

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CIVIL APPLICATION No. 0014 OF 2016

AND

MISCELLANEOUS CIVIL APPLICATION No. 0003 OF 2016

(Arising from Miscellaneous Application Nos. 0045 of 2016 and Cause No. 0003 of 2015)

ANICETA ABIO DRAMADRI **APPLICANT**

VERSUS

- 1. **ELWOKU RICHARD** }
- 2. **ONGIRIANY VINCENT** }
- 3. **OSISE JOHN** }
- 4. **MUHINDO FREDRICK** }
- 5. **BRUTOS ELLY** }
- 6. **DRAGUDU RONALD** }
- 7. **BILIA LINO** }
- 8. **MIRIA CEASER** }

..... **RESPONDENTS**

AND

- 1. **ANICETA ABIO DRAMADRI** }
- 2. **THE GOVERNING COUNCIL OF ARUA** }.....**APPLICANTS**
- SCHOOL OF COMPREHENSIVE NURSING** }

VERSUS

- 1. **ASIKU TABAN** }
- 2. **ELWOKU RICHARD** }
- 3. **MOSEKU ZENA** }
- 4. **OLUKA BONIFACE** }
- 5. **ONGIRIANY VINCENT** }
- 6. **OSISE JOHNSON** }
- 7. **MUHINDO FREDRICK** }
- 8. **MOINI JULIUS ROKANI** }
- 9. **BRUTOS ELLY** }
- 10. **AVAGA PETER** }
- 11. **FENI ROGERS** }
- 12. **DRAGUDU RONALD** }
- 13. **BILIA LINO** }
- 14. **MUHINDO FRISTER** }
- 15. **MBABAZI BARBARA** }
- 16. **MIRIA CEASER** }

..... **RESPONDENTS**

Before: Hon Justice Stephen Mubiru.

RULING

These are two applications consolidated under the provisions of Order 11 rule 1 of *The Civil Procedure Rules*. Upon perusal of the two applications, I found that they were based on the same facts, founded on more or less similar grounds and sought similar relief from the court. Therefore, the two applications, though filed separately, would raise questions of law and fact that were common to all. Order 11 rule 1 specifically provides for the consolidation of suits, either upon the application of one of the parties or at the court's own motion and at its discretion, where two or more of them are pending in the same court in which the same or similar questions of law or fact are involved. The two applications are respectively made under the provisions of Order 48 rules 7, Order 46 rules 1, 2, and 8 and Order 50 rule 8 of *The Civil Procedure Rules* and sections 82 and 98 of *The Civil Procedure Act*, seeking an order reviewing the grant of prerogative orders by this court and setting aside the order of the Registrar of this court by which he allowed an application against the applicant for contempt of court and order her to pay a fine of shs. 8,000,000/= to purge the contempt, directed her to receive research papers of the seventh and eighth respondents if presented within twenty eight days, prepare an examination for the fifth respondent between 1st July 2016 and 14th July 2016, and to meet the costs of the application. In the grounds supporting the application contained in both motions and the affidavits in support sworn by the applicant, it is contended that the impugned order by the Assistant Registrar was made erroneously against the applicant in her personal capacity yet she was acting in her official capacity as Principal, on the instructions of the Academic Committee and Governing Council of Arua School of Comprehensive Nursing and Midwifery. It is further contended that there is a mistake apparent on the face of the record with regard to the prerogative orders of this court issued against the applicants in that the court exceeded the limits of its authority thereby causing unnecessary hardship in the management of the institution.

In the affidavits in reply sworn respectively by Asiku Taban and Bilia Lino, the applications are opposed on grounds that; the first applicant is liable in her individual capacity for disobeying court orders binding on her, the first applicant personally prevented the respondents from re-sitting the examinations and refused to receive research papers from the seventh and eighth

respondent, it is her who issued them with letters requiring them to vacate the school premises, she only allowed them to re-sit the examinations upon receipt of a court directive from the Assistant Registrar of this court, they were never invited to attend any meeting of the Governing Council and nor was any of the decisions of the Council pinned on the notice board, apart from the 5th respondent, the rest of the respondents have completed their respective courses save the seventh respondent's research paper that has never been received. Further, that the grounds raised for seeking review are now moot since the majority of the respondents have completed their courses of study. The suspension of the respondents was unjustified, procedurally wrong and the court therefore made the right decision in issuing the prerogative orders and there is no mistake apparent on the face of the record to justify a review.

At the hearing of the applications, Mr. Samuel Ondoma, Counsel for the applicants submitted that the first applicant is aggrieved because she was sued for contempt of court in her individual capacity. She did not engage in conduct that was contemptuous and for that reason the relief granted by the Assistant Registrar should be set aside. The orders made by court are so wide that it is practically impossible for the administrators to administer the Institution. The court exceeded the scope of the certiorari because it gave orders restraining the applicants from taking any further decision against the respondents in relation to the demonstration. The court in effect stepped into the shoes of the decision maker. It should have dealt with the question only as to whether there was excessive use of power at that time in order to control the abuse of power. The Court went beyond the scope of an order of certiorari. Furthermore, the Assistant Registrar has no jurisdiction to handle contempt proceedings. The alleged contempt arose from a ruling given by the Judge and not in a matter before the Assistant Registrar. The decision in *Florence Dawaru v. Angumale Albino and another*, H.C. Misc. Application No. 96 of 2016 is referred to. The proceedings before the Registrar were therefore a nullity.

He submitted further that the Principal had the power to suspend the respondents by virtue of section 78 (2) of *The Universities and other Tertiary Institutions Act, 7 of 2001*, although it is specifically about staff. Under s. 83 (2) of the Act, the Principal is the chief Academic and Institutional Officer. The suspensions though indefinite, were according to annexure "D" made pending the decision of the Governing Council. The period between the suspension and the

application was short for the institution to make a decision in respect of the respondents. The right to a hearing is exercisable before the Governing Council which sits once in three months. It was not possible to make a decision within three weeks following the suspension. On 10th November 2015 the respondents obtained an interim order stopping the applicant and the other organs of the institution from dealing with the issue at hand. The Council could not give a fair hearing to the students because of the injunction. On the argument that service of the notice of motion was filed out of time, he argued that service was by court. The file could not be found in the Registry and the applicant could not therefore effect service. The delay was by court. Although the majority of the respondents have completed their courses, the issues are not moot because in the order for contempt of court, the applicant was ordered to pay shs. 8,000,000/= for purging the contempt. Costs were awarded and have not been taxed yet. The students who are still in the institution can still be heard in a disciplinary proceeding. He therefore prayed that the decision in the contempt proceedings be set aside and a review of the order in the original application be made since under Order 46 rule 1 and 2 and Order 42 the court has the power to review both decisions. He referred to the decision in *A. G. v. Kamoga and another, S.C C A No. 8 2004* and the case of *Ayub Suleiman v. Salin Kabamba S C CA No. 32 1995*.

In response, Mr. Ben Ikilai, counsel for the respondents submitted that the original application did not only seek certiorari but also sought a declaratory order and an order of prohibition. There was no hearing accorded to the students before their suspension and therefore certiorari was justified. The nature of the suspensions was indefinite. Between the suspension on 20th October 2015 and the application was filed three weeks had elapsed. Considering the period that had elapsed, the respondent had had sufficient time to decide the fate of the students but had not. The decision to suspend was *ultra vires* the powers of the applicant. The power is vested in the Governing Council by virtue of section 78 (1) of *The Universities and other Tertiary Institutions Act, 7 of 2001* and section 87 which is to the effect that the Council should make regulations for discipline. Section 87 (2) is about disciplining staff. There was an interim order issued by the Acting Registrar and during the period there was non-compliance and that was partly the basis for the application for contempt. Paragraph 4 of the affidavit in support of application No. 45 of 2016 shows that the Registrar has jurisdiction. The notice of motion in the current application was filed on 22nd June 2016 and the court sealed it 13th July 2016, yet the respondents' counsel

was served 20th February 2017. The motion is a summons and having been served out of time, the application is incompetent. It should be dismissed since it was served out of time. There was dilatory conduct on the part of the applicant and the application therefore is stale. Most of the respondents have completed their courses such that the issues raised are now moot. Only the 9th and 12th respondents are still in the institution. The 7th is only waiting for two retakes and external exams.

The background to these applications is that the first applicant is the Principal of Arua School of Comprehensive Nursing and Midwifery, a Government founded public health training institution located within Arua Municipality. Sometime during July 2015, the institution released results for the first semester in respect of the second year students of the 2014 / 2015 academic year. It so happened that the general student performance was very poor resulting in a big number of students being required to re-sit the papers they had failed, while some were discontinued. Release of these results sparked off a violent student demonstration on 31st July 2015 at the institution's campus, which threatened to spread into Arua Town. The students accused the institution's administration of having given the examinations to various support staff including the Librarian, cooks, secretaries and gatekeepers to mark. The Institution's management team identified the sixteen respondents as the ring leaders of the demonstration. Following a meeting of the Governing Council convened on 22nd August 2015, the Chairman of the Governing Council issued them with warning letters on or about 30th August 2015 and then on 20th October 2015, the first applicant issued them with letters suspending them from the various academic programmes to which they were enrolled, following a meeting of the disciplinary Committee that sat on 19th October 2015. They were "suspended indefinitely pending the final decision from the Governing Council."

The sixteen students then filed an application (Miscellaneous Cause No. 3 of 2015) on 6th November 2015 against the applicant together with the Governing Council of the institution, seeking judicial review of that decision. In the meantime they secured an ex-parte interim order (vide Miscellaneous Civil Application No. 55 of 2015) restraining the applicant and the Governing Council of the institution, from "taking any further decision in respect of the applicants" and requiring them to restore the *status quo* which existed "prior to the indefinite

suspension and [that] they be allowed unconditionally to resume their studies.” The ruling in the main application was on 17th February 2016 delivered in the students’ favour. The court granted an order of certiorari, quashing the decision suspending the students indefinitely, declared their suspension illegal and issued an injunction restraining the institution from “making any further decision against any of the applicants in respect of the demonstration of July 31st 2015 before according each and every one of them an opportunity to be heard fairly” and they were further restrained from “blocking or preventing any of the applicants from resuming and continuing with any program each of them had been pursuing before.” They were also ordered to pay shs. 300,000/= to each of the sixteen applicants “for mental stress, anguish, inconvenience suffered as a result of the actions of the respondents” and to meet the costs of the application.

Following the conclusion of the court proceedings, the second applicant’s Academic Committee at its meeting of 19th May 2016 observed that some of the students due to re-sit examinations then forthcoming had not yet to applied in writing to the Committee to be allowed re-sit the examinations. The Committee resolved that any students who did not so apply would be asked to leave the campus until they were ready to sit the examinations, which they would re-sit as non-residents. The institution went ahead and organised the end of third semester exams to start on 23rd May 2016 ending 1st June 2016, and it issued an examination time table to that effect.

Some of the sixteen students had examinations to re-sit during the slated examination period while other had re-takes. A few of them, including the first, second, third, fourth, fifth and sixth respondents, without offering any explanation, neither applied to re-sit nor turned up for the examinations. Upon their failure to do so, the Academic Committee at its meeting of 25th May 2016, which was attended by the first, second, third, and fourth respondents, issued each of them with letters directing them to leave the campus until they were ready to sit the examinations, which they would re-sit as non-residents. At the extra-ordinary meeting of the Governing Council convened later that day, that decision of the Academic Committee was revoked and the respondents were allowed to remain on the school campus for the duration of the examination period. A notice communicating this decision was put up on the notice board and it was also indicated that the Chairman of Governing Council was to meet them on 26th May 2016 for a further discussion of the issues.

Eight of the respondents, out of the original sixteen students, had instead on that very day of 25th May 2016 filed an application seeking the first applicant to be found in contempt of court. Pending the hearing of the application, the Assistant Registrar immediately issued an administrative order by correspondence dated 25th May 2016, demanding of the first applicant as Principal to comply with the prerogative orders of the court that were issued on 17th February 2016 in Miscellaneous Cause No. 3 of 2015. The Assistant Registrar subsequently heard the application for contempt of court and on 14th June 2016, delivered a ruling in the students' favour which ruling is now being challenged. By that time, all the applicants, except the fifth who re-sat his examination in November 2016, had re-sat their examinations. The seventh and eighth applicants were only left with research papers to submit.

These applications raise two broad key issues; one regarding the jurisdiction of a Registrar of this Court over civil contempt of court proceedings and the other about the extent of the powers of this court when granting prerogative orders on judicial review in respect of the internal administrative or management decisions of academic / training institutions of higher learning. It is convenient though first to deal with the argument by counsel for the respondent that the applications are incompetent by virtue of the fact that service of the notices of motion was made more than 21 days after they were sealed and signed by the court, contrary to the requirements of Order 5 rule 1(2) of *The Civil Procedure Rules*.

It is no doubt true that a litigant must be vigilant and ensure service is effected within the time prescribed by the rules. But in this case, the motions were not issued to the applicant for service after they were signed and sealed on 14th June 2016. Where a litigant goes before Court and asks for the assistance of the Court, it is incumbent on the Court, if it does not leave the litigant to his own devices, to ensure that court process is issued in a timely manner for service. In this case, service was effected, not by the applicants or their counsel, but by court. If the Court in effecting service makes a mistake, then the mistake is that of the Court, not the litigant. The Court cannot hold the litigant responsible for a mistake which it itself caused. There is no higher principle for the guidance of the Court than the one that no act of Courts should harm a litigant and it is the duty of Courts to see that if a person is harmed by a mistake of the Court, he or she should be restored to the position he or she would have occupied but for that mistake. This is aptly summed

up in the maxim: *Actus curiae neminem gravabit*. In the instant case, it was the error of this Court in serving the notices of motion out of time and it is this Court which must undo the error. The error cannot be undone by shifting the blame on the applicant, who is expected to rely upon this Court to act in accordance with the rules of procedure. For those reasons the argument of belated service invalidating the applications, is unsustainable.

The other argument raised by counsel for the respondents is the mootness of the applications since most of the respondents have completed their various courses of study. An application is moot if it does not present a concrete controversy. A court's competence to resolve legal disputes is rooted in the adversary system. A full adversarial context, in which both parties have a full stake in the outcome, is fundamental to our legal system. Secondly, judicial economy requires that a court examines the circumstances of a case to determine if it is worthwhile to allocate scarce judicial resources to resolve the moot issue. Thirdly, there is a need for courts to be sensitive to the effectiveness or efficacy of judicial intervention and demonstrate a measure of awareness of the judiciary's role in our political framework. Therefore, the doctrine of mootness is part of a general policy that a court may decline to decide a case which raises merely a hypothetical or abstract question. An application is moot when a decision will not have the effect of resolving some controversy affecting or potentially affecting the rights of the parties. A live controversy must be present not only when the action or proceeding is commenced but also when the court is called upon to reach a decision. The general policy is enforced in moot cases unless the court exercises its discretion to depart from it. The approach with respect to mootness involves a two-step analysis. It is first necessary to determine whether the requisite tangible and concrete dispute has disappeared rendering the issues academic. If so, it is then necessary to decide if the court should exercise its discretion to hear the case.

I have considered the basic facts and the matters in controversy between the parties to the instant application. As observed earlier, these applications raise two broad key issues; one regarding the jurisdiction of a Registrar of this Court over civil contempt of court proceedings and the other about the extent of the powers of this court when granting prerogative orders on judicial review in respect of the internal administrative or management decisions of academic / training institutions of higher learning. Considering this court's role in clarification of the law so as to

guide future conduct, these are matters in my view, which need to be addressed on merit, even when most of the respondents may probably not be affected by the findings of court. With regard to the seventh and eighth respondents, the requisite tangible and concrete dispute has not disappeared so as to render the issues academic. In the circumstances, absence of an adversarial relationship in respect of the majority of the respondents should be of little concern. I am therefore inclined to exercise my discretion in favour of determining the issues on merit.

Turning to the powers of a Registrar of this court in matters relating to proceedings for civil contempt of court, the same issue arose in *Florence Dawaru v. Angumale Albino and another*, H.C. Misc. Application No. 96 of 2016. There it was decided, after reviewing the relevant law, that the power to punish for civil contempt, other than contempt in the face of the court, cannot be read into the jurisdiction expressly conferred by Order 50 of *The Civil Procedure Rules*. That power is neither incidental nor ancillary to the auxiliary jurisdiction of a Registrar. Civil contempt proceedings at the instance of a party to litigation seek relief of a substantive as opposed to one of a procedural nature, the latter of which Order 50 of *The Civil Procedure Rules* is designed for. A Registrar therefore has primary auxiliary Jurisdiction to deal only with those matters expressly prescribed by that Order and exercise powers ancillary or incidental thereto. Consequently, a Registrar who exercises jurisdiction to impose a sanction for civil contempt at the instance of a party to litigation, acts without jurisdiction and the resultant orders are a nullity. On that account, the impugned orders imposed on the applicant in the contempt of court proceedings are hereby set aside.

In her paragraphs 18, 19 and 20 of the affidavit in support of the application for setting aside the orders of the Assistant Registrar, and paragraph 14 of the one in support of the application for review, the applicant averred that the orders of this court have made it very difficult for the institution's administration to manage its affairs in relation to the respondents. This is because the orders put the institution's administration, and particularly the first applicant, at the peril of being held in contempt of court whenever any decisions are made in respect of the respondents. Order 46 rule 1 of *The Civil procedure Rules* empowers this court to review a decision where an error is apparent on the face of the record. The case of *Nyamogo and Nyamogo Advocates v. Kago* [2001] 2 EA 173 defined it thus:

An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.

Under Order 46 rules 1 and 8 of *The Civil Procedure Rules*, a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. Any illegality brought to the attention of the court should not be ignored and the tendency of courts is to overlook any procedural impropriety there may have been in bringing such illegality to the attention of court (see *Makula International Limited v His Eminence Cardinal Nsubuga and another Civil Appeal Number 4 of 1981*). It is a statutory duty this court is obliged to perform with or without a formal application. In *Outa Levi v. Uganda Transport Corporation [1975] H.C.B 353*, it was held that an application for review of a decree or order ought to be made to the judge who made it, except where that judge is no longer member of the bench in which case review could be by another judge. However, that is not the only situation in which an order may be reviewed by a Judge other than the one who made the order. This being an application for review placed before a Judge who did not deliver the decision sought to be reviewed, the jurisdiction to grant the orders sought is derived from Order 46 rule 2 of *The Civil Procedure Rules* which provides as follows;

An application for review of a decree or order of a court upon some ground other than the discovery of the new and important matter or evidence as referred to in rule (1) of this order or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree shall be made only to the Judge who passed the decree or made the order sought to be reviewed.

The error as I understand it being raised here is that the court exceeded the limits of its authority and stepped into the shoes of the decision maker by deciding on the merits when it issued the prerogative orders against the applicants. As a general proposition, judicial review proceedings are not concerned with the merits but with the decision making process. In order to succeed in an application for judicial review, the applicant has to show that the impugned decision is tainted with illegality, irrationality or procedural impropriety. Illegality occurs when the decision-making authority commits an error of law in the process of taking the decision or performing the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is where there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or the duty to act with procedural fairness towards persons affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision (see *Council of Civil Unions v. Minister for the Civil Service* [1985] AC 2; *An Application by Bukoba Gymkhana Club* [1963] EA 478 at 479 and *Pastoli v. Kabale District Local Government Council and Others* [2008] 2 EA 300).

According to section 3 of *The Universities and other Tertiary Institutions Act, 7 of 2001*, among the objectives of the Act is to streamline the establishment, administration and standards of Universities and other institutions of Higher Education in Uganda and “to establish and develop a system governing institutions of higher education.....while at the same time respecting the autonomy and academic freedom of the Institutions....” In dealing with institutions of higher learning, courts have the practice of treading carefully in order not to compromise the traditional concept of “University autonomy”. This is because institutions of higher learning, when controlled and managed by governmental agencies will, like mercenaries, promote the political purposes of the State. Governmental domination of the educational process has the undesirable effect of stifling freedom of individual development which is the basis of democracy. Exclusive

control of education by the State has been an important factor in facilitating the maintenance of totalitarian tyrannies, hence the attempt by the Act to provide for governmental regulation but which at the same time respects the autonomy and academic freedom of the institutions. The evil sought to be curbed; following the liberalisation of tertiary education was the indiscriminate mushrooming or proliferation of public and private institutions of higher learning in an environment devoid of guidelines, resulting in diluted standards, unplanned growth, inadequate facilities and lack of infrastructural facilities in such institutions, but not subjugating them.

“Autonomy” is the right (and condition) of power of self government, (see, *Black's Law Dictionary*, 6th Edition, 1991 at Page 134); the state of independence, to mean, to live according to its own laws (see *Bouvier's Law Dictionary* Vol. 1, 1914 Edition, at page 296 and *Webster's Dictionary*, New Revised and Expanded Edition, at page 27). In this regard, the proper sphere of “University autonomy” lies principally in three fields; the selection of students; the appointment and promotion of teaching staff; the determination of courses of study, methods of teaching and the selection of areas and problems of research. Subject to the standards set by the National Council for Higher Education, institutions of higher learning have the right to; constitute a governing body, determine courses of study, determine the methods of teaching and the selection of areas and problems of research, admit and discipline students, set up a reasonable fee structure, appoint staff (teaching and non-teaching) and to take action if there is dereliction of duty on the part of any employees, by virtue of that concept. A careful analysis of the various provisions of *The Universities and other Tertiary Institutions Act, 7 of 2001* will further go to show that the role conferred upon the National Council for Higher Education vis-a-vis Universities and other tertiary institutions is limited to the purpose of ensuring the proper maintenance of norms and standards in the tertiary education system so as to conform to the standards laid down by it, with no further or direct control over such universities and institutions.

The autonomy though is subject to reasonable restrictions in the larger interest of the society and for the sake of better management. According to Prof Sir William Wade in his learned work, *Administrative Law*:

The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of [his property] just as he may wish. He may act out of malice or a spirit of revenge,

but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them.

Therefore, the autonomy of institutions of higher learning is restricted and controlled by the rule of law. Autonomy of universities and other tertiary institutions should not mean a permission for authoritarian functioning since “autonomy” is not “autocracy.” The autonomy of such institutions is restrained by the requirement to act within the powers vested in law viz., *The Universities and other Tertiary Institutions Act, 7 of 2001*, and subject to any other law validly made by Parliament. They are enjoined by article 42 of *The Constitution of the Republic of Uganda, 1995* and the relevant enabling enactments, to employ fair, efficient, lawful and expeditious procedures in their administrative decisions. The court will therefore intervene where it is claimed that the Act, the statutes and the regulations framed by the governing body of the university or public tertiary institution are illegal, unreasonable, arbitrary, or are not pertinent to the operation and welfare of the educational process or where the student has been unnecessarily denied a constitutionally protected right. In adjudicating upon disciplinary charges, the functions of the institutions’ administration are separate and distinct from their functions in running the institutions; the former are subject to the supervision of the courts in their compliance with the rules of natural justice. The basis of the exercise of supervisory jurisdiction by the courts is that the universities and tertiary institutions are public decision makers. Where statutory duties are imposed upon university or other public tertiary institution committees and tribunals, those

duties are public duties and courts will enforce, and control compliance with, the Act. The Act must be read as a whole and effect must be given to its provisions in accordance with its general scheme.

However, in recognition of the concept of “University autonomy,” courts have to tread with caution to avoid interfering with internal administrative matters of a university or other institution of higher learning, but if the actions are capricious or unreasonable or the rights of the students guaranteed by the Constitution have been infringed, the court will be entitled to grant a remedy. The Court of Appeal of Kenya in *Nyongesa and four others v. Egerton University College* [1990] KLR 692, had this to say;-

Courts are loathed to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that a decision has been made without fairly and justly hearing the person concerned or the other side, it is the duty of the courts to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people. Whatever the status and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings or inquiry are of an internal disciplinary character.

For example in *King v. University of Saskatchewan*, [1969] S.C.R. 678, the appellant had, after several attempts, failed to obtain the standing required by the law school of the respondent university which would have entitled him to the degree of bachelor of laws. A special committee was appointed by the president of the university to consider an appeal by the appellant from the decision of the law school, and, after holding a number of hearings, the committee rendered its report which concluded with the recommendation that due to special circumstances and for compassionate reasons the appellant be granted his degree in law. This report was, considered by an executive committee of the faculty council, and the executive committee, refusing to accept the recommendation of the special committee, recommended to the faculty council that the appellant be not granted the degree. The reports of the special committee and of the executive were presented to the council and the council agreed with the recommendation of the executive that the degree not be granted. The appellant then appealed to the chancellor. The latter considered the appeal to be one to the senate of the university and, in accordance with the

provisions of statute XII of the statutes of the senate, he appointed a committee consisting of himself, the president of the university and three deans. Unlike the earlier hearings and meetings of the various university bodies, where the appellant was neither present nor represented by counsel, at the hearing of the senate committee the appellant was present in person and represented by counsel. The committee refused to allow the appeal.

An application for mandamus requiring the university through its faculty council to hear and determine the appeal of the applicant was dismissed on the ground that an examination of the facts showed that there was no lack of natural justice before the senate appeal committee and that the proceedings in fact were carried out with the full knowledge and approval of the appellant and his counsel. Any possible failure of natural justice before the special appeal committee, the executive committee or the full faculty council, was quite unimportant when the senate, the appeal body under the provisions of The University Act, and also the body in control of the granting of degrees, had exercised its function with no failure to accord natural justice. If there were an absence of natural justice in the inferior tribunals, it was cured by the presence of such natural justice before the senate appeal committee.

As to the submission that in each case when the appellant's appeals were being considered by the successive tribunals, there was a duplication of membership in the body with the earlier tribunal, the Court was not ready to agree that such duplication would result in any bias or constitute a breach of natural justice. In such matters as were the concern of the various university bodies here, duplication was proper and was to be expected. It was significant that no member of any of the bodies was a member of the law faculty, and that when the dean or members of that faculty attended any of the bodies they withdrew before voting.

Similarly in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, section 78 (1) (c) of *The University of Regina Act* provided that the University Council shall: (c) appoint a committee to hear and decide upon, subject to an appeal to the senate, all applications and memorials by students or others in connection with any faculty of the university; Section 33 (1) (e) of the Act provided that the senate shall: (e) appoint a committee to hear and decide upon appeals by students and others from decisions of the Council; In his certiorari and mandamus proceedings

the appellant prayed that the decision taken by the committee of the council on September 27, 1976, be quashed and that a writ of mandamus issue ordering the University to hold a hearing pursuant to s. 78(1) (c) of the Act and to allow applicant to be heard, to present evidence and to be represented by counsel. Neither in his application for certiorari and mandamus nor in his affidavit did the appellant allege or swear that the faculty or the committee of the council were biased, acted in bad faith or were inspired by any improper motive. The sole basis of his application was that he was not heard by the committee of the council. As regards the discretionary nature of certiorari and mandamus and while justifying its decision not to grant certiorari and mandamus, because the appellant should have pursued his right of appeal to the university senate before resorting to prerogative writs, the court explained;

Sections 78 (1) (c) and 33 (1) (e) [of the University Act] are inspired by the general intent of the Legislature that intestine grievances preferably be resolved internally by the means provided in the Act, the university thus being given the chance to correct its own errors, consonantly with the traditional autonomy of universities as well as with expeditiousness and low cost for the public and the members of the university. While of course not amounting to privative clauses, provisions like ss. 55, 66, 33 (1) (e) and 78 (1) (c) are a clear signal to the courts that they should use restraint and be slow to intervene in university affairs by means of discretionary writs whenever it is still possible for the university to correct its errors with its own institutional means. In using restraint, the courts do not refuse to enforce statutory duties imposed upon the governing bodies of the university. They simply exercise their discretion in such a way as to implement the general intent of the Legislature.

Beetz J. then reached the conclusion that Harelkin's right of appeal to the university senate committee was an adequate alternative remedy and that the lower court should therefore have exercised its discretion not to grant a remedy. From the perspective of the applications at bar, the most important elements of that reasoning is that it followed upon the traditional deference to the available administrative appeal mechanisms within the academic institution before court may exercise its discretion to grant prerogative orders. In the above passage, it is suggested that courts are not an appropriate forum for resolution of a particular kind of disputes that have a bearing on the autonomy of institutions of higher learning.

Section 78 (1) of *The Universities and other Tertiary Institutions Act, 7 of 2001*, vests in the Governing Council of a tertiary institution, the authority of a governing body of the Public

Tertiary Institution and power to exercise the general management of the affairs of the Tertiary Institution and exercise general control of the property of the institution. It has the duty under section 87 (1) of the Act, in consultation with the Education Service Commission, to make regulations for the discipline of the students of the Institution as it may deem fit. Under section 80 (1) (b) of the Act, it also has authority to appoint a Student's Affairs Committee, and in section 80 (2), to delegate any of its functions or powers to any committee. According to section 83 (2), the Principal of a tertiary institution is the chief academic and administrative officer of the Public Tertiary Institution. Under section 87 (2) of the Act, in case of misconduct by a member of staff, which in the opinion of the Principal, is prejudicial to the interests of the Tertiary Institution, the Principal may suspend the member and any such suspension should forthwith be reported to the Governing Council.

A careful analysis of the various provisions above mentioned shows that the Principal of a public tertiary institution and its Governing Council, are not under administrative control of Government in the day to day functioning of the institution, rather, they have to act in accordance with the law, the statutes and the regulations framed by the governing body of the Public Tertiary Institution. Even though their scope of action is limited either by regulation or because of their dependence on government funds, each public tertiary institution has its own governing body, manages its own affairs, allocates its funds and pursues its own goals within the legislated limitations of its incorporation. Although Parliament has determined much of the environment in which universities and other tertiary institutions operate, the reality is that they function as autonomous bodies within that environment. Any attempt by government or courts to influence university and public tertiary institution decisions, especially decisions regarding appointment, tenure and dismissal of academic staff, as well as admission, academic progress and disciplinary action over students would violate the concept of minimal state intervention and enhance the possibility of breaches of academic freedom, hence the traditional deference to internal controls. School boards have been acknowledged to have broad express or implied powers to adopt policies and regulations relating to student conduct. In *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 507 (1969) for example, the United States Supreme Court stated: "the Court has repeatedly emphasised the need for affirming the comprehensive authority of the

states and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”

The Universities and other Tertiary Institutions Act, 7 of 2001, does not alter the traditional nature of universities and tertiary institutions as communities of scholars and students enjoying substantial internal autonomy. Their governing bodies function as domestic tribunals when they act in a quasi-judicial capacity. The Act countenances the domestic autonomy of the universities and other tertiary institutions by making provision for the resolution of conflicts internally within the institutions. Sections 87 (1), 80 (1) (b) and 80 (2) are in my view inspired by the general intent of Parliament that intestine grievances of those institutions preferably be resolved internally by the means provided in the Act. Universities and tertiary institutions thus being given the chance to correct their own errors, consonantly with the traditional autonomy of universities and tertiary institutions as well as with expeditiousness and low cost for the public and the members of the university or tertiary institution. These provisions are a clear signal to the courts that they should use restraint and be slow to intervene in universities’ and other tertiary institutions’ affairs by means of discretionary writs whenever it is still possible for the university or tertiary institution to correct its errors with its own institutional means. In using restraint, the courts do not refuse to enforce statutory duties imposed upon the governing bodies of the universities or tertiary institutions. They simply exercise their discretion in such a way as to implement the general intent of the Legislature. I believe this intent to be a most important element to take into consideration in resolving this case, and indeed to be a conclusive one.

In this light, courts support the proposition that Parliament attached importance on aggrieved students proceeding through the stages of internal complaints and dispute resolution mechanisms established by the Act, the statutes and the regulations framed by the governing body of the Public Tertiary Institutions for the protection of student rights and interests. Where there is a right of appeal entailed within the administrative organs and structures under that system of statutes and regulations, the prerogative remedies should not be granted except under special circumstances. The courts should not use their discretion to promote delay and expenditure associated with litigation unless there is no other way to protect a right. I believe the correct view was expressed by O’Halloran J. in *The King ex rel. Lee v. Workmen's Compensation Board*,

[1942] 2 D.L.R. 665 at pp. 677- 678 when dealing with mandamus but equally applicable to certiorari:

Once it appears a public body has neglected or refused to perform a statutory duty to a person entitled to call for its exercise, then mandamus issues *ex debito justitiae*, if there is no other convenient remedy ... If however, there is a convenient alternative remedy, the granting of mandamus is discretionary, but to be governed by considerations which tend to the speedy and inexpensive as well as efficacious administration of justice.

It has nevertheless been expressed by some sources such as Wade in his *Administrative Law* (4th ed., (1977) at p. 561-2 that:

There is no rule requiring what is sometimes called the exhaustion of administrative remedies. One aspect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened. There is therefore no need first to pursue any administrative procedure or appeal in order to see whether the action will in the end be taken or not.

A similar opinion is expressed in the third edition of Professor de Smith's book *Judicial Review of Administrative Action*, at pp. 209-210 as follows:

Although breaches of natural justice used to be assignable as "errors in fact," a ground of challenge presupposing that the impugned order was merely voidable, there is a substantial body of recent judicial decisions to the effect that breach of the *audi alteram partem* rule goes to jurisdiction (or is akin to a jurisdictional defect) and renders an order or determination void..... a determination thus tainted can be collaterally impeached by mandamus; recourse to administrative or domestic appellate procedures is not a necessary preliminary to impugning the determination in the courts; prior recourse to such procedures is not to be construed as a waiver of the breach, nor can an appeal in the strict sense cure the vice of the original determination for one cannot appeal against a nullity and the appellate proceedings should also be treated as void.

Although a person aggrieved by an invalid decision will not be required first to exhaust administrative or domestic appellate remedies as a condition precedent to impugning that decision in the courts, the exception is the availability of a hearing *de novo* on appeal to a body within the university or tertiary institution capable of exercising original jurisdiction. The capacity of the remedial body may be of importance. Where the body which may grant the remedy has the capacity to exercise original jurisdiction, perhaps even hearing the matter *de*

novo, the remedy will be more often perceived as adequate, even conceivably in cases of denial of natural justice. On the other hand, the normal sort of purely appellate function will rarely be seen as capable of curing a breach of natural justice as one moves away from a right of appeal to the courts to a right of appeal to a body within the university or tertiary institution (or to a statutory tribunal see *Regina v. Paddington Valuation Officer, Ex p. Peachey Property Corporation Ltd.* [1966] 1 Q.B. 380, or an appeal to administrative officials, even ministers; see *R. v. Spalding* [1955] 5 D.L.R. 374 and, ultimately, domestic bodies; see *O’Laughlin v. Halifax Longshoremen’s Association* (1972), 28 D.L.R. (3d) 315, the alternative remedies are more frequently found to be inadequate.

The Supreme Court of Canada in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, considered the case of a university student who was required by the University of Regina to discontinue his studies. The Faculty Regulations provided, inter alia, that students who are unable to attain a satisfactory standard in their studies may be required to discontinue or withdraw. The appellant had failed to maintain the required 2.5 scholastic grade average for the courses which he had taken during the previous semesters. He appealed to a university committee which was obligated by *The University of Regina Act, 1974, S.S. 1973-74, c. 119*, to “hear and decide” the appeal. The committee heard the university’s side and, without then hearing the student, decided in the university’s favour. After the student’s request for a rehearing was refused, he launched certiorari and mandamus proceedings without making a final appeal to another committee, that of the university senate, which was also charged by the Act to “hear and decide” any appeal. Writing for the majority, Beetz J. found that certiorari and mandamus are discretionary remedies, even in cases involving lack of jurisdiction and, *a fortiori*, in cases of excess or abuse of jurisdiction, into which category breaches of natural justice were found to fall. One ground for discretionary refusal to issue these prerogative writs was the presence of an adequate alternative remedy within the administrative structure of the institution. Adequacy of such internal mechanisms was to be determined after a judicial weighing of factors, some of which were outlined by Beetz J. at p. 588, thus:

In order to evaluate whether appellant’s right of appeal to the senate committee constituted an adequate alternative remedy and even a better remedy than a recourse to the courts by way of prerogative writs, several factors should have been taken into consideration among which the procedure on the appeal, the composition of the

senate committee, its powers and the manner in which they were probably to be exercised by a body which was not a professional court of appeal and was not bound to act exactly as one nor likely to do so. Other relevant factors include the burden of a previous finding, expeditiousness and costs.

The finding is consistent with Professor De Smith's book on *Judicial Review of Administrative Action* who sums up the position in the following words (pp. 210-11) which I would like to adopt:

The present weight of authority appears to support the view that a breach of natural justice in the first instance can be rectified only by a full and fair *de novo* hearing given either (i) by the body perpetrating the original breach, or (if possible) a differently constituted body with the same powers and status, or (ii) (exceptionally) an appellate body, if that body also has original jurisdiction and exercises that jurisdiction in the particular case

Therefore, before exercising its discretion to grant a prerogative remedy, the court will examine the availability of an appellate avenue to a body within the university or tertiary institution capable of exercising original jurisdiction. Where the body which may grant the remedy has the capacity to exercise original jurisdiction, perhaps even hearing the matter *de novo*, the remedy will be more often perceived as adequate, even conceivably in cases of denial of natural justice. On the other hand, if such a body exercises a purely appellate function, it will rarely be seen as capable of curing a breach of natural justice and will be found inadequate and incapable of availing an alternative remedy.

In *Leary v. National Union of Vehicle Builders* [1970] 3 W.L.R. 434 (Ch. D.), it was held that as a general rule, a failure of natural justice could not be cured by a sufficiency of natural justice on appeal. Where an appeal hearing is a review and not a rehearing, it could not cure the defects of the first hearing (see *Andrew James Taylor v. OCS Group Ltd* [2006] EWCA Civ 702). It follows therefore that where there has been a denial of natural justice (and hence a lack of jurisdiction) certiorari will issue, notwithstanding a right of appeal to an administrative or domestic body, where that body exercises purely appellate functions. In this context the authorities draw a distinction between jurisdictional and non-jurisdictional error and between a right of appeal to an administrative or domestic tribunal and a right of appeal to the courts. Generally speaking, the

rule is that, if the error is jurisdictional, certiorari will issue *ex debito justitiae*, but if the error is error in law, then certiorari may issue. The discretion is broad when the error is non-jurisdictional and there is an appeal to the courts, but virtually disappears when the error is jurisdictional and the right of appeal, if any, is to an administrative or domestic tribunal sitting in a purely appellate role. If an applicant claims to be aggrieved by a decision made without jurisdiction or in breach of the rules of natural justice, the fact that he has not taken advantage of a statutory right of appeal should normally be regarded as irrelevant.

Glynn v. Keele University [1971] 1 W.L.R. 487, was a case where an injunction was sought involving disciplinary action in a university. The applicant had been identified as one of a number of undergraduates who had been seen naked in the precincts of the university. He was punished by the vice-chancellor by a fine of 10 pounds and by exclusion from residence for the ensuing academic year. The vice-chancellor did not give the applicant the opportunity to be heard but wrote to him to inform him of his right to appeal against his decision. The applicant wrote expressing his wish to appeal but he went abroad and, in his absence, the vice-chancellor's decision was upheld by the appeal committee. On his return, the applicant did not ask for a rehearing but sought an injunction restraining the university from excluding him from residence for the remainder of the academic year. Pennycuik V.C. held that the powers conferred on the vice-chancellor of the university to impose the penalties which he did were not merely magisterial powers of a tutor over his pupil and had to be exercised in a quasi-judicial capacity. The vice-chancellor had failed to comply with the requirements of natural justice. Nevertheless Pennycuik V.C. went on at pp. 495, 496 and 497;

I have, again after considerable hesitation, reached the conclusion that in this case I ought to exercise my discretion by not granting an injunction. I recognise that this particular discretion should be very sparingly exercised in that sense where there has been some failure in natural justice. On the other hand, it certainly should be exercised in that sense in an appropriate case, and I think this is such a case. There is no question of fact involved, as I have already said. I must plainly proceed on the footing that the plaintiff was one of the individuals concerned. There is no doubt that the offence was one of a kind which merited a severe penalty according to any standards current even today. I have no doubt that the sentence of exclusion of residence in the campus was a proper penalty in respect of that offence. Nor has the plaintiff in his evidence put forward any specific justification for what he did. So the position would have been that if the vice-chancellor had accorded him a hearing

before making his decision, all that he, or anyone on his behalf, could have done would have been to put forward some plea by way of mitigation. I do not disregard the importance of such a plea in an appropriate case, but I do not think the mere fact he was deprived of throwing himself on the mercy of the vice-chancellor in that way is sufficient to justify setting aside a decision which was intrinsically a perfectly proper one. In all the circumstances, I have come to the conclusion that the plaintiff has suffered no injustice, and that I ought not to accede to the present action.

From the authorities reviewed above, the principle that certiorari and mandamus are discretionary remedies by nature cannot be disputed. The court is entitled to refuse certiorari and mandamus to applicants if they have been guilty of unreasonable delay or misconduct or if an adequate alternative remedy exists, notwithstanding that they have proved a usurpation of jurisdiction by the domestic tribunal or an omission to perform a public duty. This is confirmed further by Lord Devlin in *Ridge v. Baldwin*, [1964] A.C. 40 at p140 where he stated that “the occurrence of a miscarriage does not require the court to quash if it is satisfied that justice can be done in some other way.”

In the instant case, the court considered Miscellaneous Civil Application No. 3 of 2015, the genesis of the series of orders that have since emanated from this court, in which the respondents claimed a failure of natural justice in the process leading up to the letters of suspension dated 20th October 2015. The letters cited or made reference to Regulation No. 17.4 and Rule 11 as justifying the suspension. Under section 87 (1) of the Act, the Governing Council had the authority in consultation with the Education Service Commission, to make regulations for the discipline of the students of the Institution as it may deem fit. The court was provided with the regulations referred to in that letter a copy of which was signed by and issued to each of the respondents, as annexure “A” to the affidavit in reply. Regulation No. 17.4 thereof at page 9 of the rules classified “insubordination and ridicule of those in authority” as an act of gross misconduct. Although rule 7 stipulates that any misconduct is subject to disciplinary action, the rules unfortunately do not provide for a disciplinary procedure. Therefore there is no evidence on record of any procedural provisions relating to a domestic tribunal within the institution to which an appeal lays, the procedure on such appeal, the composition of the appellate body, its powers and the manner in which they were probably to be exercised.

In *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, the court found that the legislature had in its wisdom decided that the senate committee should occupy a position superior to that of the academic or expert body of the council committee. It was wrong therefore to assume that, since the governing bodies of the university had erroneously failed to comply with the principles of natural justice, another governing body of superior jurisdiction would do the same. Although section 33 (1) (e) of the Act did not spell out the detailed powers of the senate appeals committee, the court found no reason to doubt that such powers comprise the ordinary powers of an appellate jurisdiction including, if the appeal be allowed, the power to set aside the decision of the council committee and render on the merits the decision that the council committee should have rendered or sent it back before the council committee for a proper hearing. Thus the court found no jurisdictional lacuna in the senate committee which could have prevented it from giving full justice to appellant. The court opined;

On the other hand, in the context of a statute providing for the constitution of a body such as a university, there is every reason to construe the word “appeal” in the most flexible manner with respect to the mode of appeal, and as capable of meaning “review”, “retrial” or “new trial”. One should also expect that, in this context, an appeal is more likely to take a form resembling that of a trial *de novo* than that of a “pure” appeal.

The court found in that case that the provisions for an appeal to senate committee did not merely empower the senate committee to hear additional or new evidence as pure appellate jurisdictions sometimes do; it was broad enough to enable the senate committee to try the case afresh. It was found to be more realistic in that case to expect that a body of laymen would abide by technically less strict standards than a professional court of appeal. The superior appellate jurisdiction of the senate committee in that case was found to equip it with the means to remedy all injustices. The court then came to the conclusion that appellant's right of appeal to the senate committee provided him with an adequate alternative remedy. In addition, that remedy was found to be a more convenient remedy for the appellant as well as for the university in terms of costs and expeditiousness. The merits of his case remained undetermined from an academic point of view and for that reason it could have been resolved fairly, within a reasonable time and at little cost to himself and to the university had he simply wanted to use all the remedies put at his disposal by the Act. The court declined to grant the prerogative remedies sought.

In the instant case, since the court was not provided with any regulations stipulating a disciplinary procedure, it was curtailed in the determination of whether or not there was in place a procedure from which it could infer that failure to respect the principle of natural justice in first instance could not be cured by the exercise of a right of appeal where the latter, apart from risking of being futile, could not be exercised except at less expense and inconvenience. Furthermore, despite the letters indicating that each of the respondents had been “suspended indefinitely pending the final decision from the governing Council,” it was not possible from the material placed before the court to tell whether in those proceedings, the governing Council exercises purely appellate functions or has the capacity to exercise original jurisdiction, perhaps even hearing the matter *de novo*. The claim by the respondents being one of a failure of natural justice, there was no basis therefore upon which the court could make a finding that the error, if it existed, could be cured by a sufficiency of natural justice on appeal to a domestic tribunal, within the institution. In any event, the claim of a failure of natural justice being jurisdictional in nature, and the applicants having failed to establish the exception, the court had no option but to apply the general rule that the respondents were not in law required first to exhaust administrative or domestic appellate remedies as a condition precedent to impugning their suspension in the courts. The court therefore, on the facts of this case, did not commit any error when it did not follow the traditional deference to internal disciplinary controls of the institution.

In undertaking the determination whether or not there was a failure of natural justice when the respondents were issued with the letters of suspension dated 20th October 2015, the court had to be mindful of the fact that the natural justice is a flexible principle as stated by H.W.R. Wade in *Administrative Law*, at p. 532 where he specifically mentioned that; “the judges emphasise that it is not possible to lay down rigid rules as to where the principles of natural justice are to apply nor as to their scope and extent. Everything depends upon the subject matter.” The duty to act fairly is flexible and changes from situation to situation, depending upon: the nature of the function being exercised, the nature of the decision to be made, the relationship between the body and the individual, the effects of that decision on the individual's rights and the legitimate expectations of the person challenging the decision (see *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C.)). The doctrine of natural justice, as a legal doctrine requires an absence of bias (*nemo iudex in causa sua*) and the right to a fair

hearing (*audi alteram partem*). It is generally accepted as applicable to administrative decision making of a quasi-judicial nature. The duty to act fairly is specifically applicable to decisions that are likely to have serious adverse effects on someone's rights, interests or status.

The purpose of the participatory rights in such situations is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. In *Wood v. Woad*, (1874) L.R. 9 Ex. 190, at 196, Kelly. C.B. held that the *audi alteram partem* rule “is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals,” and further in *Fisher v. Keane*, 11 Ch. D. 353 at 363 by Lord Jessel, M.R., that “clubs, or by any other body of persons who decide upon the conduct ought not, as I understand it, according to the others, to blast a man’s reputation for ever, perhaps to ruin his prospects for life, without giving him an opportunity of either defending or palliating his conduct.” Furthermore, according to the decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (S.C.C), it was decided that the duty of fairness owed in such circumstances is more than minimal, and the claimant and others whose important interests are affected by the decision in a fundamental way must have been given a meaningful opportunity to present the various types of evidence relevant to their case and have it fully and fairly considered.

The facts as established before the court were that; following the violent student demonstration of 31st July 2015 a meeting of the Governing Council was convened on 22nd August 2015, where after the Chairman of the Governing Council issued the respondents with warning letters dated 26th August 2015. In those letters, the respondents were accused of leading the student demonstration and of having, without authority of the institution’s administration, written to officials in the Ministry of Education and another to the Arua Regional Referral Hospital, purportedly as the institution’s administration, stopping all clinical school programmes ran at the hospital. Their actions were characterised as “impersonation, insubordination and ridicule of authority” in violation of “Rule 17 (4) punishable by automatic dismissal.” The letter had the

following concluding paragraph; “However, the Council resolved that you should be served with this warning letter as the last warning. If any other case is raised against you, you will be dismissed from the program without any further notice.”

On 20th October 2015, following deliberations and a resolution of the Disciplinary Committee at its meeting of 19th October 2015, the first applicant issued the respondents with letters suspending them from the various academic programmes to which they were enrolled. They were suspended variously for; being ring-leaders, leading, commanding and participating in an unlawful demonstration, attempted assault of the Registrar, assault of one of the Tutors, recalling discontinued students, insubordination, impersonation of the institution administration, character assassination and communicating an abusive statement to the institution administration, communicating wrong information of the media regarding the marking of exams, and refusal to apologise for all that misconduct since July 2015. They were “suspended indefinitely pending the final decision from the Governing Council.” The thirteenth and sixteenth respondents, who had by then registered for the examination of November 2015, were expressly permitted to sit the exams but as non-residents. None of the sixteen students left the institution’s campus but instead filed an application for the prerogative orders of certiorari and an injunction (Miscellaneous Cause No. 3 of 2015) on 6th November 2015. An interim order was issued on 10th November 2015 directing that the “the *status quo* prior to the indefinite suspension be maintained and the applicants allowed unconditionally to resume their studies.” Presumably due to the then ongoing litigation, the respondents did not participate in the examinations that were conducted from 23rd November 2015 to 27th November 2015. The final orders of court were made on 17th February 2016, granting the order of certiorari, declaring the suspension illegal, restraining the applicants from making any further decision against the respondents in respect of the demonstration of July 30th 2015 before according each and all of them an opportunity to be fairly heard and also restraining them from blocking or preventing any of the students from resuming and continuing with any program each of them had been pursuing.

The respondents contended that prior to the warning letters of 26th August 2015 and the subsequent suspension letters of 20th October 2015, none of them was notified of the charges against them, and none was given an opportunity to be heard before any of the two decisions was

taken. They contended that the decisions were taken maliciously, were irrational, illegal and a product of procedural irregularities. On their part, the applicants argued that both measures were taken pending further investigations into the conduct of the respondents and final determination of their fate by the institution's Governing Council and therefore were justified. The question in these proceedings is whether there was an error apparent on the record in the way this court went about the issuance of the final orders.

The actions undertaken by the applicants against the respondents were of a disciplinary nature. Such actions result from proceedings of a quasi-judicial nature in that they involve the application of the institution's rules of conduct to individual situations, in a court-like setting. Quasi-judicial decision-makers are expected to hold hearings, apply the rules of evidence, investigate facts or ascertain the existence of facts, and draw legal conclusions from those facts. Proceedings of this nature thus involve two key elements: i) the finding of facts regarding the specific complaint and, ii) the use of judgment and discretion to analyse those facts as applied to predetermined standards expressed in rules or regulations. Although Courts impose fairly strict procedural requirements on quasi-judicial decision-makers in order to protect the legal rights of the parties involved, and even though in proceedings of this nature certain ways and methods of judicial procedure may very likely be imitated, and that lawyer-like methods may find special favour from lawyers, but the judiciary should not presume to impose its own methods on administrative or executive officers (see *Local Government Board v. Arlidge*, [1915] A.C. 120).

Therefore, being quasi-judicial decision-makers, the applicants were free, within reason, to determine their own procedures, adapted to suit the nature of the complaint and the circumstances of the case. A body will be quasi-judicial body if it has (i) a legal authority, (ii) to determine questions affecting the rights of the subject and (iii) under duty to act judicially by receipt of a case, ascertainment of the fact by means of evidence, over a dispute involving two or more parties, a question of law and the decision thereon involves application of law to the facts with a result that is likely to prejudicially affect one of or both parties. It would be wrong though to ask of the applicants, in the discharge of their quasi-judicial duties, to meet the high standard of technical performance which one may properly expect of a court. All that was required of the applicants was to have done their best to act justly, and to reach just ends by just means, i.e.

acting honestly and by honest means. The nature of this standard was explained in *De Verteuil v. Knaggs and Another* [1918] A.C. 557, as “a duty of giving to any person against whom the complaint is made a fair opportunity to make any relevant statement which he may desire to bring forward and a fair opportunity to correct or controvert any relevant statement brought forward to his prejudice.” Natural Justice is another name of commonsense Justice or the duty to act fairly.

By virtue of the duty to act fairly, at a minimum a quasi-judicial process requires an impartial decision-maker and a decision based solely on legitimately acquired, presented, and considered evidence. The minimum procedural requirements are that; notice of the charges / complaint should be given to the person to be affected by the decision, that person should be allowed their right to present evidence and to cross examine adverse witnesses, the quasi-judicial decision-maker should not indulge in *ex-parte* communication and the process should allow for impartial voting or other means of decision making. Quasi-judicial action must not be illegal, irrational or arbitrary. The duty to act fairly applies in every case. A higher procedural standard of justice is required only when the right to continue in one’s profession or employment is at stake (see *Abbott v. Sullivan* [1952] 1 K.B. 189).

Natural justice requires that an individual shall not be penalised by a decision affecting his or her rights or legitimate expectations unless he or she has been given prior notice of the case against him or her, a fair opportunity to answer it and the opportunity to present his or her own case. Each individual must have the opportunity to present his or her version of the facts and to make submissions on the relevant principles of the rules and the allegations against him or her. The right to a fair hearing involves prior notice of the hearing, opportunity to be heard, fairness in conduct of the hearing, right to legal representation and the decision and the reasons for it. However, there are certain exceptions to this general rule; - where the requirement of natural justice is excluded by statutory provisions or constitutional provisions. It is also excluded in case of legislative acts, in case of public interest, in case of emergency or necessity, in case of confidentiality, in case of academic adjudication, in case of fraud, on the ground of impartibility, when no right of the person is infringed, and in case of interim preventive action.

As to whether that duty to observe the rules of natural justice exists at all and its extent in student disciplinary proceedings resulting in a suspension was discussed in *Goss v. Lopez*, 419 U.S. 565 (1975). In that case, nine students, eight high school students and one middle school girl, were suspended from Central High School (Columbus, Ohio) for 10 days for destroying school property during a lunchroom commotion and disrupting the learning environment. One of the students suspended claimed to have been an innocent bystander to the disturbance. Each of the students, who had been suspended from schools in the Columbus, Ohio, Public School System due to various incidents arising during a period of student unrest, instituted a class action suit against their respective school administrators. The plaintiffs sought declaratory and injunctive relief, asserting that § 3316.66 of the Ohio Revised Code was unconstitutional in that it permitted public school officials to deprive them of their rights to an education without a hearing in violation of the due process clause of the fourteenth amendment. Ohio law provided for free education to all children between the ages of six and 21. Specifically, Ohio Law § 3313.66 empowered the school principal to suspend students for 10 days or expel them. In either case, he or she was required to notify the student's parents within 24 hours and state the reasons for his or her action. A pupil who was expelled, or his or her parents, had a right to appeal the decision to the Board of Education and in connection therewith "shall be permitted to be heard at the board meeting." The Board had the discretion to reinstate the pupil following the hearing. No similar procedure was provided for in that section or any other provision of state law for a suspended student. A three-judge District Court struck down the law as a violation of students' right to due process of law, declaring that appellants, various high school students in the CPSS, were denied due process of law in that they were temporarily suspended from their high schools without a hearing either prior to suspension or within a reasonable time thereafter, and enjoining the administrators to remove all references to such suspensions from the students' records.

An appeal by various administrators of the Columbus, Ohio, Public School System (CPSS) challenged the judgment of the three-judge federal court. The United States Supreme Court decided that; having chosen to extend the right to an education to people of appellants' class generally, Ohio could not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct had occurred. The Court found each of the suspensions involved here to have occurred without a hearing, either before or after the

suspension, and that each suspension was therefore invalid and the statute unconstitutional insofar as it permitted such suspensions without notice or hearing. Due process required, in connection with a suspension of 10 days or less, that the student be given notice of the accusation, an explanation of the evidence, and an opportunity to proffer a vindication. It decided further that students facing a temporary suspension from a public school have a “property interest in educational benefits” and a “liberty interest in reputation” which require protection under the due process clause of the fourteenth amendment from arbitrary deprivations. Commenting on the power and procedures of suspension, Justice Byron R. White who delivered the opinion of the Court, on behalf of a narrow 5-4 majority stated as follows;

Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process. The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device. The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer the untrammelled power to act unilaterally, unhampered by rules about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done. We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.

There need be no delay between the time “notice” is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is. We stop short of construing the Due Process Clause to require, countrywide, that

hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process. On the other hand, requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.

We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.

In their dissenting judgments, Mr. Justice Powell, with whom the Chief Justice, Mr. Justice Blackmun, and Mr. Justice Rehnquist join, stated;-

The Court today invalidates an Ohio statute that permits student suspensions from school without a hearing "for not more than ten days." The decision unnecessarily opens avenues for judicial intervention in the operation of our public schools that may affect adversely the quality of education. The Court holds for the first time that the federal courts, rather than educational officials and state legislatures, have the authority to determine the rules applicable to routine classroom discipline of children and teenagers in the public schools. It justifies this unprecedented intrusion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension.

The Court's decision rests on the premise that, under Ohio law, education is a property interest protected by the Fourteenth Amendment's Due Process Clause and therefore that any suspension requires notice and a hearing. In my view, a student's

interest in education is not infringed by a suspension within the limited period prescribed by Ohio law. Moreover, to the extent that there may be some arguable infringement, it is too speculative, transitory, and insubstantial to justify imposition of a constitutional rule.

I find merit in the dissenting opinion to the extent that the right to education cannot and does not mean a right to education without discipline. Students cannot claim violations of natural justice when they are; excluded from extracurricular activities, failed from a course, promoted, required to take certain subjects, transferred from one school to another, or admitted to a distant school. In my view the requirements of natural justice will in some circumstances be satisfied by the student being given written notice of the decision and the “reasons therefor” at the time of suspension, with an indication as to when and before which disciplinary body the full extent of those rights will be exercised and the final decision will be made. H.W.R. Wade, in his *Administrative Law*, at p. 532 has specifically mentioned that;

The judges emphasise that it is not possible to lay down rigid rules as to where the principles of natural justice are to apply nor as to their scope and extent. Everything depends upon the subject matter. In the application of concept of fair play there must be real flexibility and there must also have been some real prejudice to the complainant. There is no such thing as a merely technical infringement of natural justice

I also note that in the majority decision in *Goss v. Lopez*, 419 U.S. 565 (1975), the Supreme Court agreed with the District Court indicating that;

Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable.

The concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens. Lord Denning M.R. in *R. v. Secretary of State for Home Department, ex p. Mughal* [1974] Q.B. 313 at p 325 correctly observed that “the rules of natural justice must not be stretched too far. Only too often the people who have done wrong seek to invoke the principles of natural justice in order to avoid the consequences and such type of ground should be treated with great suspicion so that the

principles of natural justice may not be extended. The justification in many cases for a hearing is, precisely, because the seemingly guilty are revealed to be innocent.”

For example in *Bethel School District v. Fraser*, 478 U.S. 675 (1986), the respondent was suspended from school in the Bethel School District for making a vulgar speech at a school assembly, using a style of expression that was sexually vulgar. He gave a speech while nominating a classmate for Associated Student Body vice president. The compulsory assembly was part of a school-sponsored educational program in self-government. The speech was filled with elaborate, graphic, and explicit sexual metaphor and sexual innuendos, but not obscenity, prompting disciplinary action from the administration. He stated; “I know a man who is firm.... he's firm in his pants, he's firm in his shirt, his character is firm, but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts, he drives hard, pushing and pushing until finally, he succeeds. Jeff is a man who will go to the very end, even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president, he'll never come between you and the best our high school can be.”

Two of his teachers, with whom he discussed the contents of his speech in advance, had informed him that the speech was “inappropriate and that he probably should not deliver it,” and that his delivery of the speech might have “severe consequences.” A disciplinary rule prohibiting the use of obscene language in the school provided: “Disruptive Conduct - Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.” The morning after the assembly, the Assistant Principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. He was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was given a chance to explain his conduct and he admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. He was then informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises. After appealing through the grievance procedures of his school, he was still found to be in violation of several school policies against disruptive behaviour and the

use of vulgar and offensive speech. He then filed a lawsuit against the school authorities claiming a violation of his First Amendment right to free speech. He argued that the school's disruptive conduct rule was unconstitutionally vague and overbroad, and that the removal of his name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment because the disciplinary rule makes no mention of such removal as a possible sanction. He contended that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions. The United States District Court judge ruled in his favour. The school district then appealed to the US Ninth Circuit Court of Appeals, which ruled in his favour as well. The school district then appealed to the United States Supreme Court which held at page 686, inter alia that;

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers, and indeed the older students, demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.....There is no merit to respondent's contention that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech would subject him to disciplinary sanctions. Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. The school disciplinary rule proscribing "obscene" language and the pre-speech admonitions of teachers gave adequate warning to respondent that his lewd speech could subject him to sanctions..... maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.....We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.

The administrative organs of Universities and tertiary institutions must be given wide latitude to determine what forms of conduct are inconsistent with their educational mission. They have the authority to proscribe conduct considered to be disruptive of or inconsistent with the institution's

educational mission and prescribe sanctions for such conduct. Such rules only need to give adequate warning but need not be as detailed as a criminal code. They only need to provide an unequivocal prohibition, a fair notice of the scope of the prohibition and the consequences of its violation. If the rules are sufficiently unambiguous that, without a further explanation or construction, they can advise the reader as to what conduct is forbidden, they are sufficient and serve the purpose.

When imposing the sanction of suspension stipulated in such rules or regulations, the decision in *Goss v. Lopez*, 419 U.S. 565 (1975) advances three propositions; the first is that where the continued presence of the student on the institution premises poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process, the student may be immediately removed from school by way of suspension in which case the necessary notice and rudimentary hearing should follow as soon as practicable. The second is that brief disciplinary suspensions may be preceded by an informal hearing permitting the student to give his or her version of the events for as long as the degree of informality does not compromise the prevention of erroneous action. Thirdly, for longer periods of suspension, the suspension ought to be preceded by a formal process in which notice of the charges / complaint should be given to the student, the student should be allowed the right to present evidence, allow the student to present his or he own witnesses and to cross examine adverse witnesses, the quasi-decision maker may exercise the discretion, himself or herself, to summon the accuser, and in more difficult cases, permit the student to be represented by counsel. In determining the level of required compliance with the rules of natural justice, attention is fixed on the gravity of consequences as the test. In that regard, suspension that does not rise to the level of a penal sanction does not call for the full panoply of rules of natural justice and procedural due process.

In respect of the respondents, the first sanction that was imposed by the applicants was a final warning by way of letters dated 26th August 2015 accusing each of them of “impersonation, insubordination and ridicule of authority” in violation of “Rule 17 (4) punishable by automatic dismissal.” The Governing Council directed that they be served with this warning letters “as the last warning. If any other case is raised against you, you will be dismissed from the program without any further notice.” For all intents and purposes this was disciplinary action that was

taken against each of the respondents. There is no evidence on record that the applicants applied any of the three levels of compliance with the rules of natural justice leading up to that decision.

This was followed two months later by letters of suspension dated 20th October 2015 indicating that the decision to suspend the respondents was taken at a disciplinary committee meeting of 19th October 2015. The minutes of that meeting, attached as annexure “H” to the first applicant’s affidavit in reply filed in Miscellaneous Civil Application No. 0003 of 2015 indicate that “the students were called to come and defend themselves but none of them turned up....the students will then have to go on suspension with their parents and the case referred to the Governing Council”. In paragraph 11 of his affidavit in reply to the instant application, the seventh respondent refuted the claim that any of the respondents was invited to attend such a meeting. The general principle of law which runs through the entire corpus of our jurisprudence is that, the general burden of proof in civil suits rests on the party who asserts the affirmative of the issue. This principle is captured by the Latin expression; *matim ei qui affirmat non ei, qui negat incumbit probatio*. The position was re-affirmed by the Kenya Court of Appeal in *Maria Ciabaitaru M’airanyi and Others v Blue Shield Insurance Company Limited, 2000 [2005]1 EA 280* where it was held that:-

Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof and is equivalent to our section 102 of the Evidence Act), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence. (Emphasis added).

This is further illustrated in *Jovelyn Bamgahare v. Attorney General S.C. C.A. No 28 of 1993*, where it was decided that he who asserts must affirm. The onus is on a party to prove a positive assertion and not a negative assertion. It therefore means that, the burden of proof lies upon him who asserts the affirmative of an issue, and not upon him who denies, since from the nature of things he who denies a fact can hardly produce any proof. The burden on this issue lay on the applicants to adduce such evidence as would satisfy court that the respondents were accorded their minimum procedural guarantees of fairness under the doctrine of natural justice by giving them a fair opportunity to make any relevant statement which they may have desired to bring

forward and a fair opportunity to correct or controvert any relevant statement brought forward to their prejudice.

At the time the decision was taken by the Disciplinary Committee of the second applicant, there was no indication whatsoever that the continued presence of the respondents on the institution's premises posed a continuing danger to persons or property or an ongoing threat of disrupting the academic process. There was no need therefore for their immediate removal from campus by way of suspension with "immediate effect" such as would have justified the necessary notice and rudimentary hearing to follow as soon as practicable thereafter. Secondly, this was not a brief disciplinary suspension since it was characterised as an "indefinite suspension," such as would have justified an informal hearing permitting the respondents to give their version without compromising the capacity to prevent erroneous disciplinary action. Thirdly, being an "indefinite suspension," hence suspension for an indeterminate long period, it ought to have been preceded by a formal process in which notice of the charges / complaint should have been given to the respondents, the respondents should have been allowed the right to present evidence, to present their own witnesses and to cross examine adverse witnesses. The gravity of the possible consequences, dismissal by the Governing Council, required the full panoply of the rules of natural justice and procedural due process before the Disciplinary Committee.

Subject to the doctrine of "university autonomy," the domestic disciplinary tribunals of the second applicant are subject to the supervisory jurisdiction of the High Court. Having found that the defect of natural justice in their disciplinary proceedings was sufficiently grave to be a ground for quashing the resulting decision, and that the denial of natural justice in those proceedings could not be cured internally by appeal, the decision of the Disciplinary Committee was a nullity. I do not therefore find any error apparent on the face of the record in this court's grant of the order of certiorari based on the finding that there was a violation of the respondents' right to fairness in violation of the rules of natural justice.

It is on that account that on 10th November 2015 the respondents obtained an interim order stopping the applicants and the other organs of the institution from "making any further decision against the applicants (the students)until 19th November 2016 when the matter shall be heard

on merit.” On 17th February 2016, the court issued a final order in which it directed, *inter alia*, that;

The respondents are hereby restrained from making any further decision against the applicants in respect of the demonstration of July 30th 2015 before according each and all of them an opportunity to be fairly heard. The respondents are further restrained from blocking or preventing any of the applicants from resuming and continuing with any program each of them had been pursuing before.

The applicants contend that these orders manifest an error apparent on the face of the record in that the court exceeded its powers on judicial review by substituting its own decision for that of the administrators of the second applicant as regards the disciplining of the respondents, thereby rendering the respondents ungovernable. This is because the orders put the institution’s administration, and particularly the first applicant, at the peril of being held in contempt of court whenever any decisions are made in respect of the respondents.

As an illustration of that impact, is in respect of the decision of the Academic Committee which at its meeting of 23rd May 2016, issued each of the respondents with letters directing them to leave the campus until they were ready to sit the examinations, which they would re-sit as non-residents. The reasons for that decision as indicated in the letters were that the respondents had on many occasions “defied advice or instructions from the school authority,” which was deemed “disrespect to a person in authority.” They were therefore directed to; “apply to the school management to retake paper(s) to enable the administration prepare the papers and select appropriate external examiners to mark the scripts since you no longer trust your tutors, vacate the room today 25th May 2016 by 6.00 pm, come for your retake paper(s) from home on Monday 30th May 2016.”

The precursor to all this was that after the judicial review proceedings were concluded by the decision of 17th February 2016, the Academic Committee went ahead to prepare for the next end of semester examinations that were to begin on 22nd May 2016 ending on 1st June 2016. Concerned that the above mentioned orders of court were in force at the time, the Academic Committee meeting of 19th May 2016, resolved, that any students who had examinations to re-sit who did not apply in writing, would be asked to leave the campus until they were ready to sit the

examinations, which they would re-sit as non-residents. The respondents had examinations to re-sit during the slated examination period while others had re-takes. A few of them, including the first, second, third, fourth, fifth and sixth respondents, without offering any explanation, did not apply to re-sit the examinations.

At the Academic Committee meeting of 23rd May 2016, which was attended by the first, second, third, and fourth respondents, it was resolved that they should apply in writing to re-sit the examinations before 5.00 pm that day or leave the institution's premises. They were on 25th May 2016 served with letters to that effect. At the extra-ordinary meeting of the Academic Committee attended by the Chairman of the Governing Council convened later that day, the decision of the Academic Committee requiring the students to vacate the campus was revoked and the respondents were allowed to remain on the school campus for the duration of the examination period. A notice communicating this decision was put up on the notice board on the same day which also indicated that the Chairman of Governing Council was to meet the respondents on 26th May 2016 for a further discussion of the issues. The respondents were allowed to take the examinations starting on 28th May 2016 rather than 30th May 2016 as had been stipulated in the letters requiring them to vacate the institution's campus.

It is that letter that sparked off Miscellaneous Application No. 45 of 2016 in which the respondents sought the arrest and committal of the first applicant to civil prison for contempt of court, or alternatively for her to pay a fine to purge the contempt of contempt. It was contended that whereas the order of 19th November 2016, the ruling of 17th of February 2016 and the administrative directive of the Assistant Registrar of 25th May 2016 restrained the applicants "from making any further decision against the applicants in respect of the demonstration of July 30th 2015 before according each and all of them an opportunity to be fairly heard," and also went ahead to restrain the respondents "from blocking or preventing any of the applicants from resuming and continuing with any program each of them had been pursuing," the first applicant had defied all of them. It was further contended in that application that by the first applicant directing the respondents to vacate the institution's campus for defying advice or instructions from the school authorities, constituting acts of disrespect to persons in authority, the first applicant was in contumacious violation of the 17th of February 2016 decision of court

restraining the applicants from blocking or preventing any of the respondents from resuming and continuing with any program each of them had been pursuing before. It is that application which was heard and disposed of by the Assistant Registrar of this court.

As to whether the order of this court restraining the applicants from blocking or preventing any of the respondents from resuming and continuing with any program each of them had been pursuing before is an error apparent on the face of the record, regard must be had to the scope of the powers of this court on judicial review. It is trite law that the results or outcomes of the decision-making process are not primary concerns of judicial review. In *Minister for Aboriginal Affairs v. Peko-Wallsend Ltd*: (1986) 162 CLR 24, 40-41 citing *Wednesbury Corporation [1948] 1 KB, 228* the court opined;

The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion, which the legislator has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.

Similarly in *Ridge v. Baldwin and Others [1963] 2 All ER 66 at 91, [1964] AC 40 at 96*, it was observed that there was;

a danger of usurpation of power on the part of the courts ... under the pretext of having regard to the principles of natural justice ... I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case.

Lord Brightman came to the same conclusion when in his holding in *Chief Constable of the North Wales Police v. Evans, [1982] 1 WLR 1155, (1982) 3 All ER 141 at 154*, he said:

Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power..... Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.

In the instant case, the underlying proceedings were a challenge to the disciplinary action of suspension for misconduct allegedly committed by the respondents during the events of 31st July

2015. Allegations of misconduct, erroneously handled by the applicants, had disabled the respondents from continuing with their respective courses of study. This was corrected by annulling the decision and requiring the applicants to grant the respondents a fair hearing before taking any further disciplinary action against them springing from the events of 31st July 2015. Apart from quashing the decision, which was the limit of proper exercise of the court's judicial review power, the court in addition restrained the applicants from "blocking or preventing any of the respondents from resuming and continuing with any program each of them had been pursuing before." It so happens that "resuming and continuing" with an academic or training program does not entirely depend on disciplinary considerations. There are multiple other benchmarks for assessing academic progress in a course of study which may determine whether a student qualifies to "continue" with the program or not. Abrogation of this right of administrators of the applicants would amount to a serious encroachment on the internal autonomy of the institution.

Disciplinary considerations aside, the reasons for administrators of universities or other tertiary institutions' determination of a student's eligibility to "continue" with an academic or training program do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer. Such decisions will generally involve the application of multiple considerations which, if the discretion is to be wisely exercised, need to be weighed against one another, a balancing exercise which judges by their training and experience are ill-qualified to perform. Therefore, the limits of the authority of court upon establishing illegality or irrationality in such a process would be restricted to directing the Academic Committee to comply with the legal and procedural requirements but not to substitute as it did, apparently inadvertently and without the necessary expertise, its own decision for that of the Academic Committee.

Administrative systems which employ discretion vest the primary decision-making responsibility with the agencies, not the courts. As a result, the judicial attitude when reviewing an exercise of discretion must be one of restraint, often extreme restraint, only intervening when the decision is shown to have been unfair and irrational. The principle in matters of judicial review of administrative action is that to invalidate or nullify any act or order would only be justified if there is a charge of bad faith or abuse or misuse by the authority of its power and in matters of

administrative decision making in exercise of discretion. The challenge ought to be over the decision making process and not the decision itself.

The jurisdiction to decide the substantive issues is that of the institution and the Court does not sit as a Court of Appeal, since it has no expertise to correct the administrative decision, but merely reviews the manner in which the decision is made. It is elsewhere said that, if a review of administrative decision is permitted, the court will be substituting its own decision without the necessary expertise, which itself may not be infallible. It seems to me therefore that deciding the question whether a student “continues” with an academic or training program involves a danger of usurpation of power on the part of the court under the pretext of having regard to the principles of natural justice. The court may be inclined to think that had the decision rested with it, it would have decided differently from the institution in question, though having necessarily far less knowledge of all the relevant circumstances. Yet I do observe again that it is not the decision as such which is liable to judicial review; it is only the circumstances in which the decision was reached and particularly in such a case as the present, the need for giving to the student an opportunity for putting his or her case to that body.

A student who gets admitted to a university or other tertiary institution undertakes that the administration of that institution shall be at liberty to enforce such rules of discipline as are reasonably designed to prepare him or her for examinations and other modes of assessment, for the determination of academic and other achievement as a benchmark for progressing from one level to another during the course and finally for suitability or meriting the award. Under the implied terms of the contract the administration is entitled to withhold progress of a student from one level to the next, if the student does not show satisfactory academic progress. Likewise, the administration is entitled not to administer examinations to a student who has not complied with rules which are reasonably designed to prepare him or her for examinations. The Academic Committee directive requiring the respondents to apply to re-sit the examination is neither illegal nor arbitrary. On the face of it, the directive was designed to prevent the respondents, who had recently been embroiled in a disruptive legal dispute with the institution, from later claiming ill-preparedness for taking the examinations. Examinations are ordinarily administered to students who have studied regularly in the course of the year and made adequate academic progress.

In the circumstances, the operative effect of the order of this court is so wide that it makes it obligatory upon the applicants to maintain the respondents on the various programs irrespective of their academic progress and to administer examinations to them irrespective of their preparedness for taking the examinations after a disruptive, drawn-out, legal dispute. By virtue of this part of the order, the respondents are obliged to maintain the respondents on the various programs, even when in their opinion; their academic progress is not satisfactory or when they are ill-prepared for the examinations or engage in misconduct unrelated to the events of 31st July 2015. The administration is not in position anymore to check the indiscipline of the respondents and promote habits of regular study on their part as students, which is one of their implied statutory functions under sections 87 (1), 80 (1) (b) and 80 (2) of *The Universities and other Tertiary Institutions Act, 7 of 2001*. To comply with the order of this Court would inevitably translate into a breach of the applicants' statutory obligations and no court of law should put a party in such a situation. The order should not have been so framed as to encroach upon the function of teaching, and assessment of progress, which is left by the Legislature to the administrators of the institution subject to the power of the National Council for Higher Education prescribing the minimum standards therefor. It could never have been the intention of this court to make its orders in such a manner as will encourage disobedience amongst the respondents or will detract the authority of the administration over them.

When read from that wide perspective, which appears to be the perspective from which even the Assistant Registrar of this court read it, it would naturally mean that this court will be transgressing the limit of regulation provided to it under the powers of judicial review and instead tending to interfere with or adversely affect the function of teaching and the assessment of academic progress in the institution. The affairs of the institution cannot be run by this court and the court should not make orders that impair the institution's ability or detract the authority of the administration over its students. I therefore come to the conclusion that this aspect of the order has every tendency to encourage disobedience amongst the respondents and has obviously had adverse effect on the function of teaching and assessment of the respondents. As stated earlier, any order which transgresses the limit of the power of this court on judicial review of administrative authority is clearly an error apparent on the face of the record. This Court under its inherent power can review its order if found to have been passed with a material error, which

would be necessary to do right and undo a wrong committed in the course of administration of justice. There is need to correct and give effect to the true meaning and intention of the order of this court of 17th February 2016, i.e. ensuring that no further disciplinary action is taken against the respondents in respect of the events of 31st July 2015, except in strict compliance with the rules of natural justice, rather than curtail the authority of the applicants to check such indiscipline of the respondents as is unrelated to the events of 31st July 2015 in order to promote habits of regular study on their part as students, which effect this aspect of the order has created.

Where without any elaborate argument one could point to the error and say “here is a substantial point of law which stares one in the face,” and there could reasonably be no two opinions entertained about it, a clear case of error apparent on the face of the record would be made out. It has been emphasised before that a mistake or error apparent on the face of the record is one which is self-evident and does not require a process of reasoning and it is distinct from an “erroneous decision”. It follows, therefore, that the power of review can be exercised for correction of a mistake, but not to substitute a view. Review jurisdiction cannot be used as appellate jurisdiction. A review cannot be treated as an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. In that regard, re-hearing a matter for detecting an error in the earlier decision and then correcting the same does not fall within the ambit of review jurisdiction. Review of an order is permissible though, where a glaring omission or patent mistake or grave error has crept in, because of judicial fallibility.

Mindful of those requirements, I find such an error in the untrammelled restraint imposed on the applicants “from blocking or preventing any of the applicants from resuming and continuing with any program each of them had been pursuing.” Use of that phrase in the context of the events of 31st July 2015 was obviously the result of inadvertence, accidental slip or omission. It has had the unfortunate and clearly unintended effect of curtailing the authority of the applicants to check indiscipline of the respondents that is unrelated to the events of 31st July 2015. That the applicants should henceforth have no disciplinary control over the respondents, was never the intent of the order. In its current state, the order does not express what was really decided and intended by the court. An order may be amended by the court so as to carry out its intention and express the meaning of the court when the order was made. This court therefore has the duty to

see that its record is true and represents the correct state of affairs. I find this to be a proper case in which the power of review has to be exercised to prevent miscarriage of justice by correcting a grave and palpable error committed by the court. In any event, Order 46 rule 1 (1) (b) of *The Civil Procedure Rules* permits the court to correct errors in its orders for “any other sufficient reason” and I find that nothing can prevent the court from rectifying its own error, because the doctrine of “*actus curiae neminem gravabit*”, (i.e., an act of court shall prejudice none), can be invoked, for correcting the error committed by the court in the instant case, since that reason is sufficient on grounds, at least analogous to those specified in the rule.

In the final result, I find that in imposing sanctions for civil contempt against the first applicant, the Assistant Registrar of this court acted without jurisdiction, the proceedings and resultant orders are therefore a nullity and are hereby set aside. Furthermore, the court made an error on a substantial point of law that stares one in the face, when it issued the order restraining the applicants from “blocking or preventing any of the respondents from resuming and continuing with any program each of them had been pursuing before.” By this statement, error crept into the decision of this court and there could reasonably be no two opinions on this point. It is an error that is prejudicial to the applicants’ ability or detracts the authority of the administration over their students, because of its inadvertent wide-sweeping effect. That aspect of the order of this court issued on 17th February 2016 therefore presents a clear case of error apparent on the face of the record and it is the duty of this Court under Order 46 rules 1, 2, and 8 of *The Civil Procedure Rules* to correct such error, which has crept into the impugned order in order to redress the grievance of the applicants appropriately and so as to give effect to its meaning and intention. That error in the order is hereby corrected by striking it out or deleting it from the order of this court given on 17th February 2016. For the foregoing reasons the two applications succeed and are consequently allowed with costs to the applicants.

Delivered at Arua this 15th June of 2017.

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Stephen Mubiru
Judge
15th June 2017.