THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[CIVIL DIVISION]

MISCELLANEOUS CAUSE No. 242 OF 2019

DR. ISAAC WANZIGE MAGOOLA :::::::::::::::::::::::::::: APPLICANT

VERSUS

1. MAKERERE UNIVERSITY BUSINESS SCHOOL (MUBS)

2. PROF. WASWA BALUNYWA :::::::::::::::::::::::: RESPONDENTS

BEFORE HON. DR. JUSTICE BASHAIJA K. ANDREW

RULING:

Dr. Isaac Wanzige Magoola *(hereinafter referred to as the "Applicant")* brought this is an application for judicial review against Makerere University Business School (MUBS) and Prof. Waswa Balunywa (*hereinafter referred to as the 1st and 2nd Respondent respectively)* under the provisions of Article 42 of the Constitution of the Republic of Uganda, Sections 36 and 38 of the Judicature Act, Cap, 13 (as amended), as well as Rules 3 and 7 of the Judicature (Judicial Review) Rules S.I 11 of 2009, Sections 98 of the Civil Procedure Act,

seeking writs of certiorari, mandamus, declarations and general damages, and costs of the suit.

Background:

The background to this application is rooted in the decision contained in a letter dated 06/08/2019 authored by the 2nd Respondent in his capacity as Principal at the 1st Respondent. In that letter, the 2nd Respondent suspended the Applicant from his office as Dean of Faculty of Entrepreneurship and Business Administration on grounds of conflict of interest. On 08/08/2019, the 2nd Respondent wrote another letter suspending the Applicant as Senior Lecturer at the 1st Respondent, on grounds of alleged gross misconduct owing to, among others, alleged personal attacks by the Applicant on the person of the 2nd Respondent and his family, as well as members of the 1st Respondent community. The impugned decisions in the two letters of the 2nd Respondent recommended to the 1st Respondent's Appointments Board the Applicant for further action.

Worthy of note is that the decisions in the two letters are interlinked as they arise from similar facts as contained in letters

dated 18/04/2019 and 06/08/2019 respectively, which the Applicant authored as Acting Chairperson of the 1st Respondent's Staff Association (MUBASA) to the Minister of Education and Permanent Secretary Ministry of Public Service. In the said letters, the Applicant informed the addressees therein, of the problem of staff underpayment at 1st Respondent and the imminent industrial action if the said problem was not addressed.

The Applicant contends that recommending him to the 1st Respondent's Appointments Board for further action meant the suspension was to pave way for investigations, which up to date have never been conducted. Further, that the two impugned decisions to suspend him are directed at the two offices he is occupying, as Dean of Faculty and as Senior Lecturer at the 1st Respondent Institution. That ordinarily, one becomes eligible to be appointed a Dean of Faculty on the basis of being a Senior Lecturer. That on 23/05/2018, the Applicant being a Senior Lecturer was appointed to the office of Dean of Faculty of Entrepreneurship and Business Administration at 1st Respondent pursuant to the provisions of Section 53 (2) of the Universities and Other Tertiary

Institutions Act, 2001 (UOTIA). The Applicant thus challenges the legality and propriety of both decisions to suspend him. He maintains that the decision to suspend him from the office of Dean of Faculty and as Senior Lecturer by the 2nd Respondent as Principal of the 1st Respondent, is ultra vires, arbitrary, irrational, illegal and procedurally improper and ought to be quashed.

The Respondents opposed the application based on the affidavit sworn by Francis Yosa, the 1st Respondent's Secretary and Secretary to Council. He states that the Applicant was rightly suspended and the decision is justified as is implicit in the law, given that the 2nd Respondent, as Principal of the 1st Respondent, is in charge of its academic, administrative and financial affairs. Further, that the Applicant's suspension was the only reasonable and justifiable measure in the circumstances due to the Applicant's conduct of inciting staff to cause disobedience and thereby injure the 1st Respondent's business interests and tarnish its reputation by the Applicant's continued presence in office. Furthermore, that the Applicant's suspension or interdiction is provided for in the 1st Respondent's Human Resource Manual 2009, and under the Public

Service Standing Orders, and as such, this application is misconceived. Also, that the Applicant's suspension was merely a request for him to step aside and pave way for investigations into his conduct by the appropriate organ.

On 12/12/2019, the Respondents filed another supplementary affidavit which was incidentally in reply to the Applicant's rejoinder. The Respondents deponed that this application has now been overtaken by events since the Applicant was consequently dismissed on 13/11/2019 by the 1st Respondent's Appointment Board and that the Applicant has even lodged an appeal against the said decision to the 1st Respondent's Staff Appeals Tribunal.

At the hearing, the Applicant was jointly represented by Mr. Steven Mungoma and Mr. Mukwaya Kizito. *M/s. Loi Advocates* represented the Respondents. However, only counsel for the Applicant filed written submissions, which are on court record and have been taken into account in this ruling. The following issues were framed for determination;

1. Whether this application is amenable to judicial review.

2. Whether the Respondent's decision to suspension the Applicant was lawful.

3. What remedies are available to the parties?

Resolution of the issues

Issue No. 1: Whether this application is amenable to judicial review.

Under Rule 7A of the Judicature (Judicial Review) (Amendment) Rules 2019, it is incumbent upon the court seized with the matter to first ascertain whether the application before it, is amenable for judicial review. For ease of reference, it is quoted below;

"7A. Factors to consider in handling applications for judicial review.

(1) The court shall, in considering an application for judicial review, satisfy itself of the following –

(a) That the application is amenable for judicial review;

(b) That the aggrieved person has exhausted the existing remedies available within a public body or under the law; and

(c) The matter involves an administrative public or official."

In appropriate cases for judicial review, the specific remedies of prerogative orders issued by court are provided for under Rule 3 Judicature (Judicial Review) Rules 2009, vide; mandamus, prohibition, certiorari and injunction. A declaration may also be issued in judicial review pursuant to Rule 3(2) (supra). Section 36(1) of the Judicature Act (supra) also provides as follows;

"(1) The High Court may make an order, as the case may be, of—

(a) mandamus, requiring any act to be done;

(b) prohibition, prohibiting any proceedings or matter; or

(c) certiorari, removing any proceedings or matter to the High Court"

Further to note, is that in judicial review cases, courts are not concerned with the merits of the impugned acts and/or decisions of the public body or official. The concern is restricted to procedural propriety, legality and or rationality of the impugned decisions or acts. This position is well articulated in ***Adam Mustafa Mubiru & Irene Walubiri vs. Law Development Centre H.C.M.A No. 279 0f 2013,*** that the concern for judicial review is always whether the

decision constituting the subject matter of the application was made through an error of law, procedural impropriety or outright lack of jurisdiction generally. A similar stance was taken by the Court of Appeal of Kenya, in ***Commissioner of Lands vs. Kunste Hotel Limited Civil Appeal No.234 of 1995***, which held that;

> ***"...judicial review <u>is concerned not with the private rights or merits of the decision</u> being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected."*** [underlined for emphasis].

Most importantly, in judicial review, the court is called upon to ensure that even within jurisdiction, public powers are exercised prudently, reasonably, fairly, in good faith and in full accord with the legitimate expectations of those affected. The case of ***Shah Vershi Dershi and Co. Ltd vs. transport Licensing Board [1970] EA 631*** is also quite instructive regarding the principle that while exercising judicial review jurisdiction, court ensures that the executive authorities do not exceed their lawful jurisdiction or authority.

As these principles apply to the instant case, it is evident that the application meets the criteria for judicial review. It is the established position that competence of an actionable claim in judicial review is a matter of law, and incompetence cannot be condoned or waived. See: ***William Tumwine vs. Kampala City Council and Another H.C.M.C No. 56 of 2009; Musuku Abdul Jabar vs. Bugiri Municipal Council & Another H.C.M.C No. 207 of 2017 (Jinja).***

The Respondents raised what seemed to be a preliminary point objection in their supplementary affidavit, that this application has now been overtaken by events. That the Applicant was subsequent to the suspension subjected to a disciplinary hearing before the Appointments Board and was dismissed on 13/11/2019 and has even appealed the decision to dismiss him. It is, however, worth noting that the purported disciplinary hearing took place after this application had been filed. Therefore, this particular Respondents' contention is quite at variance with the rationale of judicial review as stated above. In ***Clear Channel Independent (U) Ltd vs. Public Procurement and Disposal of Public Assets Authority H.C.M.C***

No. 380 of 2008, it was held that it does not matter whether the impugned decision being challenged was subsequently surpassed by other procedural measures. The same cannot purport to cure any prior defects or illegalities made in the decision making process that were already before court. Therefore, in the instant application, the legality, rationality and fairness of the 2nd Respondent's decision to suspend the Applicant is still actionable despite the fact that the Respondents, for whatever intentions, subsequently made another decision to dismiss the Applicant. The Applicant is legally deemed to be on suspension pursuant to the provisions of Section 57 (5) UTIA until the determination of his appeal by the Staff Appeals Tribunal. That renders the instant application still properly and competent before this court. Issue No.1 is answered in the affirmative.

Issue No.2: Whether the Respondent's decision to suspension the Applicant was lawful.

The Respondents derive their statutory mandate from the provisions of the UOTIA, 2001, specifically under Sections 83 (1) and (2) for the 2nd Respondent, and Section 71 (1) (a), 2(b) and 132 (supra) for the 1st Respondent. As was held in ***Kuluo Joseph***

Others vs. Attorney General & Others H.C.M.C No. 106 of 2010; Gen. David Sejusa Vs A.G (H.C.M.C No. 176 of 2014; such persons/bodies, as Respondents herein, are public quasi-judicial authorities, who exercise administrative powers, which are amenable to judicial review under the provisions of Article 42 of the Constitution, Sections 36 and 38 of the Judicature Act (as amended), if those powers are exercised unfairly, arbitrarily, illegally or ultra vires. Further, in the case of ***His Worship Aggrey Bwire vs. Attorney General and the Judicial Service Commission Civil Appeal No. 09 of 2009,*** it was also established that judicial review can only be granted on grounds of illegality, irrationality and procedural impropriety.

In the present application, the Applicant contends that the two decisions made by the 2nd Respondent to suspend him both as Dean of Faculty and Senior Lecturer were tainted with illegality in as far as they were made ultra vires the powers of the 2nd Respondent, the Principal as prescribed under Section 87 UOTIA. It is the established law that it is the requirement in decision-making that the decision- makers, whether natural or artificial, correctly

understand the law that regulates the decision made and give effect to it, and that any mistake of law or fact or any inconsistency with the law, will bring their act or omission within the scope of judicial review. As was held in ***Amiran Enterprises Limited vs. Uganda Revenue Authority H.C.M.C. No. 6 of 2010*** (Commercial Court) a decision made *ultra vires* the prescribed powers provided in the law amounts to an illegality, and renders that decision null and void *ab initio* and can be quashed under judicial review.

It is not in dispute in the instant case, that the Applicant was suspended from his position/office as Dean of Faculty by the 2nd Respondent under his powers as Principal of the 1st Respondent. The affidavit in reply deposed by Francis Yosa, in his capacity as the 1st Respondent's Secretary, under paragraph 6 thereof, conceded to the said decisions and justified the same stating that under the UOTIA, the law implicitly confers the 2nd Respondent with such powers since he is the person in charge of the 1st Respondent's academic financial and administrative functions.

A proper reading of the law, however, easily reveals that the offered justification is erroneous. The law is not implicit on the disciplinary

powers of the 2nd Respondent and other disciplinary procedures. Under Section 50 and 53 (5) UOTIA respectively, and Paragraphs 5 and 13, Section F-R, and Paragraph 18 Sections F-S Public Service Standing Orders, the Applicant, as a Dean of Faculty as well as Senior Lecturer, can only be removed from office, whether temporarily or permanently, by the Appointments Board upon the prescribed recommendation of two thirds majority of faculty members or complaint. It means the 2nd Respondent's powers, under Section 87 (2) UOTIA, are not applicable to the Applicant as a Dean of Faculty as well as Senior Lecturer.

Apart from the above, even the purported recommendation by the 2nd Respondent to the Appointments Board, is itself illegal. At best it ought to have been a complaint since the 2nd Respondent was clearly the complainant in the circumstances. With these lapses, the 2nd Respondent acted *ultra vires* his powers in suspending the Applicant both as a Dean of Faculty as well as Senior Lecturer, without any lawful mandate and as such, the decision is illegal, null and void.

It must be added, as a matter of law, that the affidavit in reply of Francis Yosa is itself defective and does not offer a reasonable reply to the application. Order 19 Rule 3(1) CPR is clear on matters to which affidavits shall be confined as follows;

> ***"(1) Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated."***

The deponent herein does not state that he was privy to the impugned decisions. He does not disclose the source of his information and does not have the requisite authority to swear the same on behalf of the 2nd Respondent. The affidavit is accordingly fatally defective and is struck out. That would leave the application wholly unopposed.

Issue No.4: Whether the Applicant is entitled to the remedies sought.

For the foregone reasons, the decisions of the 2nd Respondent to suspend the Applicant as Dean of Faculty and Senior Lecturer from the 1st Respondent are illegal null and void *ab initio.* A prerogative

order of certiorari doth issue quashing the impugned decisions of the 2nd Respondent.

The Applicant sought for the recompense in general damages of UGX.500,000,000/= However, this court is reluctant to grant this remedy. As this court held in ***Sundus Exchange & Money Transfer Limited & 7 Others vs. Attorney General HCMC No..161 of 2019,*** ordinarily, damages are sought through ordinary suits in civil law actions as it is strictly a matter of private law. Damages can only, but rarely, feature as a form of collateral challenge in proceedings for judicial review. If the main purpose of litigation is to seek damages, a party ought to pursue a claim in civil action and not through judicial review, especially where there are complex factual issues to be resolved, such as the assessment of damages. The award of general damages in judicial review is thus an exception rather than the general rule.

Regarding the prayer for a refund of the Applicant's half salary withheld since 06/08/2019, having found that the decisions to suspend him from the 1st Respondent in the positions/offices he

holds, are null and void, it follows logically that the Applicant is entitled a refund of half of his salary from 06/08/2019.

On prayer for costs, Section 27 (2) of the Civil Procedure Act, provides to the effect that costs shall follow the event unless for good reasons court directs otherwise. See also: ***Oketha Dafala Valentine vs. The Attorney General of Uganda H.C.C.S No. 0069 of 2004.*** In the instant case, the applicant has succeeded in his claim and is, therefore, awarded costs of the suit.

BASHAIJA K. ANDREW

JUDGE

29/05/2020.