THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[CIVIL DIVISION]

MISCELLANEOUS CAUSE NO. 001 OF 2021

DR. HAWA NALWOGA & 40 OTHERS::APPLICANTS

VERSUS

1. **MAKERERE UNIVERSITY**
2. **PROF.DAMALIE NAKANJAKO::RESPONDENTS**

BEFORE: HON. JUSTICE ESTA NAMBAYO

RULING

Dr. Hawa Nalwoga & 40 Others (hereinafter referred to as the Applicants) brought this application under **Rule 3,6 and 7 of the Judicature (Judicial Review) Rules, 2009 (as amended)** against Makerere University and Prof. Damali Nakanjako (hereinafter referred to as the 1st and 2nd Respondents respectively), seeking for: -

1. **A Declaration that the appointment of the 2nd Respondent as Principal of the College of Health Sciences during the pendency of the Applicants' petition against the process of appointment of the Principal of the College of Health Sciences was arbitrary, illegal, unfair, irrational and a breach of the Applicant's right to a fair hearing.**
2. **A Declaration that the 2nd Respondent lacks the minimum qualifications for appointment as Principal of the College of Health Sciences and that her nomination, recommendation, approval and appointment by the search Committee, Senate, University Council and the Chancellor respectively were illegal, null and void.**

3. **A Declaration that the requirement of a PhD qualification for the position of Principal of the College of Health Sciences and the elimination of candidates in the clinical disciplines on that ground was arbitrary, irrational, unlawful, null and void.**
4. **An order of Certiorari be issued to call for and quash all the proceedings, reports and decisions of the search Committee, Senate, University Council and Chancellor leading to the appointment of the 2nd Respondent as the Principal of the College of Health Sciences.**
5. **A Declaration that the amendment of the Universities and other Tertiary Institutions (Management of Constituent Colleges of Makerere University) Statute, 2012 by the 1st Respondent to give the Search Committee powers to identify up to five suitable candidates for the post of Principal of the College of Health Sciences after commencement of the impugned recruitment process was ultra vires, illegal, null and void.**
6. **Mandamus directing the 1st Respondent to conduct a fresh process of appointing the Principal for the College of Health Sciences in accordance with the guidance and directions of this Court.**

The grounds of this application are contained in the affidavits of **Dr. David Kateete, Prof. Ibingira Charles** and **Dr. Mondo Charles Kiiza** on behalf of all the Applicants but briefly are that;

1. **The Applicants are senior members of the academic, administrative and support staff of the College of Health Sciences and they bring this application to challenge the unfair processes adopted by the 1st Respondent in recruitment of the Principal for the College of Health Sciences (CHS).**

2. **The 1st Respondent advertised for the post of Principal-CHS and appointed a Search Committee to identify up to five suitable candidates for that post and forward the names of the selected candidates to the University Senate, contrary to Section 29 (2) (a) of the University and Other Tertiary Institutions Act, 2001 (as amended), the 1st Respondent then purported to amend the Universities and Other Tertiary Institutions (Management of Constituent Colleges of Makerere University) Statute, 2012 after commencement of the search process for the post of Principal –CHS.**
3. **The 1st Respondent's requirement of a PhD qualification from candidates for the position of Principal-CHS and the elimination of clinical scholars from the race on that ground was arbitrary, unfair, irrational, illegal and an unjustified departure from the known practice without adequate consultation with relevant stakeholders.**
4. **The findings of the search committee which were endorsed by the senate, University Council and the Chancellor that Prof. Moses Joloba is not of good ethics, integrity and therefore not eligible for appointment for the position of Principal CHS were unfair and reached in violation of his fundamental rights to a fair hearing, just and fair treatment.**
5. **The 2nd Respondent does not possess the minimum qualifications for appointment for the position of Principal, CHS and as such her appointment was illegal, null and void.**
6. **The Applicants lodged a complaint against the unfair, arbitrary and irrational recruitment procedures adopted by the 1st Respondent but it was ignored.**

7. **The 2nd Respondent was appointed as the Principal CHS in total disregard of the Applicants' petition to the 1st Respondent referred to above.**
8. **In recommending and appointing the 2nd Respondent as Principal-CHS notwithstanding the pendency of a staff petition against the recruitment process, the 1st Respondent acted unfairly and in breach of the Applicant's right to be heard and to be treated justly and fairly.**
9. **The proceedings of the Search Committee, Senate, University Council and Chancellor leading to the appointment of the 2nd Respondent as Principal –CHS were therefore illegal, null and void.**
10. **The Applicants were denied a remedy within the 1st Respondent's internal structures and hence the resort to Judicial Review from this Court to exercise its supervisory powers over her inferior bodies.**
11. **The actions/inactions of the 1st Respondent impinged on a bundle of the Applicants' constitutionally guaranteed rights, namely, the right to a fair hearing, right to just and fair treatment, right to participate in the affairs and governance of the College of Health Sciences, freedom of expression, protected under Objective 11(i) of the National Objectives and Directive Principles of State Policy and Articles 20,28,29 and 42 of the Constitution.**
12. **That it is in the interest of justice that the 1st Respondent upholds, respects and promotes the rule of law and human rights in the exercise of its statutory powers and that it is just and convenient that this Court allows this application and grants the Applicants all the reliefs sought in this application.**

Yusuf Kiranda, the Acting University Secretary of the 1st Respondent and Secretary to the 1st Respondent's University Council, filed an affidavit in reply opposing this application.

Background to the application

The brief background to this application is that on the 26th of September, 2019, the 1st Respondent advertised for the job of Principle, College of Health Sciences where Applicants were required to be holders of a PhD or other academic Doctorate and to have been in a managerial position in an institution of higher learning or a research institute for at least four years. After running the advert, the 1st Respondent amended ***S. 13 of the Universities and Other Tertiary Institutions (Management of Constituent Colleges of Makerere University) Statute, 2012*** which guides the recruitment process for the post. The Applicants petitioned the University Council challenging the entire recruitment process and contend that the 1st Respondent disregarded their petition and proceeded to illegally, irrational and irregularly appoint the 2nd Respondent as Principal of the College of Health Services without giving them an opportunity to be heard, hence this application.

Representation

Learned Counsel Isaac Ssemakadde represents the Applicants while Counsel Hudson Musoke is for the Respondents. Counsel for the parties were given directives to file written submissions which they have duly complied with.

In their submissions, Counsel set out issues for determination as follows: -

1. **Whether this application should be allowed; and**
2. **What are the remedies available to the parties?**

At the beginning of his submissions, Counsel for the Applicants objected to the Respondents affidavit in reply for having no annexures attached. He submitted that in an application for judicial review, affidavits constitute the record in regard to the decision or action complained of and therefore, affidavits must be accompanied with annexures. He relied on the cases of **Lex Uganda Advocates -v- AG, MC No. 123/2017 at pg. 7 para 4, Twinamstsiko Elly -v- Makerere University Council and 2 Others, MC No. 233/2009 at pg. 7 para 4** and the case of **R –v- Lancashire County Council, ex parte Huddleston [1986] 2 All ER 941, at pg 945-946**, where Court held that, in judicial review proceedings, a Respondent Authority owes duty to Court to cooperate and to make candid disclosure by way of affidavit of the relevant facts and documents which show the reasoning behind the decision which is challenged. Counsel further relied on the case of ***Paul K. Ssemogerere and Others – v- A.G, SCCA No.1/2002,*** where the government, which was the Respondent had failed to provide Court with the Speaker's certificate of compliance in a case of alleged impropriety or illegality in the enactment process, Court held that the government side bears the burden of adducing empirical evidence pertaining to aspects of procedural compliance when its decision-making processes have been challenged in Court. Counsel emphasized that in judicial review and other public law cases, the Respondent authority bears the burden of adducing empirical evidence showing how and why it arrived at the decision complained. He explained that in the case of ***Uganda Nation al Dairy Traders Association –v- AG, MC No. 113 of 2015***, a judicial review application was allowed on that basis. Counsel submitted that where the Respondents fail to attach annexures or simply file an affidavit in reply containing "a bare denial" of the Applicant's allegations, the Court will be justified in finding that the Applicant's allegations are true since they went unanswered or unchallenged as held in the cases of ***Gandesha –v- Lutaya, SCCA No.14 of 1989*** and ***Majibu Sebyara vs AG HCMC 163 of 2016***.

In reply, Counsel for the Respondents submitted that there is no rule that every affidavit filed in a judicial review application should be validated by annexures. That all the records that the Respondents relied on to arrive at their decision were exhibited by the Applicants as annexures. That the burden was upon the Applicants to prove their case and it does not shift to the Respondents.

Analysis

In the case of ***R –V- Lancashire County Council [1986] 2 All ER 941 at 945-946***, relied on by Counsel for the Applicants, **Sir John Donaldson MR, noted, inter alia** that the appropriate response by the Respondent will depend on the facts of each case which are almost infinitely variable.

In the case of ***Nambowa Rashida –v- Bavekuno Mafumu, Godfrey Kyeswa & Anor EPA No. 69 of 2016, Engwau JA, (as he then was) noted inter alia that: -***

"even if those annexures were detached, the affidavits thereof would still be competent to support the Notice of Motion".

In view of the above therefore, it is my finding that it is not mandatory for every affidavit to have annexures attached to it. The attachment of annexures to affidavits depends on the evidence that a party wishes to rely on and may vary depending on the facts of each case. A party may present credible affidavit evidence even without any annexures to the affidavit.

Now turning to the issues set out for determination, I would amend the set issues to enable me determine all matters in controversy as follows;

1. **Whether this is a proper case for Judicial Review.**

2. **Whether the recruitment process of the 2nd Respondent was illegal, irrational and procedurally improper.**
3. **What remedies are available to the parties.**

I'm fortified in the amendment of the issues by the provisions of the law under ***Order 15 rule 5 (1) of the Civil Procedure Rules which provides for the power of the Court to amend or strike out issues and it states that;***

"The Court may at any time before passing a decree, amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed"

Also in ***Kasingye Emmanuel –v-Genevieve Kasingye CA NO. 096 of 2014,*** Court noted that;

"a court is empowered to amend, frame new, or strike out issues wrongly framed or introduced before passing a decree. It may come as a result of the evidence led, but principally it must be done to assist court to determine the actual matter(s) in controversy between the parties."

Issue 1: Whether this is a proper case for judicial review.

Section 36 (1) of the Judicature Act Cap 13, provides for the power of the High Court to issue orders under judicial review and it states as follows;

(1) The High Court may, upon application for judicial review, grant any one or more of the following reliefs in a civil or criminal matter-

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

(b) an order of prohibition, prohibiting any proceedings or matter; or

(c) an order of certiorari, removing any proceedings or matter into the High Court.

Rule 3 (1) and (2) of the Judicature (Judicial Review) Rules, 2009, provides that a party may apply for an order of prohibition, certiorari, declaration and injunction by way of judicial review in appropriate cases.

Under Rule 3A of the Judicature (Judicial Review) (Amendment) Rules, 2019, it is provided that any person who has a direct or sufficient interest in a matter may apply for judicial review.

Rule 7A (1) of the Judicature (Judicial Review) (Amendment) Rules, 2019, provides that the Court in considering an application for judicial review must satisfy itself that: -

(a) the application is amenable for judicial review,

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

(c) the matter involves an administrative public body or official among others.

In this case, the Applicants have shown in their affidavit evidence that they are senior members of the academic, administrative and support staff of the College of Health Sciences and as such, they are persons who have direct and sufficient interest in this matter. Evidence on record also shows that the Applicants are aggrieved by the process that the 1st Respondent adopted to appoint the 2nd Respondent as the Principal of the College of Health Sciences.

In regard to exhaustion of existing remedies available within the public body or under the law, annexure "F" to the affidavit in support of the application is a petition to the University Council over the criteria and process for selecting the Principal and Deputy Principal at the College of Health Sciences. In paragraph one of this

annexure, it is specifically stated that the petition is against the criteria as well as the process employed by the University in selecting the candidates. Dr. David Kateete states in paragraph 18 of his affidavit in support of the application that they lodged a complaint with the University Council challenging the unfairness, illegality and irrationality in the recruitment process but the same was not dutifully considered as the 1st Respondent ignored their petition and proceeded to appoint the 2nd Respondent as Principal, College of Health Sciences. The 1st Respondent agrees to the fact that the Applicants filed a complaint dated 24th/2/2020 over the criteria and process for selection of the Principal and Deputy Principal of the College and that the petition was handled by the University Committee which found no merit in the petition. That the report of the Committee's finding was presented to the emergency meeting held on the 3rd/8/2020 (see paragraphs 9,10,11 and 12 of the affidavit –in-reply). The Respondent has not presented any evidence to confirm that the complaint was handled and a report made to Council. No report has been provided to this court. All that is on court record is referral of the matter to the committee that was to handle the petition and report back to Council by the 3rd August, 2020 (see annexure "E" to the affidavit in support of the application). Without evidence to confirm that the staff petition was heard by the committee, it is my finding that the Applicants exhausted the internal mechanisms without getting a remedy. Therefore, the Applicants fulfilled all the requirements under ***Rule 7A of the Judicature (Judicial Review) (Amendment) Rules, 2019,*** and this application is amenable for judicial review. Issue No.1 is answered in the affirmative.

Issue 2: Whether the recruitment process of the 2nd Respondent was illegal, irrational and procedurally improper.

Counsel for the Applicants submitted that the 1st Respondent in order to appoint the 2nd Respondent as the Principal, College of Health Sciences, ignored the staff petition, which contravened their rights under Article 42 of the Constitution, introduced a PhD or other Doctorate as a requirement which eliminated Clinical scholars from applying for the post and amended the College Statute after the job

advert. That all the above were contrary to well laid down and known procedures of the 1st Respondent. That the 1st Respondent's sudden departure from the known policy of treating clinical scholars equally with non-clinical scholars in the recruitment of the Principal CHS was not only unfair and unjustified but also amounted to breach of legitimate expectation and abuse of power as expressed in grounds 3, 6, 7, 8, 9, 10 of the affidavit in support of the application by Dr. Kateete and annexures "B" and "F" thereto. Counsel explained that it is a well-established principle that before departing from a given policy or practice, a public body is required to engage in legitimate consultation with those who are likely to be affected by the change. He referred to the cases of ***Uganda National Dairy Traders Association –v- Dairy Development Authority & Anor, MC No.113/2015, 47-90*** and the case ***of Nairobi High Court Judicial Review Case No.81 of 2013 Town Council of Kikuyu –v- The National Social Security Fund Board of Trustees, 56-58*** and also submitted that as per the case of ***R –v- Chief Justice of Kenya & 6 Others, ex parte Moijo Mataiya Ole Keiwua, Nairobi HCMA 1298 of 2004 at p 41-46*** where it was noted that breach of legitimate expectation is synonymous with breach of natural justice and the duty to act fairly which renders the decision reached following such breach null and void. Counsel submitted that in the instant case, the job advert contravened the provisions of Section 6.1 (c) (i) of the Human Resource Manual currently in force which exempts Scholars in Clinical disciplines from the requirement of a PhD qualification for promotion purposes and that the Respondents' averments in paragraphs 4, 5, 6 and 17 of Mr. Kiranda's affidavit – in - reply that the Council had the mandate to introduce the PhD requirement pursuant to Sections 40, 41 and 72 of the Principal Act are misconceived. Counsel further submitted that the 1st Respondent also breached the provisions of Sections 72 (f) and 72 (j) of the Principal Act and Sections 14 and 16 of the Interpretation Act, Cap 3 when it failed to gazette the PhD requirement. He relied on the cases of ***Bwowe***

Ivan & Others -v- Makerere University, MC No. 252 and 265 of 2013 and David M Nyende -v- the Institute of Certified Public Accountants of Uganda, MA 33 of 2014 at p 17-18 and pg 28, where the decisions of an Administrative body based on ungazetted instruments were nullified and explained that where an administrative body or official has by statute any decision-making power, the same must be exercised fairly and reasonably. He prayed that Court finds that the requirement to hold a PhD or other Doctorate as a precondition for appointment as a Principal CHS was introduced by the 1st Respondent arbitrarily, unfairly, unreasonably, irrationally and improperly.

On the issue of amending the statute after the advert, Counsel submitted that the 1st Respondent's decision to change the selection process by amending the existing statutory instrument after commencement of the impugned recruitment process was not only ultra vires but also improper, unjust and unfair. He averred that it is established law that if a statute prescribes the procedure to be followed, the administrative authority must apply the provisions properly. If the clause contains any special directions in regard to the steps to be taken by the decision maker in the process of satisfying himself or herself, he or she would be bound to follow those directions. He relied on the case of ***De Souza –v- Tanga Town Council [1961] EA 377, 386I-387A*** and explained that in the instant case, the amendment relaxed the whole process leaving the 1st Respondent with the discretion of selecting only the 2nd Respondent's name right from the search committee up to her appointment by the Chancellor which was irrational. He relied on paragraphs 8,11,16 and 18 of Dr. Kateete's affidavit in support of the application.

On procedural unfairness in shortlisting, Counsel submitted that the 2nd Respondent, just like Prof. Jacinta A. Opara and Dr. Charles Kiiza Mondo whose particulars are set out in the shortlisting report which is Exh. MCK-2 to Dr. Mondo's affidavit, lacked

the 4 years required managerial experience, but the 1st Respondent chose to shortlist the 2nd Respondent leaving out the others under unclear circumstances. Counsel prayed that this court finds merit in this application and grants orders as prayed.

In reply, Counsel for the Respondents submitted that procedural impropriety relates to the decision-making body not acting fairly in the process of taking the decision. That in the instant case, the University Council of the 1st Respondent put up an advert for the post of Principal, College of Health Sciences and those who felt that they had the requisite qualifications lodged their applications. The Senate Set up a Search Committee to carry out the interviewing exercise and the Applicants who qualified were shortlisted, invited for interviews and subjected to similar questions by the same panel and the 2nd Respondent emerged successful whereupon her name was forwarded to Senate for consideration with a report detailing the process and conclusions. Counsel explained that at that stage, the Applicants petitioned the Chairperson of Council challenging the process and alleging that the Search Committee acted improperly when it did not involve them in the search process under the Universities and Other Tertiary Institutions Act, 2001. Counsel submitted that the quoted provisions were distinct from the instant case as the search process was conducted under a new structure of the University vis-a-viz the faculties, as before, to the Collegiate system of administration and management. He explained that the 1st Respondent's University Council convened and passed regulations under which the search process was conducted. Counsel contended that the application does not indicate anywhere that the Applicants were barred from making their contributions to it. That they did not make any effort to participate in the process except lodging a petition. That the said petition was considered when the University Council halted the recruitment process and launched an investigation into the

process and the decision was communicated to the Applicants as per annexure "E" to the supplementary affidavit in support of this application. That the petition was considered on the 28th July, 2020 and the Applicants were heard before the 1st Respondent proceeded to appoint the 2nd Respondent as Principal, College of Health Sciences and as such the 1st Respondent acted in accordance with the rules of natural justice. Counsel submitted that this application has no merit and prayed that it should be dismissed with costs.

Analysis

In National Drug Authority & Another -v- Nakachwa Florence Obiocha CA No. 281 & 286 of 2017, the Court of Appeal held that Judicial review is concerned with the decision-making process and not the decision itself. That the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he or she has been subjected. The Court explained that judicial review is a legal process of subjecting to judicial control, the exercise of powers affecting people's rights and obligations enforceable at law by those in public office.

In *Fuelex Uganda Ltd -v- The Attorney General & O'rs M.C. No. 48 of 2014 cited in Dr. Daniel K.N. Semambo -v- National Animal Genetic Resource Centre M.C. No. 30 of 2017;* Musota, J, (as he then was) held, inter alia, that in order to succeed in an application for judicial review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety.

***Black's Law Dictionary, 10th Edition*,** defines an illegality as an act that is not authorized by the law; or a state of not being legally authorized.

Illegality is when the decision- making authority commits an error of law in the process of taking or making an act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. **See the cases of *Mrs. Geraldine Sail Busuulwa –v- National Social Security Fund & A'nor, HCMC No. 032 of 2016, Thugitho Festo vs. Nebbi Municipal Council (Arua) HCMA No. 15 of 2017 and Ojangole Patricia & 4 O'rs vs. Attorney General HCMC No. 303 of 2013.***

Irregularity according to the case of ***Council of Civil Service Union -v- Minister for Civil Service [1985] AC 374 ALL ER 935*****,** applies to a decision which is so outrageous in defiance of logic or of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it.

In ***Ignatius Loyola Malungu -v- Inspector General of Government MC No. 059 of 2016*****,** Musota, J, (as he then was) noted that procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act without procedural fairness towards one to be affected by the decision. It may also involve failure to adhere to and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.

S. 29. (2) of the Universities and Other Tertiary Institutions Act, 2001 (as amended) provides that where the National Council establishes or declares a College or Public Tertiary Institution to be a constituent college of a University-

(a) the Chancellor of that University shall appoint a Principal on the recommendation of the University Council from three candidates recommended by the Senate of the University.

In the instant case, the Applicants contend that the 1st Respondent published a job advert for the post of Principal for the College of Health Sciences on the 26th/9/2019 and that after the recruitment process had commenced, the 1st Respondent amended the law so as to circumvent the provisions of S. 13 (2) (3) & (4) of the Universities and Other Tertiary Institutions (Management of Constituent Colleges of Makerere University) Statute, 2012. The advert dated 26th/9/2019 is annexure "B" to the affidavit in support of the application, while the gazette notice amending the statute is dated 31st/1/2020 (annexure "C" to the affidavit in support of the application). By the amendment, the search Committee was given discretionary powers to identify up to five suitable candidates instead of the five candidates for recommendation to the senate. This means that the search committee may identify less than the initially required five candidates to the University Senate. The senate now selects up to three names for submissions to the Council and not the mandatory three names, which relaxes the system. The Council then recommends one candidate to the Chancellor for appointment. The amendment was run in the gazette about four months after the advert.

S.17 (1) (a) of the Interpretation Act is to the effect that a statutory instrument commences on the date provided for under the instrument or, where no date is so provided, the date of its publication as notified in the Gazette. This means that the amendments made to the **Universities and Other Tertiary Institutions (Management of Constituency Colleges of Makerere University) Statute**, **2012** would only be applicable from the date when they were run in the gazette which is

the 31st /1/2020 and were not applicable to the Applicants as per the advert run by the 1st Respondent on the 26th November, 2019.

Under paragraphs 16 of his affidavit in support of the application, Dr. David Kateete states that Prof. Moses Joloba was unfairly eliminated by the search committee on grounds of lack of integrity. No evidence of conviction or disciplinary action in respect to the alleged lack of integrity has been presented. Annexure Mck-2 to the 2nd affidavit in re-joinder by Dr. Mondo Charles Kiiza shows that Prof. Joloba was shortlisted for the interviews. The Ag. University Secretary to the 1st Respondent in his affidavit- in – reply makes no rebuttal to the deposition that Prof. Joloba was eliminated unfairly and on baseless claims of lack of integrity, neither has he made any denial. It is settled law that where facts are sworn to in an affidavit and they are not denied or rebutted by the opposite party, the presumption is that they are accepted as the truth. **See Massa -v- Achen [1978] HCB 297.**

In regard to the requirement for a PhD and 4 years in a managerial position, it is the Applicants' position that the same was introduced as a requirement in the advert under unclear circumstances and that to their surprise the 2nd Respondent was shortlisted for the job even when she did not have the four years' experience in a managerial position and yet there were candidates with four years' managerial experience left out. Annexure "A" to the supplementary affidavit in support of the application by Prof. Ibingira Charles shows that he was appointed Principal of the College of Health Sciences on the 21st /12/2015 and he held the said office up to the 1/11/2019. This means that Prof. Ibingira was the sitting Principal when the advert was run by the 1st Respondent.

S. 15 of the Universities and Other Tertiary Institutions (Management of Constituency Colleges of Makerere University) Statute, 2012 provides that a

Principal shall be appointed for a term of 4years and on the recommendation of University Council, the appointment maybe renewed for one further term only.

Prof Ibingira states in paragraph 3 of his supplementary affidavit in support of the application that he was eligible for re-appointment for another term of 4 years upon a fair appraisal of his past performance but he was denied the opportunity when the 1st Respondent raised the terms to a requirement of a PhD without giving him notice. He wrote a letter to the 1st Respondent protesting the discriminative nature of the advert. (see annexure "C" to his supplementary affidavit in support of the application).

S. 6.1 of the Makerere University Human Resource Manual, 2009 provides for promotions of staff. Under S.6.1(a) ii, the policy objective is to provide a fair and equitable method of assessment so as to encourage a diverse range of applicants to get appointed and promoted. Under S.6.1 (c) i of the Manual clinical disciplines are exempted from the requirement of a PhD qualification for promotional purposes. Going by the wording of the advert, it means that Clinical officers with advanced qualifications which are not PhDs or other academic Doctorates would not be eligible to apply for the job of Principal, College of Health Sciences which contravenes the policy objective provided under S.6.1 (c) i of the Human Resource Manual and yet as rightly observed by Prof. Ibingira, holding a PhD or other academic Doctorate does not necessarily mean that one has the best managerial and administrative competencies.

In view of the above therefore, it is my finding that the 1st Respondent's whole process of recruitment of the 2nd Respondent as the Principal of the College of Human Sciences was marred with illegality, irrationality and procedural impropriety.

Remedies

In **Jotham Welamondi –v- Chairman of the Electoral Commission of Kenya (2002) Klr 486)** it was noted that Certiorari is designed to prevent abuse of power. The purpose of certiorari is to ensure that an individual is given fair treatment by the authority to which he or she is subjected. Its effect when issued is that the order of authority or other decision made is quashed. The court will issue it when it finds that the decision challenged was reached without jurisdiction or in excess of jurisdiction in breach of the rules of natural justice or contrary to the law. When issued certiorari quashes a past decision or act. The effect of the order of certiorari is to restore the status quo ante which was the situation pertaining before the infringed decision was made.

In General Medical Council –v- Spackman [1943] AC 627 at 644, cited with approval in SGS Societe General de Surveillance SA –v- PPDA & Anor MA No. 43 of 2011, Mwangusya, J, (as he then was) while quoting Lord Wright, noted that;

"if the principles of natural justice are violated in respect of any decision, it is indeed, immaterial whether the same decision would have been arrived at in the absence or departure from essential principles of natural justice. The decision must be declared to be no decision"

In this case, it has been established that the recruitment of the 2nd Respondent by the 1st Respondent was marred with illegality, irrationality and procedural impropriety and therefore this Courts now makes declarations and orders as follows;

1. **A Declaration be and is hereby made that the appointment of the 2nd Respondent as Principal of the College of Health Sciences during the pendency of the Applicants' petition against the process of appointment was illegal, irrational and procedurally improper.**
2. **A Declaration be and is hereby made that the requirement of a PhD or other academic Doctorate as qualification for the position of Principal of**

the College of Health Sciences and the elimination of candidates in the clinical disciplines on that ground was irrational, illegal, null and void.

3. **An order of Certiorari be and is hereby issued to call for and quash all the proceedings, report and decision of the search Committee, the Senate, the University Council and the Chancellor leading to the appointment of the 2nd Respondent as the Principal of the College of Health Sciences.**
4. **A Declaration be and is hereby made that the amendment of the Universities and other Tertiary Institutions (Management of Constituent Colleges of Makerere University) Statute, 2012 by the 1st Respondent after commencement of the impugned recruitment process was illegal, irrational, procedurally improper, null and void.**
5. **An order of Mandamus be and is hereby issued directing the 1st Respondent to conduct a fresh process of appointing the Principal for the College of Health Sciences in accordance with well laid down laws and procedures while bearing in mind the provisions of its Human Resource Manual.**
6. **The 1st Respondent pays costs of this application.**

I so order

Dated, signed and delivered by mail at Kampala, this 2nd day of September, 2021.

Esta Nambayo

JUDGE

2/09/2021.