THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 021 OF 2021

(ARISING OUT OF MISCELLANEOUS CAUSE NO.345 OF 2021)

1. **ASSOCIATE PROFESSOR JUDE SSEMPEBWA**
2. **PETER DITHAN NTALE ----------APPLICANTS**

VERSUS

1. **MAKERERE UNIVERSITY**
2. **PROF. RONALD BISASO ---------- RESPONDENTS**

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This application is brought by way of chamber summons against the respondents under Section 33 & 38 of the Judicature Act and Section 98 of the Civil Procedure Act Order 41 rule 2(1) & 2(2) and 9, Order 50 r 3 & 6 and Order 52 rule 1 of the Civil Procedure Rules for orders that;

1. An Order of temporary Injunction doth issue restraining the respondents, their servants, agents, workmen, representatives or any other person acting under their authority from interfering with the 1st applicant's academic duties, ongoing supervision of PhD students or any other related decisions and actions until the hearing and determination of the main application for judicial review or further orders of this Honourable Court.

2. An order of temporary injunction doth issue restraining the respondents their servants, agents, workmen, representatives or any other person

acting under their authority from continuous Appointment and use of Prof. Wilson Mande Muyinda as External Examiner in the 1st Respondent beyond his tenure of the mandatory three (3) years plus one extra year of appointment mandated by the Graduate Handbook until the hearing and determination of the main application for judicial review or until further orders of this Honourable Court.

3. An Order of Injunction doth issue restraining the Respondents, their servants, agents, workmen, representatives or any other person acting under them from continuing to hold onto the 2nd Applicant's PhD thesis and/or files, take any actions on it and/ or interfering with or altering the status of his PhD studies until the hearing and determination of the main application for Judicial review or until further orders of this honourable Court.

4. An Order of injunction doth issue restraining the respondents, their servants, agents, workmen, representatives or any other person acting under their authority from continuing to implement the decision to require the 2nd applicant to go back to the field to redo his PhD thesis and re-present it to fresh examination or take any other decision or action concerning his PhD studies until the hearing and determination of the main application for Judicial review or until further orders of this Honourable Court.

5. The costs be provided for.

The grounds in support of this application are set out in the application and supporting affidavits of Associate Professor Jude Ssempebwa and Peter Dithan Ntale which briefly states that;

1. The 1st Applicant is a PhD holder, protected public officer employed as an Associate Professor in the 1st respondent which is a fully fledged University and Principal Supervisor of the 2nd Applicant's PhD thesis who has sufficient interest in the application.

2. The 2nd Applicant is a PhD student of the 1st respondent whose PhD thesis examination has been stalled illegally and his appeal to the responsible bodies mishandled without according him a fair hearing.

3. The respondents have acted and threaten to continue acting ultra vires and illegally contrary to the Constitution, Act 7 of 2001 and Act No. 6 of 2006 and the rules of natural justice to the detriment of the applicants by using illegal policies and methods, usurping powers and authority of mandated organs.

4. Both the 2nd respondent and the 1st respondent's East African School of Higher Education Studies and Development acted without jurisdiction when they proceeded to act unfairly against the applicants.

5. The School's decision to require the 2nd Applicant to present a new thesis, which involves going back to the field is prejudicial to him as he was granted three (30 years study leave by his employer within which to complete the programme for which he worked hard with the guidance of his supervisors' close supervision and successfully did.

6. The applicants are unfairly and cruelly being targeted for destruction by the 2nd respondent using his friends to end their jobs, education, and by extension, employment career by causing dismissal from the 1st respondent's PhD programme.

7. Unless stopped, the respondents will continue with their illegal decisions to prejudice applicant's academic pursuit, employment career and they will irreparably cause injury to his right to hear and to complete his PhD which will adversely affect their education, career, future, employment and livelihood.

8. The balance of convenience lies in the applicant's favour as the Respondent will not be inconvenienced in any way as they shall not face any loss but the

applicants stand to lose their education, job and career if the academics stand to lose their education, job and career if the academics which affect the PhD thesis continue to be prejudiced based on the illegal External Examination Report irregularly made by a non-expert in the field of the thesis.

In opposition to this Application the Respondents through Prof Ronald Bisaso-Dean of the East African School of Higher Education Studies and Development at the College of Education and External Studies at Makerere University deposed and filed an affidavit in reply wherein he opposed application for temporary injunction briefly stating that;

(1) The 2nd applicant carried out research under supervision and presented his thesis to the Research and high Degrees Committee to be examined in order to proceed to the next stage. The committee nominated two (2) Internal and one External examiner to be appointed by the Deputy Principal for purposes of marking the 2nd Applicant's thesis.

(2) That when the examiners completed their task, one (1) internal examiner returned the verdict of 'pass' for the thesis, but one (1) Internal and the external examiner returned a negative result: requiring the 2nd applicant to carry out further research in some areas, in order to improve the quality of his thesis.

(3) That the 2nd respondent was dissatisfied with the recommendation of the two examiners, and in accordance with the Graduate guidelines, appealed to the research and Higher Education Committee for reconsideration.

(4) That the Research and Higher Degrees Committee convened and considered the 2nd applicant's appeal and the recommendations whereby the committee upheld the recommendations of the examiners. The 1st applicant participated in the committee deliberations.

(5) That there is further action undertaken, except to await the 2nd applicant to comply with the recommendations of examiners or to appeal further.

(6) That there is no imminent danger that the applicant is likely to suffer if the application is not granted.

(7) That the balance of convenience is in favour of the 1st respondent when the application is not granted in that the internal grievance procedures within the University will be given a chance to function.

(8) That for the applicants to seek this honourable Court to force the 1st respondent to award Degrees to non- deserving individuals would water down the high quality of its degrees.

In the interest of time the parties were directed to file written submissions and i have considered the respective submissions. The applicant was represented by *Dr. James Akampumuza* while the respondent was represented *Mr. Hudson Musoke.*

Issues

1. ***Whether this is a proper case to grant a temporary injunction?***
2. ***Whether the main cause is competently before the court?***

The applicants' counsel submitted that there is status quo to be maintained pending the determination of the main application since the applicants are both still staff and student of the 1st respondent.

Secondly the applicants contend that there is a serious question to be tried since there are detailed procedural breaches and that this shows they have a prima facie case with a possibility of success.

The applicants will suffer irreparable injury since they are unfairly and cruelly being targeted for destruction by the 2nd respondent using his friends to end their jobs, education and by extension their education career by causing dismissal from the 1st respondent's PhD programme.

The respondents' counsel contended that the decision was already taken by Research and Higher Degrees Committee requiring the 2nd applicant to carry out further research in order to improve on the quality of his PhD thesis to advance to the next stage of defence. Therefore, there was no further action taken or anticipated to be taken by the respondent. What is awaiting is for the 2nd applicant to either comply with the recommendations, go back in the field, improve on his thesis and re-submit or appeal to the higher body as provided in the internal organs of the 1st respondent-Makerere University.

Counsel submitted that, this is an academic matter, either the thesis was adequate academically, in content or it was not. There are no legal arguments that can change it. The researcher-2nd applicant must meet the set academic standards or not. The 1st applicant is still an Associate Professor at the east African School of higher Education Studies and he has not been stopped in executing his duties.

Analysis

An injunction is by its very nature a coercive order, and compliance with the court order will often have adverse economic as well as institutional consequences for the respondent.

The main question for this court establish is whether in such circumstances the temporary injunction can still be justified. See ***Regent Oil Co Ltd v JT Leavesley (Lichfield) Ltd*** [1966] 1 WLR 1210. The applicant's counsel has submitted that the order of temporary Injunction being sought is to preserve the status quo.

The granting of a temporary injunction is an exercise of judicial discretion as was discussed in the case of ***Equator International Distributors Ltd v Beiersdorf East Africa Ltd & Others Misc.Application No.1127 Of 2014***.Discretionary powers are to be exercised judiciously as was noted in the case of ***Yahaya Kariisa vs Attorney General & Another, S.C.C.A. No.7 of 1994 [1997] HCB 29.***

It should be noted that where there is a legal right either at law or in equity, the court has power to grant an injunction in protection of that right. Further to note, a party is entitled to apply for an injunction as soon as his legal right is invaded ***Titus Tayebwa Versus Fred Bogere and Eric Mukasa Civil Appeal No.3 of 2009***.

It is trite law that for an application to be maintained three conditions must be satisfied by the Applicant as was discussed in the case ***Behangana Domaro and Anor vs Attorney General Constitutional Application No.73 of 2010*** that is; - The applicant must show a prima facie case with a probability of success, that the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and if the court is in doubt, it would decide an application on the balance of convenience.

The legal principle upon which Court exercises its discretion to grant a temporary injunction in all actions pending determination of the main suit is now well settled as seen in the wealth of authorities.

The law for granting a temporary injunction is section 64(e) of the Civil Procedure Act and general considerations for the granting of a Temporary Injunction are set out under **Order 41 Rule (1) & (2) CPR.**

For a temporary injunction to be granted, court is guided by the following as was noted in the case of ***Shiv Construction v Endesha Enterprises Ltd Civil Appeal No.34 of 1992***

1. The Applicant must show that there is a substantial question to be investigated with chances of winning the main suit on his part;
2. The Applicant would suffer irreparable injury which damages would not be capable of atoning if the temporary injunction is denied and the *status quo* not maintained; and
3. The balance of convenience is in the favour of the Application.

Public interest is one of the paramount and relevant considerations for granting or refusing to grant or discharge of an interim injunction. See ***Uganda National Bureau of Standards vs Ren Publishers Ltd & Multiplex Limited HCMA No. 635 of 2019***

The courts should be reluctant to restrain the public body from doing what the law allows it to do or to execute its core mandate or function. In such circumstances, the grant of an injunction may perpetrate breach of the law which

they are mandated to uphold. See ***Alcohol Association of Uganda & Others vs AG & URA HCMA No. 744 of 2019***

The courts should consider and take into account a wider public interest. The public bodies should not be prevented from exercising the powers conferred under the statute unless the person seeking an injunction can establish a prima facie case that the public authority is acting unlawfully. The public body is deemed to have taken the decision or adopted a measure in exercise of powers which it is meant to use for the public good.

The circumstances of the case are that the Research and Higher Degrees Committee has recommended that the 2nd applicant repeats the research project before his PhD thesis is considered at another level. Simply put, it is below the academic standard. This is the current state of affairs existing i.e status quo. Therefore, there is no status quo to be preserved since a final decision was already made by the Research and Higher Degrees Committee any order made otherwise would be trying to change the status quo and this would indeed create confusion in the 2nd applicant's next course of action.

As rightly argued by both counsel , an order of temporary injunction is intended to preserve the status quo till the matter is decided finally, to ensure that the matter does not become either infructuous or a *fait accompli* before the final hearing. The respondents are not supposed to take any further action beyond what was decided by the Research and Higher Degrees Committee. Their decision stands as handed down and any order to suspend the decision already taken would actually be charging the status quo.

The court would have to preserve the status quo prevailing at the moment but this would not stop the court from quashing or giving any orders sought in the main application. The main application will not be rendered nugatory as counsel for the applicant seems to imply. In matters of judicial review the court is at liberty to grant any remedies that fits the circumstances of the case. It does not mean that since the decision made by Research and Higher Degrees Committee cannot be quashed.

There are no hard and fast rules that can be laid down for granting interim reliefs or temporary injunctions in public law matters or judicial review applications. The exercise of the power to grant temporary injunction must be exercised with caution, prudence, discretion and circumspection. The circumstances of each case will determine whether to grant them or not bearing in mind the various existing factors. The grounds for grant may sometimes defer from the grounds in ordinary civil suits and the same are considered with caution and appropriateness of the case.

This court deprecates the practice of granting temporary injunctions which practically give the principal relief sought in the main application for no better reason than that a prima facie case has been made out, without being concerned about the balance of convenience, public interest and a host of other considerations. Where there is a serious dispute on the facts, it cannot be said that a prima facie case had been made out for the grant of temporary injunction.

In sum and for the reasons stated herein above this application fails and is dismissed with no order as to costs.

Whether the main cause is competently before the court?

This court has in the interest of justice decided to consider the competence of the main cause as a preliminary matter in order to avoid clogging the system with a matter that is yet to be exhaustively dealt with using internal avenues provided under the Universities and Other tertiary Institutions Act.

Under judicial review a party must satisfy court that they have exhausted the existing remedies available within the public body or under the law itself.

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;"*

In *SEWANYANA JIMMY vs 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 there structures will be strengthened and respected.*

See also the case of ***OKELLO vs KYAMBOGO UNIVERSITY & ANOR (MISCELLANEOUS CAUSE NO.23 OF 2017)***

It is a settled principle that where there is an effective alternative remedy under the statute, the High Court does not exercise its jurisdiction as a self-imposed restriction. But, then, there may be circumstances when the High court may interfere.

The rule of *'Exhaustion of Alternative remedies'* is justified on ground that the remedy provided under the special procedure of judicial review is not intended to supersede the modes of obtaining relief before a civil court or to deny the defences legitimately open in such actions and that persons should not be encouraged to circumvent the provisions made by a statute providing a mechanism and procedure to challenge administrative action taken thereunder. Otherwise, without taking recourse to the alternative remedy available under the law then every person would rush to the high court rendering the provisions almost meaningless and non-existent.

The process of conducting doctoral studies leading to the award of a PhD is laid out in the Graduate Handbook. Any student, who is dissatisfied with the recommendations of the examiner, has a right of appeal to the Research and Higher degrees Committee.

Any student dissatisfied with the decision of the Research and Higher Degrees Committee has a right of appeal to the College Academic Board, which is chaired by the Deputy Principal of the College in issue.

Thereafter, a student dissatisfied with the decision of the College Academic Board has a right of appeal to the Academic Policies and Appeals Committee, which is chaired by the Deputy Vice Chancellor in charge of Academic Affairs of the University.

That once, a student who is dissatisfied with the decision of the Academic Policies and Appeals Committee has a right to appeal to Senate, which is chaired by the Vice Chancellor of the University. That a student can finally appeal to the University Council.

It can be deduced from the above that there is an elaborate process of appeal with the internal system within Makerere University to address the applicants' grievances. The orders sought are untenable and this court would not be involved in the PhD award process by ordering appointment of different external examiners for the 2nd applicant.

The high court cannot allow the constitutional jurisdiction to be used for disputes, for which remedies, under the general law, civil or criminal are available. It is not intended to replace the ordinary remedies by way of a suit or application available to a litigant. The object underlying this rule is that the High court should not be made a substitute for all other remedies available to an aggrieved party for redressal of his or her grievances. See ***Opio Belmos Ogwang v Attorney General High Court Miscellaneous Cause No. 183 of 2020***

The exhaustion of internal remedies avoids wasting the courts time with complaints like the present one that could be settled sooner and more cheaply by officials chosen specifically for the purpose with their expertise and experience. Therefore, to allow litigants to proceed straight to court would be to undermine the autonomy of the administrative process, all the more so where administrators have specialised or technical knowledge or easier access to the relevant facts and information. An aggrieved party must take reasonable steps to exhaust internal remedies See ***Koyabe v Minister for Home Affairs (2010) 4 SA 327 (CC)***

This court cannot compel the 1st applicant to award degrees (PhD) to non-deserving individuals as this would water down the high quality of its degrees. It

would set a bad precedent for all students who fail examinations to seek redress by alleging bias or mistreatment in order to be entertained by court. The rule of exclusion of jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion.

The court should not get involved in examination administration and management by questioning the External Examination Report which is an internal mechanism of assessment of candidates applying their expertise in the subject. The Universities and Other Tertiary Institutions Act has availed special remedies for enforcing rights of students aggrieved within that statute.

Therefore, the main cause fails since the applicants have failed to exhaust the existing alternative remedies and the same is dismissed with costs.

I so order.

SSEKAANA MUSA
JUDGE
14th April 2022