THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT GULU

MISCELLANEOUS APPLICATION NUMBER

HCT – 02 – CV – MA – 0018 – 2007

1. **OWOR ATHUR)**
2. **EDEMA TAKO GEORGE)**
3. **LOUM JANANI)**
4. **MUSAGALA PETER)**
5. **ADIA MADINA MOHAMED)**
6. **SEKYANZI DEO)**
7. **DR. AYELLA ATARO PAUL STEPHEN)**
8. **ATUKEI PROSSY)**
9. **WANDERA BESWERI) ::::APPLICANTS**

VERSUS

GULU UNIVERSITY ::::::::::::::::::::::RESPONDNET

BEFORE: HIS LORDSHIP JUSTICE REMMY K. KASULE

JUDGMENT

The applicants, through this cause of judicial Review, seek from the respondent reliefs by way of prerogative orders of certiorari, prohibition and injunction. They also seek general damages.

The applicants pursue their claims through section 36 of the Judicature Act Cap 13, as amended, and Order 46A Rules 2, 3,35, 6, 7 and 8 of the Civil Procedure (Amendment) (Judicial Review) Rules, 2003.

Learned Counsel Caleb Alaka of Alaka & Co. Advocates, appeared for the applicants, while Jude Atyang Otim, Esq of Atyang Otim & Co. Advocates represented the respondent.

The applicants are all adult Ugandans, University graduates in various academic disciplines with upper class degrees and are starting out academic careers. Each of the applicants was, at all time, material to this application, a teaching assistant with the respondent. Teaching assistant is the lowest rank, and thus the starting point, for the academic staff of this respondent University.

The respondent, Gulu University, is a state owned and state funded University situate in Gulu, Uganda. The motto, or vision and mission of the University are all geared towards rural transformation of the country through the disciplines of Agriculture, Medicine, Science Education, Business and Development Studies. These disciplines from the core of the faculties of this University.

The dispute between the applicants and the respondent arises from the decision taken by the University on 29th March, 2007, to terminate the services of the applicants, as teaching assistants.

The applicants seek by way of Judicial Review relief that this court quashes by the order of certiorari, the proceedings whereby the decision to terminate their services was taken, prohibit and restrain, through the orders of prohibition, order the respondent to pay general damages, as well as arrears of salary and allowances to the applicants.

The reliefs sought by applicants are based on the grounds that the organ of the respondent namely the Management Committee that took the decision to dismiss the applicants had no powers to do so; and thus it acted ultravires its authority. The said organ, the applicants further contend acted unconstitutionally and in breach of the principles of natural justice, as it afforded no opportunity to each of the applicants a fair or any hearing at all. The applicants were thus condemned unheard, contrary to the Constitution of Uganda, the Supreme Law of the land, and contrary to the University and other Tertiary Institutions (Amendment) Act, 2006 and to the Tenure, Terms and Conditions of service of the respondent that governs the contracts of employment between the applicants and respondents.

The respondent denies the claims of the applicants on premises that the application is misconceived and defective and lacks a cause of action. Further that the applicants absconded from their work as teaching assistants to pursue further studies and by reason thereof each of the applicants acted in breach of the terms of the contract of service which amounted to repudiation of the contract. Specifically with regard to the fourth, (Musala Peter), 5th (Adia Madinoa Mohamed), Sixth (Sekwyanzi Deo), seventh (Dr. Ayella Ataro Paul Stephen) eight (Atukei Prossy, and ninth (wandera Besweri) applicants their employment contracts with the respondents had already expired by the material date of 1st March, 2007 and as such each one of them was no longer an employee of the respondent. Accordingly none of them had a cause of action against the respondent.

At the actual hearing learned counsel Caleb Alaka of ALaka & Co. Advocate, appeared for the applicants, while the respondent was represented by learned counsel Jude Otim Atyang of Atyang & Co. Advocates, and was assisted by Ms. Judith Oroma, an advocate employed by the respondent.

Three issues were framed for determination by court.

1. Whether the applicants' application is competent before court
2. whether the applicants have a cause of action against the respondent.
3. whether or not the applicants are entitled to the remedies sought.

As to the first issue counsel for the respondent submitted that the applicant's application be dismissed for being incompetent by reason of the fact that except for the second applicant, Edema Tako George, the rest of the applicants did not file affidavits in support of the application. Those applicants that had not filed affidavits in support of the application had failed to discharge the burden of proving their respective cases as each one of them had failed to adduce evidence by affidavit or through other documents to substantiate his/her case against the respondent. It followed therefore that, in absence of such evidence, the respondent had no burden to discharge with regard to the claims of those applicants who filed no affidavits in support of the application. Each of those applicants had thus failed to discharge the burden placed upon each one of them by sections 101, 102, 103, and 106 of the Evidence Act Cap.6.

Though the first (Owor Arthur) and fourth (Musagala Peter) applicants had sworn and filed affidavits with application, the first did so by way of rejoinder, and not as his original affidavit to support the application. Similarly the fourth applicant filed his in court as a

supplementary one to that of the second applicant. Such an affidavit, respondents' counsel contended, cannot be a substitute for an original affidavit to support the application which the fourth applicant is obliged to file with the application.

The case of the applicants, not being in the nature of a representative suit provided for by order 1 rule 8 (old version) of the civil procedure Rules, the second applicant has no legal duty to depone for and on behalf of the rest of the applicants in support of the application.

For the applicants it was submitted that the application was competent in respect of all the applicants as the second applicant clearly stated in his affidavit that he was deponing to the contents of the affidavit on his own behalf and also on behalf of the co-applicants. Section 133 of the Evidence Act, does not require a particular number of witnesses to prove a fact. The affidavit of the second applicant was sufficient to prove the fats of all the applicants in support of the application.

Court notes that the second applicant, in paragraph 1 and 2 of his affidavit in support of the application, clearly states that:-

1. **That I am an adult male Ugandan of sound mind and am an applicant in the above application together with my other colleagues and I swear this affidavit in that capacity and also on behalf of my co-applicants.**
2. **That my co-applicants and I have been working with the respondent as Teaching Assistants on a two years renewable contract each as indicated in our appointment letters and have duly been performing our duties. Photocopies of our appointment letters are hereto attached collectively as "A".**

This court did not receive any evidence throughout the course of hearing this application that any of the applicants was disputing the authority of the second applicant to depone to matters in support of the application for and on behalf of the rest of the applicants. Yet all applicants used to attend court in person, most of the times, the application came up for hearing.

Further, section 133 of the Evidence Act provides that no particular number of witnesses is required to prove a fact.

In the considered view of this court the second applicant laid the foundation and provided the basis in paragraphs 1 and 2 of his affidavit as to why he was deponing on his own

and on behalf of the other applicants of matters that he knew of his own knowledge. He was a fellow employee of the respondent, like the rest of the applicants. The events he depones to happened to him at the same time as they happened to the rest of the applicants. In the absence of evidence from the rest of the applicants to the effect that they, or any one of them, did not authorize him to swear the affidavit on their behalf, court has no basis for not accepting his affidavit evidence as also supporting the case of the rest of the applicants.

As to the affidavit in rejoinder by the first applicant and supplementary affidavit by the fourth applicant, no legal authority was provided by respondents' counsel as to why they should not be regarded as competent evidence to support the case of the respective applicants. The import of Order 17 Rule 3 of the Civil Procedure Rules (old version) is that affidavit evidence is as good as any other evidence, provided it is confined to facts as the deponent is able as of that deponent's own knowledge to prove. Court is satisfied that both affidavit in rejoinder and the supplementary affidavit of the first and fourth applicants constituted proper evidence to support the cases of those particular applicants as well as the rest of the applicants.

Therefore as to the first issue court holds that the applicants application is not incompetent before court by reason of the rest of the applicants, except the second applicant, not having filed in court their own individual affidavits in support of the application.

The second issue is whether the applicants have a cause of action against the respondent. It is submission of the respondent that as of 01.04.2007, the 4th, 5th , 6th, 7th, 8th and 9th applicants had no valid contracts of service with the respondent as their previous contracts had expired, none of them had applied for renewal of same, and thus there had been no renewal thereof.

The said applicants therefore, by reason of absence of contracts of service, had no cause of action in this application against the respondent. The applicants, the subject of this submission, deny that by the 01/04/2007, the date of termination of their services, they, individually and /or collectively no longer had employment contract(s) with the respondent. It is their submission that the respondent had by conduct taken their individual contracts as renewed. They too, accordingly, carried on their work under the same terms and conditions of service in accordance with their contracts.

From the evidence availed to court, each of the 4th, 5th , 6th, 7th, 8th and 9th applicants was appointed by the respondent as a teaching assistant in the faculty of Science Education on a two years contract, renewable once.

The 7th applicant's contract started on 15/09/2004, the 5th applicant's on 01/02/2005, while whose of the 4th, 6th, 8th and 9th started on 01.03.2005.

It would normally follow therefore that by the 01.03.2007, latest the date of dismissal, each of those applicant's contracts should have expired, and the contractual relationship of (employee/applicants and employer/respondent) should have ceased.

Court notes however that each of the concerned applicants was communicated to by the respondent with a termination letter dated 29.03.2007 terminating each of the applicant's contract of service with effect from 01.04.2007.

From the termination letter the reason given for termination is that each of the applicants embarked on a Masters programme without being officially released for study leave.

This court concludes from the wording of the termination letter that the respondent did not take each of the applicants' contract of service as having come to an end by the 01/03/2007, or earlier in respect of the 7th and 5th applicants.

Given the fact that the respondent never communicated in writing or otherwise, to each of the applicants that their respective contracts had come to an end, but instead availed and let them continue, carrying out their teaching assignments and programmes to the respondent's undergraduates and other students, while collecting their monthly salaries, all go to show that the respondent regarded and so conducted each of the applicants as still being in employment.

Being continuing employees of the respondent, as at the time of termination letter, on 29.03.2007, the 4th, 5th, 6th, 7th, 8th, and 9th applicants, have established in their pleadings that their rights as employees are being violated and that the respondent is liable. They have thus established a cause of action: See **AUTO GARAGE AND OTHERS V MOTOKOV (No. 3) (1971) EA 514**

This court on the overall appreciation of the contents of the pleadings and the submissions of counsel of the respective parties to the application holds with regard to the second issue that the applicants have a cause of action against the respondent.

The third issue is whether or not the applicants are entitled to the remedies sought against the respondent.

The remedies sought by the applicants have already been stated.

The applicants case is that on 29.03.2007 the Management Committee of the respondent terminated their respective contracts of service on the ground that each of them had, taken up without the permission of the respondent post graduate studies at other various Universities in Uganda, and thus absconded from employment.

The applicants challenge the decision to terminate their contracts on the grounds that the decision was taken by a body that had no powers in law to take such a decision, and further, that the decision was taken in breach of the rules of natural justice as none of the applicants was afforded an opportunity to be heard and put up defence. Each one had been condemned unheard.

The respondent maintains that the law and procedure was followed in terminating the services of the applicants who abandoned their work as teaching assistants to pursue post graduate degrees without the permission or leave of the respondent. The Management Committee of the respondent had in law the powers it exercised in the matter.

According to respondent, the applicants' contracts of service having come to an end, the remedy of prohibition was not available to them. The applicants had not suffered and had not proved any damages, so none was available to them in this application. Applicants were at liberty to seek damages for wrongful dismissal through separate suits if they felt they had been wrongly dismissed.

The applicants also ought to have exhausted the machinery available to them within the University set up instead of lodging this application. Through that machinery the applicants ought to have appealed to the University Council for relief.

Court will proceed to examine in brief the law as to judicial review and then the merits and demerits of the cases of the parties to this application.

The prerogative jurisdiction of judicial review has now, in Uganda, its foundation in the Constitution.

Article 28(1) of the Constitution provides that:-

> ***"In the determination of Civil rights and obligation or any criminal charge, a person shall be entitled to a fair, speed and public hearing before an independent and impartial court or tribunal established by law"***

Thus by Constitution one whose rights are being determined must be afforded a fair hearing, a speedy disposal of the accusations against such a one, must be heard in defence and the decision must be taken without bias, and undue influence.

The respondent being a public University created under section 22 of the Universities and Other Tertiary Institutions Act, it follows that the respondents employees, who include the applicants in this case, are public officers in public service. They thus enjoy the constitutional protection of Article 173 of the constitution. The article forbids victimization or discrimination of a public officer for having performed his or her duties faithfully, or dismissal or removal from office or reduction in rank or otherwise punished without just cause.

The remedy of judicial review is thus available to the applicants, if termination of their contracts of service was in violation of the provisions of the Constitution. The burden is on the applicants to satisfy court that there was such a violation of the constitution and other laws.

The essence of judicial review jurisdiction is for this court to ensure that the machinery of justice is observed and controlled in its exercise by those inferior bodies in society that happen to be vested with legal authority to determine questions affecting the rights of subjects. Such bodies or individuals have a duty to act judicially.

Prima facie a duty to act judicially arises in the exercise of power to deprive one of a livelihood, or legal status, or liberty, or property rights, or any legitimate interest or expectation or to impose a penalty on some one.

Judicial review jurisdiction, has, over the years, developed and expanded, so that the modern view now, is that, in order to establish that a duty to act judicially applies to the performance of a particular function, it is no longer necessary to show that the function is analytically of a judicial character or involves determination of lis inter partes: see HALSBURY'S LAW OF ENGLAND, Fourth Edition, Volume 1, page 77 paragraph 65.

The modern view of judicial review jurisdiction appears to have been constitutionalised in Uganda through Articles 28, 173, and others of the 1995 constitution.

Judicial Review goes to the manner in which the decision being challenged was made. Judicial review is primarily not available as a means of reviewing a decision taken on the basis of whether it is fair or reasonable: see **PIUS NIWAGABA VS LDC: COURT OF APPEAL CIVIL APPLICATION NO. 18 OF 2005,** unreported.

The overriding purpose of judicial review is to ensure that the individual concerned receives fair treatment, that lawful authority is not abused by unfair treatment. It is not for the court to take over the authority and the task entrusted to that authority, by substituting its own decision on the merits of what has to be decided: See **CHIEF CONSTABLE OF NORTH WALES POLICE VS EVANS (1982) 3 ALL ER 141.** See also: **HIGH COURT KAMPALA: MISCELLANEOUS CAUSE NUMBER 202 OF 2006: CARING FOR ORPHANS, WIDOWS, AND ELDERLY LIMTED –VS- BANK OF UGANDA (AKIIKI KIIZA J.)**, unreported.

Implicit in the concept of fair treatment are the two cardinal rules that constitute natural justice: no one shall be a judge in one's own cause (nemo judex in causa sua); and : No one shall be condemned unheard (audi alteram partem)

Whenever and wherever there is a duty to act judicially the above two rules of natural justice must be observed. A decision reached without observing the rules of natural justice is no decision at all: see **MARKO MATOVU & 2 OTHERS VS MOHAMMED SSEVIRI and The UGANDA LAND COMMISSION**: **UGANDA COURT OF APPEAL NO. 7 OF 1987**. See also: **GENERAL MEDICAL COUNCIL VS SPACKMAN (1943) 2 ALL ER 337.**

Certiorari lies on the application of an aggrieved party to bring to this court proceedings including a decision of an inferior tribunal for review so that the court can determine whether or not those proceedings and decision be quashed. Certiorari will issue and an order to quash made in case of excess or lack of jurisdiction, error of law on the face of the record, non observance of the rules of natural justice, or in case of fraud, collusion or perjury.

While certiorari deals with what has already happened, prohibition looks to the future. By its application, court's prerogative jurisdiction is invoked to prevent the happening in future of an act complained of. It is thus preventive not corrective: see: IN RE MUSTAFA RAMATHAN (Musoke Kibuuka, J) (1996) v KALR 86 at P.87

Injunction issues to restrain the imminent threat, or commission or continuance of unlawful acts, in which case it is prohibitory. It may also issue to compel taking up some action to prevent imminent or further damage resulting from an unlawful act or to preserve the status quo of a subject matter pending further action. The injunction is then said to be mandatory.

It is submitted for each of the applicants that the body of the respondent that took the decision that resulted in termination of their employment contracts did not have the powers to do so. It acted without jurisdiction.

Each of the applicants received a letter of termination of 29/03/2007. The letter stated that the Management Committee had received, deliberated and noted with dismay that the applicant has embarked on a masters programme without being officially released for study leave. The Committee therefore considered the applicant to have absconded from work. The applicant's services were thus being terminated by reason thereof. The termination letter was signed by the University Secretary.

Part X of the Universities and other Tertiary Institutions Act provides for:

"STAFF OF A PUBLIC UNIVERSITY'

Section 50(3) provides for an appointments Board responsible to the University Council for the appointment, promotion, removal from service and discipline of all officers and staff of the University. Section 55 provides for the procedure of removal of officers and employees from office. The affected officer, other than the Vice-Chancellor or Deputy Vice- Chancellor, has to be given notice in writing including grounds for the removal and the officer is required to respond to the same in writing. The officer may then be suspended pending investigation, the case against the officer is referred to the appointments Board, and the Secretary of the University Appointments Board makes arrangements for the affected officer to appear before the University staff tribunal with respect to the matter.

The University staff tribunal and appointments board have to finish the officer's case within a period of six months from the date of suspension of the officer.

The "***Tenure, terms and conditions of service for Gulu University 2005"*** also pursuant to the Universities and Other Tertiary Institutions Act vest the power to make appointments in the Appointment Board: see 1(a) page 1

The category of Teaching Assistances to which the applicants belong, is provided for as the lowest rank of academic staff: see Term 3.2 (a) (vi) page 3.

Under terms 7 (b) page 6, the Appointments Board may for good cause remove any member of staff from office for various reasons set out therein. Appendix D provides procedure for removal for good cause. The procedure is similar to that set out in section 55 of the Act.

There is nothing in the letters of Termination of the applicants contracts of service, or any where else in the evidence adduced before court, to show that the relevant provisions herein pointed out of the Universities and other Tertiary Institutions Act, or those of the Tenure, Terms and conditions of service of Gulu University 2005, were followed when terminating the contracts of employment of the applicants.

The Management Committee of the University, from what is stated in the termination letters given to the applicants, usurped the powers of the Appointments Board and those of the University Tribunal. In so acting it acted without jurisdiction.

Both the provisions of the University and other Tertiary Institutions Act as well as the Tenure, Terms and conditions of service for Gulu University-2005 emphasize the requirement that the affected officer has to be afforded an opportunity to be heard and to put his/her case in defence.

There is no evidence that respondent afforded any of the applicants an opportunity to be herd and to put up a defence before being condemned with a termination letter. The respondent therefore acted in breach of the rule of natural justice.

It follows therefore that the decision to terminate the appointment of each of the applicants as Teaching Assistant was taken contrary to law and to the Rules of natural justice. The termination of each of the applicants is thus null and void. The same stands quashed by this court.

The decision to terminate the applicants' contracts of employment is remitted to the respondent, so that, the respondent, if he still so wishes, deals with it, in accordance with the provisions of the Universities and other Tertiary Institutions Act, and the Tenure, Terms and conditions of service for Gulu University-2005. This remittance is made pursuant to Rule 10 (4) of the Civil Procedure(Amendment) Judicial Review Rules, 2003.

Since the termination of the contracts of service of the applicants has been held to be void ab initio, it is ordered that each of the applicants be paid his/her full monthly remuneration and all entitlements, as from the date of the purported termination of contract of service, that is 01.04.2007 until such a time, if it is the wish of the respondent, be conclusively dealt with one way or the other in accordance with the law as herein set out. Until the respondent acts otherwise, each of the applicants is bound to carryout the terms and conditions of his/her employment contract with the respondent strictly.

Each of the applicants is awarded interest at court rate on the remuneration due to him/her for the period from the date of purported termination up to the date of this judgment. No interest is to accrue on any future payments to any of the applicants, who continues to work after the date of this judgment, if the same is paid in time together with other remunerations of other staff of the respondent.

Court received no credible evidence to justify an award of general damages. None are awarded.

The applicants are awarded the costs of this application as well as those of the application for leave to file application for judicial Review.

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Remmy K. Kasule

Ag. Judge

30/11/2007