THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLENEOUS CAUSE NO. 0129 OF 2022

1. OYIKI SIRINO KASSIANO
2. OKOT PATRICK
3. SUNDAY WILLIAM RELWOR
4. GABRIEL BOL KUOL ATEM
5. EMMANUEL WANI GALDINO
6. AKUOT SARAH DUT
7. MANUT RING TONG
8. PETER MUT LIEP
9. TABAN JOSEPH
10. DADA CALISTO
11. SUSAN PONI LADU
12. ACHOL GOCH WUOI
13. ACHER JACOB MAYOM
14. LILIAN YANGI KENYI
15. AGUEK NYUOUL BOL
16. MBALI VASTO JOAB
17. PETER WANI LUAL
18. MALISA DAVID SURUK KONYANGI
19. WINNY MARY
20. JANIS JOJO GERI WOGGA
21. FRANCO KOOR ARU LUAC & 900 OTHERS :::::::::::::::::: APPLICANTS

VERSUS

KAMPALA UNIVERSITY :: RESPONDENT

BEFORE: <u>HON. JUSTICE BONIFACE WAMALA</u>

RULING

Introduction

[1] The Applicants brought this application by Notice of Motion under Article 42 of the Constitution of the Republic of Uganda, Sections 33, 36 and 38 of the Judicature Act as Amended, Section 98 of the CPA and Rules 3, 5, and 6 of the

Judicature (Judicial Review) Rules, 2009 seeking for several declarations and orders, to wit;

a) A declaration that a denial of the existence and operation of the Respondent's campus in Juba – College of Juba by the Respondent is unfair, illegal, irregular and irrational.

b) A declaration that the failure and refusal of the Respondent to graduate the Applicants on 23rd June 2022 is unfair, illegal, irregular, irrational and procedurally flawed.

c) A declaration that any administrative issues between the Respondent and its Juba Campus cannot be visited on the Applicants.

d) An order of Mandamus doth issue directing the Respondent to graduate the Applicants and award them the requisite transcripts and certificates.

e) An order of Prohibition doth issue restraining the Respondent, its employees or agents from denying the existence and operation of the Respondent's Campus in Juba and from denying the Applicants any of its services that the Applicants are entitled to.

f) An order of Prohibition doth issue restraining the Respondent from collecting additional and unclear fee or monies form the Applicants.

g) general damages, exemplary damages and costs of the suit.

[2] The grounds upon which the application is based are summarised in the Amended Notice of Motion and also set out in the affidavit in support sworn by **Oyiki Sirino Kassiano**, one of the Applicants, in support of the application. The grounds also set out the background to the application. Briefly the grounds are that the Applicants are South Sudanese students admitted by the Respondent's College of Juba under different academic programmes. The Respondent's College in Juba was opened up in 2016 and has been admitting and graduating students since then. It is claimed that the Applicants paid all fees and fulfilled all academic requirements, and were cleared by the College for the Respondent's 23rd Graduation Ceremony that was held on 23rd June 2022.

The Applicants travelled to attend the graduation but were denied external clearance by Respondent for graduation and were subsequently not graduated on said date. It is finally averred that it is in the interest of justice that the application is granted.

[3] The Respondent opposed the application through an affidavit affirmed by **Prof. Badru Dungu Kateregga,** the founding Vice Chancellor of the Respondent University, in which he averred that the Respondent is a Private Chartered University with branches in Uganda and fully fledged sister universities in Kenya and Rwanda. He stated that by resolution of the directors of the Respondent dated 17th February 2016, it was resolved that the Respondent establishes a branch or study centre in Juba South Sudan (the Kampala University South Sudan Study Centre). The Respondent made efforts to set up a conducive learning environment and to regularize its operations with the authorities of the government of South Sudan. The Respondent's efforts towards being licensed and accredited were, however, frustrated whereupon the Respondent took a painful decision to suspend operations of the College in Juba until its registration was regularized. The Respondent communicated the suspension by letter dated 23rd January 2017 to the concerned authorities and Principal of the College in Juba. The Respondent averred that registration of the College was never obtained and the suspension of its operations was never lifted. The Respondent is therefore not privy to the activities undertaken at the College after the suspension. The deponent further stated that since the Applicants were not students of the Respondent, there is no way they could have been vetted or cleared for graduation and award of transcripts and certificates. It was finally averred that the application has no merits and ought to be dismissed with costs.

[4] The Applicants filed an affidavit in rejoinder and two supplementary affidavits deposed by Kalema Faisal Juuko and Eluga John, the Ag. Principal

and Academic Registrar respectively of Kampala University College, Juba South Sudan.

Representation and Hearing

[5] At the hearing, the Applicants were represented by **Mr. Steven Nelson** while the Respondent was represented by **Mr. David Kaggwa, Mr. Mohamed Sebandeke,** and **Mr. Tumusiime Eric.** It was agreed that the hearing proceeds by way of written submissions which were duly filed by both Counsel. I have considered the submissions in the course of determination of the matter before the Court.

Issues for Determination

[6] Three issues are up for determination by the Court, namely;

(a) Whether the case is amenable for judicial review?

(b) Whether the application raises sufficient grounds for judicial review?

(c) Whether the Applicants are entitled to the reliefs sought?

Preliminary Objections

[7] Counsel for the Respondent raised a number of preliminary points of objection. I will first handle and dispose of the same, one by one.

Amendment of the Notice of Motion without leave of the Court

[8] It was submitted by Counsel for the Respondent that the Applicants amended their Notice of Motion without leave of the Court after the time within which they could do so without leave had expired. Counsel submitted that this was contrary to the provisions under Order 6 rule 19 of the CPR and Rule 7(1) and (2) of the Judicial Review Rules, 2009. In reply, Counsel for the Applicants submitted that under Order 6 rule 20 of the CPR, the Applicant had a right to amend their pleading without leave of the Court.

[9] Under Order 6 rule 19 of the CPR, the Court has power to allow amendment of pleadings at any stage of the proceedings. Under rule 20 thereof, a plaintiff is permitted to amend the plaint without leave. In essence, the provision applies to an applicant, mutatis mutandis. Rule 20 provides that;

> *"A plaintiff may, without leave, amend his or her plaint once at any time within twenty-one days from the date of issue of the summons to the defendant or, where a written statement of defence is filed, then within fourteen days from the filing of the written statement of defence or the last of such written statements".*

[10] For our purpose, the Applicants had a right to file an amended Notice of Motion without the court's leave either before the filing of the affidavit in reply by the Respondent or within 14 days from the date of filing of the affidavit in reply. According to the record, the first Notice of Motion was filed 21/06/2022; an amended Notice of Motion was filed on 28/06/2022; and a 2nd amended Notice of Motion filed on 30/06/2022. The affidavit in reply was filed on 05/07/2022. As such, both amended Notices of Motion were properly filed without having to seek any leave of the court since the Applicants were still within the time set by rule 20 cited above. The 2nd amended Notice of Motion could lawfully introduce other applicants who shared the same cause of action against the Respondent. There is no bar to introduce new plaintiffs or applicants by way of amendment, where a party is authorised to bring an amendment. This objection is, therefore, overruled.

Amendment of Affidavits

[11] It was submitted by Counsel for the Respondent that the Applicants purported to amend the affidavit in support of the amended Notice of Motion which is not authorised under the law. It is true that it is not permitted to amend an affidavit since it contains evidence that cannot be subjected to amendment. The option available to a party is to file an additional affidavit. On

the present case, it appears that when the Applicants filed an amended Notice of Motion, they also amended the affidavit. It however appears to me that the amendment to the affidavit was a matter of form; to indicate that it is deposed on behalf of 972 others instead of 900 others. I have not seen any change or adjustment in the evidence contained in the affidavit. Counsel for the Respondent also pointed out none. In the circumstances, it is my view that the amendment in form cannot make the affidavit incurably defective. It does not run contrary to the intention of the prohibition against amendment of affidavits. It is such as can be ignored without occasioning any miscarriage of justice. This objection is devoid of merit and is overruled.

Swearing an Affidavit on behalf of others without authorisation

[12] It was submitted by Counsel for the Respondent that the 1st Applicant (Oyiki Sirino Kassiano) deponed to an affidavit on his behalf and on behalf of the other applicants without the requisite authority. Counsel pointed out that the purported authority attached to the application is signed by 81 persons including the deponent himself. It means only 80 persons gave him authority to give evidence on their behalf. Counsel also argued that the suit was brought by the lead applicant in a representative capacity without a representative order and without complying with the provisions under Order 1 rule 8 of the CPR. In response, Counsel for the Applicant submitted that it was clear that the Applicants brought the application each in their individual capacity and not as a representative suit.

[13] It is correct as stated by the Applicant's Counsel that the suit was brought by the Applicants in their individual capacities. It is also clear that the other Applicants only authorised the 1st Applicant to act on their behalf in line with the provision under Order 1 rule 12 of the CPR. While under Order 1 rule 8 CPR the authorised person brings the suit on behalf of the other interested persons, rule 12 of Order 1 CPR applies where more than one persons are

before the court as parties, and they wish to authorise one of them to appear, plead or act for the others. The latter is what happened in the instant application.

[14] The only valid question relates to the number of applicants that signed the authorization. According to the record, only 80 persons signed the authorization. While this does not affect the competency of the action, since the action was brought in each individual's capacity, it does affect the 1st Applicant's capacity to lead evidence on behalf of those who did not sign the authorisation. As such, the 1st Applicant can only appear, plead and act only on behalf of the 80 Applicants that signed the authorisation. By deposing to an affidavit in support of the application, the 1st Applicant could only do so on his behalf and on behalf of the 80 other Applicants that authorized him to act on their behalf. As such, while the other Applicants remain parties to the case, they remain without evidence. This point of objection by Counsel for the Respondent partly succeeds.

Filing Supplementary Affidavits without leave of the Court

[15] It was submitted by Counsel for the Respondent that the Respondent's affidavit in reply was filed on 5/07/2022 and thereafter on 8/07/2022 the Applicants filed two supplementary affidavits without leave of the court and without affording an opportunity to the Respondent to counter the depositions therein. Counsel prayed to court to strike out the said two affidavits. In response, Counsel for the Applicant stated that they sought leave to rely on the said affidavits in their main submissions.

[16] The time for filing supplementary affidavits and when parties ought to seek leave of the court is determined by when pleadings close in an application. In ***Surgipharm (U) Ltd vs Uganda Investment Authority & Another, HCMC No. 65 of 2021***, I had occasion to consider this point. I did point out that

where pleadings have closed in a matter that has proceeded by way of affidavit evidence, a party would not be at liberty to file a supplementary affidavit after the closure of pleadings without seeking the court's leave and giving the other party an opportunity to respond to the additional averments. The position of the law is that in an application of that nature, all affidavits and pertinent documents should be filed and served on the opposite party before the date fixed for the hearing of the particular application. As such, if a party waits up to after the matter has come up for hearing, and for some reason the matter does not take off, a party seeking to file any supplementary affidavit would need to seek leave of the court and to notify the opposite party. The cut-off point is, therefore, determined by closure of the pleadings in such a matter.

[17] In the present case, the supplementary affidavits were filed shortly after the filing of the affidavit in reply and before the filing of the affidavit in rejoinder and also before the matter came up for hearing. Pleadings had, therefore, not closed and the Respondent had opportunity to make replies to the supplementary affidavits either before or at the time the matter came up for hearing. It is therefore not true that the filing of the said affidavits amounted to an ambush against Respondent. The supplementary affidavits were therefore properly filed. This point of objection accordingly fails.

Resolution of the Issues by the Court

Issue 1: Whether the case is amenable for judicial review?

Submissions by the Applicants' Counsel

[18] It was submitted for the Applicants that they have a sufficient interest as they are duly admitted students of the Respondent's Juba study centre and that the decision not to graduate them by the Respondent was an exercise of a public function that can be a subject of judicial review. Counsel explained why the Applicants could not explore alternative remedies in the present case and

relied on the case of ***Henry Byansi v Nkumba University, HCMC No. 31 of 2017*** to submit that the court may grant judicial review remedies even when a party has not undertaken an alternative remedy that may be in existence. Counsel for the Applicant argued that they could not exhaust any existing remedies because the Respondent had denied them as its students and had shown that the Applicants had been chased away by the Askari of the Respondent when they attempted to seek an explanation from the Respondent.

Submissions by the Respondent's Counsel

[19] On their part, Counsel for the Respondent submitted that there was no decision whether formal or informal by the Respondent that is capable of being subjected to judicial review. Counsel further submitted that the Applicants did not exhaust the available remedies before instituting this application and were not bona fide students so as to be said to have direct or sufficient interest hence had no locus standi to institute the matter for judicial review. Counsel argued that the Applicants do not have any legal grievance against the Respondent. He further submitted that the Applicants did not make any effort to exhaust the internal remedies, no evidence of petition or complaint against the Respondent was ever made but only alleged that they were chased away. Counsel submitted that the Applicants had an alternative remedy under Section 5(f) of the Universities and Other Tertiary Institutions Act 2001 which provides a mode of complaints relating to Institutions of Higher learning. Counsel relied on the cases of ***Dr. Isaac Wanzige Magoola vs MUBS & Anor HCMC No.424 OF 2019*** and argued that it was a mandatory requirement to exhaust all the alternative remedies.

Determination by the Court

[20] Rule 5 of the Judicature (Judicial Review) (Amendment) Rules, No. 32 of 2019 introduces Rule 7A into the principal rules, which lays out the factors to consider in handling applications for judicial review. It provides as follows;

"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 the public body or under the law; and

(c) That the matter involves an administrative public body or official."

[21] It follows, therefore, that for a matter to be amenable for judicial review, it must involve a public body in a public law matter. The Court must, therefore, be satisfied; first, that the body under challenge must be a public body whose activities can be controlled by judicial review; and 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**. It is, therefore, a requirement that the right sought to be protected is not of a personal and individual nature but a public one enjoyed by the public at large.

[22] It was argued for the Respondent that there was no decision made by the Respondent that is capable of being subjected to judicial review. This is not a correct statement or appreciation of the facts on the part of Counsel for the Respondent. The facts before the Court clearly indicate that the Applicants are aggrieved for having been led to believe that they were attending to their studies at the Respondent's study centre in Juba only to be later denied clearance for graduation and award of transcripts and certificates. That is the allegation of the Applicants. It is clear to me that the decision by the Respondent to deny recognition and clearance for graduation and award of transcripts and certificates is a decision that is capable of challenge and consideration under judicial review. This contention by Counsel for the

Respondent does not, therefore, deny the present application amenability for judicial review.

[23] Counsel for the Respondent also argued that the Applicants were not bona fide students of the Respondent and had not exhausted existing remedies within the Respondent institution or as provided for by the law. The Applicants on their part explained that they could not explore any existing remedies because the Respondent denied any connection with them.

[24] As I stated in ***John Ssentongo vs Commissioner Land Registration & Others, HCMC No. 13 of 2019***, the rule of exhaustion of existing remedies is a rule of discretion on the part of the court and the exercise of discretion is stricter where the challenge by the aggrieved party is premised on merits of the decision rather than the decision making process. Where the challenge is directed against the decision making process, the judicial review option may be more preferable. In ***Salim Alibhai & Others vs Uganda Revenue Authority, HCMC No. 123 of 2020,*** my Learned Brother Ssekaana J., had this to say;

> ***"The rule of exhaustion of alternative remedies is not cast in stone and it applies with necessary modifications and circumstances of a particular case. When an alternative remedy is available, the court may refrain from exercising its jurisdiction, when such alternative adequate and efficacious legal remedy is available but to refrain from exercising its jurisdiction is different from saying it has no jurisdiction. Therefore, the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, inspite of availability of an alternative remedy, the High Court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies namely, (i) where the application seeks enforcement of any of the fundamental rights (ii) where there is***

failure of natural justice or (iii) the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged."

[25] In the present case, the facts indicate that the Applicants were disowned as students of the Respondent. For the Respondent to argue that they ought to have explored internal remedies within the same institution is, in my view, a contradiction. In any case, the Respondent did not lay out any alternative remedies that existed within the Respondent as an institution. This argument by the Respondent's Counsel is therefore devoid of merit. As relates to remedies available under the Universities and Other Tertiary Institutions Act 2001, it is clear to me that the said complaints mechanism would not be capable of resolving the dispute as to whether the Applicants were bona fide students of the Respondent. That dispute mechanism is available where there is no dispute of belonging; that is, where there is a student – school relationship. In the present case, the core of the dispute is as to whether the Applicants are the Respondent's students. Such a dispute cannot be resolved by way of the complaints mechanism set out under Section 5 of the Universities and Other Tertiary Institutions Act 2001. Accordingly, I would agree with the Applicants that there were no applicable alternative remedies in place and the application for judicial review was properly brought before the court. The present case is therefore amenable for judicial review.

Issue 2: Whether the application raises sufficient grounds for judicial review?

Submissions by the Applicants' Counsel

[26] It was submitted by Counsel for the Applicants that the decision of the Respondent of denying that the Applicants are its students and the refusal to graduate them was irrational, irregular and unfair, and was contrary to the usual practice between the Respondent and the College of Juba since it had been graduating students from the same college even after its suspension.

Counsel further submitted that majority of the Applicants were admitted prior to the suspension and that the centre kept on admitting various students including some of the Applicants. Counsel argued that by recognising the administrators of the College and continuing to receive payments from students at the College, the Respondent had made a representation that the suspension had been lifted and it acknowledged the students. It was therefore illegal, irrational and unfair for the Respondent to refuse to graduate the students.

Submissions by the Respondent's Counsel

[27] In reply, Counsel for the Respondent submitted that there was no formal decision made by the Respondent and, as such, the Applicants could not examine whether the procedures adopted were legal, fair and rational. Counsel submitted that the grounds that were relied upon by the Applicants were not grounds for judicial review and the Applicants had not proved any ground for judicial review. Counsel further submitted that according to the evidence of the Respondent's Vice Chancellor in the affidavit in reply, the Juba study centre was officially suspended pending regularization of its registration status. The suspension had never been lifted since the College has never received registration from the Government of South Sudan. The Respondent was, therefore, not answerable to the activities that took place after the said suspension.

Determination by the Court

[28] The position of the law is that judicial review is concerned not with the decision on its merits but the decision making process. Essentially, judicial review involves an assessment of the manner in which a decision is made. It is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate the rights as such but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. The

duty of the court therefore is to examine the circumstances under which the impugned decision or act was done so as to determine whether it was fair, rational and/or arrived at in accordance with the rules of natural justice. See ***Attorney General vs Yustus Tinkasimire & Ors, CACA No. 208 of 2013 and Kuluo Joseph Andrew & Ors vs Attorney General & Ors, HC MC No.106 of 2010***.

[29] It therefore follows that the court may provide specific remedies under judicial review where it is satisfied that the named authority has acted unlawfully. 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 unreasonableness or irrationality); or without observing the rules of natural justice (unlawful on grounds of procedural impropriety or unfairness). See: ***ACP Bakaleke Siraji vs Attorney General, HC MC No. 212 of 2018***.

[30] On the case before me, the decision challenged by the Applicants is the refusal by the Respondent to recognise them as its students and to clear them for graduation and award of transcripts and certificates at the 23rd Graduation Ceremony of the Respondent that took place on 23rd June 2022. According to the Respondent, it could not recognise the Applicants because by letter dated 23/01/2017 (Annexure C to the affidavit in reply), the Respondent had suspended the Juba study centre that had been established in 2016. The main reason for the suspension was that the Respondent had failed to secure registration and accreditation from the responsible authorities in South Sudan. The Respondent explained that although the letter indicated that the suspension would be for one Semester, it could not be lifted until the registration status was cleared; which had never occurred. The Respondent

stated that the administrators and staff at the College were well notified of the decision and they acknowledged and raised a response to the same. The Respondent was therefore not aware or responsible for any activities that may have taken place after the said suspension.

[31] For the Applicants, it was stated that the suspension was for one Semester and after the said Semester, the College resumed admitting students and undertaking academic programs. The Applicants alleged that the Respondent continued receiving payments from the Applicants and indeed graduated some students in the Applicants' category. It was therefore argued for the Applicants that by representation, the Respondent had acknowledged the Applicants as its students and the decision to refuse to graduate them was illegal, irrational and unfair.

[32] Despite the above contention by the Applicants, the Applicants did not produce any documentary evidence indicating the lifting of the suspension which had been communicated not only to the administrators of the Juba College but also to the stakeholders in the Government of South Sudan. I do not accept the argument that a suspension that was communicated in such a manner could be lifted by implication; especially so when the condition precedent had not been fulfilled. The condition precedent was the registration and accreditation of the study centre. There is no evidence that the said condition had been met. There is no way it could be assumed that after the lapse of the one Semester, the activities at the College could resume by implication.

[33] Secondly, the Applicants cannot be entitled to rely on any representation by the Respondent. It has not been proved as a fact that the Respondent was aware or was party to any admission of students at the Juba College after the suspension of the centre. It has not been proved that the Respondent received

any payment from the Applicants specifically on account of the operations of the Juba College. The receipts attached to the Applicants' pleadings are incapable of providing this proof in light of evidence that some students continued relating with the Respondent's Kampala Campus after the suspension. By simply looking at the receipts, the Court cannot rule out the possibility that the payment was done in connection with the Respondent's activities at the Kampala Campus. In the circumstances, the Applicant have not proved that the Respondent made any representation as to make them believe that it had lifted the suspension which had been clearly communicated.

[34] In light of the foregoing, the evidence adduced by the Applicants does not disclose any illegality, irrationality or procedural impropriety or unfairness in the conduct or decision of the Respondent in this matter. It is not in public interest that the Respondent should graduate and award academic certificates to persons whose admission and instruction it did not superintend. Academic institutions are established and licensed to instruct and produce students that pass particular tests and conform to particular standards. Such cannot be realized in a situation of ambiguity such as the present one. The administrators at the Juba College ought to have been alive to this duty and ought to have risen to their calling to a standard that is expected in the interest of the education system and in the public interest. Now that they abdicated their duty, they are personally responsible and cannot extend that responsibility to the Respondent in absence of evidence that they were acting for and on behalf of the Respondent after the date of suspension of the study centre.

[35] In the premises, the Applicants have not satisfied the Court that any grounds for judicial review exists in the present case.

Issue 3: Whether the applicants are entitled to the reliefs sought?

[36] In light of the above findings, the Applicants are not entitled to any of the remedies claimed in the application. The application wholly fails and is accordingly dismissed with costs to the Respondent.

It is so ordered.

Dated, signed and delivered by email this 19th October, 2022.

Boniface Wamala

JUDGE