

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**CIVIL DIVISION**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**MISCELLANEOUS CAUSE NO. 141 OF 2012**

**PROF. ISAIAH OMOLO NDIEGE:.....:APPLICANT**

**VERSUS**

**KYAMBOGO UNIVERSITY:.....:RESPONDENT**

**RULING**

**BEFORE: HON. JUSTICE BENJAMIN KABIITO**

This is an application for Judicial Review brought under Article 42 of the Constitution of the Republic of Uganda, Sections 33,36 &39 of the Judicature Act, cap13, Section 98 of the Civil Procedure Act, Rules 5(1),3 & 6(1) of the Judicial Review Rules S.I No. 11 of 2009.

The Applicant is the sitting Vice Chancellor of Kyambogo University while the Respondent is Kyambogo University, a public university governed by the **UNIVERSITIES AND OTHER TERTIARY INSTITUTIONS ACT, 2001** as amended, of the laws of Uganda.

The Applicant has prayed for the following orders as set out in the notice of motion:-

- a) A writ of certiorari to call for and quash the decision arrived at by the University Council, the top most governing body of the Respondent University to dismiss the Applicant from his office as the Vice Chancellor;
- b) A writ of mandamus directing the Respondent to comply with the findings and recommendations of the Ad hoc committee which it set up through the University

Council to investigate the alleged mismanagement of the University by the Vice Chancellor and report its findings before the Council within a period of six weeks.

- c) An order of prohibition effecting the illegal orders of the University Council.
- d) Costs of this application be provided for.

The grounds upon which this application is made are;

1. That the Applicant was the Vice Chancellor until the 31<sup>st</sup> day of October 2012 when he learnt through electronic and print media that he had been dismissed from his position as the Vice Chancellor of Kyambogo University in public interest and two days later the University Secretary served him a notice of removal from office.
2. That on the 9<sup>th</sup> day of August 2012 the University's three staff associations, namely, the Kyambogo Academic Staff Association (KYUASA), Kyambogo University Senior Administrative Staff Association (KYUSASA) and National Union of Educational Institution (NUEI) (Kyambogo University Branch) congregated and deliberated upon the allegations of mismanagement of the University, and resolved that the Applicant herein, steps aside by the 20<sup>th</sup> of August 2012 to allow for a thorough investigation into the working conditions of the members of staff of the University and that if this was not done the said staff would withdraw their services from the University.
3. That the University Council, being the supreme organ responsible for the overall administration of the University, sat and considered the resolutions of the three staff associations and resolved inter alia that the council institutes an ad hoc committee of chairpersons of council committees to conduct investigations on the issues raised against the Vice Chancellor and report to council within two (2) months.
4. That the ad hoc committee carried out investigations by interviewing various groups, individuals including the Vice Chancellor and presented its report to the University Council. On the 31<sup>st</sup> October 2012 the University Council convened a meeting at Hotel Africana to discuss the findings and recommendations of report. The said council completely digressed from the findings and recommendations of the ad hoc committee and without according the Applicant a hearing decided to dismiss him from office.

5. That the dismissal of the Applicant from his office was arrived at through an irregular voting process conducted by the members of the council the minimum number of members thereof required was short of the threshold set by the law being two-thirds (2/3) of the council members outlined in the Universities and Other Tertiary Institutions Act 2001, as amended.
6. That the sacking and dismissal of the Vice Chancellor from office by the University Council on grounds outside the grounds and conclusions of the ad hoc committee without a fresh hearing was a fundamental breach of his human rights.
7. That the Vice Chancellor had never been implicated for misconduct or found to have failed to perform the functions of his office in the report of the ad hoc committee so as to warrant his removal from office.
8. That the decision of the University Council members to dismiss the Applicant was in bad faith as the membership of the council was constituted by complainants of the alleged mismanagement of the university by the Vice Chancellor, who were also witnesses during the investigation itself. Furthermore the said complainants attended the meeting of 31<sup>st</sup> October 2012 wherein the decision to dismiss the Applicant from office was made.
9. That in bad taste, the Chairman of the University Council Prof. John YakoboOkedi who presided over the meeting of 31<sup>st</sup> October 2012 respectively was also a member of the ad hoc committee. He declined to sign the report because he had personal issues with the Applicant as he had issued the Applicant notice of intention to sue over a story published in the media arising from the alleged sale of the university land.
10. That in bad taste, Mr. Bruhan Byaruhanga Mugisha, the area LCV Councillor, who was a member of the ad hoc committee attended the joint staff meetings of 23<sup>rd</sup> August 2012 and signed the register of members attached to the resolution. The said Bruhan Byaruhanga is said to have given a press conference to the Media on WBS Tv and Record Tv on 31<sup>st</sup> /08/2012 and 3<sup>rd</sup> /09/2012. He was heard declaring that he would voice a minority report even if the ad hoc committee exonerated the Applicant.

11. That the Applicant while appearing before the ad hoc committee objected to participation in the investigation of the two individuals named above as they had expressed their grievances with him but they declined to discontinue their participation.
12. That the two individuals also participated in the decision made against the Applicant on 31<sup>st</sup> October 2012 despite being aggrieved or having conflict of interest.
13. That the decision to dismiss the Applicant from office without according him a hearing is not only contrary to the principle of natural justice but also illegal, lacked procedural propriety and was also in utter defiance of logic.

This application is supported by an affidavit in support and a supplementary affidavit both deponed by Prof. Isaiah Omolo Ndiege dated 2<sup>nd</sup> November 2012 and 10<sup>th</sup> December 2012 respectively.

In response, the University Secretary of the Respondent, Sam. A. Akorimo deponed an affidavit in reply dated 13<sup>th</sup> November 2012 and a supplementary affidavit dated 7<sup>th</sup> February 2012.

The Applicant's affidavit largely set out the pertinent facts as are contained in the grounds of the application set out herein.

The contents of these affidavits were read out during the hearing of this application.

I will consider this application on the basis of orders sought. I will do so as the affidavit evidence of the Applicant and submissions of his learned counsel raises matters outside the scope of the orders sought in the notice of motion.

By so doing the Applicant and his counsel in certain respects in respect to this application took this court on a fishing expedition with no fish to catch but with the precious time of this court being put to waste. Affidavit evidence and submissions of learned counsel in applications of this nature must be relevant, to the point and address the issues raised and that justify the writs or orders sought.

- 1. Whether there are grounds for issuing the writ of certiorari to call for and quash the decision by the University Council to dismiss the Applicant from the office of Vice Chancellor.***

### **What is certiorari?**

Certiorari is designed to prevent abuse of power. The purpose of certiorari is to ensure that an individual is given fair treatment by the authority to which he is subjected. Its effect when issued is that the order of an inferior court, tribunal or a public authority or other decision made is quashed. The court will issue it when it is convinced that the decision challenged was reached without jurisdiction or in excess of jurisdiction in breach of the rules of natural justice or contrary to the law. (See: **JOTHAM WELAMONDI VS. CHAIRMAN OF ELECTORAL COMMISSION OF KENYA (2002) KLR 486**).

When issued certiorari quashes a past decision or act. The effect of the order of certiorari is to restore the status quo ante which was the situation pertaining before the infringed decision was made.

The heart of this matter in my view is whether the decision of the University Council to recommend the removal of the Applicant from office on grounds of public interest is lawful.

It is the Applicant's case that the decision taken by the University Council was riddled with illegality, irrationality and procedural impropriety.

Counsel complains that the letter of Notice of Removal recommending the removal of the Applicant from office was issued in contravention of the law. He pointed out that the notice of removal cites public interest as the ground for recommending his removal from office yet the law cites misconduct and inability to perform functions as grounds for removal from office, of a Vice Chancellor.

I will set out the Letter of Notice of Removal dated 2<sup>nd</sup> November, 2012 in full,

***“At a Special meeting of Council held on the 31<sup>st</sup> October 2012, it was resolved that you be given notice of removal from office, in writing in***

*accordance, with Section 55(1) of the Universities and other Tertiary Institutions Act 2001,as amended.*

*The resolution of Council to recommend your removal from office is made in public interest.*

*The purpose of this letter therefore is to inform you of the above decision of Council.”*

The said letter offends the provisions of **Section 55(1)** of the **Act** which provide as follows,

*“If two-thirds of the University Council are satisfied that the Vice-Chancellor or Deputy Vice Chancellor should be removed from office on the grounds of misconduct or inability to perform the functions of the office of the Vice-Chancellor or Deputy Vice-Chancellor, the University Council shall,*

*a)give notice in writing to the Vice-Chancellor or Deputy Vice-Chancellor concerned; and*

*b)on the recommendation of the University Appointments Board, recommend to the Chancellor that the Vice-Chancellor or Deputy Vice-Chancellor should be removed from office.”*

The issue before this court is whether the Applicant has been dismissed from the position of Vice Chancellor or served merely with a notice of his recommendation of removal from office. I refer to Paragraphs 4 and 5 of the affidavit in reply of Mr. Sam Akorimo, where he avers that the notice of removal is a mere preliminary step and it is not a dismissal as such. Besides the letter addressed to the Applicant is very clear as it attests to a recommendation for removal and not a removal from office as such.

It therefore seems to me that the decision that should be the subject of judicial review is the one of recommendation of removal of the Applicant from office and not the dismissal of the Applicant from office as such.

I revert to the order of certiorari as is sought which was to call for and quash the decision to dismiss the Applicant from office as Vice Chancellor. This order is not tenable and cannot be granted considering that there is no decision reached as yet to dismiss the Applicant under the law. It would have been different if the order for certiorari was to call for and quash the recommendation for removal from office which was not the case as presented by the Applicant.

In the circumstances of the case, no decision to dismiss the Applicant was made and therefore there is no decision to quash by this court. I find the order of certiorari to quash the dismissal to be premature and if the intention had been to secure the order of certiorari to call for and quash the mere recommendation for dismissal, then the order as presently framed does not address that situation.

A court cannot grant an order that is not specifically sought for. Nor can a court improvise or alter an order that is sought as framed when the evidence points otherwise. The rationale for court not granting orders not sought is because it puts the other party at a disadvantage in not addressing the matter directly in relation to the orders that are sought.

I have considered the submission of the Applicant that the recommendation to dismiss is not grounded within the ambit of Section of 55 of the Universities and Other Institutions Act. Clearly the issue in this regard is whether a recommendation of the removal for the Applicant from office in public interest is in contravention of the provision of the law which provides for removal of the Vice Chancellor on the grounds of misconduct and inability to perform functions. These issues can be determined once a substantive decision has been made by the proper authority of the Respondent. As of now, the application is misconceived in respect to the order of certiorari that is sought and I decline to grant the order as is sought.

The case of **KARUNGO THUKU KABIA VS. TEACHERS SERVICE COMMISSION MISC. APPLICATION NO. 310 OF 2012** is authority for the proposition that an internal disciplinary mechanism that is in place in an organization must be exhausted before a court of law may intervene in a dispute under judicial review.

In respect to this matter, the court expects that the parties submit to the internal disciplinary mechanisms of the Respondent and for such mechanisms to be fully exhausted and which mechanisms could help resolve the dispute before recourse is made to the court.

The Applicant had during the course of this matter an opportunity to seek the leave of this court to amend the pleadings to seek an order for certiorari to call for and quash the recommendation of removal and not dismissal as such. He did not.

### Fair hearing

**Article 42** of the Constitution of the Republic of Uganda provides for the right to just and fair treatment in the making of administrative decisions. Article 42 provides,

***“Any person appearing before any administrative official or body has a right to be treated justly and fairly and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.”***

This right includes adherence to the principles of natural justice such as the right to be heard and the right to a fair hearing.

The right to be heard imposes a duty on every person, body or tribunal vested with the power to resolve a dispute fairly to hear both parties and consider both sides of the case before making a decision on the matter. In principle no man should be condemned unheard. It follows therefore that the body or tribunal should not base its decision only on hearing one side it must hear both sides and not hear one side in the absence of the other. In so doing it should grant equal opportunity to both parties to present their cases or divergent view points and should hold the scales fairly and evenly between them. **(See: ERRINGTON VS. MINISTER OF HEALTH [1935] 1 KB 249).**

The record shows that the Applicant was accorded a hearing by the ad hoc committee of the University Council. His complaint, however, is that following the ad hoc committee's findings and recommendations to the University Council, that the Applicant “builds a functional team to manage the university”, the University Council instead made a decision to recommend his removal from office without according him a hearing on this decision.



Given that the University Council had taken a decision to recommend the removal of the Applicant from office, it is only fair that he should have been heard on this matter before the decision was made and before being served with a notice of recommendation of removal. However, since the internal administrative process is still in progress this is a matter which the relevant management organs of the Respondent may wish to consider.

If the Applicant maintains that he was denied an opportunity to be heard on the recommendation for removal from office, and if the decision made to dismiss him eventually on the basis of that decision, the Applicant has a right to return to court to call for and quash the decision that may have been taken in such circumstances.

### Procedural Impropriety

The Applicant has complained about the constitution of the members of the University Council and the quorum requirements of the meeting of 31<sup>st</sup> October 2012 that recommended his removal from office. Given that this is still an internal disciplinary process that is still on going and has not yet been exhausted as per the provisions of the law, and if a decision is made by the competent authority to dismiss the Applicant, the Applicant will have the right to call for and quash under judicial review by court the decision made under that situation, if the complaints are verifiable.

- 2. Whether the writ of mandamus can be issued to compel the Respondent to comply with the findings and recommendations of the ad hoc committee of the University Council, to investigate the allegations of mismanagement of the University by the Vice Chancellor.***

### **What is mandamus?**

It comes from the Latin word *mandare* which literally means 'we command'. This order is issued by the High Court to an administrative authority or inferior tribunal directing it to perform a duty imposed upon it by law.

It is to be noted that the duty to be compelled by mandamus must be mandatory in nature, but it need not to be statutory in origin.

In order to maintain an application for mandamus, the Applicant must satisfy the court that he has a right to compel the Respondent to comply with the findings of the Ad hoc committee.

The order of mandamus issues to compel performance of a public duty not to control the exercise of discretion.

With respect, a University Council handed out terms and duties of reference to the Ad hoc Committee. Under administrative law, a sub-committee of the main committee that set it up cannot compel the main committee to comply with its findings or recommendations. I refer to paragraph 14 of the affidavit in reply of the University Secretary of the Respondent on this issue.

Accordingly and for the reasons stated, I decline to grant the order sought.

***3. Whether an order of prohibition to stop the Respondent from effecting the illegal decision of the University Council.***

Having found as I have that the decision of the University Council is a mere recommendation of removal of the Applicant from office and is not a dismissal as such having determined that and the internal disciplinary process is ongoing and has not been exhausted, the court will not interfere with this process at this stage.

I decline to grant this order as sought.

According this application is dismissed.

Finally, I urge the Applicant to engage the competent authorities of the Respondent within the internal disciplinary systems that are in place and that are not yet exhausted for his complaints and concerns to be addressed.

The order of this court that the Applicant remains on leave during the consideration of this application is vacated forthwith.

The Applicant shall bear the costs of this application, and those of the application in Miscellaneous Application No. 528 of 2012.

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**BENJAMIN KABIITO**  
**JUDGE**  
**18<sup>th</sup>/03/2013.**