

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA CENTRAL CIRCUIT
MISC. CAUSE NO. 20 OF 2013
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
BETWEEN
PROF. ISAIAH OMOLO NDIEGE**APPLICANT**
V E R S U S
KYAMBOGO UNIVERSITY..... **RESPONDENT**

Before: HON JUSTICE WILSON MASALU MUSENE

RULING

The applicant, Professor Isaiah Omolo Ndiege filed this application for judicial review against the respondent, Kyambogo University. It was brought under Article 42 of the 1995 Constitution of the Republic of Uganda, Section 33, 36 & 39 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act, Rules 5 (1) 3 & 6(1) of the Judicial Review Rules

It seeks orders of judicial review of certiorari, mandamus, prohibition and costs.

The applicant was represented by M/s Akile, Olok & Co. Advocates and the respondent was represented by Ms. Kalenge, Bwanika, Ssawa & Co. Advocates.

The application was supported by the affidavit of the applicant, and the pertinent grounds are;

1. That the Parliament's Sectoral Committee on Education carried out its investigations by listening to all relevant stakeholders to the University and came up with a report that was tabled before Parliament on the 6th November 2012, identified University officers/offices to be investigated by the office of the Inspector General of Government, Criminal Intelligence Investigations Directorate and the office of the Auditor General.
2. That the above three (3) institutions tasked to investigate the alleged mismanagement in the University have constitutional mandates to undertake professional/technical investigations on behalf of the Government as their respective mandates are provided under Articles 230, 160 and 212 of the 1995 Constitution of the republic of Uganda.

3. That the action of Parliament to request these bodies to investigate the alleged mismanagement effectively stopped any other inferior body from undertaking parallel investigations or taking action on any earlier investigation report.
4. That the investigations by these institutions are in progress and no report of their investigations has ever been released.
5. That the recommendation of applicant's removal from office, closure of his office, issuance of notice of removal from office and decision to send him on forced leave for no good reason is premature since the IGG and Auditor General have not completed investigations on the alleged mismanagement of Kyambogo University as directed by the Parliament of Uganda on the 15th November 2012.
6. That applicant has not been given a fair hearing before recommending removal from office and being asked to go on forced leave which is against the principles of natural justice as provided under the Constitution of the Republic of Uganda.
7. That the internal disciplinary process has been infested with breaches of the Leadership Code Act 2002 (conflict of interest and abuse of office) which the IGG is investigating.
8. That the council is acting as the complainant for insubordination, investigator through the Ad hoc Committee, the prosecutor through Appointments Board and the Judge in recommending applicant's removal from office, closing his office and sending him on forced leave.

It is important to note that the main import of this application is that having been on leave since 15th September, 2012 to 18th March 2013 (6 months), sending applicant on a further leave of three months contravenes the public service standing orders 2010 and Kyambogo University terms and conditions of service 2005 section 21 (K) as annexed P1 and P2 to the application.

Its further prayed that the disciplinary process is not only premature and illogical, but is riddled with procedural impropriety and should be stopped until such a time that reports from Constitutional Investigative Bodies (IGG, office of Auditor General, and Criminal Investigation Department) complete investigations into the alleged mismanagement of Kyambogo University and submit their reports.

The basis of this application for judicial review was that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. According to the detailed

submissions by counsel for the applicant, the decision arrived at by the university council recommending the removal of the applicant, ordering him to face disciplinary committee and sending him on forced leave for 90 days and thereafter sending him on indefinite forced leave are all riddled by illegality, irrationality and procedural impropriety.

The relevant affidavits in support of the application and in rejoinder have been considered by this court. This court has also considered the affidavit in reply for the application, sworn by the University secretary Mr. Sam S. Akorimo. This court has also considered the preliminary points of law raised by both advocates for the applicants and the advocates for the respondent. Such preliminary matters raised include whether the affidavit of Sam S. Akorimo, the respondent's secretary should be struck out because he was charged by the IGG with a felony and whether the law firm of M/S Kalenge, Bwanika, Ssawa & Co, Advocates should present the public University of Kyambogo without clearance of and approval from the Attorney General.

The other preliminary points of law raised by counsel for the respondent were that the application is time barred and secondly that the application before this court is the same as constitutional court petition No. 27 of 2013-**Kyambogo University and 8 others Vs Attorney General**, and further that it's the same as MISC. CAUSE. No. 141 of 2012 previously handled by Justice Kabiito.

I must emphasize that the emphasis of this court will be on the substantive justice of the main application and reply thereto. However, for clearance of the air before I delve into substantive issues, I would in summary state that the fact that the university secretary is charged with a felony which is still pending does not deprive him of the authority to work in that office because of the presumption of the innocence. Secondly I agree with the submission of counsel for the respondent that Kyambogo University is a body corporate with perpetual succession and a common seal and may sue or be sued or be sued in its corporate name and can therefore lawfully choose advocates of their own choice.

On the issue of the same matters having been dealt with before Justice Kabiito in MISC CAUSE No. 141 of 2012, my finding is that whereas the parties are the same, the **subject matter** is not the same. In MISC CAUSE No. 141 of 2012 before Justice Kabiito, the subject matter was challenging **the dismissal, removal from office of the vice chancellor** of the respondent

university, while in the present MISC CAUSE No. 20 of 2013, the subject matter is judicial review challenging the alleged **illegal forced leave which applicant was sent on 19th March 2013 and extended indefinitely on 11th July, 2013.**

Secondly and as submitted by counsel for the applicant, the ruling of my brother Justice Kabiito in Misc. Cause No. 141 of 2012 is being contested vide Appeal Case No. 142 of 2013 in the Court of Appeal. The Court of Appeal is yet to deliver its verdict.

Not only that, Justice Kabiito in his own ruling advised the applicant that he was free to return to court later to call and quash a decision that may have been taken unfairly. And on the issue of application before this court being the same **as constitutional court petition No. 27 of 2013**, my findings are that the applicant is not a party to the constitutional court case. And on time bar or limitation, I agree with the submissions of counsels for applicants that the forced leave that is being challenged in the present application is a consequence of the notice of recommendation of removal from office and was filed on 13th May, 2013, 55 days after the ruling. So it is within the stipulated time limit.

The above paragraphs deal with the preliminary points raised by both sides which, without prejudice should not derail the course of substantive justice. I now turn to the merits of the application.

According to the submissions by counsel for the applicant, the Vice-Chancellor can only be removed from office on the ground **of misconduct or inability to perform his functions, and not a reason of removal in interest of public.** It was further submitted that throughout the applicant's period of office, there has not been any proof of misconduct, or inability to perform his functions. They added that there has been no warning served in respect thereof. And that the applicant was never charged before the disciplinary Sub-committee or appointments Board as required by the KYU terms and conditions of service. It was equally stressed that the evidence of misconduct or inability to perform has never been produced in court by the Respondent through their affidavit.

Further submissions by the applicant are that the parliament of Uganda represents public interest and its findings exonerated the applicant of the alleged mismanagement of the Institution.

Counsel for the applicant's other submission was that the grounds for removal are in the circumstances unknown as they are not supported by evidence. The other ground was that the process of the recommendation for removal did not meet the procedural requirement requiring quorum of two thirds. And that although the council meeting of 31/10/2012 had 21 members, the statutory threshold required 2/3 of the members of the council to endorse the removal of the applicant from office as stipulated under S.55 of the Act. That the basic requirement was at least 16 members to support the removal but not only 13 as was the case.

It was further submitted that the applicant was subjected to a series of forced leaves with the intention of keeping him out of office till the end of his contract in January 2014. And that the return to office was prevented by the council as they sent him on 90 days leave and when the same ended on 11/07/2013, an indefinite leave was ordered in utter defiance and contempt of the orders of this court in Misc. Application No. 210 of 2013. It was the applicant's submission that the respondent had effectively removed the applicant from office but were only trying to formalise the illegal action taken. Breach of the employment Act and Uganda Public Service Standing Orders were cited.

The other ground emphasized by counsel for the applicant was that whereas the Ad-hoc committee established by Counsel listened to the applicant and other stake holders on the allegations of mismanagement, they did not find him to have mismanaged and did not recommend for the removal of the vice-chancellor, the respondent through its council arrived at a different conclusion.

It was the applicant's case that the recommendation of applicant's removal in public interest was done without affording him an opportunity to be heard, a process which offends the rules of Natural Justice. It was emphasized that the High Court has jurisdiction over tribunals, quasi-judicial bodies and administrative bodies. Conflict of interest was also cited as some officials of the respondent's university who had a pivotal role were also involved in the staff Association meetings that resolved for the removal of applicant from office.

Some of the officers cited in that regard were **Dr. Ali Bagwemu, Dr. George Baziraake, Mr. Daniel Ndawula, Mr. Wilfred Nahamya, Miss Christine Obonyo- Kyayonka** and **Mr. Michael Ongiriany**. And that some of the above like Mr. Ndawula, Mr. Nahamya and Mr. Ongiriany were part of the delegations from KYUASA and KYUSASA which gave testimony in the Ad-hoc Committee, hence being complainants/witnesses and judges in the Council meeting, which was conflict of interest and constitutes breach of the leadership code and sections 8 and 9 of the Anti-corruption Act.

Further conflict of interest was cited in the participation of **Professor John Ekeidi**, Chairperson of the Council, **Engineer Dr. Samuel E. Kigundu**, the Vice-Chairperson of the Council, **Dr. Frank Ssebowa, Hon. Beatrice Laganda, M/S Jelly Nzamukunda, M/S Pamela Nizeyimana** and **Mr. Bruhan Byaruhanga** who were members of the sub-committee that investigated applicant and who also attended special council meeting of 31/10/2012. The minutes were annexure A2. The case decided by the Supreme Court of **John Ken Lukyamuzi vs Attorney General and Electoral Commission, Constitutional Appeal No. 2 of 2007** was cited in support.

The thrust of the submissions by Counsel for the Respondents were that the Applicant, in Misc. Cause No. 141 of 2012 applied for orders to call for and quash the decision arrived at by the University Council, the top most governing Body of the Respondent University to dismiss the applicant from office as the Vice- Chancellor. They submitted that the applicant in this application No.20 of 2013 is praying for the quashing of the University Council's decision recommending his dismissal which prayers and facts were similar to those in Misc. Cause No. 141 of 2012. They therefore submitted that the present application should not be allowed as the same was found by Justice Kabiito to be pre-mature.

Learned Counsel for the respondents further submitted that the functions of the appointments of the Board and the Chancellor should not be usurped by court at this stage. It was further submitted by the respondent's Counsel that the actions of the respondent pointing to automatic dismissal are speculative, anticipatory, second guessing and should be ignored. And that the

internal mechanisms of the University should be left to take their course other than rushing to court.

This court has already ruled that the subject matter in **Misc. Cause No. 141 of 2012** before my brother Justice Kabiito was different from the subject matter in the present application **Misc. Cause 20 of 2013**. And for emphasis, whereas in the previous application the subject matter was challenging **the dismissal and removal from office of the Vice-Chancellor**, the present matter is challenging the alleged **illegal forced leave of 19/03/2013 and extended indefinitely on 11/07/2013**.

The major issue in the present application is the legality of the applicant's forced leave contrary to the employment Act, 2006 (as amended), sections 64(2) and 63(2) thereof. And the thrust of the contention in the present application is that by extending the illegal leave which is under contention, the respondent is in contempt of court contrary to the Interim Orders granted in Misc. Application 210 of 2013 and Misc. Application No.27 of 2013.

Furthermore, this court finds and holds that this application is seeking for orders that the respondent be ordered to comply with the report of the parliamentary sectoral committee on Education and Sports, and subsequent reports on the investigations currently being undertaken by the Inspectorate of Government IGG, office of Auditor General and Criminal Intelligence and Investigations Directorate.

Having **clearly distinguished the application before my brother Justice Kabiito and the present application**, and in view of what i have summarised from both sides, I find and hold that the claim by the respondent that the applicant was removed from office in "**Public Interest**" cannot stand. The reason is because it is the Parliament of Uganda that represents public interest of the people and their findings exonerated the applicant from any acts of mismanagement. The respondent has not submitted that even the student community, who are the major stakeholders have complained about the conduct or performance of the applicant or demanded for his removal from office. The question left is **what public interest** is the respondent referring to?

Secondly, this court notes that the mandate to investigate the mismanagement at the respondent University by the Institutions of Government was a resolution of parliament as communicated to the office of IGG by the office of the Prime Minister as the leader of Government business in Parliament (Annexure “J” to the application).

This court further finds and holds that the office of IGG communicated to the University about the commencement of the investigations and summoned officials of the respondent to appear and give information on mismanagement. (Annexure “K1”, “k2”, L1 and L2 attached to the application and annexures “Y1”, “Y2”, “Y3” and “Y4” of the affidavit in rejoinder). They are all on record and have not been challenged or been rebutted by the respondent.

On damages and costs, the applicant’s advocates have submitted that the unfair treatment accorded to the applicant by the respondent has caused the applicant immense pain and colossal costs in terms of money. And that being a scholar of National and international reputation which have been damaged, he prays for damages.

Although Counsel for the respondents have not submitted anything in opposition, this court finds and rules that proof and compensation for psychological, professional, monetary and general damages may be subject of another court process. As for now, the court will concentrate on the application for Judicial review.

And before I conclude, I reiterate the differences between Misc. Application No. 141 and Misc. Application No. 528 of 2012 that whereas Justice Kabiito made a ruling on the quorum of the earlier meeting, this miscellaneous cause No. 20 of 2013 is contesting the failure to attain the mandatory 2/3 majority of the whole council required to sustain a recommendation to remove a vice chancellor from office as stipulated in S.55 of the Universities and other Tertiary Institutions Act, 2010 as amended. And even on conflict of interest, the present application is concerned with conflict of interest by some members of the University Council, and not some members of Ad-hoc Committee which was considered by Justice Kabiito.

And since the ruling of 18/03/2013, the respondent has sent the applicant on 90 days forced leave in violation of the employment act as already stated herein above. Not only that, the respondent has continued to keep applicant out of office for 4 months without undertaking any investigations in violation of the employment Act and Article 40 of the Constitution.

Counsel for the respondent, in their submissions, have not replied to or challenged the above. And even the submission by applicant's Counsel that the Respondent has continued to invite and allow 4 members of the council with conflict of interest to attend and participate in several meetings where the removal of applicant from office is being discussed. That has not been challenged by the respondent or their Council.

Counsel for the respondent have instead submitted that the applicant has rushed to court. However, this court holds that applicant has no alternative but to seek a judicial review of the **unfair decisions and actions of the respondent**. Courts of Judicature have jurisdiction to review unfair and illegal decisions made and taken by tribunals, quasi-judicial bodies and administrative authorities under Article 42 of the Constitution. The courts should therefore not be misconstrued to have taken over the roles of the appointments Board or Chancellor as the respondent's Counsel has submitted. This court is entertaining an application by the applicant to quash an illegal forced leave which is a consequence of the recommendation of removal from office, and court cannot look the other side when injustice is being meted out.

In view of what I have outlined, and in the circumstances, I find and hold that the respondent University Council recommended the removal of the applicant from office **without giving him a fair hearing and the subsequent decisions to keep him out of office on forced leave indefinitely are unfair, unreasonable and unjustifiable**.

The underlying intention to keep the applicant on indefinite forced leave till his contract expires in 2014 cannot be allowed by this court.

Furthermore, the respondent has deviated from and violated the provisions of the employment Act 2006 (as amended), sections 62(4), 62(5) and 63(2), the Universities and other Tertiary

Institutions Act, 2010 (as amended), and the Public Service Regulations, Cap. 277 and Uganda Public Service Standing Orders.

The respondent's submissions, which are basically full of technicalities, have already been dealt with. In any case, the concern of the courts under this era is substantive justice as opposed to technicalities. Article 126(2) (e) of the Constitution refers. I am therefore obliged to find and hold that the applicant's application is properly before this court and is hereby allowed. I accordingly do hereby issue the following writs:-

- 1) Certiorari, calling for and quashing the decision arrived at by the respondent University Council, recommending the dismissal of the applicant as the Vice Chancellor and keeping him out of office on an indefinite forced leave.**
- 2) Mandamus, directing the respondent to comply with the findings and recommendations of the parliament of Uganda which ordered that the entire University management be investigated by the offices of Inspector General of Government, (IGG), the Auditor General (AG) and the Directorate of Criminal intelligence investigations Department.**
- 3) Prohibition, effecting the illegal orders of the University Council.**

I also award the costs to the applicant.

.....

WILSON MASALU MUSENE

JUDGE

21/10/2013