THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 102 OF 2021

(ARISING FROM CIVIL SUIT NO. 142 OF 2018)

1. **PROF. MAHMOOD MAMDANI**
2. **DR. LYN OSSOME :: APPLICANTS**

VERSUS

1. **IKIRING JUDITH OBORE**
2. **MAKERERE UNIVERSITY :: RESPONDENTS**

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] This application was brought by Notice of Motion under Section 98 of the Civil Procedure Act Cap 71, Order 6 rules 28, 29 and 30(1), Order 11(a) and (e), and Order 52 rules 1 and 3 of the Civil Procedure Rules SI 71-1 seeking for orders that:

a) The Applicants are not proper parties to Civil Suit No. 142 of 2018.
b) The plaint in Civil Suit No. 142 of 2018 is frivolous, vexatious, an abuse of court process and does not disclose a cause of action against the Applicants.
c) Civil Suit No. 142 of 2018 is not properly before Court.
d) Civil Suit No. 142 of 2018 be dismissed as against the Applicants.
e) Costs of the application be provided for.

[2] The grounds of the application are set out in the Notice of Motion and in an affidavit in support of the application deposed by **Professor Mahmood Mamdani**, the 1st Applicant. Briefly, the grounds are that the 1st Respondent

upon being awarded a scholarship by the Makerere Institute of Social Research (MISR) was admitted by the 2nd Respondent to undertake a Master of Philosophy/Doctor of Philosophy whereupon she successfully completed the Master of Philosophy degree and graduated in 2017. The 1st Respondent had however submitted her PhD proposal in September 2016 after the stipulated deadline leading to the suspension of her scholarship. Her proposal was subsequently considered in August 2017 and was rejected because it lacked a research problem. The 1st Respondent then filed Civil Suit No. 142 of 2018 seeking a declaration that the Applicants neglected their duty, manipulated examination processes, abused their trust and victimized the 1st Respondent, among other allegations. The 1st Applicant averred that the suit is malicious against the Applicants, is an abuse of court process and the plaint does not disclose a cause of action against the Applicants on account that the claim is against a decission taken by MISR which is an institution of the 2nd Respondent. He concluded that the suit was meant to circumvent the procedure provided for under the Judicial Review rules. The Applicants filed another affidavit in support deposed by **Suky Lucy** whose contents I have also taken into consideration.

[3] The 1st Respondent opposed the application through an affidavit in reply deposed by **Ikiring Judith Obore**, the 1st Respondent, who stated that she submitted her PhD proposal after the deadline because the members of her Reading Committee that included the 1st and 2nd Applicants responded to her drafts outside the obligated time frame in violation of their duty of guidance towards her. The 1st Respondent stated that the matters deposed in the Applicant's affidavit require proof by way of evidence; and that the main suit is founded on procedural irregularities with a breach of a duty of care and guidance in handling her PhD proposal writing and examination as provided under the 2nd Respondent's Graduate Student Hand Book. She further stated that the Reading Committee failed in their individual duty towards her by

continuously showing bias and creating conditions that made it impossible for her to submit her doctoral application in time leading to the eventual termination of her scholarship. She also stated that the negligent actions complained of were perpetrated by the Applicants in their own personal capacities and the main suit is not against any decission taken by MISR or its Academic Board but the Applicants for their neglect of duty, breach of the University's academic procedures and discriminatory and malicious treatment to which they subjected her.

[4] The 2nd Respondent too opposed the application through an affidavit in reply affirmed by **Yusuf Kiranda**, the 2nd Respondent's University Secretary, who stated that the Applicants are academic staff of the 2nd Respondent who were charged with the administration of the 1st Respondent's academic programme under the overall supervision of the Directorate of Research and Graduate Training (DRGT). The deponent stated that the 1st Respondent had proceeded well on her Master of Philosophy degree and graduated in February 2017 but had to present a research proposal to be reviewed and approved by the Reading Committee chaired by the 2nd Applicant with the 1st Applicant as a member in order to advance to the next segment leading to a PhD. He stated that the 1st Respondent submitted her research proposal beyond the stipulated deadline leading to misunderstandings with the administration of her academic programme whereupon the DRGT intervened with a view of resolving the misunderstandings between the Applicants and the 1st Respondent. However, the guidance of the DRGT was rejected by the 1st Applicant which rendered the 1st Respondent unable to continue with her studies. The deponent stated that as employees of the 2nd Respondent, the Applicants were bound to comply with the terms, regulations and directions issued by their employer from time to time. As such, the 2nd Respondent ought not to be held liable for the acts and/ or omissions allegedly committed by the Applicants outside their powers and

contrary to the relevant regulations, directions and policies. He concluded that it was in the interest of justice that the application is dismissed with costs.

[5] The Applicants filed two affidavits in rejoinder whose contents I have also taken into consideration.

Representation and Hearing

[6] At the hearing, the Applicants were represented by **Mr. Francis Gimara** and **Mr. Laston Guurume**; the 1st Respondent was represented by **Mr. Paul Musiitwa** and **Mr**. **Innocent Okong** while the 2nd Respondent was represented by **Mr. Hudson Musoke**. It was agreed that the hearing proceeds by way of written submissions that were duly filed by Counsel, and which I have reviewed and taken into consideration in the course of determination of this matter.

Preliminary Objections

[7] In their written submissions, Counsel for the 1st Respondent raised preliminary points of law which I will consider first. Both objections were raised towards the affidavits deposed and filed on behalf of the Applicants. The first point is that the 1st Applicant lacked express authority to swear an affidavit on behalf of the 2nd Applicant. The second point is that the affidavit deposed by Suky Lucy is defective for having been sworn by an unrecognized agent of the Applicants.

[8] It was submitted by Counsel for the 1st Respondent that the 1st Applicant's affidavit in support of the application is defective for lack of express authority from the 2nd Applicant in contravention of the provisions of Order 1 rule 12(1) and (2) of the CPR. Counsel stated that there is no written and signed authority given to the 1st Applicant by the 2nd Applicant. Counsel cited the decision in *Kabanda Sam Mbwana & Another v Gatsizi Edward, HCMA No. 436 of 2019* to support his submission. On the second point, Counsel for the 1st Respondent

submitted that the affidavits deposed by Suky Lucy were incurably defective and made contrary to the provisions of Order 3 rules 1 and 2 of the CPR on account of the fact that the deponent had no capacity to swear the affidavit in the matter since she was neither an advocate nor any other recognized agent of the Applicants at the time she deponed to the affidavits. Counsel relied on the decision in *Emmanuel Lukwajju v Myers Mucunguzi & Another, HCMA No. 862 of 2011* for his submission.

[9] In response, Counsel for the Applicants submitted that the objections by the 1st Respondent's Counsel were based on the presumption that the affidavits in issue are pleadings and thus subject to the rules cited by Counsel. Counsel submitted that to the contrary, the affidavits are simply evidence and are not subject to the cited provisions that relate to institution of suits and presentation of pleadings. Counsel cited the decisions in *Water & Environment Media Network (U) Ltd & 2 Others v National Environment Management Authority & Another, Consolidated Misc. Causes No. 239 & 255 of 2020* and *Esemu Nicholas v Mwitanirwa Charles, HCMA No. 952 of 2020*. Counsel submitted that the 1st Applicant as party to the application has authority to adduce evidence in support of the application in his own right. Counsel further submitted that on the other hand, the affidavits by Suky Lucy neither purports to be made in a representative nor in the capacity of an advocate. It simply presents evidence of a lawyer who has a personal understanding of the questions of law between the parties. Counsel cited the decision in *BankOne Limited v Simbamanyo Estates Limited, HCMA No. 645 of 2020* to support the above submission.

Determination by the Court on the Preliminary Points

[10] In order to resolve the contention raised by the 1st Respondent's Counsel, particularly under the first preliminary point of law, it is necessary to examine the origin of the requirement that for a person to depose an affidavit on behalf of another, the deponent must seek written authority from the other person.

From a number of decided cases, the authorities cite the provision under Order 1 rule 12 of the CPR which states as follows;

> ***"Appearance of one of several plaintiffs or defendants for others.***
> *(1) Where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorised by any other of them to appear, plead or act for that other in any proceeding.*
> *(2) The authority shall be in writing signed by the party giving it and shall be filed in the case."*

[11] I have before had occasion to deal with this kind of contention and I have expressed the view that it is evident that the above provision is in respect of appearance, pleading or acting by one person on behalf of several parties where there are more parties than one in a suit. Clearly, the role of giving evidence does not necessarily constitute appearing, pleading or acting on behalf of the other. One does not need to be an agent of another for them to give evidence on behalf of the other. They are only required to have knowledge of the peculiar facts of a given case. See: *Prof. Philip Alston v Initiative for Social & Economic Rights (ISER) Ltd & Others, HCMA No. 550 of 2022.*

[12] It should be noted that the decided cases that have expressed the notion that such authorization is necessary have been based on the provisions under Order 1 rule 12 of the CPR and Order 3 rules 1 and 2 CPR. See: *Binaisa Nakalema & 3 Ors vs. Mucunguzi Myers MA 460/2013; Taremwa Kamishana Thomas vs AG MA 48/2012; Mukuye & 106 Others vs Madhvani Group Ltd MA 821/2013* and *Bishop Patrick Baligasiima vs Kizza Daniel & Others, M.A No. 1495 of 2016*; (although in some of the decisions, the provision was erroneously cited as Order 1 rule 10(2) and rule 13 CPR which are inapplicable). Also see: *Emmanuel Lukwajju v Myers Mucunguzi & Another,*

HCMA No. 862 of 2011 for the argument that one has to be a recognized agent for them to depone to an affidavit on behalf of another.

[13] In *BankOne Limited v Simbamanyo Estates Ltd, HCM.A No. 645 of 2020 (Commercial Court)*, Mubiru J. held the view that a number of cases often cited for the above proposition wrongly based on the analogy between bringing representative suits on the one hand and giving evidence on the other hand; which analogy the Learned Judge found misplaced. The Learned Judge further found that there was no basis either in the rules of evidence or of procedure for the principle that where there is no written authority to swear on behalf of another person, the affidavit is defective. Such a principle can neither be imported from the provision under rule 2 of Order 3 CPR nor from rule 12 of Order 1 CPR. The Court further held that, like in giving evidence before the court, what is required in affidavits is the knowledge or belief of the deponent, rather than authorisation by a party to the litigation. The content of affidavits is dictated by substantive rules of evidence and their form by the rules of procedure. Competency to swear an affidavit is pegged to ability "to depose to the facts of the case," which in turn is circumscribed by the deponent's ability to "swear positively to the facts," on account of personal knowledge or disclosure of the source, where that is permitted. The Learned Judge went on to hold as follows:

> *"While filing a suit and related pleadings has aspects of locus standi, adducing evidence is all about competence. … Therefore, when the relevant facts are within the common knowledge of parties having the same interest in the litigation, an affidavit by one of them will suffice. Whereas initiating a suit in another's name clearly requires authorization since it raises issues of autonomy of the individual, adducing evidence of facts that have a bearing on another's case already before court does not".*

[14] The above analysis and finding of the Learned Judge represent a true position of the law on the matter in my view. In the present case, one deponent of the affidavit in support of the application is one of the parties. He is possessed of knowledge of the facts of case that was brought against the two applicants jointly and severally. He is competent to depone to the facts that are within his knowledge or belief and he requires no authorization from the co-party to do so. In the second affidavit, the deponent is said to be a lawyer working with the firm representing the Applicants. She deposes to facts that are within her knowledge and belief. She did not need to be an advocate or any other kind of recognised agent in order to have competence to depose to such matters as are contained in her affidavit. She only needed to be possessed of that knowledge and/or belief.

[15] In the circumstances, there is neither a legal bar nor anything wrong for either deponent in issue giving evidence in this matter by way of affidavits. The contention raised by the 1st Respondent's Counsel is, therefore, not based either on the rules of evidence or on any rules of procedure. In the premises, the two points of objection raised by the 1st Respondent's Counsel are devoid of any merit and are accordingly overruled.

Issues for Determination by the Court

[16] Three issues were framed for determination on merits by the Court, namely;

a) **Whether Civil Suit No. 142 of 2018 is competent before Court?**
b) **Whether the plaint in Civil Suit No. 142 of 2018 discloses a cause of action against the Applicants?**
c) **What remedies are available to the parties?**

Resolution of the Issues

Issue 1: Whether Civil Suit No. 142 of 2018 is competent before Court?

Submissions by Counsel for the Applicants

[17] Counsel for the Applicants submitted that Civil Suit No. 142 of 2018 ought to have been instituted by way of judicial review in accordance with the Judicial Review Rules. Counsel pointed out that in paragraph 7 of the 1st Respondent's affidavit in reply, it is stated that the main suit is founded on procedural irregularities in the handling of the 1st Respondent's exam procedure and her doctoral proposal. Counsel argued that the procedure for handling procedural improprieties is by way of judicial review since the 1st Respondent seeks to invoke the supervisory jurisdiction of the Court over the Applicants who are charged with performance of public acts. Counsel cited the case of *Basile Difasi v The National Unity Platform, HCMC No. 226 of 2020* to the effect that inherent powers of court cannot be invoked where there is a specific law governing a subject matter. Counsel further cited the decision in *Derakhshan v University of Toronto [2000] O.J No. 1463 No. CP-17702/99* for the view that a plaintiff in matters of misapplication, misrepresentation, misapprehension, or mistrust against a university has the opportunity to apply for judicial review under the appropriate statutes and rules.

[18] Counsel submitted that the main suit is incompetent before court on account of having been brought by way of an ordinary plaint instead of an application judicial review. Counsel argued that the reliefs sought regarding the process of supervision of her biographies, rejection of her research proposal and various breaches of the MISR Graduate Students' Handbook leading to the unfair loss of her scholarship ought to have been pursued under the Judicature (Judicial Review) Rules, 2009. Counsel concluded that the main suit is a disguised appeal under clause 13.1.2 of the Makerere Students Handbook and invited court to dismiss the suit.

Submissions by Counsel for the 1st Respondent

[19] Counsel for the 1st Respondent submitted that the contention by the Applicants that the main suit ought to have been brought by judicial review is erroneous and misconceived. Counsel referred the Court to paragraphs 5 and 7 of the affidavit in reply to the effect that the main suit is based on breach of a duty of care and to page 7 of the plaint which lays out the particulars of negligence. Counsel stated that the 1st Respondent's claim is founded on tort, is not merely administrative in nature and seeks to challenge merits of a series of decisions taken by the Applicants in their individual capacity and outside the scope of powers conferred on them by the 2nd Respondent. Counsel prayed that the Court finds that the main suit is outside the ambit of judicial review remedies and is competent before this Honourable Court.

Submissions by Counsel for the 2nd Respondent

[20] For the 2nd Respondent, Counsel submitted that the substance and prayers sought in the main suit being grounded on her discontent with the acts, omissions, processes and decisions allegedly committed by the Applicants and the 2nd Respondent, in determination of her academic progress and termination of her PhD scholarship, concern procedural irregularities in the handling of her exam procedure and the writing of her doctoral proposal which in effect challenges the fairness and lawfulness of the decisions of the Applicants and the 2nd Respondent in exercise of their public function (administration of the PhD programme) which should have been brought by way of an application for judicial review after exhausting the existing remedies. Counsel argued that the main suit is clandestinely attempting to evade the legally provided procedure under judicial review to bring her action by way of an ordinary suit.

[21] Counsel further submitted that this Court ought not to punish the 2nd Respondent and the Applicants for executing their public mandate but rather allow them to effectively conduct examination administration and management which is an internal mechanism of assessment of candidates by the 2nd Respondent's examiners applying their expertise in the subject. Counsel further argued that allowing the contrary would water down the high quality of the 2nd Respondent's degrees and set a bad precedent for all students who fail to meet academic deadlines and/or examination standards to seek redress by alleging bias or mistreatment in order to be entertained by court. Counsel prayed to the Court to find that the suit is not properly before the Court and ought to be dismissed with costs.

Determination by the Court

[22] Looking at the plaint in the main suit, the claim by the 1st Respondent/Plaintiff is for a declaration that the defendants (the Applicants and 2nd Respondent herein) neglected their duty and breached the University's code of procedures; a declaration that the defendants manipulated the examination process, abused trust and responsibilities to victimize the plaintiff; a declaration that the plaintiff be compensated for the pain, lost time and opportunities; for orders for general damages, punitive damages and costs. In paragraph 6 of the plaint, the plaintiff sets out the facts leading to the cause of action and specifically in sub-paragraph (u), she particularizes the alleged acts of negligence. Nowhere in the plaint is it indicated either expressly or by necessary implication that the plaintiff/ 1st Respondent was invoking the prerogative powers of the High Court or that she was seeking prerogative remedies. In law, the supervisory power of the High Court is invoked through the quest for prerogative remedies. Clearly, in my view, the quest by the 1st Respondent is for declarations and compensatory remedies which are within the court's inherent powers and outside the ambit of judicial review.

[23] In my view, upholding the Applicants' argument would mean that the Applicants and the 2nd Respondent are immune to tortious liability for acts done by them having an infringement on another person's right. Otherwise, I would not see any reason as to why it would be imposed upon a plaintiff to seek redress for her grievance only by way of judicial review even when she chooses otherwise. I have not seen any evidence of such immunity in favour of the defendants in the main suit for negligent acts allegedly committed by them. It should be noted that a plaintiff is *dominus litis*; she has the power to choose her cause of action and necessary reliefs. Negligence is a known cause of action in tort and once the particulars of negligence are set out, there would be nothing to make such a suit incompetent. The rest would be matters of evidence.

[24] The authorities of *Basile Difasi v The National Unity Platform, HCMC No. 226 of 2020* and *Derakhshan v University of Toronto [2000] O.J No. 1463 No. CP-17702/99* cited by Counsel for the Applicants do set out the correct position of the law on the use of judicial review when raising challenges concerning academic matters. However, the said principles do not apply to the circumstances of the present case. The positions expressed in the said authorities cannot be construed to mean that an academic professor or tutor can never be sued in professional negligence, among other torts. In the circumstances, the argument raised by the Applicants under this issue is devoid of merit and is rejected. Civil Suit No. 142 of 2018 is accordingly properly before the Court for determination on its merits. Issue 1 is answered in the affirmative.

Issue 2: Whether the plaint in Civil Suit No. 142 of 2018 discloses a cause of action against the Applicants?

Submissions by Counsel for the Applicants

[25] It was submitted by Counsel for the Applicants that the main suit does not disclose a cause of action against the Applicants in their personal capacity as Director MISR and Chairperson of the 1st Respondent's Reading committee. Counsel cited the case of *Auto Garage v Motokov (No.3) [1971] EA 514* for the elements that establish existence of a cause of action in a plaint. Counsel argued that in this case, the 1st Respondents rights as a student are only enforceable against the 2nd Respondent University as the proper defendant pursuant to section 41(a) of the University and Other Tertiary Institutions Act. Counsel further argued that since the Applicants are part of the academic staff of the 2nd Respondent, who are subject to the general authority of the University Council, and the acts complained of having been done in the course of execution of their employment; the main suit ought to have been preferred against the University Council. Counsel cited the case of *Fuelex Uganda Limited v Attorney General & Others, HCMC No.048 of 2014*, where the Court struck out the 2nd and 3rd Respondents from the matter on account that they were wrongly sued in light of the fact that Article 250(1) and (2) of the Constitution of Uganda designates the Attorney General as the official Government representative. Counsel concluded that the Applicants are not proper parties to the main suit as no cause of action is disclosed against them in the plaint.

Submissions by Counsel for the 1st Respondent

[26] In reply, Counsel for the 1st Respondent cited the same case of *Auto Garage v Motokov No.3 1971 EA 514* on the elements for a cause of action in a plaint. Counsel submitted that according to the plaint in the main suit, the Applicants breached their duty of care owed to the 1st Respondent when they deliberately, with impunity and maliciously discriminated against the 1st

Respondent and manipulated the academic examination processes leading her to fail to meet the deadline. The above act infringed on the 1st Respondent's right to successfully carry out and complete her education with the 2nd Respondent. Consequently, the 1st Respondent suffered damage for which the Applicants and the 2nd Respondent are liable. Counsel concluded that the plaint clearly establishes that a cause of action in negligence exists and the issues raised therein ought to be investigated through trial of the main suit.

Submissions by Counsel for the 2nd Respondent

[27] Counsel for the 2nd Respondent submitted that the Applicants should be maintained as parties to Civil Suit No. 142 of 2018 on account that they acted in their personal capacity when the 1st Applicant rejected and declined to implement the recommendations of the Directorate of Research and Graduate Training (DRGT) which supervises PhD Programs on behalf of the 2nd Respondent and which had issued directives to the 1st Respondent that would have enabled her to resume her studies. Counsel argued that although the Applicants are employees of the University, their conduct was beyond the scope of their employment when they refused to implement a lawful directive of their employer. As such, their decisions ceased being those of the 2nd Respondent and became their personal decisions. Counsel prayed that the Applicants ought to be maintained as defendants in the suit in order to ably answer for their actions and/or omissions against the 1st Respondent, should the 1st Respondent prove them at the hearing.

[28] While agreeing with the contention by Counsel for the Applicants to the effect that it is important to preserve the integrity of the education system by preventing the threat of legal suits that target individual professors and lecturers, Counsel for the 2nd Respondent argued that the said need should be balanced with the need to protect the University from the wanton actions of such professors and lecturers who may defiantly contradict lawful orders

thereby exposing the University to unnecessary law suits, which also ultimately would compromise the integrity of the education system and impose a burden on the tax payers. Counsel further argued that the professors and lecturers disputing personal liability for their acts, such as the Applicants, ought to come to court with clean hands and intentions. Counsel submitted that in this case, since the Applicants are alleged to have failed to act in good faith while handling the 1st Respondent's case, it is only fair to all parties that the Applicants are accorded an opportunity to defend themselves and their actions and also be subjected to any subsequent orders of this Honorable Court. Counsel prayed that the Applicants be maintained as parties to Civil Suit No. 142 of 2018.

Determination by the Court

[29] It is trite law that for a suit to disclose a cause of action, it must show that the plaintiff enjoyed a right, the right was violated and it is the defendant who violated the right. See: *Auto Garage v Motokov No.3 1971 EA 51*. It is also the established position of the law that in order to determine whether a plaint or any pleading discloses a cause of action, court has to look at the plaint or the particular pleading and nowhere else. See: *Kapeeka Coffee Works Ltd vs NPART, CA Civil Appeal No. 03 of 2000*. In the relevant suit, the alleged cause of action is based on the tort of negligence. In order to establish a tort of negligence, the plaintiff must prove that there was a legal duty of care owed to him or her, that the duty of care was breached by the named defendant, and that damage or injury was suffered by the plaintiff. See: *Donoghue v Stevenson (1932) UKHL 100*.

[30] According to the main suit, the relationship between the Applicants and the 1st Respondent was that of academic supervisors and supervisee respectively. It is alleged by the 1st Respondent that the Applicants owed her a duty of care by supervising and guiding her during her writing and submission

of her PHD proposal. She alleges that the Applicants breached that duty of care in particulars set out in the plaint; leading to her loss of the scholarship, loss of academic progress and other opportunities. Upon perusal of the plaint, I am convinced that it establishes a cause of action against the Applicants. Issue 2 is also answered in the affirmative.

Issue 3: What remedies are available to the parties?

[31] Given the above findings, the application has failed on both issues. It is accordingly dismissed with costs to the Respondents.

It is so ordered.

Dated, signed and delivered by email this 21st day of November, 2023.

Boniface Wamala

JUDGE