivered by  
**JOHN EUDES KEITIRIMA**

**DEPUTY REGISTRAR**