

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
MISCELLANEOUS APPLICATION NO. 038 OF 2022
(ARISING OUT OF MISCELLANEOUS CAUSE NO.021 OF 2022)

1. OCEN JEFFERSON ALDO SILVA
2. ODOKI JOSHUA
3. MASIKA SAM
4. ACAM AGNES
5. OKELLO HENRY MAXSON-----APPLICANTS

VERSUS

1. KYAMBOGO UNIVERSITY COUNCIL
2. KYAMBOGO UNIVERSITY
3. PROF. KATUNGUKA ELI RWAKISHAYA
4. RICHARD MANANO ----- RESPONDENTS

BEFORE HON. JUSTICE MUSA SSEKAANA

RULING

This application is brought by way of chamber summons against the respondent under Articles 42 and 44 of the Constitution, Section 36 of the Judicature Act and Section 98 of the Civil Procedure Act and Rules 6, 7 and 8 of the Judicature (Judicial review) Rules 2009, Order 41 rule 1 and 3, and Order 52 rule 1,2 & 3 of the Civil Procedure Rules for orders that;

1. A temporary Injunction doth issue restraining the respondents, their agents or servants and any other person acting under their direction from implementing, executing and or acting on the impugned letters of the 3rd and 4th respondents dated 18th September, 2021, 1st October 2021, 10th January 2022 and 21st January 2022.

2. An Order of Injunction doth issue restraining the respondents, their agents, or servants and any other person acting under their direction from further renewing the contracts of the 3rd and 4th respondent's until determination of the above suit.

3. Provision be made for the costs of this application.

The grounds in support of this application are set out in the chamber summons and the affidavits of all the applicants which briefly states;

1. That the applicants are employed as Security and Library Assistants at Kyambongo University since the creation of Kyambongo University in 2003, and were before appointment employed at the Institute of Teachers Education Kyambogo. (ITEK).
2. That at the time of creation of Kyambongo University different institutions were integrated to form it which included Institute of teacher Education Kyambogo (ITEK), Uganda Polytechnic Kyambogo (UPK) and Uganda National Institute for Special Needs Education (UNISE) and the applicants were integrated into Kyambogo having gone through the legal process such as interviews, verification and validation that was conducted by a neutral party Ministry of Public Service.
3. That the decision to validate the applicants and other University Staffs is an individually designed plan by the 3rd and 4th respondents in total abuse of their offices and hiding behind the mask of their principle official offices they hold illegally.
4. That the decisions and directives in the impugned letters dated 18th September, 2021, 1st October 2021, 10th January 2022 and 21st January 2022 are individually perpetuated by the 3rd and 4th respondents to the detriment of the applicants and other University Staff and the 1st and 2nd respondents for their individual and or personal gain and the 3rd and 4th respondent are

using the process to cover up their illegal occupation and employment as Vice Chancellor and Human Resource Kyambogo University respectively.

5. That the Decisions and Directives of the 3rd and 4th respondent's contained in the impugned letters dated 18th September, 2021, 1st October 2021, 10th January 2022 and 21st January 2022
 - a. Are Unconstitutional, illegal, irrational, procedurally irregular and unlawful.
 - b. Ultra vires the jurisdiction, powers, authority and mandate of the 3rd and 4th respondents as it amounts to expropriation and deprivation of the applicant rights and interest in employment and the University as a citizen contrary to the Constitution of the republic of Uganda and the enabling laws that govern public servants.
 - c. An intentional, individually motivated and reckless abuse of office by the 3rd and 4th respondent

In opposition to this Application the Respondents through Charles Okello Secretary to University deposed and filed an affidavit in reply for an on behalf of all the other respondents wherein he opposed application for temporary injunction briefly stating that;

- (1) The Ministry of Public Service approved the new structure and establishment of the 2nd respondent and cleared its implementation within the available wage bill.
- (2) That under the new approved structure, new Departments/Sections/Units were created through split and/ or new creation and as a result new positions were created and a few were abolished or reduced in number. There was also change in names of some positions.
- (3) That as part of the implementation of the new structure and establishment, all staff at the 2nd respondent are required to be validated and deployed into the new structure and establishment.

- (4) The 2nd respondent through its responsible organs has the right to control and manage employment status of its employees based on a number of factors including the employees qualifications, competence and established structure.
- (5) That the applicants seek prerogative orders to issue against the validation process being undertaken by the respondent is premature as no decision affecting the applicants' employment status in the 2nd respondent has been taken.
- (6) That the 3rd & 4th respondents are employed in the 2nd respondent on contractual terms and their current contracts subsist.
- (7) That the validation process was undertaken by the 2nd respondent's appointment's board in accordance with the regulatory frame work and not by 3rd and 4th Respondents.
- (8) That the said appointments board, may pursuant to the validation process designate or deploy the applicants in accordance with new approved structure that is being implemented.
- (9) That even where the Appointments Board has taken a decision on the validation of the applicants, Section 57(1),(2) & (3) of the University and Other Tertiary Institutions Act, 2001 mandates the applicants to lodge an appeal to the University Staff Tribunal against such impugned decision of the Appointments Board.

In the interest of time the respective counsel made brief oral submissions and i have considered the respective submissions. The applicants were represented by *Mr. Mudoola Dennis* whereas the respondents were represented *Mr. Baguma Cyrus*.

The respondent counsel raised a preliminary objection about the propriety of the main cause that the application was premature and the applicant had not exhausted internal remedies.

Whether the main application is premature and the applicant has not exhausted all the available internal remedies?

The respondents' counsel submitted that the main cause is premature and the applicant has not exhausted all the internal procedures before them as provided under Section 57(1) of The Universities and Other Tertiaries Institutions Act and Rule 7 of the Judicature (Judicial Review) Rules, 2019.

It was his contention that this court should dismiss the entire application in order for the applicant to exhaust the available remedies.

The applicants' counsel contended that section 57 of The Universities and Other Tertiary Institutions Act is not applicant since the directives and letters are not issued by the Appointments Board.

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 applicants 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.

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 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 applicants are members of staff who had an available alternate procedure to address their grievance rather than stampeding court prematurely and later try to make a case for discovery (*to be availed minutes, decision of the University Council and or Ministry of Public Service authorizing the alleged process of validation and new structure contained in the impugned letters*) 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 Ngenqa 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 University Staff Tribunal is headed by a person who is qualified to be a High Court Judge 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 issue is therefore resolved in the negative. The application was not properly brought before court and it was a breach of the set procedures of resolving disputes arising from a Public University like Kyambogo University.

The resolution of the above issue disposes off this entire application (Main Cause).

In sum and for the reasons herein above, this court upholds the preliminary objection and the main application and cause are dismissed with costs.

I so order.

SSEKAANA MUSA

JUDGE

11th / February / 2022