

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(CIVIL DIVISION)**  
**MISCELLANEOUS CAUSE NO. 255 OF 2021**  
**SSALI MUHAMAD T/A SEESA HIGH SCHOOL ::::::::::::::: APPLICANT**  
**VERSUS**  
**UGANDA NATIONAL EXAMINATIONS BOARD ::::::::::::::: RESPONDENT**

**BEFORE: HON. JUSTICE BONIFACE WAMALA**

**RULING**

**Introduction**

[1] The Applicant brought this application by Notice of Motion under Sections 33, 36(1)(b), 38 (1), (3) & 39(2) of the Judicature Act Cap 13, Section 98 of the CPA Cap 71, and Rules 3(1) & (2), 4, 6, 7 & 8 of the Judicature (Judicial Review) Rules S.I No. 11 of 2009 seeking orders that;

a) A declaration that the decision of the Examinations Security Committee (ESC) of the Respondent suspending the Applicant's UNEB Examinations Centre No. U2804 for both O and A level dated 26<sup>th</sup> May 2021 and served on the Applicant on 7<sup>th</sup> June 2021 is null and void, illegal and irregular for procedural illegality, irrationality and breach of the principles of natural justice.

b) An order of Certiorari doth issue quashing the Respondent's Examinations Security Committee's impugned decision dated 26<sup>th</sup> May 2021 suspending the Applicant's UNEB Examinations Centre No. U2804 for both O and A level for a period of 3 years.

c) An order of Mandamus compelling and directing the Respondent, its servants, agents to reinstate the Applicant's UNEB Centre No. U2804 for both O and A level forthwith.

d) An order of prohibition, prohibiting the Respondent's officials, Committees/or agents from enforcing and implementing the above impugned decision.

- e) An award of Exemplary/punitive damages of UGX 100,000,000/=.
- f) General damages.
- g) Costs of the application.

### **Background to the Application**

[2] The Applicant, Ssali Muhamad, is described as the sole proprietor of Seesa High School which he started in 2008. The School is located in Kyakateba Trading Centre along Mubende – Mityana Highway in Kasanda District and operates both O and A levels. In 2012, the Applicant applied for and was granted Examination Centre No. U2804 for both O and A level. During the conduct of Uganda National Examinations Board (UNEB) Examinations for the year ending 2019, it was alleged that two students of the School were involved in an examination malpractice during the UACE Examinations. UNEB (the Respondent) is said to have conducted investigations and, among others, summoned the School Administrators to appear for a hearing in March 2020. It is claimed by the Respondent that no one appeared for the School despite evidence that the letter of invitation was served to the office of the Head Teacher of the School. The Respondent went ahead and conducted an ex parte hearing resulting into a decision suspending the Applicant's Examination Centre. When the Applicant learnt of the decision, he filed a judicial review application in the High Court of Uganda at Mubende challenging the decision on grounds of illegality, irrationality and procedural impropriety. That was vide Mubende Miscellaneous Cause No. 12 of 2020.

[3] The Court in the above matter found out that there was no satisfactory evidence that the Applicant had been notified of the hearing and as such, the decision had been reached in violation of the principles of natural justice. The Court therefore, among other remedies, quashed the decision by the Respondent suspending the Applicant's Examination Centre and issued an order of Mandamus reinstating the said Examination Centre. It is indicated by the Respondent that it complied with the decision of the Court

and reinstated the Examination Centre. The Respondent then started the inquiry afresh and arranged a proper hearing over the matter since the same had not been substantially resolved on the merits. The Applicant, other School Administrators and the concerned students were invited for a hearing which they attended. The hearing was conducted by the Respondent's Examination Security Committee which found that the alleged malpractice had been committed by the two students with the knowledge and participation of the School. This led to the decision of 26<sup>th</sup> May 2021 suspending the School's Examination Centre for three years. It is this latter decision that is the subject of the present application.

### **The Grounds of the Application**

[4] The grounds for the application are summarised in the Notice of Motion and are also set out in the affidavit in support of the application deposed by the Applicant, **SSALI MUHAMAD**, the sole proprietor of Seesa High School. Briefly the grounds are as follows;

- a) The Respondent's Examination Security Committee (ESC) decision of 26<sup>th</sup> May 2021 suspending or withdrawing the Applicant's Examination Centre for both O & A level was reached without any hearing conducted by the Respondent under the law and was tainted with illegality, irrationality and procedural impropriety. Any hearing ought to have been conducted by the Respondent itself and not its ESC which acted illegally and without any authority by purportedly exercising powers of the Board.
- b) The ESC hearing was ONLY in respect to the offence of impersonation against the Applicant's two former students and it was illegal for the Committee to base its decision on the charge or offence of falsification of entries of candidates which was not part of the notice calling for the hearing.
- c) The Applicant's school administration was not notified of any charge in the notice of hearing but were surprised when the Committee gave a ruling and accused the school of having aided/or abated the offence of impersonation.

- d) The ESC acted in a very biased manner when it created new charges of aiding and abetting impersonation and falsification of candidate's entries.
- e) The Committee acted ultra vires its powers and authority when it determined the criminal offence of impersonation, when it is not a court of law.
- f) The Committee committed grave illegalities when it purported to suspend the Applicant's entire centre number for both O & A level yet its hearing only related to UACE Examinations in 2019 and not UCE Examinations or its Centre as the two were applied for and granted separately.
- g) The Committee acted irrationally when it based its decision on phone contacts used by candidates, their dress code and relationship of one of the candidates, Ssali Shanita, to the applicant to find a verdict of guilty on the school administration.
- h) It is just and convenient that the Respondent's actions be subjected to judicial review.

### **Grounds of Opposition by the Respondent**

[5] The Respondent opposed the application through an affidavit in reply deposed by **Dr. Yusuf Nsubuga**, the Chairperson of the Examinations Security Committee (ESC) of the Respondent in which he stated as follows: -

- a) The Applicant applied for and was granted a UNEB Examination Centre pursuant to a meeting of the ESC held on 29<sup>th</sup> May 2012. The Applicant was in the same letter notified that the Respondent reserved the right to withdraw the centre status if it was proved at any time that the centre had been involved in examination malpractice, failed to comply with any of the regulations on the conduct of Examinations or when the centre infrastructure has deteriorated below the acceptable levels.
- b) The Respondent received a report that Seesa High School was involved in examination malpractices in 2019 UACE examinations where one candidate Nantume Babirye Joan, a student of Mbarara University of Science and Technology (MUST) was an impersonator sitting exams

for and on behalf of a one candidate Ssali Shanita. It was stated that while writing exams, the two candidates each avoided writing their names on their answer scripts at the start and would write the name of the other at the end of the exam.

- c) The Respondent under Sections 5 (1), (2)(b), (e), (f), (g) and (h) of the UNEB Act 2021 has powers, in regard to examination malpractices, to investigate, commission inquiries, conduct hearings, call for any witnesses and to cancel or suspend the registration of an examination centre which is proven to have engaged in examination malpractice.
- d) Pursuant to the aforesaid powers, the Respondent investigated the allegations of malpractice and invited the Applicant, the Chairman Board of Governors Seesa High School, Shanita Ssali and Joan Babirye to appear before the ESC for a hearing regarding the malpractice allegations. The Applicant was informed about his right to legal representation during the hearing and the right to call any witnesses.
- e) The ESC is one of the committee's established under Section 14(1)(d) of the UNEB Act 2021 with power to determine allegations of malpractice on behalf of the Respondent and the ESC arrived at its decision after hearing the allegations of malpractice and the Applicant's response to the allegations and the decision and penalty issued by the ESC was in exercise of the committee's powers as stipulated under the Act.
- f) The Applicant's lawyers wrote to the Executive Director of the Respondent requesting him to review the decision of the Respondent and they were informed in reply that the Executive Director had no power to review the decision of the ESC as the same was not provided for under the UNEB Act 2021.
- g) The notification letter dated 8<sup>th</sup> April 2021 clearly spelt out the allegations against the Applicant and his school administration were adequately allowed the opportunity to prepare and defend themselves against all the alleged malpractices.

- h) The ESC has administrative/regulatory power to hear an examination malpractice of impersonation and that the hearing and penalties are administrative/disciplinary in nature and ought to be distinguished from criminal offences. The criminal offences created under the UNEB Act 2021 that carry custodial sentences and fines are prosecuted by the DPP.
- i) The Respondent had the power to suspend the Applicant's Examination Centre number for both UCE and UACE since the Applicant's Centre number was granted and administered jointly for both UCE and UACE and that malpractices at any level entitles the Respondent to withdraw or suspend it.
- j) The application has no merit and ought to be dismissed with costs to the Respondent.

[6] The Applicant filed an affidavit in rejoinder deposed by **Opyene Geoffrey**, the Head Teacher of Seesa High School, whose contents I have also taken into consideration.

### **Representation and Hearing**

[7] At the hearing, Mr Ndaula Sylvester appeared for the Applicant while Mr. Mika Eria appeared for the Respondent. It was agreed that the hearing proceeds by way of written submissions which were duly filed by both sides and have been adopted and considered by the Court in the course of determination of this matter.

### **Issues for Determination by the Court**

[8] The following issues are up for determination by the Court: -

**(a) Whether the application is properly before the Court?**

**(b) Whether the Respondent acted illegally, improperly or irrationally in coming to the decision to suspend the Applicant's UNEB Examinations Centre No. U2804 for both O Level and A level?**

**(c) What remedies are available to the Applicant?**

[9] Counsel for the Applicant had raised an issue as to **Whether the Examination Security Committee was biased towards the School Administration**. There was no need to raise this issue separately since, under judicial review, bias is an element of procedural impropriety being a failure to observe the principles of natural justice. As such, the said issue forms part of the investigation under issue 2 stated above.

### **Resolution of the Issues by the Court**

#### **Issue 1: Whether the application is properly before the Court?**

[10] Under this issue, I intend to consider the preliminary objection raised by Counsel for the Respondent regarding the *locus standi* of the Applicant in this matter. Counsel for the Respondent submitted that the Applicant who is said to be a sole proprietor of Seesa High School has no *locus standi* to bring and maintain this application. Counsel argued that the Application ought to have been brought by the Board of Governors of the School in accordance with **Sections 44(4) and 58 of the Education (Pre-Primary, Primary and Post Primary) Act, 2008**. Counsel prayed that the application be dismissed on this ground.

[11] In reply, contained in the Applicant's submissions in rejoinder, Counsel for the Applicant submitted that the objection was without merit since, under *Rule 3A of the Judicature (Judicial Review) (Amendment) Rules S.I No. 32 of 2019*, any person with direct or sufficient interest in a matter is permitted to bring an application for judicial review. Counsel submitted that as a sole proprietor of the School in issue, the Applicant has a direct and sufficient interest in the matter and he rightly brought the application.

[12] The term *locus standi* is defined as the right to bring an action or be heard in a specific forum. See: **The Black's Law Dictionary, 8<sup>th</sup> Edition, page 2754**. In an application for judicial review, *locus standi* is provided for

under the Judicial Review Rules. *Rule 3A of the Judicature (Judicial Review) (Amendment) Rules, No. 32 of 2019* provides that;

*“Any person who has a direct or sufficient interest in a matter may apply for judicial review”.*

[13] The question, therefore, is what amounts to a direct or sufficient interest in a matter. This term has been a subject of construction by the Court. In ***Ben Muhumuza vs Attorney General & Others, HC MC No. 212 of 2020***, the court had this to say on what amounts to sufficient interest as to make an applicant seized with *locus standi* in an application for judicial review;

***“The interest required by law is not a subjective one; the court is not concerned with the intensity of the applicant’s feelings of indignation at the alleged illegal action, but with objectively defined interest. Strong feelings will not suffice on their own although any interest may be accompanied by sentimental considerations.”***

[14] The Learned Judge went on to state that to sustain an action on account of public interest in a judicial review application, an applicant must fulfil either of two elements, namely; that the matter before the court has such a real public significance that it involves a public right and an injury to the public interest; or that he/she has sufficient interest of his/her own over and above the general interest of other members of the public bringing the action. In ***Male Mabirizi Kiwanuka vs Capital Markets Authority, HCCM No. 287 of 2021***, the court stated that for a party to have sufficient interest in a matter, to give them the *locus standi* to apply for judicial review, the party must demonstrate that they are sufficiently affected by the impugned decision of the public body or official. They must prove that they have a genuine grievance owing to the doing of something which has or will prejudicially affect them, thereby requiring the intervention of the court by issuing judicial review orders.



[15] On the case before me, there is sufficient material to satisfy the Court that the Applicant as a sole proprietor of the School in issue is possessed of direct and sufficient interest and is empowered under the law to challenge the decision of the Respondent's ESC by way of judicial review. It follows, therefore, that the preliminary objection raised by the Respondent's Counsel is devoid of merit and is overruled.

[16] Secondly, Counsel for the Respondent argued that this application is not properly before the court as it is a disguised appeal against the decision of the ESC. Counsel submitted that in an application for judicial review, the court does not concern itself with the decision but rather the procedure adopted by the public body in arriving at its decision. Counsel submitted that in the present application, there are no matters that call for judicial review. Rather the Applicant seeks to reverse the decision of the ESC of the Respondent through a disguised appeal. Counsel submitted that this renders the application incurably defective and the same should be dismissed with costs to the Respondent. Counsel for the Applicant countered this submission in the submissions in rejoinder.

[17] The application by the Applicant challenges the decision of the Respondent's ESC on grounds of alleged illegality, procedural impropriety and irrationality. Until the application is investigated along those lines, it would be premature to conclude that the application is a disguised appeal. This objection by the Respondent's Counsel is not made out and it is rejected. The application is properly before the Court.

**Issue 2: Whether the Respondent acted illegally, improperly or irrationally in coming to the decision to suspend the Applicant's UNEB Examinations Centre No. U2804 for both O Level and A level?**

[18] *Rule 7A (2) of the Judicature (Judicial Review) (Amendment) Rules, 2019* provides that;

*“The court shall grant an order for judicial review where it is satisfied that the decision making body or officer did not follow due process in reaching a decision and that, as a result, there was unfair and unjust treatment”.*

[19] In that regard, the duty of the Applicant in an application such as this is to satisfy the Court on a balance of probabilities that the decision making body or officers subject of his challenge did not follow due process in making the respective decisions or acts and that, as a result, there was unfair and unjust treatment of the Applicant and which is likely to have an effect on other members of the public.

[20] Under the law, 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.***

[21] On the case before me, it is alleged by the Applicant that the impugned decision of the ESC of the Respondent was made illegally, irrationally, and/or with procedural impropriety. I intend to consider each ground under a separate head.

### **The Ground of Illegality**

[22] Illegality has been described as the instance when the decision making authority commits an error in law in the process of making a decision or

making the act the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of the law or its principles are instances of illegality. **Lord Diplock** in the case of **Council of Civil Service Unions v Minister for Civil service (1985) AC 375**, made the following statement;

**“By illegality as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulated his decision making power and must give effect to it. Whether he has or not is par excellence a justifiable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercised.”**

[23] 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. Decisions made without the legal power are said to be made *ultra vires*; which is expressed through two requirements: one is that a public authority may not act beyond its statutory power; the second covers abuse of power and defects in its exercise.

[24] In **Dr. Lam - Lagoro James v Muni University, HCMC No. 007 of 2006, Mubiru J.**, held that decisions classified as illegal include the following;

- i) decisions which are not authorized;
- ii) decisions taken with no substantive power or where there has been failure to comply with the procedure;
- iii) decisions taken in abuse of power including bad faith (where the power has been exercised for an ulterior purpose, that is, for a purpose other than a purpose for which a power was conferred);
- iv) where power is not exercised for purpose given (the purpose of the discretion may be determined from the terms and subject matter of the legislation or the scope of the instrument conferring it);

- v) taking into account irrelevant considerations in the exercise of discretion or failing to take account of relevant considerations;
- vi) failure to exercise discretion, including acting under dictation (where an official exercises a discretionary power on direction or at the behest of some other persons or body. An official may have regard to government policy but must apply their mind to the question and the decision must be their decision).

[25] In the present case, the Applicant raised several allegations attacking the legality of the process and decision undertaken by the ESC of the Respondent. I will deal with each of them below.

**The ESC exercised powers not vested in it**

[26] Counsel for the Applicants submitted that the ESC exercised powers vested in the Board in hearing and making their decision to suspend the Applicant's Centre No. U2804. Counsel submitted that by Section 14 of the UNEB Act, the powers of the Committee are limited to assisting the Board to execute its functions and that the powers to suspend the Examination Centre Number are vested in the Board under Section 40 of the UNEB Act.

[27] On their part, Counsel for the Respondent submitted that the ESC is one of the committees established under Section 14(1)(d) of the UNEB Act with power to hear allegations of malpractice on behalf of the Respondent. He further submitted that the ESC arrived at its decision after hearing the allegations of malpractice and the Applicant's response and that the decision was issued in exercise of the Committee's powers stipulated under the Act.

[28] I should begin by pointing out that this dispute is affected by two legal regimes, which fact has substantial impact on its resolution. The regimes are governed by the Uganda National Examinations Board (UNEB) Act Cap 137 and the Uganda National Examinations Board (UNEB) Act No. 1 of

2021. The latter Act that came into force on 1<sup>st</sup> April 2021 repealed the former. It is however important to observe that some of the facts and incidents relevant to this matter occurred at the time when the old UNEB Act was still in force. These include, the examinations in issue which took place in 2019, the establishment of the ESC, among others.

[29] Section 13(2)(b), (c) and (e) of the Interpretation Act Cap 3 provides as follows;

*“(2) Where any Act repeals any other enactment, then unless the contrary intention appears, the repeal shall not —*

*(a)...*

*(b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed;*

*(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;*

*(d)... or*

*(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed.”*

[30] It follows that acts done, and rights and obligations acquired, under the old UNEB Act Cap 137 are not affected by the coming into force of the UNEB Act 2021. Section 8 of the UNEB Act Cap 137 provided for committees of the Board. Under Section 8(g) thereof, the Board was given power to establish such other committees as the board may from time to time consider necessary. It was in line with the above provision that the Board established the Examinations Security Committee. According to the Letter confirming grant of a UNEB Examination Centre of the Applicant dated 30<sup>th</sup> May 2012 (Annexure B to the Respondent’s Affidavit in Reply), the role of confirming

and granting of an examination centre to the Applicant was performed by the ESC. According to another letter dated 16<sup>th</sup> November 2020 appointing one Dr. Yusuf K. Nsubuga as Chairperson of the ESC (Annexure A to the Affidavit in Reply), it was stated that the ESC was constituted as one of the committees of the Board under the UNEB Act 1983 and has delegated powers of the Board to handle matters of examination.

[31] The powers of the Board under the old UNEB Act were provided for under Section 5. Section 5(h) thereof provided that the Board had power to “*delegate any of its powers and functions, other than the approval of estimates or any powers required by this Act to be exercised by resolution of the board, to any member, officer or committee of the board as it may deem necessary*”. According to the Respondent’s evidence, the Board had delegated the power to grant, cancel, withdraw or suspend examination centres to the ESC. This power was not removed by the coming into force of the UNEB Act 2021 which in its long title is described as “*An Act to continue in existence the Uganda National Examinations Board*”, among others. Under Section 14(d) of the new Act, the ESC is expressly included as one of the Committees of the Board.

[32] I note that under the new Act, the express power of the Board to delegate its functions is omitted. This could be the reason behind the argument by the Applicant’s Counsel that the ESC had no power to handle a matter that is reserved for the Board. I however find this argument inaccurate. This is because under the law, where a person or authority is given power by statute or any instrument, the power to delegate is inherent and implied unless otherwise expressly prohibited by the law or instrument granting the power. A statute does not have to expressly provide for the power to delegate. I believe that could have been the reason the same is not replicated in the new Act since it was a superfluous provision.

[33] As such, both under the old and new legal regimes, the Board's power to delegate and to perform its functions through committees is unfettered. It would not be correct to argue, as the Applicant's Counsel would seem to do, that the roles that were delegated to the ESC under the old regime ceased with the coming into force of the new Act. It is also not true that a delegate cannot do that which is mandated to be done by the body or authority. If I were to take that argument, it would mean that the Applicant had no examination centre in the first place since the same was issued by the same delegate. It is not possible that the Committee has power to grant a centre and has not the power to withdraw it. That would be a very absurd argument.

[34] In the circumstances, any questions on legality of the decision based on the fact that the inquiry and decision were carried out by the ESC and not by the Board itself are misguided and devoid of merit. This aspect of the Applicant's claim based on the ground of illegality therefore fails. Accordingly, I find that the ESC of the Respondent had powers to cancel or suspend the Applicant's Examinations Centre and the Committee did not act illegally in doing so.

### **The ESC based its decision on Criminal Offences**

[35] Counsel for the Applicant submitted that the Committee acted illegally when it purportedly sat and determined criminal offences of impersonation, aiding and abetting impersonation, when it was actually not a court of law and without any evidence of trial and conviction. Counsel reasoned that such offences are clearly provided for under Sections 29 and 36 of the UNEB Act with prescribed sanctions. Counsel submitted that neither the Board nor its committees had the power to prosecute and convict a person under the cited provisions and they could only lawfully act as complainants to police. Counsel concluded that such conduct made the impugned decision null and void.

[36] In response, Counsel for the Respondent submitted that the ESC acted legally within its statutory mandate in hearing the allegations of impersonation which is a category of malpractice that was defined and set out under *Regulation 2.0 of the UNEB Regulations on the Conduct and Supervision of UCE and UACE Examinations 2019*. Counsel submitted that the ESC heard the Applicant on allegations of impersonation as a malpractice and not a criminal offence. As set out in paragraph 11 of the Affidavit in Reply, the ESC has the statutory duty to hear allegations of malpractice. In its decision, the ESC referred to Regulation 2.0 of the UNEB Regulations on the Conduct and Supervision of UCE and UACE Examinations 2019 which set out the malpractice of impersonation and its elements, and it is on that basis that the ESC rendered its decision. Counsel concluded that it is therefore not true that the Applicant was heard in the criminal offence of impersonation and invited the Court to find as such.

[37] It is clear from a reading of the UNEB Act 2021 that the law makes a clear difference between “examination malpractices” and “offences”. Under Section 1 of the Act, an “*examination malpractice*” is defined as “*an act of wrongdoing carried out by a candidate, a group of candidates or any other person with the intention to cheat or gain an unfair advantage in an examination or to place a candidate at a disadvantage.*” Under Section 5 of the Act, among the powers granted to the Respondent, paragraphs (e), (f), (g) and (h) of sub-section (2) thereof expressly set out the role of the Board in handling an examination malpractice. For avoidance of doubt, I will set out the provisions below;

“(2) ... the Examinations Board has powers to —

(a)...

(b) ...

(c) ...

(d) ...

(e) *institute or commission an inquiry or investigation into a case of alleged examination malpractice;*



*(f) conduct hearings in case of examination malpractice;*  
*(g) summon any person the Examinations Board considers fit to assist as a witness in any inquiry or investigation into a case of examination malpractice and where necessary, examine the witness on oath;*  
*(h) cancel or suspend the registration of an examination centre which is proven to have engaged in examination malpractice.”*

[38] On the other hand, offences under the UNEB Act 2021 are provided for under Part IV of the Act. It is clear by the provisions under the said Part of the Act that they create criminal offences that are prosecutable under the usual criminal procedure. There is no ambiguity, in the least, as to cause a thinking that the powers of the Board extend to trial of those offences. There is not the slightest indication that the Respondent Board made any attempt to extend their powers to that domain beyond doing their duty to complain to police. As submitted by the Respondent’s Counsel, the argument by the Applicant’s Counsel that the ESC based its decision on a criminal offence of impersonation is at best a flimsy attempt by the Applicant to mislead the Court. I fully agree with this submission by Counsel for the Respondent.

[39] In the circumstances, therefore, it is clear under the law that the Respondent is granted powers to deal with examination malpractices by investigating, hearing and determining any complaint in that regard. Where they find a case proved, the Respondent has power to institute disciplinary sanctions including the power to “*cancel or suspend the registration of an examination centre which is proven to have engaged in examination malpractice*” as set out under Section 5(2)(h) of the Act. This power is express under the law. The Respondent exercised this power within its limits. It cannot therefore be faulted for any illegality under this allegation. This allegation by the Applicant, therefore, fails.

[40] Counsel for the Applicant raised another argument that the facts of the present case did not disclose a case of impersonation according to

Regulation 2.6.1 of UNEB Regulations on the Conduct and Supervision of UCE and UACE Examinations 2019. This argument by Counsel seeks to dispute the interpretation of the regulations in issue as to what amounts to impersonation. While the Respondent's Committee found that an act of impersonation had been committed upon the evidence before them, the Applicant disputes that finding. Unfortunately, such is not a matter for judicial review. It is a matter that could be raised on appeal against the decision of the Respondent. It is trite law that judicial review is concerned not with the merits of the decision by a public body but with the legality, propriety and rationality of the decision making process. As such, provided the entity acted within the boundaries of its power, its decision cannot be subjected to review on its merits. This argument by the Applicant's Counsel is also without merit and it fails.

### **The ground of Procedural Impropriety**

[41] According to **Lord Diplock** in the case of ***Council for civil service unions vs Minister of Civil service (supra)***, procedural impropriety has been defined to mean ***“the failure to observe basic rules of natural justice or failure to act with procedural fairness toward the person who will be affected by the decision”***. Procedural impropriety encompasses four basic concepts namely; i) the need to comply with the adopted and usually statutory rules for the decision making process; ii) the requirement of fair hearing; iii) the requirement that the decision is made without the appearance of bias; iv) the requirement to comply with any procedural legitimate expectations created by the decision maker. See: ***Dr. Lam –Lagoro James v Muni University (supra)***.

[42] Procedural propriety calls for adherence to the rules of natural justice which imports the requirement to hear the other party (*audi alteram partem*) and the prohibition against being a judge in one's cause. The latter essentially provides against bias. Natural justice requires that the person accused should know the nature of the accusation made against them;

secondly, that he/she should be given an opportunity to state his/her case; and thirdly, the tribunal should act in good faith. See: ***Byrne v. Kinematograph Renters Society Ltd, [1958]1 WLR 762.***

[43] In the present case, it was argued by Counsel for the Applicant that the notification of the hearing served onto the Applicant contained only one charge of impersonation but during the hearing, the ESC imported the charge of aiding or abetting impersonation against the School administration; which was contrary to the rules of natural justice. Secondly, the Applicant's Counsel argued that the proceedings of the ESC constituted an inquiry and not a hearing. Counsel for the Respondent countered these arguments.

[44] With due respect to Counsel for the Applicant, I do not appreciate the distinction Counsel is trying to make between an inquiry and a hearing. As a matter of law, whether the proceeding is an inquiry or a hearing, the rules of natural justice must be adhered to in either case. If by this argument, Counsel intended to say that the ESC's power was restricted to making an inquiry and report to the full Board, this aspect has already been answered under the ground of illegality. It has been established as a matter of law that the ESC had power to handle examination malpractices on behalf and in the name of the Respondent.

[45] Upon evidence, it is also clear that the Committee conducted a full and proper hearing within its own procedure as mandated under Section 14(3) of the UNEB Act 2021. The Committee complied with the rules of natural justice by issuing a notice of hearing which informed the Applicant of his right to legal representation, calling witnesses and any other person he may wish to attend the hearing. The School administration represented by the Chairperson Board of Governors, the Head Teacher, Deputy Head Teacher and their lawyer appeared before the Committee for hearing. Objections for attendance of some members was accepted, evidence and submissions were

taken and the matter was decided. I have not found any procedural impropriety committed by the Respondent's ESC.

[46] Regarding the allegation of introducing charges that were not included in the notification of the hearing, this allegation by the Applicant is false and misleading. It is not borne out by any of the available materials on record that a new malpractice or charge was introduced. All I have seen is evidence of the particulars on which the ESC relied to find the alleged malpractice of impersonation proved. The notice of the hearing dated 8<sup>th</sup> April 2021 addressed to the Head Teacher of the School (Annexure C to the affidavit in support of the application) clearly points out that he is being invited for a hearing regarding examination malpractice in form of impersonation. The Head Teacher was asked to appear with Ssali Muhamad (the proprietor), the 2 students in issue, the Chairman Board of Governors of the School and any legal representative. The notice also states in the last paragraph on its page 1 thus; *"The allegations against you ... are that you knowingly registered Nantume Babirye Joan a student of Mbarara University to sit examinations on behalf of Ssali Shanita. The two candidates will be availed their written scripts on arrival"*.

[47] In light of the above, it not true as stated by the Applicant that a new charge was introduced. The notice clearly indicated that the charge was impersonation which was to be proved with particulars including the fact that the Head Teacher and any other School administrators participated in the said malpractice. The Applicant cannot claim that they were not on notice that their participation in the alleged malpractice was alleged. This explains why in the proceedings before the ESC, the second issue read – **"Whether the school administration was involved in the perpetration of the malpractice of impersonation contrary to UNEB Regulations"**. See the decision of the ESC dated 26<sup>th</sup> May 2021 – Annexure D to the affidavit in support of the application. The claim by the Applicant that they were not on

notice that the charge included their participation cannot, therefore, be believed.

[48] It was further alleged that the ESC conducted the proceedings against the Applicant in a biased manner. The particulars of bias are stated as creating new charges during the hearing, suspending the UCE Centre when the allegation only involved the UACE Centre, and adverse media publicity by the Respondent's Executive Secretary.

[49] In response, it was stated that the Respondent conducted the hearing in a fair and impartial manner contrary the Applicant's allegations that the ESC was biased. Counsel for the Respondent stated that the only objections raised by the school administrators and the lawyers related to attendance of two members namely Mr. Odongo Daniel, the Executive Director, and Mr. Turyatamba James, the Manager Examinations on grounds that they were biased because they had on two previous occasions referred to the school in the media as a habitual offender and as such there would be no fairness in their dispensation of justice. The ESC upheld the objection and asked the two members to exit the hearing.

[50] I have not found any evidence of bias on the part of the ESC. The question of creating new charges has already been resolved herein above. On suspending the UCE Centre when the allegation only involved the UACE Centre, it was explained by the Respondent that a UNEB Centre is issued as one and not per level. This explanation is corroborated by the letter confirming grant of the Centre to the Applicant (Annexure B to the affidavit in support of the application). The letter shows that one centre was granted under which the Applicant could register 120 candidates for UCE and 120 candidates for UACE. There is no evidence before the Court to indicate that the centres were issued separately. The Applicant cannot, therefore, justifiably demand that in case of suspension, the centres ought to have been severed. In any case, such facts are incapable of manifesting bias.

Regarding adverse media publicity by some officials of the Respondent, there is clear evidence that the two officials objected to by the Applicant were asked to disqualify themselves from the proceedings and they actually did so. It cannot justifiably be alleged that their biased inclination affected the ESC's decision in any way. In the circumstances, the allegation of bias has not been made out.

[51] In the circumstances, therefore, the Applicant has not established that the decision by the Respondent's ESC suffered any procedural impropriety. This ground of the application also fails.

### **The ground of Irrationality**

[52] In judicial review parlance, irrationality refers to arriving at a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it as per **Lord Diplock** in ***Council for Civil Service Unions (supra)***. In ***Dr. Lam -Larogo (supra)*** the court held that in judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[53] On the case before me, the allegations raised by the Applicant under this ground are the same I have already dealt with under the above two grounds. Considering the facts and the evidence before the Court, I have not found any instance of irrationality or unreasonableness in the process undertaken by the Respondent's ESC or in its decision. Due process was properly observed and the decision reached was reasonable in the circumstances. The Applicant's allegations based on the ground of irrationality have not been made out and this ground fails as well. The 2<sup>nd</sup> issue is, therefore, answered in the negative.

**Issue 3: What remedies are available to the Applicant?**

[54] In light of the above findings, the Applicant has not established any of the alleged grounds for judicial review in the matter before the Court. The application, therefore, wholly fails and is dismissed with costs to the Respondent.

It is so ordered

A handwritten signature in blue ink, appearing to read 'Boniface Wamala', with a long horizontal flourish extending to the right.

**Boniface Wamala**

**JUDGE**

**17/10/2022**