

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS CAUSE NO.23 OF 2017

DR. PETER OKELLO ----- APPLICANT

VERSUS

1. KYAMBOGO UNIVERSITY
2. DR ANNIE BEGUMISA ----- RESPONDENTS

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Section 36 of the Judicature Act as amended, Rules 3, 6, 7 and 8 of the Judicature (Judicial Review) Rules, 2009 for the following Judicial reliefs;

- 1.) Certiorari to call for and quash the 1st respondent's decision to appoint the 2nd respondent as its substantive Academic Registrar;
- 2.) Mandamus directing the 1st respondent to conduct afresh the recruitment process for a substantive Academic Registrar in accordance with the law and established procedures and policies on recruitment and promotion of staff;
- 3.) Prohibition barring the 1st respondent from removing the applicant from his position as the 1st respondent's acting Academic Registrar until and /or unless the proper process for recruitment of a substantive Academic Registrar is conducted; and
- 4.) General damages.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavits in support of the applicant but generally and briefly state that;

- 1) The 1st respondent appointed the 2nd respondent as its substantive Academic Registrar without following the established procedures and to the detriment of the applicant who has hitherto been the acting Academic Registrar.

- 2) The process leading to the impugned decision was tainted with illegality, procedural impropriety, irrationality and breach of legitimate expectation, and so impugned decision is inoperative, null and void.
- 3) As a result of numerous flaws in the impugned decision-making process, the applicant has suffered and is likely to continue suffering irreparable harm through violation of his fundamental right to equality and non-discrimination, hurt feelings, humiliation, loss of dignity, loss of reputation and social standing, impairment of personal and vocational growth, loss of future salary and employee benefits, stress, inconvenience, among others.
- 4) Unless the 1st respondent is restrained by this Honourable Court in the terms hereby proposed, the 1st respondent's authorities will continue to flout its policy on recruitment and promotion of staff among other provisions of its 2014 Human Resource Manual (as amended) which will, in turn, confuse, demoralize, embarrass and stress current and prospective employees of the 1st respondent.

The respondents opposed this application and the 1st respondent filed an affidavit in reply through its University Secretary-Charles Okello and the 2nd respondent filed her affidavit.

The 1st respondent contended that the appointment of the Academic Registrar was conducted in accordance with the Kyambogo Human Resource Manual 2014. The 2nd respondent was legally appointed and the applicant being in the acting capacity was no guarantee that as the person acting will be confirmed or promoted to the substantive post. The applicant's expectations and imaginations were so wild and overstretched.

The 2nd respondent on her part contended that she responded to the advert for a vacancy on the website of the 1st respondent which was also published in the print media and applied for the position of Academic Registrar on 8th May 2017. She was invited for interviews along with other candidates including the applicant on 28th November 2017.

On 21st March 2018, she received an appointment letter to the office of Academic Registrar for the 1st respondent and she duly accepted the appointment and reported for duty on 3rd April 2018. She denied having had any role to play in the recruitment process other than attending interviews as a candidate.

To appreciate the decision of this court I find it proper that I lay down the chronological sequencing of the events leading to this application as shown from the pleadings.

- a) The 1st respondent on 3rd April 2017 appointed the applicant as the acting Academic Registrar.

- b) On 7th April 2017 the 1st respondent externally advertised on its official web site the Academic Registrar vacancy and on 10th April 2017 advertised in the daily Monitor and New Vision newspaper.
- c) The applicant applied for the said vacancy in response to the said external adverts.
- d) The 1st respondent's Appointment's board received and considered applications from 13 individuals but only shortlisted only 2 applicants; the applicant and another candidate who was not the 2nd respondent.
- e) During the 87th Meeting held on 7th July 2017, the appointments Board mysteriously declined to interview the two shortlisted candidates and instead decided to externally re-advertise the vacancy.
- f) In September 2017, the 1st respondent externally re-advertised the position of Academic Registrar on its web site and in newspapers of nationwide circulation.
- g) The Appointments Board shortlisted and scored 4 candidates for the Academic Registrar vacancy including the applicant and the 2nd respondent.
- h) On 20th March 2018, the applicant received a letter from the respondent's Vice Chancellor Prof. Eli Katunguka-Rwakishaya informing him that the University Council had declined to appoint the applicant to the position of Academic Registrar because he was not the best candidate.
- i) That the applicant on 19th March 2018 appealed to the University staff Tribunal and was supposed to have argued his appeal on 19th April 2018 but withdrew the appeal on 10th April 2018.
- j) The 2nd respondent received a letter of appointment on 20th March 2018 and reported on duty on 3rd April 2018.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

Four issues were proposed for court's resolution;

1. Whether this application is properly brought before this court?
2. Whether there was a breach of established procedures pertaining to the appointment of a substantive Academic Registrar?
3. Whether the 1st respondent breached the legitimate expectation of the applicant to be appointed on promotion?

4. Whether the applicant is entitled to the remedies sought?

I shall resolve this application in the order of the issues so raised. The applicant were represented by Mr Ssemakadde Isaac whereas the 1st respondent was represented by Mr Ronald Muhwezi and Mukwatirire Sam and the 2nd respondent was represented by Senior Counsel Bruce Kyerere assisted by Adam Kyomuhendo.

ISSUE ONE

Whether this application is properly before this court?

The respondents have argued that the applicant had alternative remedies under the Universities and Other Tertiary Institutions Act which ought to have been exhausted before recourse to the High Court through the appeal process of the University Staff Tribunal.

The applicant in his response contended that the decision in issue was one made by the University Council which is mandated to appoint the Academic Registrar. Therefore according to counsel for the applicant the University Staff Tribunal has no jurisdiction over complaints arising from decisions taken by The University Council.

The applicant is a member of staff of Kyambogo University who was appointed as the Acting Academic Registrar from 3rd April 2017 until 3rd April 2018. The applicant was a Deputy Registrar, Graduate School.

The decision not to appoint the applicant was made by the appointment's board in accordance with the Universities and Other Tertiary Institutions Act.

Section 43 provides;

(1) The University Council may-

- (a) Appoint committees and boards consisting of such number of its members and other persons as it may deem necessary;***
- (b) Appoint one of the members of a Committee to be the Chairperson of that Committee;***
- (c) Co-opt any person on any Committee of the University Council.***

(2) A University Council may, subject to the limitations that the Council may deem fit, delegate any of its functions to any Committee appointed under subsection(1), but the Council shall not delegate the power to approve the budget or the final accounts of the Public University.

Section 50 provides;

- (1) There shall be a Committee of the University Council to be known as the Appointments Board.***
- (2) The Appointments Board shall consist of nine members under section 43.***

(3) The Appointments Board shall, except where provided otherwise under this Act, be responsible to the University Council for the appointment, promotion, removal from service and discipline of all officers and staff of the academic and administrative service of the University, as may be determined by the University Council.

Section 51 provides;

(1) There shall be three categories of staff in a Public University, namely, the academic staff, the administrative staff and support staff.

(2)

(3) The administrative staff shall consist of persons employed by the University, other than academic staff, holding administrative, professional or technical senior posts established by the University Council for the efficient management and running of the University.

Section 57 provides;

(1) A member of staff may appeal to the University Staff tribunal against a decision of the Appointments Board within fourteen days after being notified of the decision.

(2) ...

(3) A member of staff aggrieved by the decision of the Tribunal under subsection (2) may within 30 days from the date he or she was notified of the Tribunal's decision apply to the High Court for judicial review.

The sum effect of all the above provisions is that the applicant is a member of staff who had an available alternate procedure to address his grievance rather than stampeding court prematurely and later try to make a case for discovery in total disregard of an established procedure of resolving the dispute.

It is surprising that the applicant made an appeal to the University Staff tribunal and it was to be heard on 19th April 2018 but the applicant withdrew the appeal on 10th April 2018. He never availed any reasons although he stated for personal reasons. It can be deemed that the applicant was no longer aggrieved by the decision of the appointments board. At least he does not state that he withdrew the discontentment letter because of the court case that he had filed. According to the court record, on the same day 10th April 2018, the applicant filed an application for judicial review in the High Court.

The actions of the applicant can indeed be seen as an act of forum shopping. This indeed adds to the problem of case backlog in the system. Once the law has created statutory procedure to address a grievance, then it is deemed mandatory to exhaust that alternate procedure before trying to seek the courts discretion in availing the same remedies.

The above finding is buttressed by the case of **Fuelex Uganda Ltd vs AG & 2 others High Court Miscellaneous Cause No. 48 Of 2014**, *Hon Justice Stephen Musota* (as he then was)

referring to the case of **Micro Care Insurance Limited vs Uganda Insurance Commission Miscellaneous Cause No. 218 of 2009** wherein Justice Bamwine (as he then was) cited the case of **Preston vs IRC [1995] 2 All ER 327 at 330** where Lord Scarman said; “ My fourth position is that a remedy by way of Judicial Review is not available where an alternative remedy exists. This is a position of great importance. Judicial review is a collateral challenge; where Parliament has provided appeal procedures, as in taxing state, it will only be rarely that the court will allow collateral process of judicial review to be used to attack an appealable decision.”

Similarly Justice Geoffrey Kiryabwire (as he then was) in the case of **Classy Photo Mart Ltd vs The Commissioner Customs URA Miscellaneous Cause No. 30 of 2009** re echoed the same position and the words of Bamwine J (as he then was) that “ I should perhaps add that it is becoming increasingly fashionable these days to seek judicial review orders even in the clearest of cases where alternative procedures are more convenient. This trend is undesirable and must be checked..... In this era of case management, it is the duty of a trial judge to see that cases are tried as expeditiously and inexpensively as possible....and this also means ensuring that unjustified short cuts to the judge’s docket are eliminated.”

See also **Prof. Isaiah Omolo Ndiege vs Kyambogo University Miscellaneous Cause No. 141 of 2015**

In the case of **Charles Nsubuga vs Eng Badru Kiggundu & 3 Others HCMC No. 148 of 2015** citing *Bernard Mulage vs Fineserve Africa Limited & 3 Others Petition No. 503 of 2014* in which Musota J (as he then was) with which he was in agreement, it was held inter alia that;

“There is a chain of authorities in from the High Court and the Court of Appeal that where a Statute has provided a remedy to a party, this court must exercise restraint and first give an opportunity to the relevant bodies or state organs to deal with the dispute as provided in the relevant statute. This principle was well articulated by the Court of Appeal in Speaker of National Assembly versus Ngenga Karume [2008] 1 KLR 425 where it was held that; In our view there is merit..... That where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed”.

It is clear to court that the action of the applicant running away from the procedure set by Parliament for resolving such a dispute; he did not have sufficient information upon which he could challenge the decision of the appointments board. In paragraph 20 of his affidavit in support, he states “.....i shall request for discovery of essential information from the 1st respondent in the course of this litigation in order to buttress my complaint of lack of fairness, equality and transparency in the impugned process”.

The applicant lacked necessary information to challenge the decision of the appointments board and this would have been avoided if the University Staff Tribunal had heard the complaint first before the matter would come for judicial review in this court.

The case of *R v Huntingdon District Council ex parte Cowan and Another [1984] 1 All ER 58* that was cited by the applicant's counsel is very distinguishable and was quoted out of context. In that case it was about alternative remedies and not alternative bodies to grant a remedy. The University Staff tribunal could also give the same remedies as the High Court and not necessarily different or alternative remedies. It is after the determination by the University Staff Tribunal that the applicant could apply for Judicial Review.

However, the 2nd respondent would have been entertained in an application of this nature since she was not a staff of the 1st respondent at the time she was applying for the said position. The tribunal only applies to members of staff of which she was not.

It is important that bodies created under any legislation by Parliament are given an opportunity to operate and resolve their disputes since they possess better knowledge, skill and expertise in such areas. In this case the University Staff Tribunal is headed by a person who is qualified to be a High Court Judge and 7 other members representing the different interest groups or categories.

This issue is therefore resolved in the negative. The application was not properly brought before court and it was a breach of the set procedures of resolving disputes arising from a Public University like Kyambogo University. The resolution of the above issue disposes off this entire application.

In the interest of justice and for completeness, I will consider the rest of the issues that were raised for determination.

ISSUE TWO

Whether there was breach of established procedures pertaining to the appointment of a Substantive Academic registrar.

Mr Ssemakadde for the applicant submitted that the appointments board which interviewed and scored both the applicant and the 2nd respondent was improperly constituted. The two members who are disputed to have sat on the board were Dr Steven Kasumba and Dr. Aaron Wanyama.

According to him, he expected minutes of the University Council in which the said two persons who sat on the appointments board to have been appointed to become members of the appointments board. He also expected the duo to swear affidavits rebutting the allegation in their individual capacity.

The respondent's counsel relying on the information that had been availed to court contended that the appointments board was properly constituted and the said persons were holding the respective

offices. That Dr. Aaron Wanyama was appointed to the Office of Deputy Vice Chancellor (Academic Affairs) for an initial period of 6 months with effect from 15th May 2017 or until the position was substantively filled. While Dr Kasumba Steven was appointed Deputy Vice Chancellor (Finance and Administration) with effect from 1st October 2017 for a period of six months or last until a substantive Deputy Vice Chancellor & Finance and Administration) is appointed.

The applicant's counsel further contended that the two were not duly appointed members of the Board.

It is clear that both persons were appointed to the respective positions of Deputy Vice Chancellor Academic Affairs for Dr. Wanyama and Deputy Vice Chancellor Finance and Administration.

The two persons by virtue of their respective offices sat on the appointments board as members.

According to the Constitution of the committees of the Council, there are only two offices which appear to be members of every committee of the University Council i.e Vice Chancellor and Deputy Vice Chancellor (Finance and Administration). They sit on the following committees; Appointments Board, Finance and Planning Committee, Estates and Works Committee, Students Affairs and Welfare Committee, Establishment and Administration Committee and Resource Mobilisation, Development and Investment Committee.

It would imply that any person holding any of those offices at any given time should automatically become a member of the respective committees or board. In this respect Dr. Kasumba was supposed to sit on the respective committees including the Appointments Board. However, Dr. Aaron Wanyama was only appointed to the position of Deputy Vice Chancellor (Academic Affairs) and that office does not seem to be appearing on any committees of the council.

Under Section 50 (4) of the Universities and Other Tertiary Institutions Act, it provides for the appointments board to invite any person to give technical advice in any meeting of the Board.

It is not clear whether the said Dr. Wanyama was invited to give technical advice to the board since he was not a member of the board. However it should also be noted that the said Dr. Aaron Wanyama who may have sat on the said appointments Board was indeed a personal referee of the applicant. According to the application letter-“OP-5” the applicant lists the said Associate Professor Aaron Wanyama as his first referee for the said position.

Even if the said Aaron Wanyama had taken part in the proceedings without being formally appointed, it would not have affected the applicant and if anything, it would have favoured him instead of the 2nd respondent who never knew any person on the appointments board.

The decision of the Board could only be vitiated, if it can be shown that the said person who was not supposed to be a member actually influenced the final decision or that when the matter was put to vote, the person's vote changed the outcome. This is not the case in this matter.

Secondly, the applicant as a senior staff of the institution was also aware that the said persons who were not members of the appointments board but decided to keep quiet about it with a view of taking benefit of it, but when it never worked in his favour he decides to challenge. He does not state that he objected to the presence of the said persons on the appointments board whom he was fully aware that they were not members according to him. He therefore acquiesced with his right to make any objections.

ISSUE THREE

Whether the 1st respondent breached the legitimate expectation of the applicant to be appointed on promotion.

This issue is premised on the fact that the employment of all staff of Kyambogo University is regulated by the Human resource manual. The applicant averred in his affidavit in support paragraph 6, that the 1st respondent's elaborate and clear policies on recruitment and promotion of staff, he had legitimate expectation that as an existing member of staff, he would be given a reasonable opportunity to be assessed for appointment as the Substantive Academic registrar before the 1st respondent published an external advertisement. However this expectation was unjustifiably frustrated.

The applicant further contended that the decision to appoint the 2nd respondent to the post of substantive Academic registrar is tantamount to breach of his legitimate expectation to be promoted to the highest position in my department.

The 1st respondent in response contended that in line with the provisions of the Kyambogo University Human Resource Manual 2014, that upon expiry of contract of an administrative staff in salary scale M3, such positions shall be advertised externally. Therefore, the 1st respondent was alive when it explored an external advert. In addition, that being in acting capacity is no guarantee that the person acting will be confirmed or promoted to the substantive post. The applicant's expectations and imaginations were so wild and overstretched.

The principle of legitimate expectation is concerned with the relationship between public administration and the individual. It seeks to resolve the basic conflict between the desire to protect the individual's confidence in expectations raised by administrative conduct and the need for the administrators to pursue changing policy objectives. The principle means that expectations raised as a result of administrative conduct may have legal consequences. Either the administration must respect those expectations or provide compelling reasons why the public interest must take priority.

Therefore the principle of legitimate expectation concerns the degree to which an individual's expectations may be safeguarded in the face of a change of policy which tends to undermine them. The role of the court is to determine the extent to which the individual's expectation can be accommodated within the changing policy objectives.

The origins of this ground of review is traced in the case of **Schmidt vs Secretary of State for Home Affairs [1969] 1 All ER 904**. Lord Denning noted that;

“It all depends on whether he has some right or interest or, I would add, some legitimate expectation of which it would not be fair to deprive him without hearing what he has to say”

Applying this principle to the facts of the case, Lord Denning said:

“A foreign alien has no right to enter this country except by leave, and if he is given leave to come for a limited period, he has no right to stay for a day longer than the permitted time. If his permit is revoked before time expires, he ought, I think, to be given an opportunity of making representations; for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right-and, I would add, no legitimate expectation-of being allowed to stay. He can be refused without reasons given and without a hearing. Once his time has expired, he has to go”

In the case of **AG of Hong Kong vs Ng Yuen Shiu [1983] 2 All ER 346**, the Privy Council held that, in light of the statement by the Government, the respondent had a legitimate expectation of being accorded a hearing.

It can be deduced from the above cases that legitimate expectations may include expectations which go beyond legal rights, provided that they have some reasonable basis. Secondly, the legitimate expectation may be based on some statement or undertaking by, or on behalf of, public authority which has the duty of making the decision, if the authority has through its officers, acted in a way that would make it unfair or inconsistent with good administration for him to be denied an inquiry. Thirdly, when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it would act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.

In the present case the applicant claims that the decision not to appoint him as a substantive Academic Registrar breached his legitimate expectation as based on the Human Resource Manual.

See also **World Point Group Ltd vs AG & URA HCCS No. 227 of 2013**

One of the requirements for a legitimate expectation to be effective is that the promise, the representation that gave rise to the expectation, should be clear, unambiguous and unqualified.

This is an essential requirement because the person cannot claim to have expected the public authority to act in a particular way if the representation was unclear or was ambiguous or qualified-in such circumstances, it would not be reasonable for the applicant to have relied on such an expectation.

The applicant was appointed in an acting capacity as the Acting Academic registrar for a period of six months or last until the position is substantively filled, if the latter comes first.

The position of Academic Registrar is an M3 salary scale, and under the Human Resource Manual paragraph 2.7.7; All administrative staff in M3 salary scale shall be appointed on five year contractual terms and may eligible for appointment for one more term. Paragraph 2.7.8 provides that; upon expiry of the first term of employment, for staff in paragraphs 2.7.6 and 2.7.7 such positions shall be advertised.

I agree with counsel for the respondent that the position of Academic Registrar was supposed to be advertised and was not available for internal appointment as other lower positions and the applicant was fully aware and took part in the whole exercise with such knowledge and without any representations. He cannot claim breach legitimate expectation since his letter of appointment was very clear and unambiguous.

Where an applicant claims legitimate expectation, the burden is on him to show that it was unreasonable to rely on the promise made. The court will consider all circumstances in the making the determination because an applicant cannot claim a legitimate expectation where, in light of available information to him, or to surrounding circumstances or practices of which he is well aware, he has not acted unreasonably.

The applicant has a higher burden to prove the breach of a substantive legitimate expectation because it constrains the public authority not to deviate from the set promise. Just like in the present case, the applicant had to show that there has been a practice or policy of elevating persons to higher positions in M3 category without externally advertising the said positions.

There was no reason for the applicant to assume, imagine and expect that he would automatically be appointed a Substantive Academic Registrar after he had been appointed as acting and the same position had been advertised externally. There could not be any legitimate expectation to substantively be appointed in the position.

This issue is therefore resolved in the negative.

The applicant's counsel made new submissions in rejoinder and I find this wrong since the respondents were denied an opportunity to respond. Therefore I have not considered the new points raised in the written submissions in rejoinder; under the following heads- Strange and or unfair evaluation Criteria, Bias/Conflict of Interest.

ISSUE FOUR

Whether the applicant is entitled to the remedies sought in the application.

Having resolved in the first issue negative, the applicant cannot obtain any remedies.

In the event that the application had been considered on its merits as discussed and resolved herein, the second issue would have necessitated the determination of whether to quash the decision to appoint the 2nd respondent.

The ever-widening scope given to judicial review by the courts has caused a shift in the traditional understanding of what the prerogative writs were designed for. For example, whereas *certiorari* was designed to quash a decision founded on excess of power, the courts may now refuse a remedy if to grant one would be detrimental to good administration, thus recognising greater or wider discretion than before or would affect innocent third parties.

The grant of judicial review remedies remains discretionary and it does not automatically follow that if there are grounds of review to question any decision or action or omission, then the court should issue any remedies available. The court may not grant any such remedies even where the applicant may have a strong case on the merits, so the courts would weigh various factors to determine whether they should lie in any particular case. See ***R vs Aston University Senate ex p Roffey [1969] 2 QB 558***, ***R vs Secretary of State for Health ex p Furneaux [1994] 2 All ER 652***

In the result I would not have quashed the decision to appoint the 2nd respondent since she was never at fault and she had already taken office and resigned her former position/employment. The discretion would have been exercised in her favour not to quash the decision.

The application is dismissed with no order as to costs.

I so order.

SSEKAANA MUSA
JUDGE
16th /08/2018