IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Miscellaneous Civil Cause No. 10 of 2017

In the matter between

DR. KITARA DAVID LAGORO **APPLICANT**

And

GULU UNIVERSITY **RESPONDENT**

Heard: 24 October 2018

Delivered: 12 February 2019

Summary: judicial review of academic assessments.

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] This is an application for judicial review made under section 36 of *The Judicature Act* and Rule 5 of *The Judicature (Judicial Review) Rules*. The applicant seeks a declaration that the decision of the respondent's *viva voce* sub-committee to make inquiries into the applicant's decorate research dissertation rather than oversee its corrections was illegal, irrational and a failure to execute its mandate. He also seeks several orders; an order quashing the decision of the respondent not to award the applicant a Doctorate of Philosophy in epidemiology based on that report; an order prohibiting the respondent from undertaking any act in contravention of the recommendation of the viva voce panel; an order compelling and directing the respondent to award the applicant a Doctorate of Philosophy in

Epidemiology, and general damages, exemplary or punitive damages, and the costs of the application.

[2] The application is premised on the grounds that; the applicant having defended his thesis and secured approval of the *viva voce* panel, subject to corrections that were to be made, it was erroneous of the sub-committee appointed for that purpose to exercise powers outside its mandate when it instead made inquiries into the research itself which had already obtained approval by the full committee. He further contends that as a result of the resultant report, the applicant has to-date not been admitted to the award of the degree of Doctor of Philosophy in Epidemiology.

[3] The background to the application is that the applicant is one of the lecturers at the respondent university. On 25th March, 2011 he was admitted to the respondent's programme of study by thesis, leading to the award of a Doctorate of Philosophy in Epidemiology. His topic, "The Epidemiology of Pyomyositis in relation to HIV infection Status," was approved and two supervisors were assigned to him. On 15th April, 2014 he submitted his research findings to the respondent's Institute of Graduate Studies and Staff Development whereupon it was rated as a pass by a team of three examiners. On 5th March, 2015 he defended his thesis before a panel of five examiners and it was rated as a pass with significant corrections.

[4] Two members of the panel were assigned the responsibility of overseeing the corrections to be done to their satisfaction before making recommendations to the full panel of five. On 8th July, 2016 the applicant submitted his corrected thesis for review by the select sub-committee. The sub-committee on 13th July, 2016 wrote a report denying the applicant approval of his thesis on basis of inquiries they had made in to the research methodology, a field which the applicant contends was outside the mandate that had been given to them. On basis of that report the applicant has to-date not received his award of a

Doctorate of Philosophy in Epidemiology, yet he contends that his research had been rated as a pass.

[5] The application is opposed. In his affidavit in reply, the respondent's Deputy Vice Chancellor Academic Affairs, Prof. George Ladaah Openjuru, states that the *viva voce* panel made recommendations for significant corrections to be made to the applicant's thesis, that required a near overhaul of the entire study. A sub-committee of reviewers was constituted. The applicant was obliged to make corrections to the satisfaction of the two member sub-committee, failure of which the applicant would not be recommended for the award.

[6] During the review, the applicant failed to provide the two member sub-committee with the information and data they required to perform their task. The sub-committee communicated its findings to the Dean of the respondent's Faculty of Medicine. On 24th April, 2015 the Dean wrote to the applicant giving him a period of two months within which to submit the information required by the sub-committee. The applicant not having responded, the reviewers undertook the task themselves of gathering the underlying data from the places where the applicant had indicated he had collected it from. To the sub-committee's surprise, three of the institutions denied the claim that the applicant had undertaken any study at their facilities. This finding revealed a scenario of grave academic dishonesty prompting the sub-committee to decline recommending the applicant for an award of the degree. The decision was communicated on 13th July, 2016. Recommendations for the award are made by the Faculty Board. A candidate dissatisfied with a decision of the Faculty Board has recourse to the Institute of Graduate Studies and Staff Development, and thereafter to Senate.

[7] The other affidavit in reply is sworn by the respondent's Dean, Faculty of Medicine, Dr. Felix Kaducu Ocaka. He states that the report of the sub-committee to the Faculty of Medicine indicated that the applicant had persistently failed to meet their requirements. The applicant did not seek more time for

completion of the study. The rules also permitted him to appeal to the Faculty Board and the Institute of Graduate Studies for review. The applicant has never submitted to the Faculty Board, his final thesis duly approved by the *viva voce* panel, together with a compliance report co-signed by him and the *viva voce* panel, and neither has he asked for an extension of time, nor appealed the decision not to recommend approval of his thesis.

[8] The last affidavit in reply is sworn by the Head of Dept. Community Health, School of Public Health, Makerere University, Prof. Christopher Garimoi Orach. He states that he was selected as a member of the five member *viva voce* panel to examine the applicant's thesis. The Committee found the thesis required major corrections particularly in the area of data collection and analysis. He was one of the two members selected to constitute a sub-committee of reviewers to oversee those corrections. The applicant was asked to produce his raw data and samples to enable them perform their role, but he did not produce them despite the numerous reminders. The sub-committee was left with no choice but to decline to recommend approval of the thesis as it was incomplete..

The applicant's arguments:

[9] In his submissions in support of the application, counsel for the applicant argued that when the *viva voce* committee sat, it made certain recommendations contained in the minutes of the meeting of 5th March, 2015. By way of a letter, the Dean Faculty of Medicine brought the decision of the *viva voce* committee to the attention of the applicant. It contained the conclusions and recommendations made by the *viva voce* committee. The contention of unfair assessment arises from the report of the two appointed reviewers. In paragraph two of their report, the two reviewers acknowledged receipt of the applicant's re-submitted work. They made comments on the re-submitted work. They in addition decided to institute an inquiry as to whether he did undertake the research. They discovered adverse information which they never brought to the attention of the applicant. They made a determination without getting his side of the story. They turned

themselves into the final decision makers. The report was not addressed to anyone. It was supposed to be addressed to the *viva voce* committee. The two reviewers assumed a power they did not have by rejecting the dissertation. Their sub-committee had no power of approval. The sub-committee's powers were limited to recommendation to the *viva voce* committee.

[10] He argued further that in "The Institute of Research and Graduate Handbook," under regulation 6 dealing with "Examination Regulation and award of degrees," the procedure for *viva voce* examination is provide for and in this instance the *viva voce* committee passed the applicant. Regulation 7 thereof indicates the procedure to be followed. There are errors in the date of the *viva* and the name of the doctoral candidate which indicates that the sub-committee never took its work seriously. Their letter was written in the year 2016 and thus the sub-committee of the *viva voce* committee has never reported back since then. All the supervisors and examiners have approved the thesis as per the corrections which were asked to be done.

[11] He continued to submit that the letter communicating the decision of the *viva voce* committee to the applicant was written by the dean Faculty of Medicine, indicating that there were significant corrections to be made. It communicated the minutes of 5th March 2015 in which the expression "significant corrections" was not used. It is not *viva voce* committee that said there were significant errors. This was an interpretation by a person who could not classify the degree of errors. Prof. Christopher's affidavit does not state that there was official communication for a hearing after the corrected version was re-submitted. In the March, 2017 letter the university states three grounds, one of which is submission of six bound copies, which depended on the *viva voce* committee informing the applicant the final verdict. The applicant was kept and limbo and did not know what was to happen next. The annexure to Prof. Christopher's affidavit does not state who received the report on behalf of the applicant. No addressee is mentioned in the report. It cannot be relied upon. It should have

been forwarded to the Committee not the school. He prayed that the application s hould be allowed and the orders and relief sought ought to be granted.

The respondent's arguments:

[12] In response, counsel for the respondent argued that the memo by the Dean Faculty of Medicine dated 22nd April, 2015 communicated to the applicant the decision of the *viva voce* panel. This was after the first presentation. There were significant corrections that had to be made to the satisfaction of the two member sub-committee that was constituted out of the five member *viva voce* panel. They were to make necessary recommendations. In the letter dated 13th July 2016 sent to the *viva voce* panel, they stated that they had found that the research could not be verified. They only stated that the validity of the study findings could not be verified. They did not make any decision denying the applicant the award of the degree. In Para 9 and 10 of Prof. Christopher Garimoi Orach's affidavit it is stated that the applicant was summoned but he never turned up to address then on the new information they had gathered. The applicant never requested for additional time to complete the corrections and answer the queries raised. The respondent awaits the outcome of these proceedings before a final determination.

[13] In Counsel's view, the regulations applicable at the time are contained in "The Institute of Research and Graduate Handbook," regulation 6 in the older edition, now regulation 13 in the current edition, and it provided for three possible outcomes of the *viva voce* panel; acceptance, to make specified reviews within a given time period or to reject. The overall period of study was five years and the applicant began in 2011. His period of study lapsed in 2016, with extension up to seven years. The candidate has not sought extension of the period. The seven year expired in March 2018. The sub-committee found that the applicant's research does not merit the award but finally recommended that the work be sent back to the *viva voce* committee. The lawyers wrote in February, 2017 and the university replied on March 7th 2017. It is the senate that makes the decision. All

other bodies make recommendations to the senate. The decision challenged is the one communicated on 30th July, 2016 received by the applicant on 2nd August 2016 and the application was filed in June, 2017. It is clearly out of time. He prayed that the application should be dismissed with costs to the respondent.

General principles:

[14] It is trite that applications for Judicial review under rule 3 of *The Judicature (Judicial Review) Rules, 2009, S.I. 11 of 2009*, made under section 38 (2) of *The Judicature Act*, for orders of mandamus, prohibition, certiorari or an injunction are directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by public decision makers, i.e. the lawfulness of the decision-making process, and not the decisions themselves. Traditionally judicial review is premised on allegations that a public body;- acted without powers (lack of jurisdiction); went beyond its powers (exceeded jurisdiction); failed to comply with applicable rules of natural justice; according to the record, proceeded on a mistaken view of the law (error of law on the face of the record); or arrived at a decision so unreasonable that no court, tribunal or public authority properly directing itself on the relevant law and acting reasonably could have reached it (*Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1948] 1 K.B 223*). Judicial review of administrative action is a procedure by which a person who has been affected by a particular administrative decision, action or failure to act by a public authority, may make an application to the High Court, which may provide a remedy if it decides that the authority has acted unlawfully.

[15] The body under challenge must be a public body or a body performing functions that are traditionally reserved to the state. In this case the respondent is a public University established by the Minister with the approval of Parliament by *The Universities and Other Tertiary Institutions (Establishment of Gulu University) Instrument, 31 of 2003* made section 22 of *The Universities and Other Tertiary Institutions Act, 7 of 2001*. It is maintained out of public funds and as a body established under an Act of Parliament, but also funded by government, the

respondent is performing functions that are traditionally reserved to the state, hence public functions.

[16] Secondly, the subject matter of the challenge must involve claims based on public law principles and not the enforcement of private law rights (see Ssekaana Musa, *Public Law in East Africa*, p 37 (2009) LawAfrica Publishing, Nairobi). While it has been said that the grounds of judicial review "defy precise definition," most, if not all, are concerned either with the processes by which a decision was made or the scope of the power of the decision-maker. Administrative power is the authority to determine questions affecting the rights of citizens. It involves exercise of a public decision making power in relation to a set of factual circumstances applicable to the subject. The process of arranging for, and releasing the results of, examinations are, on any view, distinctly administrative, as are some aspects of conducting them (see *Evans v. Friemann [1981] FCA 85; (1981) 35 ALR 428, at 435*). Exercise of discretion in admission to, or exclusion from a research program, academic misconduct, or procedures dealing with such cases therefore may be the subject of judicial review.

[17] That notwithstanding, the judicial attitude when reviewing an exercise of discretion must be one of restraint, only intervening when the decision is shown to have been illegal, unfair or 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. 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 authority 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.

[18] 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.

[19] 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.

[20] "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; i.e. the four

essential freedoms of a university; to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study. 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.

[21] 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.

[22] 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.

[23] 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.

[24] In adjudicating upon matters of academic qualification or progression however, in recognition of the concepts of “University autonomy,” and "academic freedom," courts have to tread with caution to avoid interfering with the autonomy and freedoms 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.

[25] Academic freedom is the freedom of teachers and students to teach, study, and pursue knowledge and research without unreasonable interference or restriction from law, institutional regulations, or public pressure. Academic freedom is an indispensable requisite for unfettered teaching and research in institutions of higher learning like universities. Any attempt by government or courts to influence university and public tertiary institution decisions, especially decisions regarding academic progress would violate the concept of minimal state intervention and enhance the possibility of breaches of academic freedom, hence the traditional deference to internal controls. *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.

[26] *The Universities and other Tertiary Institutions Act, 7 of 2001* countenances the domestic autonomy of 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.

[27] 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.

[28] As a general rule, judicial review of grading disputes would inappropriately involve the courts in the very core of academic and educational decision making. Moreover, to so involve the courts in assessing the propriety of particular grades would promote litigation by countless unsuccessful students and thus undermine the credibility of the academic determinations of educational institutions. "[the Court] does not sit as a Court of factual review over decisions of...[university]

committees...[but] it can...intervene in accordance with accepted administrative law principles, for example where the Committee has not been properly constituted, where it failed to follow proper procedure, where it acted in a way constituting a denial of natural justice, where it otherwise reached a decision which was contrary to law, or where its decision was such that no reasonable committee, acting with a due appreciation of its responsibility, could have arrived at it" (see *Harding v. University of New South Wales [2002] NSWSC 113* and *Keefe v. New York Law School, 2009 NY Slip Op 52331(U) [25 Misc 3d 1228(A*).

[29] Therefore, in the absence of demonstrated bad faith, arbitrariness, capriciousness, irrationality or a constitutional or statutory violation, a student's challenge to a particular grade or other academic determination relating to a genuine substantive evaluation of the student's academic capabilities is beyond the scope of judicial review.

[30] The applicant seeks various orders, certiorari, prohibition and mandamus. Certiorari is a means of quashing decisions of public authorities where there has been an excess of jurisdiction, an *ultra vires* decision, a breach of natural justice or an error of law on the face of the record. The order will issue to control administrative decisions only to statutory authorities or where the administrative authority has acted in excess of its statutory power. It will also issue to ensure that a statutory tribunal or body applies the law correctly. Simply put the order is available to ensure the proper functioning of the machinery of Government (see *In Re: Application by Bukoba Gymkhana Club [1963] EA 478*). The writ of certiorari is discretionary and issues only in fitting circumstances (see *Re- An Application by Gideon Waweru Gathunguri [1962] EA 520* and *Masaka District Growers Co-operative Union v. Mumpiwakoma Growers Co-operative Society Ltd and Four others [1968] EA 258*).

[31] On the other hand prohibition is directed to a public authority which forbids that authority to act in excess of its jurisdiction or contrary to the law. Mandamus is

directed at ordering the public body to properly fulfil its official duties or correct an abuse of discretion. Whereas certiorari is concerned with decisions in the past, prohibition is concerned with those in the future. While Certiorari looks at the past as a corrective remedy, prohibition looks at the future as a prohibitive remedy. Certiorari is sought to quash the decision and prohibition to restrain its execution (see *Wheeler v. Leicester City Council [1985] 2 ALL.ER 1106*).

[32] Prohibition and certiorari will lie to prevent a body acting in excess of its legal jurisdiction if it has legal authority to determine questions affecting the rights of subjects and in so doing must act judicially. Prohibition will lie as soon as it is established that such a body is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to be brought up and quashed on certiorari (see *Thorne v. University of London [1966] 2 All ER 338*).

[33] An application for judicial review should on the face of it demonstrate that the applicant seeks to establish that a decision of a public authority infringed rights whose protection the applicant was entitled to under public law. There may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the applicant arising under private law, such as situations where the action impugns the authority's performance of its statutory duties as a pre-condition to enforcing private law rights (see for example *Cocks v. Thanet District Council, [1983] 2 AC 286, [1982] 3 WLR 1121, [1982] 3 All ER 1135*). Otherwise, where a relationship is regulated by private law, administrative law remedies should generally not be available. A party should not take advantage of public law simply because it contracted with a public body, and thereby obtain an advantage that would otherwise not be available against a non-public body or private person.

[34] The limits within which courts may review the exercise of administrative discretion were stated in *Associated Provincial Picture Houses Limited v. Wednesbury Corporation [1947] 2 ALL ER 680: [1948] 1 KB 223*, which are;- (i)

illegality: which means the decision-maker must understand correctly the law that regulates his decision making power and must give effect to it. (ii) Irrationality: which means particularly extreme behaviour, such as acting in bad faith, or a decision which is "perverse" or "absurd" that implies the decision-maker has taken leave of his senses. Taking a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it and (iii) Procedural impropriety: which encompasses four basic concepts; (1) the need to comply with the adopted (and usually statutory) rules for the decision making process; (2) the common law requirement of fair hearing; (3) the common law requirement that the decision is made without an appearance of bias; (4) the requirement to comply with any procedural legitimate expectations created by the decision maker. Having outlined the general principles that ought to be borne in mind in applications of this nature, the court now proceeds to examine the grievances presented by the applicant under the three prisms of judicial review.

First issue; Whether any of the decisions complained of is bad for illegality.

[35] A public authority will be found to have acted unlawfully if it has made a decision or done something: without the legal power to do so (unlawful on the grounds of illegality); or so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (unlawful on the grounds of reasonableness); or without observing the rules of natural justice (unlawful on the grounds of procedural impropriety or fairness). Failure to observe natural justice includes: denial of the right to be heard, the rule against actual and apprehended bias; and the probative evidence rule (a decision may be held to be invalid on this ground on the basis that there is no evidence to support the decision or that no reasonable person could have reached the decision on the available facts i.e. there is insufficient evidence to justify the decision taken).

[36] Decisions made without the legal power (*ultra vires*) may arise within the narrow or extended context of the concept. The narrow context requires that a public authority may not act beyond its statutory power. The extended context covers abuse of power and defects in its exercise. These include; decisions which are not authorised, decisions taken with no substantive power or where there has been a failure to comply with procedure; decisions taken in abuse of power including, bad faith (where the power has been exercised for an ulterior purpose, that is, for a purpose other than a purpose for which the power was conferred), where power is not exercised for purpose given (the purpose of the discretion may be determined from the terms and subject matter of the legislation or the scope of the instrument conferring it), where the decision is tainted with unreasonableness including the duty to inquire (no reasonable person could ever have arrived at it) and taking into account irrelevant considerations in the exercise of a discretion or failing to take account of relevant considerations. It may also be as a result of failure to exercise discretion, including acting under dictation (where an official exercises a discretionary power on direction or at the behest of some other person or body. An official may have regard to government policy but must apply their mind to the question and the decision must be their decision).

[37] From the perspective of the scope of the respondent's statutory powers, under section 45 (1) *The Universities and other Tertiary Institutions Act, 7 of 2001*, the Senate is responsible for the organisation, control and direction of the academic matters of the University and as such the Senate should be in charge of the teaching, research and the general standards of education and research and their assessment in the University. Under section 42 (2) (e) and (f) of the Act, it has the mandate to; (e) make regulations regarding the standard of proficiency to be attained in each examination for a degree diploma, certificate or other award by the University; and (f) decide which persons have reached the standard of proficiency and are fit for the award of any degree, diploma, certificate or other awards of the University. Under section 45 (5) it has the authority to delegate any

of its powers or functions to a faculty, school, board of studies or Committee as the Senate may consider fit.

[38] Section 72 (h) *The Universities and other Tertiary Institutions Act, 7 of 2001*, authorises a Public University Council to make statutes not inconsistent with this Act for the better carrying out of its functions, including the academic organisation of the University, admission to the University, courses of study, duration and number of academic terms. In the instant case, the respondent has in place "The Institute of Research and Graduate Handbook" which sets out; entry requirements to the research programmes offered, procedures for application, requirements for registration, examination regulations and procedures, qualification for awards, and so on.

[39] It is argued by the applicant that approval of his dissertation by the *viva voce* committee entitled him to the award upon completion of the recommended corrections. Furthermore, that the sub-committee in effect assumed the powers of the *viva voce* committee and reversed the decision of the *viva voce* committee that had passed him.

[40] The viva examination serves multiple purposes, including: to demonstrate that the thesis is the candidate's own work, for the candidate to confirm that he or she understands what he or she has written and can defend it verbally, for the academic staff to investigate the candidate's awareness of where his or her original work sits in relation to the wider research field, to establish whether the thesis is of sufficiently high standard to merit the award of the degree for which it is submitted, to allow the candidate clarify and develop the written thesis in response to the examiners' questions, and so on. After the *viva voce*, a candidate should obtain the information or comments and report for making the necessary corrections and improvements to the thesis as directed by the *viva voce* committee and should be given a specific period to correct and complete the thesis for the submission of the final hard bound copies.

[41] A *viva voce* Committee is therefore meant to enable the academic staff to come to a judgement on the candidate's knowledge and understanding of the material presented, how the candidate constructed and developed his or her argument, how the candidate applied principles or formulae, performed an experiment or a statistical test, what the candidate concluded from analysing data, etc. It is the forum in which the candidate and his or her ideas that are assessed. It is not the function of the *viva voce* Committee to determine whether or not the candidate merits the award. According to Section 42 (2) (f) *The Universities and other Tertiary Institutions Act, 7 of 2001,* it is the mandate of the Senate to decide which persons have reached the standard of proficiency and are fit for the award of any degree, diploma, certificate or other awards of the University. According to Regulation 7 (Regulation 14 in the 2017, Edition) of "The Institute of Research and Graduate Handbook" published by the respondent, the Senate makes such a decision after a letter of award of the degree is processed by the Institute of Research and Graduate Studies through the Board of Research, Graduate Studies to the Senate;

> This is done only when a candidate has made corrections on the thesis / dissertation as recommended by the *viva voce* panel and a letter from the examiners written to the Director, Institute of Research and Graduate Studies, indicating that he / she is satisfied with the corrections. This recommendation is then presented to the Board of Research, Graduate Studies and Staff Development for approval before it is finally approved by Senate which has the mandate to grant approvals.

[42] Within this setting, the Board of Research, Graduate Studies and Staff Development serves as the Board of Examiners, which ordinarily is responsible for making final decisions about students' results for courses, their progression status, and their eligibility for an award. Boards of Examiners of tertiary institutions are usually made up of academic members of staff involved in the delivery of courses within the student's subject area (or related areas), and one

or more External Examiners. External Examiners are members of academic staff from the same (or a relevant) subject area in other institutions who take part in the Board of Examiners to make sure that they make fair and consistent decisions on a comparable basis with those at other universities, and that the Board follows the University's academic regulations in doing so.

[43] The implication of this elaborate process is that a candidate does not merit an award only by satisfying the *viva voce* panel. The *viva voce* examiners can make a variety of recommendations to the Board of Research, Graduate Studies and Staff Development through the Director, Institute of Research and Graduate Studies. The possible recommendations are clearly outlined in Regulation 5 (Regulation 13 in the 2017, Edition) of "The Institute of Research and Graduate Handbook," i.e. (i) the thesis is acceptable as it stands; or (ii) specified revisions must be made within a given time period; or (iii) the candidate cannot convincingly defend his / her work and is discontinued.

[44] For the viva voce panel to say and the applicant to argue that he was "passed" by the *viva voce* panel, based on the communication of the outcome by the Dean in his memo of 22nd April, 2015 is therefore erroneous. The category of "pass" is not listed as one of the possible outcomes and it is not within the mandate of the *viva voce* panel. The decision as to whether or not the applicant passed and merited the award is the preserve of the Board of Research, Graduate Studies and Staff Development, to which a final copy of his dissertation has never been submitted.

[45] Indeed in its report communicated to the applicant through the Dean Faculty of Medicine dated 22nd April, 2015 (annexure C_2 to the applicant's affidavit in support of the motion), while observing that the applicant's "study was very good and made significant contribution to the science and practice of medicine; it addressed a medical condition that is common in the area (population) of study; [the] presentation was clearer than the writing in the book; [and his] confidence at

the defence was evident of [his] ownership of the study," the *viva voce* panel also made extensive comments on the weaknesses and concerns raised by the applicant's defence of his thesis on 5th March, 2015 as follows;

1. The study lacks focus. State the express hypothesis of the study and tailor it to the study distinguishing between the theoretical framework and the conceptual framework.
2. The study findings were not clearly interpreted in context. Make a clear interpretation of the study findings and relate them to variables of each study objective.
3. Some of the aspects of the study do not add new knowledge like for example the use of gentamycine, contrimoxazole, incision, drainage and debridement. Sort out these aspects and explain clearly what knew knowledge is generated in your study in these issues. What is new to learn?
4. There is clear lack of understanding of the concepts of some of the limitations listed in the study, for example, the interpretation of "risk factors" does not appear suitable in the study. You should elaborate on the risk factors and explain how they contribute to limitations in your study.
5. Define primary pyomysitis and differentiate it from other forms of pyomysitis.
6. Define prevalence an show how it relates to this study

Methodology

1. The rationale of selecting a study population aged 13 years and above is not clear; explain clearly the selection criteria for the population 13 years and above.
2. It is not clear from the variables which social status of the population are most affected.
3. The sampling criteria and methods are not clear. Explain these in clear terms.
4. Information or evidence of pre-site and pre-analysis preparations with regards to tissues, serum, and pus sample collection handling, transport security, strategy, preservation and testing procedures is scanty. This casts doubt on quality control measures. Clearly sate the quality control measures in each case in the above aspects.
5. There are no quality control measures reported to ensure quality, sensitivity and susceptibility of the microbiological tests. State all quality control measures for the above and demonstrate with a control.
6. There is no evidence of validation of laboratory methods and no evidence of micro-bacterial culture done. Show evidence of any validation and cultures

done or show whether these were omissions which constituted limitations and why.

7. The sampling of pathological organisations was not explained. Explain this and especially explain the pathophysiology of how and why pathogenic micro-organisms select or prefer major muscles in pyomysitis. Also define pus and explain its pathophysiology.
8. There were 6 FGD and 8 FIG. Clearly explain the rationale for selection. What were the number of participants in each FGD and FIG? How many participants were from each hospital? How were these numbers determined?
9. The qualitative methods used to collect data are not clear. Explain clearly the qualitative methods used and elaborate on the codes, themes and software used.
10. Relating pyomysitis to HIV / AIDS required a bigger sample size than what is presented in the study in table 10. Justify your sample size and relate it to the study by bringing out information (data) gathered from FGD and show the statistical significance of these discussions.
11. Provide evidence of the following;
    - Where the FGD was held
    - Valid copies of informed consent documents as appendices.
    - Provide samples of stained slides (photos).
    - Where the patients were examined.
    - List of Research assistants.
12. Provide evidence of elimination of bias to the satisfaction of the panellists and make necessary recommendations.

[46] That the thesis required "significant corrections" is clearly inconsistent with a rating of "pass." The applicant in addition takes issue with the fact that when he made his corrections and submitted them to the two man review committee, that committee did not forward its conclusions to the *viva voce* panel but rather to Dean Faculty of Medicine. Re-submission of the corrections was unnecessary in the instant case since what was decided by the *viva voce* panel is that the applicant was to make his corrections "to the satisfaction of the review committee." Re-constituting the *viva voce* panel for considerations of the corrections would have been necessary had its decision been that the applicant could not convincingly defend his work, in which case he would have been discontinued and required to commence a new examination process.

[47] In any event, under section 53 (4) *The Universities and other Tertiary Institutions Act, 7 of 2001*, the Dean is responsible for the promotion and maintenance of efficient teaching and research in the respondent's Faculty of Medicine. The issue as to whether the two man committee of reviewers appointed by the *viva voce* panel to approve the corrections was competent so to do without referring its findings back to the *viva voce* panel is wholly a matter of academic judgment in which this court should not interfere (see *R v. Judicial Committee ex parte Vijayatunga [1990] 2 QB 444*; *R v. Cranfield University ex parte Bashir [1999] ELR 317* and *R v. Cranfield University ex parte Bashir [1999] ELR 317, [1999] EWCA Civ 995*). In its report dated 13th July, 2015 the committee of reviewers wrote that after reviewing the corrections and based on its specified findings in that letter "the team was no longer certain of the validity of the study findings. Hence the team was not able to approve the dissertation for the award of PHD Gulu University."

[48] The conclusion reached by the committee of reviewers selected by the *viva voce* panel is within the permitted range of outcomes specified by Regulation 5 (Regulation 13 in the 2017, Edition) of "The Institute of Research and Graduate Handbook." In its report dated 13th July, 2015 the committee of reviewers submitted to the Graduate School provided a detailed review of the areas in which the thesis, even after the corrections were made, was deficient and a clear explanation as to why it was not able to approve the dissertation for the award of PHD Gulu University. The committee had the administrative and academic mandate to make such a recommendation and did not usurp any powers. I therefore find that the applicant has not established a case of illegality in the actions taken by either the *viva voce* panel, the review committee or other organ of the respondent.

Second issue; Whether there was any procedural impropriety in the process leading up to the decision of the review committee of the respondent.

[49] It is contended by the applicant that he was subjected to unfair treatment in the process leading up to the decision of the review committee of the respondent, not to approve his dissertation for the award of PHD Gulu University. Academic assessment, whatever form it takes, is the means by which the University tests whether or not a student has achieved the objectives of a degree programme and the standards of an award. It is therefore fundamentally important that students are assessed fairly, and on equal terms with each other for the same award. It is this court's view that "The Institute of Research and Graduate Handbook" is designed to ensure that students complete assessments honestly and fairly. It is primarily intended to help the Institute in achieving consistency of practice in a range of activities including academic assessments.

[50] Procedural impropriety may arise from one of three possible sources; either from (i) failure to adhere to procedural rules laid out by statute, or (ii) failure to observe the principles of natural justice; or (ii) failure to act fairly. In the instant case, the applicant has not cited any procedural rules laid out by statute, catalogue, handbook and other statements of institutional policy, including written and oral statements of administrators and professors, or the internal instruments of the respondents that was violated. He argues instead that he was treated unfairly and not afforded a proper hearing before the decision was taken.

[51] The Principles of natural justice apply equally to an administrative enquiry which entails civil consequences as much as they apply to quasi-judicial processes. The principles should be observed when administrative decisions likely to affect rights or the status of an individual are to be taken. The application of the principles of natural justice varies from case to case depending upon the factual aspect of the matter. For example, in matters relating to serious disciplinary

action, the requirement is very strict and full-fledged opportunity is envisaged before a person is dismissed removed or reduced in rank, but where it relates to only minor punishment, a mere explanation submitted by the subject of the intended action meets the requirement of principles of natural justice. In some matters oral hearing may be necessary but not in others.

[52] Academic assessments, not being matters of a disciplinary nature, what is required is a "careful and deliberate" assessment rather than a hearing as known under the principles of natural justice. For example in *George van Mellaert v. Oxford University [2006] EWHC 1565 (QB)*, the Claimant, was registered as a research student at Oxford University with effect from the Michaelmas term 1999 under the supervision of a one Mr. A. A. Zuckerman on the subject of "Abuse of Process." He was transferred to D. Phil Status in 2001. He applied for the appointment of examiners in June 2003 on the nomination of Mr. Zuckerman. Mr Ben McFarlane (St. Peter's College) and Professor Loic Cadiet (University of Paris) were appointed as examiners. The Claimant submitted his doctoral thesis in August 2003. The oral examination (or "*viva*") took place on 19th November, 2003. The two examiners thereafter submitted a joint written report which recommended that the Law Board should offer the Claimant a choice between (a) reference of the thesis back for revision for re-examination for the D.Phil degree or (b) reference of the thesis back for revision for re-examination for the M.Litt degree. The eight page report, as made available to the Claimant included a number of academic criticisms of the quality of the Claimant's thesis, including a lack of direction and a failure to develop a sustained critical analysis of the subject matter.

[53] The Claimant's thesis in that case focused on an aspect of Belgian law. Part of the *viva* was conducted in French. The claimant contended that reference of the thesis back for revision for re-examination was due to the failure by the University to appoint a Belgian lawyer who might have appreciated the Belgian system better and this omission was to the disadvantage of the Claimant. Finding that it

was appropriate for the University to have appointed a French academic lawyer with experience of European legal codes and procedures rather than a Belgian lawyer who might have deprecated criticisms of the Belgian system to the disadvantage of the Claimant, the court held that questions of academic judgment are generally treated by the courts as being non-justiciable and unsuitable for adjudication in the courts (see also *Clark v. University of Lincolnshire & Humberside [2000] 1 WLR 1988*).

[54] To the contrary, in *Mumbuna Wamuneo Mwisiya v. The Council of the University of Zambia (1981) Z.R. 247*, the University Senate Graduate Committee refused to award a Master of Laws Degree to the applicant and directed him to re-write his dissertation. He applied for an order of certiorari and declaration for the court to remove the matter in its jurisdiction and quash this decision. The respondent objected on grounds, *inter alia*, that the High Court did not have jurisdiction to entertain the matter as the senate and the Chancellor had complete power to the exclusion of the courts of law. It was held that the High Court for Zambia has jurisdiction to hear and determine cases of this nature.

[55] Guided by persuasive authority, it is the view of this court that the decision whether a student failing an examination should re-sit the whole examination or withdraw from the course is in the sole discretion of the examiners of the institution administering the examination and no higher or other body. The only question is whether the examiners before deciding to require a student to withdraw from the course, should afford the student the opportunity to explain or intimate his or her failure either orally or in writing (see *R v. Aston University Senate, Ex parte Roffey and another [1969] 2 QB 538*; *Glynn v. Keele University [1971] 1 WLR 487*).

[56] It is generally accepted that in academic matters and admissions processes, once a university gives "a reasoned, principled explanation" for its decision, deference must be given to the University's conclusion, based on its experience

and expertise, that the decision would serve its educational goals and meet its educational mission (see *Fisher v. University of Texas at Austin, 570 US 297 (2013*). There are issues pertaining to the intimate life of every independent academic institution that, sensibly, courts decline to review: the marking of an examination paper; the academic merit of a thesis; the viability of a research project; the award of academic tenure; and internal budgets (see *Griffith University v. Tang (2005) 221 CLR 99, [2005] HCA 7*). Others might be added, such as: the contents of a course; particular styles of teaching; and the organisation of course timetables (see *Clark v. University of Lincolnshire and Humberside [2000] 1 WLR 1988*).

[57] In the report dated 13th July, 2016 containing their findings and recommendations to the respondent's School of Graduate Studies, the review committee made the following pertinent comments;

> .....however, the candidate consistently could not address some of the comments in the book such as....indicating to have performed procedures that are extremely difficult to achieve in field conditions e.g. ....owing to failure to address some of these comments, the team met the candidate and his two supervisors....in an effort to try and see if we could address the unresolved comments. Owing to this persistent failure of the candidate to address the areas of concern, the team made an inquiry into the conduct of the study. The team wrote to the institutions where the candidate indicated he performed the study.....The objective was to establish whether the patients were recruited in those hospitals and samples analysed in those laboratories...the hospital has no proof of the study having been carried and can neither provide patient records nor isolates....[the] laboratory reports that they received the study concept but the study was not carried out...the Director...could not find any evidence of such study in [the hospital] and nobody seems to know about it...A report from the Medical Director states that they could not find any

documents certifying that this study was done in their hospital from March, 2011 to March, 2014.

[58] This court takes the view that research is primarily conducted to advance the common good and not to further the interest of either the individual researcher or the institution as a whole. Students therefore have an obligation to conduct research honestly, competently and ethically. The University expects academic honesty on the part of its students, that any work a student submits for assessment is their own and is not the result of dishonest behaviour. All incidents of the use of unfair means must therefore be investigated promptly, thoroughly and fairly. In paragraph 18 of the respondent's affidavit in reply sworn by the respondent's Deputy Vice Chancellor (Academic Affairs) Prof. George Ladah Openjuru, it is contended, and the court agrees, that "a PhD study in the field of medicine is a very serious matter and a false study would cause loss of life in future when other students and doctors rely on them, and it was imperative that the viva voce panel, through the delegated team had to crosscheck the study thoroughly as seen in the report and their findings."

[59] On the other hand, any instance of cheating or academic dishonesty undermines the value of qualification that a student is pursuing. Academic dishonesty involves any illegitimate behaviour designed to deceive those setting, administering and marking the assessment. It includes plagiarism (i.e. the act of representing another's work or ideas as one's own without appropriate acknowledgement or referencing), and acting dishonestly in any way including fabrication of data, whether before, during or after an examination or other assessment so as to either obtain or offer to others an unfair advantage in that examination or assessment. It covers any situation where a student, acting alone or in conjunction with others, attempts to gain credit or advantage in assessment by unfair or improper means.

[60] For that reason, the court agrees entirely with the views expressed in paragraph 9 of the respondent's additional affidavit in response sworn by Prof. Christopher Garimoi Orach thus;

> That we as examiners are tasked to ensure integrity of the Medical Profession, rigour in research, honesty in science, the integrity of the institution, and our own integrity as professionals and University Professors and scholars. We ensure that any scientific work must be evidence based and the findings consistent....

[61] In the instant case, the *viva voce* panel expressed wide-sweeping doubts about the methodology used by the applicant. The comments made by the *viva voce* panel bordered on questioning the authenticity of the entire research. It is apparent to this court from the comments made by the *viva voce* panel that it would be almost inevitable for the review committee to re-examine the technical aspects of the research including the samples, data, and protocols that guided the research. In reviewing corrections requiring that magnitude of validation, it was within the mandate of the review committee of two to adopt its own procedure for inquiry into and validation of the methodology used by the applicant. It had reasons to, and justifiably so based on their findings, to make an inquiry into the conduct of the study owing to the applicant's persistent failure to address the areas of concern to their satisfaction.

[62] As a decision-maker to whom authority had been delegated by the *viva voce* panel to review corrections to the academic work, the committee of two was free to determine its procedure provided such procedure was compliant with its general duty to act fairly, in good faith, without bias and with a judicious disposition or fair-minded temperament, giving the applicant the opportunity to adequately present his corrections. It did not extend to giving the candidate applicant the opportunity to correct or contradict any relevant information prejudicial to his research. They were under no obligation to bring to his attention adverse information independently obtained by it. Since it was an

academic and not a disciplinary process, such information could influence its decision without having first been brought to the attention of the applicant. Validation of academic work does not trigger the right to a fair hearing. The process involved the review committee in carrying out its own investigation into the facts, independently of any information provided by the applicant to the *viva voce* panel.

[63] The duty resting upon the review committee did not include “to hear and decide” or "to give audience to.” The respondent had no procedural duty to give the applicant the opportunity for adequately presenting his corrections, save in writing. Having interfaced with the *viva voce* panel, the applicant had exercised and exhausted his right to know what adverse information the committee had and was only required to respond to and correct information prejudicial to his academic work, that had been highlighted by the *viva voce* panel.

[64] Unlike in other administrative or disciplinary decisions where a committee having before it such information, although not required to proceed as if the question before it were a trial, would be required to give a fair opportunity to the applicant f or correcting or contradicting any relevant prejudicial information (see *Board of Education v. Rice [1911] AC 179 at p. 182*), the review committee was constituted for academic assessment and was thus not required to observe such a process, unless it was provided for in the regulations governing assessment.

[65] An examiner in the position of the review committee need not meet the standards of a trial in court but fairness must prevail. The review committee had the right to regulate its procedures as it thought fit, for example by hearing the applicant orally or by receiving written statements from him, or by appointing a person to hear and receive submissions from him for its own information (see *James Edward Jeffs and others v. New Zealand Dairy Production and Marketing Board and others [1967] AC 551*). The rules of natural justice need not involve an oral hearing, more so since in the context of academic assessment the review

committee had no obligation to give the applicant a fair opportunity to correct or contradict any relevant prejudicial information.

[66] Whichever procedure was adopted, there was no obligation to let the applicant know the materials that were collected, what evidence was given and what information or reports were made affecting his dissertation. Post the *viva voce* interaction, the committee was not under a legal obligation to give him another opportunity for correcting or contradicting any information prejudicial to his view. In this regard, the court is mindful of the fact that academic decisions are "more subjective and evaluative, and not readily adapted to the procedural tools of judicial or administrative decision-making (see *Van de Zilver v. Rutgers University, 971 F. Supp. 925, 931 (D.N.J. 1997*). An academic case calls for far less stringent procedural requirements.

[67] For example in Board of Curators of the *University of Missouri v. Homwitez, 435 U.S. 78 (1978)*, the Court let stand a dismissal based on failure to meet institutional standards. A Council of Evaluation, a group of faculty members and students charged with assessing academic performance, recommended that Ms. Horowitz be placed on probation for her final year. This action followed expressions of dissatisfaction from several faculty members concerning her clinical performance during a paediatric rotation.

[68] After further unhappiness with her clinical achievement, the Council concluded that she should not graduate that year and moreover, absent "radical improvement," should be dropped from the program. She was allowed, as an "appeal," to undergo oral and practical examinations under the supervision of seven practicing physicians. Her results disappointed yet again: Only two of the reviewers recommended timely graduation; three recommended continued probation; the remaining two urged immediate dismissal. As a result, the Council reaffirmed its position. At a subsequent meeting, the Council, noting that she had generated a "low-satisfactory" rating in a recent surgery rotation, concluded that,

barring reports of radical improvement, she should not be allowed to re-enrol. At last, when still another negative report on a rotation appeared, the Council unanimously recommended that she be dropped from the program She contended that her right to a fair hearing had been violated since she had not been allowed to appear before either the Council or the coordinating committee, the provost. Her dismissal, the Court said, required no hearing before the institution's decision making body.

[69] This court is persuaded by the reasoning in that case to find that in situations of this nature, fairness would not demand that the applicant be issued with a letter detailing the nature of the adverse information obtained by the review committee, informing him of the date of interfacing with him, and inviting him to provide a formal response either in writing, by telephone or in person to the Committee. Had it chosen that course of action, then if after such notification the applicant did not attend the meeting of the Committee, or having previously indicated that he would attend and provided all reasonable attempts have been made to contact him, the meeting of the review committee would justifiably proceed in his absence.

[70] To the contrary, the review committee was prompted to make an inquiry into the conduct of the study by the applicant's persistent failure to address the areas of concern. As a result of that inquiry, it obtained information that was adverse to the applicant. In another context, fairness would have demanded that such information should have been brought to his attention in order to give him a fair opportunity for correcting or contradicting it, before the review committee could consider it in making its decision. However, academic assessment of this type is an ongoing process rather than an event. This court is persuaded by the view that unlike dismissals for indiscipline, discontinuance for academic (as opposed to disciplinary) cause does not necessitate a hearing before the school's decision making body (see *Board of Curators, Univ. of Missouri v. Horowitz, 435 U.S. 78 (1978*).

[71] The requirement of fairness in academic assessment is met when it is demonstrated that the decision was not taken capriciously or arbitrarily. In the instant case, the review committee fully informed the applicant of its dissatisfaction with his research. The ultimate decision not to approve it was taken after careful and deliberate analysis. The court would no doubt in a suitable case intervene if it were shown that there had been a material procedural irregularity or if actual bias on the part of the review committee were demonstrated or if it could be shown that there was some procedural unfairness to the applicant. However, in academic assessments, they not being matters of a disciplinary nature, what is required is a "careful and deliberate" assessment under the standard of fairness rather than "a hearing" as known under the principles of natural justice. The court therefore finds that the respondent's actions were sufficient to meet the demands of procedural fairness in what is otherwise purely an academic assessment.

Third issue; Whether the decision of the respondent's review committee to make an inquiry into the applicant's conduct of the study was irrational and outside its mandate.

[72] It is contended by the applicant that the review committee's decision to make an inquiry into the applicant's conduct of the study was irrational and outside its mandate of overseeing corrections of the applicant's thesis. The aspect of illegality of the decision was addressed under the first issue. It is the rationality of the decision that will now be addressed.

[73] Academic decisions spring from exercise of discretion in a highly subjective and evaluative process. It is trite that where an administrative decision is a matter of discretion, it will not be disturbed on judicial review except on a clear showing of abuse of discretion that is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Some of the general principles relevant to the

exercise of discretion are: acting in good faith and for a proper purpose, complying with legislative procedures, considering only relevant considerations and ignoring irrelevant ones, acting reasonably and on reasonable grounds, making decisions based on supporting evidence, giving adequate weight to a matter of great importance but not giving excessive weight to a matter of no great importance, giving proper consideration to the merits of the case, providing the person affected by the decision with procedural fairness, and exercising the discretion independently and not under the dictation of a third person or body. What fairness requires will vary from case to case and manifestly the gravity and complexity of the charges and of the defence will impact on what fairness requires.

[74] In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Decision-makers remain free to take whatever decision they deemed right in their conscience and understanding of the facts and the law, and not be compelled to adopt the views expressed by other members of the administrative tribunal. "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached.

[75] When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum; the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference is the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc. the concept

of “deference as respect” requires of the court’s respectful attention to the reasons offered or which could be offered in support of a decision and not submission. The fact that there may be an alternative decision to that reached by the tribunal does not inevitably lead to the conclusion that the tribunal’s decision should be set aside if the decision itself is in the realm of reasonable outcomes. On judicial review, a judge should pay “respectful attention” to the decision-maker’s reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.

[76] To justify interference by court without delving in the merits, the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Judicial review of determinations regarding academic standards is limited to the questions of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith, or contrary to a Constitutional provision or a statute (see, *Matter of Susan M. v. New York Law School, 76 N.Y.2d 241, 247, 557 N.Y.S.2d 297, 556 N.E.2d*).

[77] For example in *Jean-max Auguste v. New York Hospital Medical Centre of Queens*, *260 A.D.2d 589 (1999); 688 N.Y.S.2d 652*, the plaintiff, who was a resident physician at the defendant New York Hospital Medical Centre of Queens, filed a suit after he was not offered an appointment for the second year due to unsatisfactory performance during his first year. The plaintiff had within the first six months of the program, received mostly below-average marks on his evaluation by two house staff chief residents. Moreover, these chief residents were not the only faculty who found that the plaintiff's performance was unsatisfactory. The plaintiff was described by another doctor as “an unreliable, insensitive, irresponsible intern” who “failed to monitor and follow up patient care”

and whose “overall clinical competence, including clinical judgment, medical knowledge, clinical skills....[and] medical care, is unsatisfactory.” Additionally, other hospital doctors noted the plaintiff's many difficulties in handling an intensive-care environment, his inability to adequately interpret data and care for critically-ill patients, his disorganisation, his inability to properly present cases, and his unprofessionalism. The court found that under these circumstances, where the plaintiff's residency file was replete with unsatisfactory evaluations, the plaintiff's claim that the defendants' determination was arbitrary and capricious or made in bad faith was devoid of merit.

[78] In contrast, in the *Matter of Sheri G. Lederman, Ed. D v. John B. King, Jr., Commissioner, New York State Education Department, Candace H. Shyer, Assistant Commissioner, Office of State Assessment of the New York State Education Department, 2016 NY Slip Op 26416*, a fourth-grade teacher who had been teaching in New York’s Great Neck Public School district for seventeen years challenged her performance assessment rating as “ineffective” in her 2013-14 evaluation. She sued state officials over the method they used to make that determination. She contested the convoluted statistical model that the state used to evaluate how much a teacher “contributed” to students’ test scores by which she was awarded only one out of 20 possible points. She contended that these ratings affect a teacher’s reputation and at some point are supposed to be used to determine a teacher’s pay and even job status.

[79] The evaluation method, known as value-added modelling, or VAM, purported to be able to predict through a complicated computer model how students with similar characteristics are supposed to perform on the exams, and how much growth they are supposed to show over time, and then rate teachers on how much their students compare to the theoretical students. In 2012-13, 68.75 percent of her students met or exceeded state standards in both English and math. She was evaluated “effective” that year. In 2013-14, her students’ test results were very similar but she was rated “ineffective.” She contended that this

simply did not make, both as a matter of statistics and as a matter of rating teachers based upon slight changes in student performance from year to year. Deciding in her favour, the court stated;

> In order to find..... actions arbitrary and capricious, the Court must determine that the respondents' actions here were "taken without sound basis in reason or regard to the facts".... The burden of establishing the arbitrary and capricious standard rests with the petitioner.... Critically, [the] respondents also failed to meaningfully address how the petitioner's score could have so precipitously dropped from 14 to 1 (reflecting a drop of two levels from the second-highest level of Effective all the way to the lowest level of Ineffective) in a single year with statistically similar scoring students.

[80] The Court found that the petitioner met her burden of establishing that her growth score and rating for 2013-2014 was indisputably arbitrary and capricious. A decision without reasonable grounds or adequate consideration of the circumstances, is said to be arbitrary and capricious and can be invalidated by court on that ground. In other words there should be absence of a rational connection between the facts found and the choice made. There should be a clear error of judgment; an action not based upon consideration of relevant factors such that it is arbitrary, capricious, an abuse of discretion or is otherwise not in accordance with law or was taken without observance of procedure required by law.

[81] In both judicial decisions cited above, the determinant of reasonableness in academic assessment hinged on the question whether or not the decision was taken with a sound basis in reason or with regard to the facts. In the instant case, the reason justifying the course of action taken by the review committee to make an inquiry into the applicant's conduct of the study was stated to be his persistent failure to address the areas of concern, even after the review committee had met him and his two supervisors. The committee therefore not only had a sound basis

in reason when it took that course of action, but also its decision was based on the facts before it. This court is persuaded by the decision in *George van Mellaert v. Oxford University [2006] EWHC 1565 (QB*) in which the court was faced with somewhat similar facts. It was held in that case that the validity of the reasons which led the examiners to make the recommendation which they did in relation to the Claimant's thesis was a matter of academic judgment with which it would be inappropriate for the court to interfere.

[82] The validity of the reasons that led the review committee to take the course of action it did and eventually to make the recommendation that it did in relation to the applicant's thesis, was a matter of academic judgment with which it would be inappropriate for this court to interfere (see *Clark v. University of Lincolnshire and Humberside [2000] 3 WLR 752*; *R v. Her Majesty in Council, Ex parte Vijayatunga [1990] 2 QB 444* and *R v. The Cranfield University Senate, Ex p Bashir (1999) ELR 317*). Questions of academic judgment are not open to challenge by judicial review. The basic point was well put in the case of *Keefe v. New York Law School 25 Misc 3d 1228(A) (2009)* which was affirmed on appeal *71 AD3d 569 (2010*), thus;

> As a general rule, judicial review of grading disputes would inappropriately involve the courts in the very core of academic and educational decision making. Moreover, to so involve the courts in assessing the propriety of particular grades would promote litigation by countless unsuccessful students and thus undermine the credibility of the academic determinations of educational institutions.

[83] A student will usually have to do more than simply argue that an academic result is wrong or a professor is incompetent in order to make out a case for judicial review. In the absence of bias, or unfairness, or prejudice on the part of the review committee, or on the part any other member of the respondent's staff, or any procedural irregularity at any stage of the academic assessment, the court will not interfere. Deference is afforded both to academic decisions and to the

internal academic procedures that lead to such decisions. No compelling reasons have been proved in the instant application to justify the court's interference.

Fourth issue; Whether the circumstances of this case otherwise justify exercise of the court'sdiscretion to grant the prerogative orders sought.

[84] The grant of remedies under judicial review is at the discretion of the court. Although the granting of relief under judicial review is discretionary, it is not arbitrary. For a number of reasons, the remedies available under judicial review may be inappropriate, even where the court has subject matter jurisdiction. The court must take into account a number of considerations in weighing whether or not it should exercise its discretion to grant relief.

[85] Firstly, there is the view that there is no rule requiring what is sometimes called the exhaustion of administrative remedies. It is opined that 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. It is argued that 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 (see Wade in his *Administrative Law* (4th ed., (1977) at p. 561-2 and Professor de Smith's book *Judicial Review of Administrative Action*, at pp. 209-210). Despite that standpoint, by reason the two principles of "university autonomy" and "academic freedom," this court is of the view that when dealing with decisions taken by tertiary institutions, judicial review ought to be a remedy of last resort: alternative remedies should be exhausted first unless, exceptionally, such alternatives are ineffective or inappropriate to address the substance of complaints at issue.

[86] For example in *Ogawa v. University of Melbourne [2005] FCA 1139*, the applicant was enrolled as a PhD student at the University of Melbourne. Her candidature for PhD was withdrawn or cancelled by the respondent. She alleged that that was brought about because the supervision that she was given was inadequate and

resources were inadequate. She alleged breach of natural justice, breach of contract and defamation, that she had suffered loss and damage and she sought an order that her PhD studies be reinstated. She sought relief pursuant to the University's internal grievance and appeals procedures but remained dissatisfied. She also brought the matter to the attention of the Victorian Ombudsman and complained that the University had not complied with the requirements of *The Educational Services for Overseas Students Act 2000*. At the same time she filed a suit in court. The proceedings in court were stayed pending the exercise of that discretion by the Victorian Ombudsman to whom the applicant had earlier complained, an office that had been established under Commonwealth legislation.

[87] Similarly in *Clark v. University of Lincolnshire and Humberside, [2000] 3 All ER 752; [2000] 1 WLR 1988*, the appellant was a student at the respondent university between 1992 and 1995, reading for a first degree in humanities. For her final examination she had to submit a paper by 14th April 1995. She chose to do a presentation and academic write-up on "A Streetcar Named Desire," and she worked on these using her father's computer. She made the mistake of failing to make a backup copy of her work. On the last day before the deadline, all her stored data were lost from the hard disk. All the appellant was able to put in were some notes copied from a Methuen commentary.

[88] The university's Board of Examiners failed her for plagiarism. She appealed to the Academic Appeals Board which accepted that she had not set out to deceive and referred the paper back for remarking. The Board of Examiners marked it 0. The appellant appealed once more to the Academic Appeals Board without success. But on further appeal to the Governors' Appeal Committee it was decided that the mark of 0 was not "an appropriate academic response," and her assessment was referred back to the Academic Board under the relevant provision of the respondent's Student Regulations. What appears to have happened is that the Academic Board, taking itself to be seized once more of the

appeal, rejected it. Its secretary wrote to the appellant on 23rd July, 1996 to say that the board's members had advised the Vice-Chancellor that a mark of 0 was permissible so long as the examiners had treated the paper as a failure rather than as plagiarism, and that the chair of the Board of Examiners had confirmed that this was what they had done. The Vice-Chancellor as chair of the Academic Board had accordingly not upheld the appeal.

[89] Under the respondent's Student Regulations this gave the appellant one more attempt to obtain her degree. But the relevant Regulation provided that a candidate who satisfies the examiners for the award of a classified degree at the second attempt should not normally be awarded a degree classification higher than a Third Class. The appellant re-sat her finals and was awarded a third class degree, which was not good enough for the further career options which she wanted to pursue. She took out proceedings for the determination that the Appeal Board misconstrued the meaning of plagiarism, awarded a mark beyond the limits of academic convention and failed to take into account the claimant's explanation.

[90] It was held that grievances against universities are preferably resolved within the grievance procedure which universities have today. If they cannot be resolved in that way, where there is a visitor, they then have (except in exceptional circumstances) to be resolved by the visitor. The courts will not usually intervene. While the courts will intervene where there is no visitor normally this should happen after the student has made use of the domestic procedures for resolving the dispute. If it is not possible to resolve the dispute internally, and there is no visitor, then the courts may have no alternative but to become involved. If they do so, the preferable procedure would usually be by way of judicial review.

[91] It has not been demonstrated in the instant application that alternative remedies as provided for under the laws governing the respondent university or its internal statues were exhausted first. It has also not been demonstrated that the

alternatives under the internal processes are ineffective or inappropriate to address the substance of the complaints at issue so as to invite court's intervention, exceptionally.

[92] Secondly, delay in bringing proceedings for a discretionary remedy has always been a factor which a court could take into account in deciding whether it should grant the remedy. The fact that certiorari and mandamus are discretionary remedies by nature cannot be disputed. The court is entitled to refuse certiorari and mandamus to an applicant if the applicant has been guilty of unreasonable delay or misconduct, notwithstanding that the applicant may have proved a usurpation of jurisdiction by the domestic tribunal or an omission to perform a public duty (see *Ridge v. Baldwin, [1964] A.C. 40 at p140*). In the instant case, the impugned decision of the review committee declining to recommend the corrected version of the thesis was made on 13th July, 2016. This application was filed on 7th June, 2017, almost a year after the impugned decision.

[93] Rule 5 (1) of *The Judicature (Judicial Review) Rules, 2009* provides that an application for judicial review should be made promptly and in any event within three months from the date when the grounds of the application first arose, unless the Court considers that there is good reason for extending the period within which the application shall be made. An order for enlargement of time should ordinarily be granted unless the applicant is guilty of unexplained and inordinate delay in seeking the indulgence of the Court, has not presented a reasonable explanation of his or her failure to file the application within the time prescribed by the Rules, or where the extension will be prejudicial to the respondent or the Court is otherwise satisfied that the intended application is not an arguable one.

[94] Public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any

longer period than is absolutely necessary in fairness to the person affected by the decision (see *O'Reilly v. Mackman, [1983] 2 AC 237, [1982] 3 WLR 1096, [1982] 3 All ER 1124*). The purpose of this requirement is to protect public administration against false, frivolous or tardy challenges to official action. In the instant case, although he filed the application out of time, the applicant never sought enlargement of time first. An application filed out of time without an order for enlargement of time is bad in law.

[95] Lastly, 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. Hardship or impossibility of performance may militate against the grant of remedies under judicial reiew. 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."

[96] In the instant case, although in "The Institute of Research and Graduate Handbook," the applicant had recourse to seeking an extension of the time for making the required corrections beyond the two months that were stipulated by the *viva voce* panel, he never sought to avail himself of that opportunity. The maximum duration of the course is seven years. Having been admitted to the respondent's programme of study by thesis on 25th March, 2011, the seven year period elapsed on or about 25th March, 2018. To compel the respondent to continue with the process of assessing his thesis, would be to compel it to breach its internal regulations. The present case presents a situation where performance is so unlikely, impractical and impossible that it would render the orders futile. It

is a well-established rule that a court should not order a remedy which is not feasible.

[97] An academic qualification, award or recognition is deemed valid or genuine when it is conferred by an institution legally authorised to award such qualifications, when it is conferred in accordance with the minimum standards set by the state regulatory agencies and the institution itself, and after proper, careful and deliberate assessment of the student's performance by the institution.

[98] Authentic qualifications are conferred to a student who has satisfied the minimum requirements and expectations in a particular discipline, as certified by the university senate upon submission of assessments by qualified academics. Directing the institution to confer the award by order of court would be a perversion of the entire legal framework and process. Absent bad faith, an arbitrary and capricious judgment by the institution or violation of a constitution or statute, the courts have not usually substituted judicial judgment for professional academic judgment.

Order :

[99] For all the foregoing reasons, I have not found merit in the application and it is accordingly dismissed with costs to the respondent.

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Stephen Mubiru

Resident Judge, Gulu

Appearances

For the applicant : Mr. Kitara Tony.

For the respondent : Mr. Walter Okidi Ladwar.