

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**  
**MISC. CAUSE No. 053 OF 2014**

**KAMPALA UNIVERSITY:..... APPLICANT**

*VERSUS*

**NATIONAL COUNCIL FOR HIGHER EDUCATION ::: RESPONDENT**

**BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA**

**RULING**

Kampala University represented by M/s Crane Associated Advocates brought this application against the National Council for Higher Education represented by Lex Uganda Advocates & Solicitors under the provisions of Articles 24, 42, and 44 of the Constitution of the Republic of Uganda, Sections 33 and 38 of the Judicature Act Cap 13 rules (3) and (6) of the Judicature (Judicial Review) Rules for orders that:-

1. An order of certiorari be made quashing the decision of the respondent made on 30<sup>th</sup> April 2014 at a special council meeting of the respondent in which a resolution was reached in the following terms;

*“there was no clear evidence that academic due process was followed from admission to graduation regarding a Bachelor of Business Administration Degree (Human*

*Resource Option) awarded to MR. HASSAN ALI JOHO by Kampala University. In conclusion the council does not recognize the Bachelor of Business Administration Degree awarded to MR. HASSAN ALI JOHO by Kampala University on 28<sup>th</sup> February 2013”.*

2. An order of prohibition be made prohibiting the respondent from using disseminating and/or in any manner whatsoever using the decision contained in the resolution of 30<sup>th</sup> April 2014 in any manner inimical to the interests of the applicant in respect of the degree of Bachelor of Business Administration awarded to Hassan Ali Joho as expressed in the resolution aforesaid or any other manner thereto ejudsem generis.
3. An order of permanent injunction to issue restraining the respondents from interfering in any way with the applicants’ grant of the subject degree to Hassan Ali Joho.
4. An order of punitive, aggravated and general damages for the inconvenience.
5. Costs of the application to be met by the respondent.

The application is supported by the affidavit by one Ambassador Professor Badru Kateregga which enumerates in detail the facts and grounds on which the application is based. The affidavit shall be reproduced in this ruling verbatim because its averments are interconnected and for ease of reference. The deponent averred that;

1. **“I, AMB. PROF. BADRU KATEREGGA** of Kampala in the Republic of Uganda do hereby solemnly affirm and state as follows:-

2. **THAT** I am the Vice-Chancellor of Kampala University which is a private University, operating pursuant to a Charter approved by the National Council of Higher Education, and the Government of Uganda. It awards degrees, diplomas and certificates to students who successfully accomplish studies in their respective and various courses.
3. **THAT** the Respondent is the National Council of Higher Education (*hereinafter referred to as "NCHE"*). It is a statutory body established pursuant to the provisions of the *Universities and other Tertiary Institutions Act, 2001*.
4. **THAT** on diverse dates in the 2013, the Respondent conducted investigations in relation to the process leading the award of Bachelor of Administration (Human Resource Management option) to a Kenyan student, Hassan Ali Joho, who was then a student at the Applicant's University.
5. **THAT** on the 5<sup>th</sup> day of December, 2013, the Respondent, by a letter of that date informed the Criminal Investigating Officers as follows:-
  - (a) *The initial communication of 27<sup>th</sup> March 2013 from the National Council of Higher Education (NCHE) to the Criminal Investigations and Intelligence Directorate was erroneously done.*
  - (b) *The Vice Chancellor of Kampala University, Ambassador Professor Badru Kateregga furnished this office with documents in defense of Hassan Ali Joho's disputed study at the said University.*
  - (c) *In view of the above stated facts, the National Council of Higher Education (NCHE) believes that the above captioned matter should be drawn to a conclusion.*  
*[The said letter is attached hereto and marked as annexure "A" to this Affidavit].*
6. **THAT** on the same day, 5<sup>th</sup> day of December, 2013, the Respondent also wrote another letter addressed to the Ministry of Education and Sports, in which it stated as follows of and concerning that subject matter;

*“I wish to inform you that the Secretariat of National Council of Higher Education (NCHE) has acted on the matter with a view to bringing it to an end”.*

*Following the submission of documentary evidence by Kampala University, the National Council of Higher Education (NCHE) is satisfied and has resolved to conclude the matter herein given as CLEARED”.*

*[A copy of the letter is attached hereto and marked as annexure “B”].*

7. **THAT I am aware** that both letters referred to above were authored and signed by Professor Opunda Asibo John, the Executive Director of the Respondent.
8. **THAT** the letters that are stated above and annexed here were all copied to me and I received both letters.
9. **THAT** the Applicant fully believed the Respondent and the conclusions made by it, which fully assured the Applicant that the matter had been put to a close and an end.
10. **THAT** the position that the matter was concluded on **5<sup>th</sup> December, 2013**, was put beyond controversy by a letter from the same Executive Director of the Respondent who on the **27<sup>th</sup> January 2014**, wrote a letter to AIGP Akullo Grace, Director, Criminal Investigations and Intelligence Department (CID), in the following terms;
11. **THAT** although the **Top NCHE** Management had concluded this matter, the Uganda Police through the **CRIMINAL INVESTIGATION AND INTELLIGENCE DEPARTMENT (CIID)** were continuously and incessantly visiting the campus of the Applicant to conduct investigations which conduct led the Applicant to approach the High Court sitting in Kampala to issue an injunction against the said officers and end their conduct against the Applicant.
12. **THAT** unknown to the Applicant and contrary to the **legitimate expectations** of the Applicant, bolstered by the Executive Director of

the Respondent's own correspondence, it was the Respondent who in 2014 had again clandestinely contacted the Uganda Police through the Criminal Investigations and Intelligence Directorate (CIID), to conduct investigations **again** into the matter that had been closed by 5<sup>th</sup> December 2013 which as stated in the letter at page 1 of the annextures hereto, was done through; **"..... the National Council of Higher Education (NCHE) sitting on 4<sup>th</sup> December 2013"**

13. **THAT** the Applicant the filed **MISCELLANEOUS APPLICATION No. 30 OF 2014**, in the High Court at Kampala, and on the **4<sup>th</sup> February 2014**, **Honorable Justice Elizabeth Musoke** issued order barring the police from entering the campus of the Applicant and also a further order in these terms;

*"An interim injunction restraining the Uganda Police from investigating the process resulting in the award of a Bachelor of Business Administration degree to Hassan Ali Joho".*

*[A copy of the said Order duly served and received by the Uganda Police is hereto attached and marked as annexture "D" to this affidavit].*

14. **THAT** despite the injunctive orders issued against the police **INTELLIGENCE DIRECTORATE (CIID)** however proceeded, on the 7<sup>th</sup> February 2014, to compile and complete what they call their report on investigations in this matter. [Attached as "E" hereto is a copy of the said report].

15. **THAT** on the 15<sup>th</sup> day of April 2014, AIGP Grace Akullo, the Criminal Investigation and Intelligence Directorate (CIID) wrote to the Respondent, in connection with the investigations that she had been forbidden by the Court not to continue to undertake and concluded her said letter as follows;

***".....in your letter, you requested us to avail a copy of the report of investigations carried on the said Hassan Ali Joho's academic papers.***

***This is to forward a copy of the said report as requested”.***

*[This letter is annexed here to as “F” to this affidavit].*

16. **THAT** the Respondent, who, aside from re-opening the investigations that it had fully concluded and closed by its letters of **5<sup>th</sup> December 2013** and **27<sup>th</sup> January 2014**, on the **16<sup>th</sup> April 2014** wrote a letter copied to the Applicant which stated as follows:

***However, in view of Criminal Investigation and Intelligence Directorate (CIID) investigations and report now available in this office on this matter, the position as stated in this office’s earlier letter of 5<sup>th</sup> December 2013 may be affected. The National Council of Higher Education (NCHE) Council shall be guided by the findings of the Criminal Investigation and Intelligence Directorate (CIID), and the report from the National Council of Higher Education (NCHE) Council appointed committee.***

***[The said letter of 16<sup>th</sup> April 2014 is hereto attached as “G”].***

17. **THAT** on the 30<sup>th</sup> day of April 2014, the Respondent then made the impugned decision.

*[A copy of the resolution embedding the decision is attached hereto and marked as “H”].*

18. **THAT I am aware that** when the Respondent made and/or came to its decision of 30<sup>th</sup> April 2014, it relied on the impugned report from the Criminal Investigation and Intelligence Directorate (CIID), without giving either the Applicant or the recipient of the degree in issue a hearing and this was contrary to the rules of Natural Justice, “audi alterem partem” which require that the other side must be heard before a decision affecting that party is made.

19. **THAT** I am further aware that by the Respondent excluding it from the deliberations of 30<sup>th</sup> April 2014, it breached the Provisions of **Articles 28, 42 and 44 of the Constitution of Uganda.**
20. **THAT** earlier on the 9<sup>th</sup> March 2014, the Respondent wrote to the Applicant a letter stating that it was to visit the Applicant's campus to conduct investigations on the matter; on a date not therein specified.
21. **THAT** the Applicant replied to that letter *vide* its own letter to the Respondent dated 7<sup>th</sup> April 2014 in which the Applicant clearly stated that the matters that the Respondent wanted to investigate were the subject of proceedings in both the High Court and the Court of Appeal, [The said two letters are hereto annexed as exhibits as "I" and "J"].
22. **THAT** the contents of the letter from the Respondent dated **9<sup>th</sup> March 2014**, did not make any reference to a meeting that was to be held by the Respondent on 30<sup>th</sup> April 2014. Accordingly the said meeting was held and conclusions reached monumentally affecting the Applicant and its former student, without any of them being given an opportunity of being heard. **THAT** sensing bad faith on the Respondent's part, the applicant again filed an Application to block the Respondent from deliberating on the matters which now were in Court and the Application was heard interparties by the Assistant Registrar of the High Court.
23. **THAT** the Respondent argued that the Application was speculative as there was no eminent danger that it was about to hold a meeting and this argument was advanced by the Respondent well knowing that it was going to hold a meeting on the 30<sup>th</sup> day of April 2014.
24. **THAT** in its Ruling, Court declined to grant the interim Order due to its cognizance of the fact that in place were subsisting Court Orders which in effect restrained the Respondent from taking any action on the said issue of the degree and the award and on the basis of the Respondent's submissions that no imminent

action was going to take place and that the application was speculative. [A copy of the Ruling of the Registrar is attached and marked as “K”].

26. **THAT** at no time was the Applicant or the said student Joho notified or in any other way made aware of the holding of the Special Committee Meeting that was held on 30<sup>th</sup> April, 2014.
27. **THAT** the Respondent herein initially acted as a complainant in the report that it tendered to the Criminal Investigation and Intelligence Directorate on the matters in question regarding the award of the subject degree to Hassan Ali Joho by the Applicant.
28. **THAT** the Respondent then turned itself into an investigator of the matter by forming its own internal committee to investigate the said matter. **This was on the 1<sup>st</sup> day of April 2014.**
29. **THAT** finally on the 30<sup>th</sup> April 2014, the Respondent constituted itself into a “Special Council” to sit in judgment of its own cause – being the very complaint that it had reported to the Criminal Investigation and Intelligence Directorate (CIID).
30. **THAT** from the foregoing, it is clear that the Respondent was first, the complainant, which mutated into an investigator and finally became the judge over its own complaint, all of which actions are contrary to good conscience and the rules of natural justice.
31. **THAT** I am aware that at the time of convening the Special Committee Meeting, the same was done in violation of an Order issued by **Honorable Justice Elizabeth Musoke** on the 4<sup>th</sup> February 2014, barring the Uganda Police from “Investigating the process of the award for Bachelor of Business Administration (Human Resource Management option) to Hassan Ali Joho vide High Court Miscellaneous Application Number 30 of 2014.



32. **THAT** I am also aware that actions of the Respondent were in violation of the orders referred above, when it proceeded on the 30<sup>th</sup> April 2014, to convene the Special Committee meeting at which resolution in question was reached.
33. **THAT** the Applicant as well as the affected recipient of the Bachelor of Business Administration Degree, Hassan Ali Joho, were never invited to appear at the said Special Committee Meeting for them to be heard, before a decision so grave as that contained in the Resolution of that day could be made.
34. **THAT** the Resolution of the Respondent shows that the evidence upon which it based itself before arriving at the Resolution was not conclusive and it made its decision unreasonably, reckless, in bad faith with bias and malafide.
36. **THAT** the Respondent's actions were manifestly malafide, reckless and tainted with bad faith and malice and caused a lot of psychological torture, unrest in the Applicant's campus as a result of which the Applicant is entitled to General damages and aggravated and exemplary damages and shall at the trial pray to this Hon. Court to award the same to the Applicant.
37. **THAT** the decision of the Respondent by way of its resolution of 30<sup>th</sup> April 2014 was tainted with illegality, irrationality and procedural impropriety.
38. **THAT** I affirm this affidavit in support of the Application for quashing the decision of the Respondent dated 30<sup>th</sup> April 2014 and for the other Orders sought therein.
39. **THAT** whatever is stated hereinabove is true and correct to the best of my knowledge.

AFFIRMED at Kampala by the said **AMB. PROF. BADRU KATEREGGA** this 9<sup>th</sup> day of July 2014.”

It is trite law that in a trial where evidence is by affidavit, and the respondent does not file any affidavit in reply or rejoinder that party is taken to have conceded the truthfulness of the affidavit, she or he has not rebutted. This is the case in the present application. The respondent, the National Council for Higher Education did not file any affidavit in reply.

At the commencement of these proceedings, two interested parties to wit Fahim Kasozi in support of the application and one Silas Make Otuke on the side of the respondent joined the proceedings as interested parties. Each of the interested parties filed affidavits in support of their respective cases and interests.

Mr. Fahim Kasozi is represented by M/s Kigozi, Ssempala, Mukasa, Obonyo Advocates while Mr. Silas Make Otuke is represented by M/s Akampulira Advocates & Solicitors and M/s Karuhaga Kassajja & Co. Advocates.

All respective counsel involved in this matter were allowed to file written submissions in support of their respective cases which I don't intend to reproduce in this ruling because they are indeed voluminous. Several authorities were filed by respective counsel for my assistance for which I am very grateful. Suffice to mention that I have considered the application a whole. The submissions filed by respective counsel and authorities cited by all parties.

The issues for resolution in this application are basically two;

1. Whether the respondents' decision of 30<sup>th</sup> April 2014 is unlawful or was reached unlawfully in that:
  - (i) was the decision reached in violation of a court order issued on 4<sup>th</sup> February 2014.
  - (ii) Was the decision reached in breach of the rules of natural justice
  - (iii) was the decision reached ultra vires.
2. What remedies are available?

This is an application for judicial review and judicial review is governed by Sections 22, 36, 37, 38 of the Judicature Act and the Judicature (Judicial Review) Rules. Judicial review is concerned with prerogative orders which are basically remedies for the control of the exercise of power by those in public offices. They are not aimed at providing final determination of private rights which is done in normal civil suits. The said orders are discretionary in nature and court is at liberty to refuse to grant any of them if it thinks fit to do so even depending on the circumstances of the case where there had been clear violation of the principle of natural justice: **John Jet Tumwebaze versus Makerere University Council & 2 others.**

The discretion I have alluded to here has to be exercised judiciary according to settled principles. It has to be based on common sense as well as justice: **Moses Semanda Kazibwe versus James Ssenyondo Misc. Application No. 108 of 2004.**

Factors that ought to be considered include;

Whether the applicant is meritorious in his or her cause or whether there is reasonableness vigilancy without any waiver of the rights of the applicant. Court has to give consideration to all the relevant matter of the cause before arriving at a decision in exercise of its discretion. It was held in case of **Koluo Joseph Andres & 2 Others Vs Attorney General** and I agree that:

***“It is trite law that judicial review is not concerned with the decision in issue per se but with the decision making process. Essentially judicial review involves the assessment of the manner in which the decision is made. It is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality”.***

The purpose of judicial review was summed up by Lord Hailsham St Marylebone in **Chief Constable of North Wales Police Vs Heavens [1982] Vol.3 All ER** as follows:-

***“the purpose of judicial review is to ensure that the individual receives fair treatment not to ensure that the authority after according a fair treatment reaches on a matter it is authorized or enjoined by law to decide from***

***itself a conclusion which is correct in the eyes of the court.”***

In the instant case, the applicant seeks *inter alia* for an order of certiorari. An order of certiorari issues to quash a decision which is ultra vires or vitiated by error on the face of the record.

With the above legal principles in mind I will go ahead and decide the issues I have outlined above starting with:-

**Whether the respondents’ decision of 30<sup>th</sup> April 2014 is unlawful or was reached unlawfully and in violation of the court order issued on 4<sup>th</sup> February 2014.**

As I have stated earlier in this ruling, the respondent did not file any affidavit in reply leaving the averments by the applicant uncontroverted. This omission could not be cured by the affidavit by the interested party Silas Make Otuke who came in only to bolster the case for the respondent. It has remained unclear what legal grievance Silas Make Otuke has suffered to make him interested in these proceedings on the side of National Council for Higher Education (the respondent). A person aggrieved must be a man or woman who has suffered a legal grievance, a man against whom a decision has been pronounced, which has wrongfully deprived him or her of something or wrongfully affected his title. This was the decision in **ex-parte Side Botham in Re Said Botham [1880] 14 Ch D 458, 465.**

In order to answer this issue, it is necessary to give a brief background to this dispute. The applicant is a private university operating under a charter approved by the respondent and the Government of Uganda. It awards degrees, diplomas and certificates to students who successfully accomplish studies in various courses offered by the applicant. On the other hand the respondent is a statutory body established under section 4 of the Universities and other tertiary institutions Act 2001. Its powers include licensing and regulating tertiary institutions in Uganda.

In its averments, the applicant affirmed that in 2013, the respondent conducted investigations relating to the process leading to the award of a degree of Bachelor of Business Administration Human Resource Management to a Kenyan student Hassan Ali Joho. According to annexure "A" to the supporting affidavit dated 5<sup>th</sup> December 2013, the Executive Director of the respondent by that letter informed the Uganda Police Criminal Investigation and Intelligence Directorate as follows;

*"I wish to further state that National Council for Higher Education top management at its sitting of 4<sup>th</sup> December 2013 discussed the matter and resolved that:*

*a) the initial communication of 27<sup>th</sup> March 2013, from NCHE to CIID was erroneously done since the officer involved was not the authorized signatory.*

*b) -----*

*c) The National Council for Higher Education ought to have carried out its independent investigation prior to passing on*

*the matter to CIID, this is because National Council for Higher Education is the statutory body mandated under section 5(F) of the Universities And Other Tertiary Institutions Act 2001 to among others receive and investigate complaints relating to institutions of higher education and take up appropriate action.*

d) -----

*g) The Vice Chancellor of Kampala University Ambassador Professor Badru Kateregga furnished this office with documents in defence of Hassan Ali Joho's disputed study at the said university". In view of the above stated facts, NCHE believes that the above captioned matter should be drawn to a conclusion since there is no further evidence to suggest otherwise".*

Thereafter, on 5<sup>th</sup> December 2013, the respondent wrote another letter to the ministry of education and sports in which is stated *inter alia* that;

*"Following the submission of documentary evidence by Kampala University to the National Council For Higher Education is certified and has resolved to conclude the matter herein given and labeled CLEARED.*

In annexure "C" to the supporting affidavit dated 27<sup>th</sup> January 2014, the respondent wrote to the CIID stating that:-

*“I wish to inform you that as far as this office is concerned, the matter of Ali Hassan Joho was disposed off based on the information provided by Kampala University and as per our letter of 5<sup>th</sup> December 2013”.*

As rightly submitted by learned counsel for the applicant, the latter was made to believe that the issue at hand had been put to a close for it had no reason to doubt the veracity of the respondents conclusions quoted above.

However, the applicant was to learn later in early 2014, that the respondent had yet again contacted Uganda police to conduct investigations into a matter it had closed by 5<sup>th</sup> December 2013. The police swung into action and visited the applicants’ campus to conduct investigations into the said matter. It arrested and detained the applicants’ officials which prompted the applicant to file Misc. Application No. 30 of 2014 and on 4<sup>th</sup> February 2014, the Hon. Lady Justice Elizabeth Musoke issued an interim injunction restraining the Uganda police from investigating the process resulting in the award of a Bachelor Of Business Administration degree to Hassan Ali Joho. This order was made by the consent of all the parties. This court order is annexed to the supporting affidavit as annexure D”. Despite, this court order, the CIID proceeded to compile a report on their investigations in this matter as per annexure “E” dated 7<sup>th</sup> February 2014 and forwarded the same to the executive director of the respondent on the 15<sup>th</sup> April 2014 as per annexure “F”.



From the above facts, it is apparent that despite the existence of an equivocal court order, the CIID went ahead to compile a report contrary to the court order without having the court order set aside. What the CIID did was an illegality and by the respondent relying on the illegal report, it was erroneous for the respondent to rescind its decision of 5<sup>th</sup> December 2013 and go ahead to decide as it did on 30<sup>th</sup> April 2014. I highly doubt whether the respondent took this action on its free will. It must have been as a result of fear and constructive duress that it back tracked on its earlier decision which dents the image and integrity of the respondent. This is shown in the correspondence the respondent copied to the applicant on 16<sup>th</sup> April 2014 that:

***“However in view of the criminal investigation and intelligence directorate investigations and report now available in this office on this matter, the position as stated in this office’s earlier letter of 5<sup>th</sup> December 2013 may be affected. The National Council For Higher Education shall be guided by the findings of the CIID and the report from the national council for higher education council appointed committee”.***

Whatever followed was in absolute reliance on the impugned report of the CIID. The committee appointed by the respondent solely based its findings on that report which culminated into the respondents’ decision of 30<sup>th</sup> April 2014. The foundation of this decision rendered it unlawful. As rightly pointed out by Mugambe J. in ***Lukwago Erias versus Attorney General Misc. Application 94 of 2014***, it is incumbent upon all to respect court orders without exception at all times. This

includes reading orders of court positively to enhance their effectiveness whether or not they are in ones' favor. Any actions done in disregard or disobedience of court orders are actions in futility. If any order is passed by any authority inspite of the knowledge of the order of court is of no consequence as it remains a nullity and any subsequent action thereof would be a nullity. The same position was held in the case of **Union of India and Another Vs Ashok Kumar Civil Appeal 9454 of 2013 of the Indian Supreme Court.**

In its an unrebutted deponment in paragraph 21 of the affidavit in support the applicant informed the respondent vide annexure "J" that the matters the respondent wanted to investigate were the subject of proceedings both in the High Court and the Court of Appeal but the respondent simply ignored the notification. It did not matter that the order was not directed at the respondent but once it became aware of the order it was obliged to ensure its enforcement and efficacy. It ought not to have acted in contempt thereof. I therefore agree with submission by learned counsel for the applicant that since the report by the CIID was in contempt of a court order, it was a nullity and what stemmed from it was equally a nullity. To allow the respondents' decision to stand would be to erode the dignity and guardianship of court on matters of the rule of law.

I further agree that the foundation of the judiciary is the trust and confidence of the people in its stability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working, the edifice of the judicial system gets

eroded, whoever is dissatisfied with a court order should apply to court that it might be discharged.

**Whether the decision by the respondent was in the breach of the rules of natural justice.**

From the documents revealed and relied upon in this application, there is no indication that either the applicant or the recipient of the contested degree were heard before the 30<sup>th</sup> April 2014 decision yet the allegations of malpractice were made against them. The respondents' committee simply visited the applicant's institution. This is contained in the affidavit in rejoinder by ambassador Prof. Badru Katerega sworn on 18<sup>th</sup> July 2014 that the purpose of that visit by the respondent's subcommittee to the applicant was to obtain:

- The admission qualification which merited the admission of one Joho.
- Evidence of tuition fees paid by Joho.
- Evidence of attendance of lectures by Joho.
- Departmental reports of Joho's academic progress.
- Examinations done, marks obtained and approval of senate for award of the degree.

In other words this was an information collection tour by the respondents subcommittee and not a hearing. The applicant also affirms that it was never given a chance to see the materials placed by

the complainants before the respondent. That it never saw and cross examined the complainants and/or their witnesses to verify the veracity of the allegations at all. T

The right to be heard is sacrosanct and none derogable under Article 28 (1) and 44 (C) of the Constitution of Uganda. It has been decided over again by this court to this effect. In the cases relied on by the applicants of **Rosemary Nalwadda versus Uganda AIDS Commission, High court Civil Suit 45 of 2008**, Bamwine J. (as he then was) quoting the Supreme Court decision of **Charles Harry Twagira versus Uganda, Criminal Appeal No. 27 of 2003** said:

***“I have already indicated that the right to a hearing before being condemned is enshrined in article 28 of the constitution. A fair trial or a fair hearing under this article of the constitution means that a party should be afforded the opportunity to inter alia hear the witnesses of the other side testify openly; that he should if he chooses, challenge those witnesses by way of cross examination; that he should be given an opportunity to give his own evidence if he chooses to do so in his defence; that he should if so wishes call witnesses to support his case”.***

The whole value of the legal system, the integrity of the rule of law is at once destroyed if it becomes possible for officials by arbitrary decisions made not in public courtrooms but in the private offices of officialdom without hearing the parties, without taking evidence free

from all obedience to settled legal principles and subject to no appeal, effectively to overrule the courts and deprive any citizen of a right he has established by immemorial methods of trial at law. See: **Bachard versus Dupuis 1946 D. L. R. 641.**

It is now settled that it a fundamental principle of justice and procedural fairness that no person is to be condemned unless that person has been given prior notice of the allegations made against him or her, and a fair opportunity to be heard.

In **Halsbury's Laws of England 5<sup>th</sup> Edition 2010 Vol. 61 para 639,** It is stated as follows with regard to the right to be heard:

***“The rule that no person is to be condemned unless that person has been given prior notice of allegations against him/her and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adopted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court”.***

In the case of ***Onyango Oloo Vs Attorney General [1986] EA 456*** the Court of Appeal of Kenya considered in a local

context the application of the rules of Natural Justice as follows:-

***“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others, to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard ..... There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice ..... To ‘consider’ is to look attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to hold the opinion ..... Consider implies looking at the whole matter before reaching a conclusion ..... A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at ..... It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant***

***and others guessing about what matter could have persuaded the decision maker”.***

In terms of conduct of proceedings the Court of Appeal of Kenya proceeded to observe that:

***“..... In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings. .... It is not to be implied that the rules of natural justice are excluded unless parliament expressly so provide and that involves following the rules of natural justice to the degree indicated.***

***..... It is to everyone’s advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be***

***fair ..... Denial of the right to be heard renders any decision made null and void abinitio”.***

See also **Kuluo Andrew & 2 others Vs Attorney General & others HC Misc. Cause No. 106 of 2010** per Bamwine J (as he then was).

From the above celebrated pronouncements it is apparent that the rule of natural justice obliges an adjudicator faced with the task of making a choice between two opposing stories to listen to both sides. He should not base his decision only on hearing one side. He should give equal opportunity to both parties to present their cases or divergent view points. The scales should be held evenly between the parties. It does not matter that the result would be the same.

In the instant case, I am constrained to find that the applicants were not accorded a fair hearing during the respondents’ investigations of this case.

Therefore where a prejudicial decision has been made by a public authority in the course of exercise of its statutory authority without according the affected party a right to be heard then a writ of certiorari should often freely be granted by the courts. I accordingly grant the same to the applicant herein.



**Whether the decision reached by the respondent was ultra vires its powers.**

Ultra vires acts are acts beyond the official's statutory authority. These are acts or decisions taken pursuant to constitutionally void powers or acts exercised in a constitutionally void manner. An act of a governmental agency is ultra vires if it is beyond the express or implied powers conferred by statute. When a decision is thought to be ultra vires, the typical remedy is to get a higher level judicial body such as this court to assess and rule on it. If the decision has already been made, the remedy is certiorari. If the decision is anticipated then the remedy is prohibition.

In the instant case, the respondent acted under section 5 (F) of the Universities and Other Tertiary Institutions Act 2001 to make the impugned decision against the applicant. That section provides that the National Council for Higher Education is *(f) to receive and investigate complaints relating to institutions of higher education and take appropriate action.*

Clearly the above section gives power to the respondent to investigate institutions of higher learning. It does not vest in the respondent powers to determine which student in the institutions it supervises has followed due process from admission to graduation in any particular course in a university in Uganda. That power is specifically vested in the university senate under the provisions of section 45 (2)(F) of the Act. As rightly deposed by Fahim Kasozi, the independence, autonomy

and academic freedom of a given institution awarding an academic qualification under the act is preserved and sacrosanct. The Act empowers a given institution's organs such as the council and senate to handle and manage matters that pertain to the recall, cancellation and or non recognition of an individual's degree award.

Section 45 (2)(F) of the Act provides that;

***“(2) without prejudice to the generality of subsection 1, the senate shall (F) decide which persons have reached the standard of proficiency and are fit for the award of any degree, diploma, certificate or other awards of the university”.***

I therefore agree with the submissions by learned counsel for the applicant that with the above clear provision of the law, the question of whether any student of the applicant or Hassan Ali Joho followed the academic due process from admission to graduation during their study at the applicant university does not fall within the investigative territory of the respondent. Neither is it to the business of the respondent to make any pronouncements about that process after it granted the university accreditation and approval of the courses the university should offer. The governance structures of such a university are well versed and competent to handle such cases after a thorough review of the course units attended and passed by an individual, continuous assessment, external examiners' reviews and other considerations which are not available at the NCHE. In the circumstances of the concerns of Mr. Fahim are founded unlike those revealed by Silas Make Otuke. As rightly deposed by Prof. Badru

Katerega in his affidavit in rejoinder, the allegations as set out in the affidavit of Silas Otuke are surprising after thoughts, mostly irrelevancies and speculations which could not help boost the case the respondent. Many of the averments were not in the knowledge of the Silas Otuke. The pre-occupation of Mr. Otuke were the merits of this case which is not a concern for judicial review. Judicial review is not concerned with the decision in issue per se but with a decision making process to assess the manner in which the decision was made.

The respondent therefore went outside its mandate and as such acted unreasonably. It ought not to have acted the way it did because it is not empowered to withdraw cancel or revoke directly or indirectly any award given by a university it has already accredited. The respondent in this case acted *ultra vires* its powers allowed by statute because under the Universities And Other Tertiary Institutions Act, Section 45 (3) thereof, the powers to award and withdraw or cancel any award of the university are vested in the university senate.

Subsection 3 of section 45 provides:

***“the senate may deprive any person of a degree, diploma, certificate or other award of a public university if after due inquiry it is found that the award was obtained through fraud or dishonorable and scandalous conduct.”***

In the instant case, the respondent is not and cannot be a university senate and the respondent cannot have a body equivalent to a university senate since it is not a university itself. It therefore had no

power to usurp unto itself the functions of another independent and duly constituted body and that is the university senate. It is unfortunate that NCHE succumbed to external pressure which stampeded it into acting ultra vires. The moment the respondent purported to exercise functions under section 45 of the Act, it failed to direct itself properly in law, failed to consider matters that it was bound to consider and in the result failed to exclude from its consideration matters that were outside the per view of its mandate. This rendered the respondents decision and decision making process null and void and of no legal effect. It was an abuse of its powers. The respondent committed an error of law and a breach of the rules of natural justice. No reasonable tribunal would have reached or abused its powers to this extent. Something fundamentally went wrong in the process of the decision making process.

The applicant sought for an order of prohibition. As I have stated, an order of prohibition may be granted if it is anticipated that an impugned order will be implemented. Having held that the respondent acted ultra vires and illegally in reaching its resolution of 30<sup>th</sup> April 2014, I will grant an order of prohibition prohibiting the respondent from using, disseminating and/or in any manner whatsoever using the decision contained in the resolution of 30<sup>th</sup> April 2014 in any manner inimical to the interest of the applicant in respect of the degree of Bachelor of Business Administration awarded to Hassan Ali Joho. It follows that an injunction shall issue restraining the respondent from interfering in any way with the applicants' grant of the said degree.

## **Remedies.**

The applicant has prayed for general damages for the inconvenience as well as exemplary and aggravated damages. Rule 8 of the Judicature (Judicial Review) Rules permits this court to make an order for damages. However it has remained unclear whether all types of damages may be awarded by motion including those that require extensive evidential proof. In my considered view the damages that can be awarded under rule 8 are those that are not proven by detailed material facts or require one to set out necessary particulars. These are the type of damages envisaged under Rule 8 (2) of the Judicature (Judicial Review) Rules 2009 which states that:

***“(2) Rules 1 to 5 of Order Vi of the Civil Procedure Rules shall be applied to a statement relating to a claim for damages as they apply to a pleading.”***

The provisions of order 6 relate to the pleading of all material facts and the requirement to set out necessary particulars. Therefore an application for judicial review cannot support a claim for general, punitive and exemplary damages. It appears the type of damages envisaged under the rules could be special damages only. I am fortified by my decision by the supreme court decision in **Charles Harry Twagira Vs Attorney General and 2 others Civil Appeal No. 4 of 2007** Tsekooko J. S. C (as he then was),

Regarding a claim for punitive and general damages, the Supreme Court made a holding in respect of the incompetence of a Motion to support a claim for such a claim thus:

***“Prayer 12 sought an order that the respondents should pay to the appellant general and exemplary damages for gross violation of his constitution rights. In my experience at the bar and the bench, I cannot understand how by his notice of motion the appellant would be able to call evidence to establish such damages without filing an ordinary suit”.***

In view of the nature of pleadings made by the notice of motion, no sufficient justification has been made to warrant the award of any type of damages to the applicant. I will consequently decline to award any damages to the applicant.

For the reasons outlined in the ruling, I am inclined to allow the applicants application and grant the orders sought and with costs.

**Stephen Musota**

**J U D G E**

**20.10.2014**