

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

MISCELLANEOUS CAUSE NO.147 of 2020

DR. CHARLES BARUGAHARE=====APPLICANT

VERSUS

- 1. MAKERERE UNIVERSITY**
- 2. PROF. BARNABAS NAWANGWE**
- 3. YUSUF KIRANDA =====RESPONDENTS**
- 4. ATTORNEY GENERAL**

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The applicant brought this suit under Articles 50, 28, 42, 44(c) of the Constitution; Section 33 and 36 of the Judicature Act Cap 13, Rule 3, 6, 7 and 8 of the Judicature (Judicial Review) Rules.2009, for the following judicial reliefs/orders;

1. A declaration that the decision contained in the Permanent Secretary/Secretary to the Treasury's letter dated 8th June 2020 appointing the 3rd Respondent Accounting Officer on the request of the 2nd respondent to take over the applicant's statutory roles/duties of the University Secretary of the 1st respondent effective 1st July 2020 without cause or any hearing was ultra vires, null and void.

2. A declaration that the decision to remove the applicant from his office of University Secretary/ Secretary to Council contained in the 2nd respondent's letter dated 29th June 2020 disguised as compulsory leave for three months which was made two days before he completed his study leave and was to resume his duties and without Council and the Appointments Board approval is illegal, ultra vires, null and void.
3. A declaration that the 1st respondent in enacting paragraph 8.7 of the Human Resource Manual irregularly amended Sections 62 and 63 of the Employment Act 2006 and Section 55(2) of the Universities & Other Tertiary Institutions Act and the same is ultra vires, null and void.
4. A declaration that the respondents' decision to remove the applicant from his statutory role of Accounting Officer of the 1st respondent which is integral to his job of University Secretary and give it to the 3rd respondent is constructive removal of the applicant from his statutory office.
5. A declaration that the respondent's to force the applicant to take compulsory leave without adhering to section 55(2) of the Universities & Other tertiary Institutions Act and Employment Act of 2006 was abuse of power, made without jurisdiction and the same is ultra vires, null and void.
6. A declaration that the decision of the 2nd respondent to create his alleged Committee of Management which does not exist within the 1st respondent's statutory organs and disciplinary powers is

usurpation of the statutory powers of Parliament and mandate of council, University Staff Tribunal and Appointments Board and the same is abuse of powers, ultra vires, null and void.

7. A declaration that the respondents acted arbitrarily, ultra vires and in breach of statute when they bypassed the 1st respondent's statutory organs mandated with the appointment and discipline of University staff to make decisions adversely affecting the applicant's legitimate expectation of being treated fairly, justly and being accorded a fair hearing.
8. A declaration that the applicant is entitled to his eligibility right to renewal of his job of University Secretary which the respondents are acting arbitrarily to forestall.
9. An Order of Certiorari doth issue calling into court the respondents decision contained in the 4th respondent's Permanent Secretary and Secretary to the Treasury's letter dated 8th June 2020 appointing the 3rd respondent Accounting Officer on the request of the 2nd respondent to take over the applicant's statutory role/duties of University Secretary of the 1st respondent effective 1st July 2020 for quashing from the public records of the Government of Uganda.
10. An Order of Certiorari doth issue calling into court the respondent's decision contained in the 2nd respondent's letter dated 29th June 2020 forcing the applicant to go on compulsory leave to block him from resuming his duties of University Secretary for quashing from the public records of the Government of the republic of Uganda.

11. An Order of Mandamus doth issue ordering the respondents to perform statutory duty and reinstate the applicant's statutory duties of Accounting Officer attached to his office of University Secretary/Accounting Officer of the 1st respondent with the corresponding respective salary, emoluments and allowances.
12. An Order of Prohibition doth issue prohibiting the respondents from continuing to arbitrarily, unfairly, unjustly discipline and/or remove the applicant from his job and duties of University Secretary/Accounting Officer of the 1st Respondent.
13. An Order of Injunction doth issue restraining the respondents from irregularly removing the applicant from his job, roles and duties attached to his office of University Secretary/Accounting officer of the 1st respondent and / or continuing with irregular disciplinary process against the applicant.
14. Compensation, Special and general damages, punitive and Exemplary damages.
15. Costs.

The grounds of this application were stated briefly in the notice of motion and supported by Dr. Charles Barugahare's affidavit briefly stating that;

1. That the respondents' have to the detriment of the applicant usurped the powers and authority of mandated organs, acted and threaten to continue acting ultra vires and illegally contrary to the Constitution, Employment Act and Universities and Other Tertiary Institutions Act, and the Respondent's Human Resource Manual and rules of natural Justice.

2. The 2nd respondent wrote to the Permanent Secretary/Secretary to the Treasury to appoint the 3rd respondent as the Accounting Officer of the 1st respondent effective 1st July 2020 and the latter complied with his Appointing letter dated 8th June 2020.
3. That the 2nd respondent on 29th June 2020 moved to force the applicant on what he called forced leave which in effect disguised as removal from office and purported to create a Management Committee outside the law to investigate non-existing allegations personally concocted by the 2nd respondent.
4. The respondents prejudicially proceeded with inherent bias and out right prejudice targeting to illegally give out the applicant's job, duties and responsibilities to his deputy, the 3rd respondent and constructively remove him from his statutory office without cause or according him a hearing.
5. The applicant is being victimized by the 2nd respondent for having performed his duties and refused to bow to pressures to approve questionable expenditures, consents, contracts and decisions that would have cost the 1st respondent huge sums of money.
6. That the respondents took extreme harsh decision without taking into consideration the applicant's exemplary outstanding work for the University, never gave him written notice including grounds for his personal removal and asking him to respond in writing, nor made arrangements for him to appear before the University staff tribunal or appointments board with respect to the matter.

7. That the applicant was never subjected to any disciplinary process within the 1st respondent's organs as per his legitimate expectation before the impugned decision was taken, which denied him a remedy in the face of the unfair and unjust treatment and judicial review is the most appropriate remedy.

The respondent opposed this application and filed an affidavit in reply sworn by Prof Barnabas Nawangwe for the 1-2 respondents, Yusuf Kiranda as 3rd respondent and Mr Keith Muhakanizi for the 4th respondent stating as follows;

1. That the applicant is still the substantive University Secretary of the 1st respondent and the 3rd respondent was only appointed only in acting capacity. The applicant was sent on compulsory leave for a period of 3months effective 1st July 2020 with full salary pursuant to Human Resource Manual.
2. The decision to send the applicant on compulsory leave was taken after a number of issues requiring action which brought to the attention of the 1st respondent relating to Public Procurement and Disposal of Public Assets Authority and the University Council concerning the applicant's performance of his duties as University Secretary.
3. The applicant was informed and requested to respond to said matter prior to sending him on compulsory leave. The applicant responded by saying that he was still on study leave and needed more time respond to those matters. He was further invited to a meeting at the University on June 26th 2020 to discuss the resumption of his duties after the expiry of his study leave in light of the matters raised regarding the performance of his duties but the respondent received

the letter of invitation but did not turn up for the said meeting and attempts to reach him on phone to find out the reason for non-attendance were futile as he did not answer the calls.

4. That the applicant has to-date not furnished a response to the matters raised earlier and had not given any reason for failure to attend a meeting.
5. That the 2nd respondent constituted a Management Committee comprising of diverse senior university staff to conduct a free enquiry into the allegations raised against the applicant for the purposes of advising on whether the allegations amount to reasonable cause for instituting disciplinary proceedings against the applicant. The said committee has not been vested with any powers to discipline the applicant or to remove him from employment.
6. The 3 month leave will be adequate for the applicant to respond to the allegations and he will be given an opportunity to furnish his response to the said committee and thereafter will resume his duties as University Secretary, if no reasonable cause is established for instituting disciplinary proceedings against him.
7. That in case reasonable cause is established for instituting disciplinary proceedings against the applicant, the matter will be referred to the Appointments Board for appropriate action in terms of the Manual. In the event of any adverse findings by the appointments board, the applicant will be given an opportunity to challenge the findings before the University Council or the University Staff Tribunal.

8. That the present cause is premature and the applicant has not exhausted grievance procedure enshrined in the Employment Act and Manual before lodging this cause. The relevant University organs have not received any complaints regarding the decisions to send him on compulsory leave.
9. That I have never acted in bad faith toward the applicant or victimized the applicant in any way or pressurized the applicant to approve any alleged questionable expenditures, contracts or consent judgment. I would never have approved the applicant's study leave which was geared towards his professional development and career enhancement if I was biased against him.
10. That the applicant as a member of top management has been party to and or participated in the setting up of over 12 similar committees to inquire into allegations against University staff prior to commencement of disciplinary proceedings against the said staff. At no point has the applicant ever raised any objection as to the legal validity or otherwise of the said committees.
11. That the 3rd respondent has since July 01 2019 been acting as the 1st respondent's Accounting Officer for the period that the applicant has been on study leave. By a letter dated June 08 2020, the Permanent Secretary Ministry of Finance and Secretary to Treasury, re-appointed the 3rd respondent as the 1st Respondent's Accounting officer for the 2020/2021 financial year and the 3rd respondent has dutifully performed the said role since 1st July 2019.

12. That as per the Public Finance Management Act 2015 and Public Finance Management Regulations 2016, the appointment of Accounting Officers is a prerogative of the 4th respondent and the deadline for the appointment of accounting officers for the financial year is June 10th of the current financial year.
13. That on 26th May 2020, the Secretary to Treasury and Permanent Secretary received a communication from the Vice Chancellor of Makerere University-2nd respondent requesting that the 3rd respondent be re-appointed as Accounting Officer for the financial year 2020/2021.
14. That even if the 2nd respondent had not requested, the applicant would not have been appointed as Accounting Officer for the FY2020/21 owing to the Audit queries from the internal Auditor General and Auditor General's report for FY2016/2017 and FY2017/2018.
15. The 3rd respondent stated that upon appointment I was required to accept the appointment as Accounting Officer of the 1st respondent in writing which I duly did and signed a performance contract as well.
16. That the 2nd respondent on 23rd June 2020 wrote a letter to the applicant and tasked the University Secretary's office to deliver the said letter. On 24th June 2020 the applicant came to Makerere University and he was personally handed over the letter.

17. That the applicant requested for several documents to enable him respond to the letter written by the 2nd respondent on several matters. The said documents were provided to the applicant.

Four issues were proposed by the applicant for courts resolution;

1. *Whether this is not a proper application for the grant of the reliefs of judicial review?*
2. *Whether the applicant's indefinite compulsory leave was proper?*
3. *Whether the respondent's advertisement of the applicant's job while there was a subsisting order preserving the status quo was proper?*
4. *What remedies are available to the applicant?*

The applicant was represented by *Dr. James Akampumuza* and the 1st-3rd respondents were represented by *Hudson Musoke* and *Esther Kabinga* while the 4th respondent was represented by *Johnson Natuhwera (SA)*

The parties were directed to file submissions which I have considered in this ruling.

DETERMINATION

Whether this application is competently before the court?

The parties appear not to have covered this issue in their submissions although it appeared in the affidavits in reply.

Analysis

Judicial review claim should be refused where the claimant has failed to exhaust other procedural remedies. There is growing recognition of the importance of alternative dispute resolution in civil litigation generally.

The nature of the dispute of the applicant has a substitute remedy provided under the Universities and Other Tertiary Institutions Act which

established Staff Tribunal to resolve any disputes related to employment matters of the University.

It is a well-established proposition that where a right or liability is created by statute which gives a special remedy for enforcing the same, the remedy provided by statute must be availed of in the first instance.

Rule 5 of the **Judicature Judicial Review (Amendment) Rules 2019** which introduces **Rule 7A (1) (b)** is couched in the following terms;

“The court shall in handling applications 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 the public body or under the law;”*

This court has pronounced itself in matters where applications were filed without exhausting available remedies. In *Sewanyana Jimmy v Kampala International University HCMC NO. 207 OF 2016*. The court dismissing a similar application for failure to exhaust existing remedies within the body held that;

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

There are various reasons why legislation may create an avenue of redress into which the Court may divert challenges, including: a desire to make access to justice available more locally; a wish to prevent court becoming overburdened with cases; the fact that the tribunal or other specialist body may have more expertise in the subject of the claim than court.

The most straightforward reason in this matter is the fact that Universities and Other Tertiaries Institutions Act provides an appeal to University Staff Tribunal. The available statutory appeal process is a clear substitute for judicial review and essentially judicial review is used where there is no statutory right of appeal. The powers of an appeal body or tribunal will often be atleast as extensive as those in judicial review (and perhaps greater).

Therefore, there can be no constitutional or practical objection to High court refusing to hear an application for judicial review where there is a statutory appeal to a tribunal or a court. To hold otherwise would risk subverting Parliament's intention in creating such appeals to tribunals. See *R.(on the application of Sivasubramaniam) v Wandsworth County Court* [2002] EWCA civ 1738 [2003] 1 WLR 475

The Universities and Other Tertiary Institutions Act provides for an elaborate procedure on employment of University staff.

Section 50 provides;

- (1) There shall be a Committee of the University Council to be known as the Appointments Board.*
- (2) The Appointments Board shall consist of nine members under section 43.*
- (3) The Appointments Board shall, except where provided otherwise under this Act, be responsible to the University Council for the appointment, promotion, removal from service and discipline of all officers and staff of the academic and administrative service of the University, as may be determined by the University Council.*

Section 57 provides;

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

(2)...

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

The sum effect of all the above provisions is that the applicant is a member of staff who has an available alternate procedure to address his grievance rather than stampeding court prematurely in order to stop the disciplinary process in total disregard of an established procedure of resolving the dispute internally.

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

The above finding is buttressed by the case of *Fuelex Uganda Ltd vs AG & 2 others High Court Miscellaneous Cause No. 48 Of 2014*, Hon Justice Stephen Musota (as he then was) referring to the case of *Micro Care Insurance Limited vs Uganda Insurance Commission Miscellaneous Cause No. 218 of 2009* wherein Justice Bamwine (as he then was) cited the case of *Preston vs IRC [1995] 2 All ER 327 at 330* where Lord Scarman said; “ My fourth position is that a remedy by way of Judicial Review is not available where an alternative remedy exists. This is a position of great importance. Judicial review is a collateral challenge; where Parliament has provided appeal procedures, as in

taxing state, it will only be rarely that the court will allow collateral process of judicial review to be used to attack an appealable decision."

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

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

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

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

It is important that bodies created under any legislation by Parliament are given an opportunity to operate and resolve their disputes since they possess better knowledge, skill and expertise in such areas. In this case the present University Staff Tribunal is headed by a retired Judge of the High Court-(Justice Tabaro) with a wealth of experience and 7 other members representing the different interest groups or categories. See *Dr Peter Okello v Kyambogo University & Dr. Annie Begumisa High Court Misc.Cause No. 23 of 2017*

This application is incompetently before this court for failing to exhaust the existing available remedies under the Employment Act or the Universities and Other Tertiary Institutions Act. Under Rule 7A of the Judicature (Judicial Review) (Amendments) Rules,2019, it is incumbent upon the court seized with the matter to first ascertain whether the application is amenable for Judicial Review or establish whether the application is competently before the court (*the aggrieved person has exhausted the existing remedies available within a public body or under the law*)

For the reasons herein above stated this application fails and there is no need to delve into the rest of the issues raised for trial.

The application is dismissed with costs.

I so Order.

SSEKAANA MUSA

JUDGE

30th September 2022