

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISCELLANEOUS CAUSE NO.207 OF 2018

SSEWANYANA JIMMY----- APPLICANT

VERSUS

KAMPALA INTERNATIONAL UNIVERSITY----- RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Article 42 of the Constitution, Section 33,36 & 38 of the Judicature Act as amended, Rule 6 & 7 of the Judicature (Judicial Review) Rules, 2009 seeking orders and declarations that;

- a) A declaration that the applicant sat for the Pharmacology (2.1) supplementary oral examination of the respondent's Western Uganda Campus.
- b) An order of Certiorari doth issue quashing the decision of the respondent's Western Uganda Campus directing the applicant to redo Pharmacology (2.1) class when next offered at his own cost.
- c) A Prerogative writ of mandamus doth issue compelling the Respondent's Western Uganda Campus to clear the applicant's academic record and submit his name for the final year internship training and graduation ceremony.
- d) Punitive, Exemplary and General Damages.
- e) Interest of (d) at Court rate from the date of Judgment till payment in full.
- f) Costs of this application be provided for.
- g) Any other reliefs this honourable court deems fit.

The grounds in support of this application were stated in the supporting affidavit of the applicant but generally and briefly state that;

- a) The applicant is a student of the respondent's Western Uganda Campus at Ishaka-Bushenyi, pursuing a bachelor of Medicine and Surgery, who has passed his final year exams, awaiting final internship and graduation.
- b) The applicant in his second year of study, failed the examination in Pharmacology (2.1) and the respondent's Western Uganda campus required him to do a supplementary exam which he missed owing to the fact that he had lost his mother at the time.
- c) The applicant upon advice by the University, applied for and was granted a dead semester where he was cleared to sit for the supplementary examination.
- d) In January 2015, the applicant sat for both written and Viva supplementary examinations together with two other students namely Onama Charles Wacibra, Samuel Ooga while another student called Ngobi did with us the Viva supplementary exam only.
- e) The Viva exam was administered by Ms Rebecca Nakaziba, the then Head of Department of Pharmacology of the respondent's Western Campus
- f) The applicant successfully passed the Pharmacology examination scoring 23/40 in the written examination and 07/10 in the Viva examination bring his final score to 60%.
- g) The applicant was thereafter allowed to cross from Biomedical Department to Pathology Class (3.1) having duly been cleared and in compliance with the university regulation that requires a student to have fully passed before crossing to the next year of study.
- h) In his final year of study in March 2018, the applicant was informed by the respondent that he had a backlog to clear in Pharmacology (2.1), the same exam he sat for and passed in 2015 before being allowed to proceed to the next level as per university regulations.
- i) The applicant immediately clarified and corrected this position through the Head of Department Pharmacology, a one Kirumuhuzuza Claude and his associate Ms Nabirumbi Ritah that he had been cleared and evidence to show that he had sat and passed the said exam had been submitted to the faculty of Clinical medicine and the Central Examination Unit.
- j) The applicant was cleared when his name appeared on the list of the only students that had been allowed to proceed for senior clerkship-final semester (Kiryandongo site).

- k) The applicant appealed to the respondent's University by way of letter wherein he clarified that he had sat for the examination and requested to be cleared. However the respondent ordered the applicant to retake the same when next offered at his cost.
- l) The applicant has engaged the University management over his clearance, but this has turned out futile.
- m) The respondent actions and decision is unfair, unreasonable, unjust and irrational, and is a proper case where this Honourable court can grant the orders sought by way of judicial review.

The applicant also filed another affidavit of Nakaziba Rebecca who was a former lecturer at Kampala International University, Western Campus and she confirms that she knows the applicant as a student of the same University.

She confirms that she was the Head of Department of Pharmacology which was under the Faculty of Biomedicals, and she conducted viva examination in a course Unit called pharmacology (2.1) supplementary examination.

She vived the applicant and three other students in the said course unit, and she knows that as a result the applicant was allowed to proceed to the pathology class (3.1) as the University rule states that no student is allowed to cross to pathology class when not cleared with the Faculty of Bio medicals.

Upon viving the said students, she duly submitted the results and upon leaving the University, she handed over all the records of students to the department of Pharmacology of the respondent.

The respondent opposed this application and averred that the applicant indeed failed to sit the examination and was allowed to sit a supplementary. He sat the written examination in which he scored 23/40 but his did not sit his viva examination.

That the said fellow student Ooga Samuel, whom the applicant claims to have sat the viva examination, and he had in writing, admitted to doing the viva examination on the same day that the written examination was done. That this impermissible and contrary to the University Policies and Practice and did not qualify as a valid examination.

That the oral examinations are usually administered last, after the written examinations as well as the practical by selected panels of lecturers and must also include an external examiner, and it was the case for that semester.

That it is against the respondent University's quality assurance practices for an oral examination be administered by single examiner. That as is the policy and practice of the University, oral examinations are administered by a panel of examiners, not an individual, and it is therefore not

possible that the applicant sat for the viva and was examined by an individual examiner as alleged.

That the said Ms Rebecca Nakaziba, who has since been dismissed from the University, and who is alleged to have examined the applicant was the then Acting Head of Department for Pharmacology is the same person who submitted the mark sheet that did not have the viva marks of the applicant.

That the applicant was never cleared or authorised by the University to proceed to year 3. The applicant could not be allowed to proceed to the Pathology class, since the paper of Pharmacology is a prerequisite course supposed to be done before progression to the next class.

That the applicant therefore progressed on the frolic of his own. That the Heads of each department are different and therefore it is not their mandate to follow-up or pin-point each student and determine whether they have retakes or not. Each department receives students and takes them through the necessary course of study, whereby they are marked at the end and their results are submitted to Central Marking Unit.

Therefore, it was not for each department to investigate whether each of their students passed their previous courses to warrant. That the applicant therefore manipulated this system and proceeded to a semester which was taught by a different department under the pretext that he had passed, whereas not.

That the applicant had not found about the missing marks in the final semester, since he had earlier filed a form of change of marks for the same in September, 2017.

The applicant had filed his change of marks form which was supported by evidence in form of a mark sheet attached by the department Exam coordinator, which was examined and it was different from the one that had been submitted earlier by the same department of pharmacology. That the said mark sheet contained his marks for the viva exam whereas the one submitted earlier had not contained the said marks.

That if it had been found out earlier that the applicant had not passed, he would not have been allowed to proceed with his studies before he cleared his backlog.

The respondent further filed an affidavit of Ngobi Mathias, who confirmed that the applicant and others indeed sat for the supplementary examination. The applicant and others indeed informed him that they were planning/organising to do the viva examination before the actual day of the viva exam, as had been scheduled by the Department.

The said Ngobi claimed that he was examined and appeared before a panel composed of 2 examiners. However in a letter written by the said Ngobi to the ADVC, he had claimed that “ *I was vived by a male lecturer whom I cannot recall his names but during that time when we doing vivas with 131 and 132 they were describing that panel as being external*”

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.

The parties filed a joint scheduling memorandum with the following agreed facts and issues.

Agreed facts

1. The applicant was admitted at the respondent's Western Campus to pursue a Bachelor of Medicine and Surgery commencing in the academic year 2012/2013.
2. The applicant in his second year of study failed the examination in Pharmacology (2.1) for which he was required to do a supplementary examination that he missed.
3. The applicant sat for the written examination in Pharmacology (2.1) where he scored 23/40.

Four issues were proposed for court's determination;

1. Whether the applicant's application is properly and competently before this court and whether the court is seized with jurisdiction to entertain it.
2. Whether the applicant sat for the oral (Viva) supplementary examination in Pharmacology (2.1) within the confines of the University Regulations.
3. Whether the respondent acted unfairly, unreasonably, irrationally and unjustly in the process that culminated into its decision directing the applicant to re-sit pharmacology (2.1) when next offered at his cost.
4. Whether the applicant is entitled to remedies sought.

The applicant was represented by Mr. Rwakafuuzi Ladislaus whereas the respondent was represented by Mr Kyazze Joseph.

Whether the applicant's application is properly and competently before this court and whether the court is seized with jurisdiction to entertain it.

The respondent's counsel contended that the said application is premature and incompetent for failure to exhaust the remedies available within the respondent's administrative mechanism.

Mr Kyazze contended that the relationship between the applicant and the respondent is primarily regulated by the University Charter, the University rules and regulations and the academic policies. These were drawn to the appellant's attention at admission in the admission letter together with the University handbook.

The applicant's complaint is of an academic nature, being aggrieved with the decision made against him, the applicant sought the indulgency of the Deputy Vice Chancellor who advised that the decision made was correct.

According to the respondent's counsel the remedy available under the university administrative structure from the decision of the Deputy Vice Chancellor should have been by lodging an appeal to the University Senate. Compliance with this requirement is not optional.

It is further provided that the said appeal must be lodged with the board of the Appellant's faculty which shall forward the same to Senate with observations and recommendations of the board.

That the applicant has a further unrestricted right to appeal to the University Council, which is the highest decision making body vested with powers to hear and determine appeals by students and jurisdiction to reverse or vary any decision of a lower committee.

The applicant counsel contended that the applicant fully exhausted all internal mechanisms of having his issue administratively handled, unsuccessfully. According to him, upon receipt of the letter from the respondent's Director of Academic Affairs, informing him that upon investigations, it had been confirmed that the results submitted by the respondent's department of Pharmacology were different from the authentic one initially submitted by the same department and the applicant being advised to redo the exam when next offered at his own cost.

The applicant being dissatisfied by the said decision submitted an appeal to the Deputy Vice Chancellor's office of the respondent by way of letter wherein he submitted his evidence. That the Deputy Vice Chancellor in response to the appeal wrote back to the applicant a letter which consisted of the final decision by the respondent, reaffirming the earlier decision of Director Academic Affairs of the respondent.

Applicant's counsel further contended that the respondent's Deputy Vice chancellor to whom the applicant addressed his appeal, is a member of the respondent's Senate, who should have reasonably forwarded the applicants appeal to the Senate for consideration but did not and it is the same Deputy Vice Chancellor who sat and constituted himself into the Senate and made a decision which is the subject of the application before the court. Therefore according to him, the applicant's appeal was submitted to the respondent's administration.

This court is in agreement with submission of counsel for the respondent on the principle that an aggrieved party ought to exhaust the available alternative modes of addressing the grievance by way of appeal or review. The applicant has not advanced any reason why he did not appeal to the University Council or Senate.

It would appear the applicant deliberately ignored or refused to lodge an appeal to the University Senate as the highest organ to determine academic disputes or complaints of students.

The applicant's counsel's argument that the applicant lodged an appeal with the Deputy Vice Chancellor's office and therefore they should have forwarded the same to the Senate and that he took a decision on behalf of the University Senate, is very flawed and erroneous. If such a decision was ever made allegedly on behalf of the University Senate would be illegal, unlawful and void ab initio.

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 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.*”

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”.

The practice of running to court for judicial review by University students even before exhausting the internal disciplinary mechanisms or appeal processes obviates the relevance of such mechanisms and structures. ***Apiima Abel Onyantha vs Kampala International University HCMC No. 142 of 2018***

Therefore, where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first. A court's inherent jurisdiction should not be invoked where there is specific statutory provision which would meet the necessities of the case. This is the only way institutions and their structures will be strengthened and respected.

Under Rule 34, it provides Student Grievances against the University.

(3) Students shall observe the following channel to lodge their grievances related to academic matters;

a. Lecturer

- b. Head of the Department
- c. Dean or Principal of School or Faculty or College
- d. Director of Academic Affairs
- e. Deputy Vice Chancellor of Academic Affairs
- f. The Senate

The applicant in this matter ought to have lodged an appeal to the Senate and upon determination then he would be able to file an application for judicial review.

This court is aware that the powers of court may be invoked in certain circumstances with justification to hear the matters even if the available remedies/structures have not been exhausted. The present case is not one of such cases and the applicant has not made any justification for disregarding the existing structures in determining the complaint.

This issue is determined in the negative.

The determination of the 1st issue disposes of the application and I have restrained myself from commenting on the rest of the issues and facts since they could still be subject of future litigation when a final decision is made.

The applicant should lodge his appeal before the University senate within two weeks and the respondent's senate should hear and determine the appeal at the next meeting.

The Senate should determine the appeal with an open mind and make an informed decision that is not shrouded with vindictiveness of the applicant. The applicant's appeal should be determined by considering the peculiar circumstances of his case.

In the result I find this application to be premature although it raised triable issues that can be addressed in the University structures and it's hereby dismissed with no order as to costs.

I so Order

SSEKAANA MUSA
JUDGE
25th/02/2019