

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA - NAKAWA HIGH COURT CIRCUIT
MISC. APPLICATION NO. 549 OF 2013
(Arising out of HCMA No. 548 of 2013)
(Arising out of HCMC No. 44 of 2013)

DANIEL JAKISA & 2 ORS ::
APPLICANTS

V E R S U S

KYAMBOGO UNIVERSITY::
RESPONDENT

BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

RULING

The Applicants, through their Lawyer, Mr. Isaac Kimaze Ssemakadde of M/s Centre for Legal Aid, brought this application against the Respondent. He filed Chamber Summons under Order 41 Rules 2 and 9 of the Civil Procedure Rules S.I 71-1; Section 98 of the Civil Procedure Act Cap 71 and; Sections 33 and 38 of the Judicature Act. The Applicants seek that;-

- 1. A temporary injunction doth issue restraining the Respondent and its servants, agents or other persons acting under its authority from enforcing the impugned decision of the Ag. Vice Chancellor complained of in Miscellaneous Cause No. 44 of 2013 (herein referred to as “ the main suit’’) pending the disposal of the main suit;**
- 2. A temporary injunction doth issue restraining the Respondent and its servants, agents or other persons acting under its authority from preventing the Applicants from accessing**

campus, attending lectures, sitting for tests, course works and/or examinations pending the disposal of the main suit;

- 3. A temporary injunction doth issue restraining the Respondent and its servants, agents or other persons acting under its authority to prevent the Applicants from continuing to reside at their respective Halls and enjoying the services ordinarily provided to a resident student of the University pending the disposal of the main suit;**
- 4. Costs of the Application be provided for.**

The Application is supported by Affidavit deponed by Mr. Daniel Jakisa, the first Applicant dated 8th November 2013, an Affidavit sworn by Mr. Abel Ochar, the second Applicant dated 8th November 2013, and an Affidavit sworn by Mr. Nathan Okure, the third Applicant dated 8th November, 2013.

The grounds upon which the application is based are particularised in the Affidavits set out above but for purposes of brevity are that;

1. The Applicants are vowed students' rights activists, third year students of Kyambogo University herein referred to as the "Respondent";
2. The first Applicant is under Registration number 11/U/727/CBD/GV, is pursuing a Bachelors of Community Based Rehabilitation Degree on a Government Scholarship, residing at Nanziri hall. The second Applicant under registration number 11/U/738/MSD/GV is pursuing a Bachelor of Management Science Degree on a Government Scholarship, residing at Kulubya Hall while the third Applicant under registration number 11/U/7460/BGDD/PD is pursuing a Bachelor of Guidance and Counselling Degree on a private scholarship, residing at North Hall.
3. On the 18th of October 2013, Applicants were served with a letter written by the Ag. Vice Chancellor of the Respondent which was served to them by their respective Hall Wardens suspending and kicking them out of the University indefinitely pending the decision of the Students'

Affairs and Welfare Committee as per exhibits marked 'A' attached to each Applicant's Affidavit. The said exhibits are copies of the Applicants impugned suspension letters.

4. The impugned suspension letters also threatened to dismiss the Applicants from the University should they remain at the University during their period of suspension.
5. On 28th of September 2013, the Applicants Hall Wardens arbitrary took the decision to expel them from their halls of residence and cautioned them not to be back to their respective Halls.
6. The Hall Wardens threatened the Applicants with detention by the police if they refused to hand over the keys and vacate the University which they vehemently protested. After the protests to hand over the keys, the Applicants were allowed to stay in their respective Halls until on the 18th October 2013 when they were each served with the impugned letter from the Ag. Vice Chancellor.
7. The suspension letter has denied the Applicants their right to access the University lest they be dismissed from the University.
8. The Applicants have filed before this Court the main suit vide Miscellaneous Cause No 44 of 2013, for a declaration that their impugned suspension by the Ag. Vice Chancellor is in-operative, null and void; an order of certiorari quashing the same; a prohibition order and a permanent injunction against the implementation of the impugned decision among other reliefs. Further Prayers are That;-
9. The main suit has high chances of success because the Ag. Vice Chancellor's impugned decision is not only unfounded in law and irrational but also procedurally improper as the Applicants were not given a fair hearing before reaching the impugned decision;
10. If the orders of the temporary injunction are not granted by this Honourable Court, the main suit will be rendered a nugatory.
11. If the Respondent is not restrained from enforcing the impugned decision of the Ag. Vice Chancellor pending the disposal of the main

suit, the Applicants will be effectively prevented from attending lectures and discussions at the University, sitting for tests, course works and examinations thereby subjecting them to irreparable harm which cannot be atoned for by an award of damages.

12. The Applicants are likely to miss their end of semester Examinations scheduled to begin on the 9th of December 2013 if the Respondent is not restrained from interfering with the Applicants academic commitments. Reference is made to attachment marked "B" which is the examination timetable.
13. Due to the impugned indefinite suspension decision of the Ag. Vice Chancellor to the Applicants, they have arbitrary been deprived of on campus meals and a decent place of accommodation on campus which has forced them stay with some of their friends at their hostels surviving on handouts which is very inconveniencing and demeaning to the Applicants.
14. The Applicants seek this Honourable Court's restraint to the Respondent and **its** servants, agents or other persons acting under its authority from enforcing the impugned decision of the Ag. Vice Chancellor complained of in the main suit or otherwise from interfering with the Applicants academic commitments until after the disposal of the main suit or until further order of this Honourable Court.

The Application was opposed by the Respondent who filed an Affidavit in Reply deposed to by **Mr. Sam S. Akorimo**, the University Secretary through its Lawyer, Counsel Sarah Kisubi of M/s Kalenge, Bwanika, Sawa and Co. Advocates. Both Counsel made oral submissions on the matter.

The Law on Injunctions:-

Definition

An injunction is a Court order requiring an individual to do or omit doing a specific action. It is an extraordinary remedy that courts utilize in special cases where preservation of the Status Quo or taking some specific action is required in order to prevent possible injustice. They are issued early in a law suit to maintain the status quo by preventing a Defendant from becoming insolvent or to stop the Defendant from continuing his or her allegedly harmful actions. Choosing whether to grant temporary injunctive relief is a discretionary power of the court.

In the case of ***State v. Odell, 193 Wis.2d 333 (1995)***, Court stated that an injunction is a prohibitive, equitable remedy issued or granted by a Court at suit of a Petitioner directed at a Respondent forbidding the respondent from doing some act which the respondent is threatening or attempting to commit or restraining a Respondent in continuance thereof, such act being unjust, inequitable or injurious to the Petitioner and not such as can be addressed by an action at law.

In deciding whether or not to grant an injunction, courts have been guided by the consideration that unless the injunction is granted, the damage so occasioned is such that the applicant would not be adequately compensated by an award of damages. Secondly, the Applicant must show that his case has a probability of success. Thirdly, if the court is in doubt it will decide the application on the balance of probability. Fourthly, the applicant must show or prove that the aim of the temporary injunction is to maintain the Status Quo until the determination of the whole dispute. See ***Robert Kavuma vs. M/s Hotel International, S.C.C.A. No. 8 of 1990; Kiyimba Kaggwa vs. Haji A.N. Katende [1885] HCB 43.***

Section 38 Judicature Act Cap 13 gives this Honourable Court power to grant orders of a temporary injunction in all cases in which it appears to it to be just and convenient to do so to restrain any person from doing acts. The grant of a temporary injunction is invariably in the discretion of the Court.

The general considerations for the granting of a temporary injunction under **Order 41 r. (2) CPR** are that;

(1) In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the Defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The Court may, by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the Court thinks fit.

In ordinary situations, the principles governing the grant of a temporary injunction are well settled although each case must be considered upon its own peculiar facts. See ***American Cyanamid Co v Ethicon Ltd [1975] AC 396*** where Lord Diplock laid down guidelines for the grant of temporary injunctions that have been followed in Ugandan cases of ***Francis Babumba and 2 others Vs Erisa Bunjo, HCCS No. 697 of 1990*** and ***Robert Kavuma Vs M/S Hotel International SCCA NO.8 of 1990***. These principles are that;

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.

I now consider the issues as were put before me. That is;

1. Likelihood of success
2. Issue of Status Quo
3. Irreparable damages
4. Balance of convenience.

Issue 1

Whether there is a Prima facie case with a probability of success.

In answering this question, the Applicant is required to show that there is a prima facie case with a probability of success of the pending suit.

The Court must be satisfied that the claim is not frivolous or vexatious and that there is a serious question to be tried. **(See *American Cyanamide versus Ethicon [1975] ALL ER 504*).**

A prima facie case with a probability of success is no more than that the Court must be satisfied that the claim is not frivolous or vexatious. In other words, that there is a serious question to be tried. In **Robert Kavuma Vs M/S Hotel International SCCA NO.8 of 1990 [Supra], Wambuzi CJ** (as he then was) was emphatic and stated that the Applicant is required at this stage of trial, to show a prima facie case and a probability of success but not success.

As to whether the suit establishes a *prima facie* case with probability of success, case law is to the effect that though the Applicant has to satisfy Court that there is merit in the case, it does not mean that one should

succeed. It means there should be a triable issue, that is, an issue which raises a *prima facie* case for adjudication. See ***Kiyimba Kaggwa [1985] HCB 43, Wanendeya V Norconsult [1987] HCB 89; Devon V Bhades [1972] EA 22.***

Further, the Applicant must demonstrate that there are serious issues to be tried. See: ***Daniel Mukwaya v. Administrator General, H.C.C.S No. 630 of 1993 [1993] IV KALR I.*** Should the Court be in doubt as to any of the above factors, the case ought to be decided after weighing doubts against certainties of the risks of doing injustice; also referred to as the “balance of convenience”. See: ***Francome v. Mirror Group Newspapers [1984] IWLIR 892.***

On the issue of a *prima facie* case; Counsel Kimaze submitted that the Applicants have filed and served their cases/suit properly based on impropriety, illegality, and irrationality as set out in pages 2-3 of the Review Application. He referred to Mr. Akorimo attached letters marked as “A” especially paragraph 2 of letter of 14/10/13. This Court has taken note of the 2nd paragraph and for purposes of emphasis, I will reproduce it. It reads that;-
“on the basis of the powers granted to me as the Vice Chancellor of Kyambogo University under Regulation 42(a) of the same, I hereby suspend you indefinitely from the University over your alleged misconduct and or indiscipline. You are not to appear on Kyambogo University Campus at all while on suspension. If you are seen on the University campus while you are still serving your suspension, you will then be dismissed from the University.”

This Honourable Court takes judicial notice of the fact that the suspension was based on the alleged misconduct and in the event that any of the Applicants is seen at the University premises, he will be dismissed from the University. I take this to mean that even if there had been no proceedings to

determine the guilt or innocence of the Applicants, they will be dismissed without further recourse from the University should they be seen within the University's vicinity. (Emphasis added).

Mr. Kimaze's contention was that the Acting Vice Chancellor did not have powers to issue such suspension under **Reg. 42 (a) of University Regulations**. He maintained that the Vice Chancellor's powers were exceeded because he could suspend the students only if there was a matter pending the Council's decision. Paragraph 3 of the letter dated 10/11/13 shows that the Applicants were suspended pending a decision by the Students Affairs and Welfare Committee. According to Mr. Kimaze, the organs of the University are crucial. The Council is an Appellate body. There must have been an investigation by Students Affairs Committee, among others. Vice Chancellor is part of the Students Committee. The Council can recommend a suspension based on the students Affairs Committee. **Refer Regulation 39 of Kyambogo University.**

The Students Affairs Committee has both Appellate (from Hall Disciplinary and original jurisdiction committee if matters are exclusively sent by Dean of Students and **Regulation 39** lists a number of actions to be taken. It is only the Students Affairs Committee to take the kind of action when the Vice Chancellor took. **See Reg. 39 (k) (l) which indicates that suspension comes only after an opportunity to be heard and cross examined. As such,** Suspension is not a temporary measure. It's a final measure of the Students Disciplinary Committee. Any student can appeal to Council and the Vice Chancellor can actually ignite his powers as per Reg. 42. Counsel Kimaze convinced Court that he will adduce evidence in the main case that the Vice Chancellor acted prematurely as there was no matter before the Council. The Acting Vice Chancellor acted *ultra vires* by suspending Applicants before completion of investigations and a finding of guilt as set out by law. The Applicants were not given a fair hearing before suspension

which is a punishment with the consequent denial of rights. The letter of suspension is clear on this. The indefiniteness of suspension and the fact that students were not given a speedy hearing of their rights are against **Article 28 of the Constitution of the Republic of Uganda 1995**. He wondered why the Vice Chancellor could not convene a Students Committee and argues that there was irrationality in Vice Chancellor's action. He relied on the case of **Ananias Tumukunde vs. Attorney General, Constitutional Petition Application No.3 of 2009 at page 8** and concludes that Mr. Akorimo had no good reason for not convening a Students' Committee. Counsel Kimaze further contended that it is over a month since the letter of 14th October 2013 was sent to the Applicants. There has been inaction and that procrastination is an element in the case. (**See paragraph 6** of each of Applicant in Rejoinder). According to the Applicants, there is no rational basis for the arbitrary action against them by the Acting Vice Chancellor. It is an abuse of power for the University to immediately enforce suspension and not give students a chance to defend themselves. In Akorimo's Affidavit, he has not given good explanation why there is procrastination. Suspension was immature and has procedural impropriety. The continued observance of the suspension should be stopped until various committees have given their reports.

In reply to the Applicants submissions, Counsel Kisubi Sarah referred to the three elements of judicial review that the Applicants had claimed that were flouted by the Respondent. On the issue of illegality under Regulation 42, she noted that Counsel Kimaze had contended that the Acting Vice Chancellor acted *ultra vires* by not going via Students' Affairs Committee. She argued that **Regulation 42 (a)** refers to independent powers of the Vice Chancellor one of which is to suspend a student of misconduct. This is because there may be emerging circumstances relating to events such as a strike and there might be no time to constitute the Committees. In the mean time, according to Counsel Kisubi Sarah, the students would be sustaining

injuries and there would be disruption of normal activities. In her view, the the Vice Chancellor's decision therefore was a legal one. According to Ms. Kisubi, there is no prima facie case proved on that ground. Counsel Kimaze's reiteration on this issue was that by the time of the Applicants indefinite suspension, there was normal University environment as the lecturers strike had not kicked off.

Regarding the procedural impropriety to which Counsel Kimaze had referred to, lack Ms. Kisubi contended that the letter of 14th October 2013, the Acting Vice Chancellor had in mind the fact that the students will be heard on a date to be communicated. On the issue of irrationality, Counsel Kisubi claimed that the status of indefiniteness is such that the indefiniteness is that one may be called on sooner than he/she thinks. She added that the Acting Vice Chancellor also did not know when the Lecturers strike would end.

Counsel Kisubi further submitted that even if the Applicants had been suspended basing on a rumour as Counsel Kimaze had pointed out that the Acting Vice Chancellor had powers to suspend them right away without a founding of guilt. She concluded by saying that there was no proof of prima facie proved by the Applicants'. Therefore, no temporary injunction should not be granted.

I need to deal with an issue of whether the Acting Vice Chancellor acted beyond his powers by suspending the Applicants' for misconduct. **Regulation 42(a)** gives the Vice Chancellor the powers to suspend the student if accused of misconduct. The powers are not absolute according to the wording '*he may suspend*'. I must put it clear before this Honourable Court that a law has to be read as a whole and not in part. If I consider **Regulation 42 (a) and (b)**, when read together, it appears that the Vice

Chancellor powers herein comes after the Students Affairs Committee has followed the procedures laid down in **Regulations 39-4**. The Vice Chancellor may have the powers embedded under **Regulation 42**, he has exercise his discretion judiciously. **See Hon. Sam Kuteesa and Ors Vs A.G, Constitutional Petition No. 46 of 2011 and Constitutional Reference No. 54 of 2011**, Court held that Judicial discretion is not private opinion, humour, arbitrariness, capriciousness or vague and fanciful considerations: See also **R Vs Board of Education [1990] 2 KB 165**.

The Acting Vice Chancellor being in a public office should use his discretionary powers while observing the principles of natural justice, fair hearing and the rule of law. A public official just like the Acting Vice Chancellor must use his powers in good faith and for a proper, intended and authorised purpose. He must not do anything that is outside his powers. It is important to apply the values that the Regulation promotes and not personal values. This was observed in the case of **Philadelphia Trade & Industry Ltd v Kampala City Council CIVIL REVISION No. 15 OF 2012**, Court held that Under Article 42 of the Constitution, the Respondent being a Public Body is enjoined to individuals and institutions that deal with it fairly and justly failing which, an injured party may take out an action by way of judicial review under Section 36 (1) of the Judicature Act (Cap. 13).

Similarly, in Nazarali Punjwani vs Kampala District Land Board & Anor; HCCS No. 07 of 2005 Justice Kasule (as he then was), observed that procedural impropriety is when rules and principles of natural justice, and / or failure to act with procedural fairness, are not observed by the decisions maker to the prejudice of the one affected by the decision. According to His Lordship, impropriety covers non-observance of procedural rules in the empowering legislation. Its test is whether the duty to act fairly and the right to be heard have been observed.

The right to a fair hearing is constitutional and enshrined in Article 28 (1) of the Constitution. The right to fair and just treatment by the administrative body is also enshrined under Article 42 of the Constitution. The rules of natural justice enjoin a body that intends to make a decision that affects another, to ensure that that other, ought not to be condemned unheard. Court observed on page 21 that, the first Respondent was required to act judicially by complying with the rules of natural justice in order to act fairly. That the rules of natural justice and the duty to act fairly necessitated that the Applicant in that case can be heard. The Court concluded that the Applicant was condemned unheard and no fairness was shown and thus the 1st respondent was found to have acted with procedural impropriety.

On issues of illegality and irrationality, **Justice Kasule** (as he then was) in the case of **Nazarali Punjwani vs Kampala District Land Board & Anor; supra**, observed that illegality is when a decision, subject to review, is made contrary to the law empowering the decision maker. The test is whether the decision maker has acted or not acted within the law. On page 18, the Honourable Justice stated that irrationality is when the decision made is so outrageous in its defiance of logic or acceptable moral standards that no person, could have arrived at that decision. Underlining emphasis is mine.

In my own opinion, the Applicants' have not been given an opportunity to appear before the Students Affairs Committee to present their case. They have been suspended indefinitely without access to the University by the Acting Vice Chancellor. His decision was baseless as there was no evidence to the effect that the Applicants are guilty of the offences complained. Thus, in my opinion is enough to give rise to serious triable issues raising a *prima facie* case for adjudication since the Applicants are out of the University's jurisdiction basing on their indefinite suspension by the Ag. Vice Chancellor and the main suit that is still pending before me for final determination.

Issue 2

Whether there is a Status Quo

This brings me to the question of preserving the *Status Quo*. The purpose of the order for temporary injunction is primarily to preserve the *Status Quo* of the subject matter of the dispute pending the final determination of the case. An order for a temporary injunction is granted so as to prevent the ends of justice from being defeated. See: ***Daniel Mukwaya v. Administrator General, H.C.C.S No. 630 of 1993; Erisa Rainbow Musoke v. Ahamada Kezala [1987] HCB 81.***

The Court of Appeal in ***Godfrey Sekitoleko & Ors V Seezi Mutabaazi & Ors [2001 - 2005] HCB 80*** made the position clear by stating as follows;-

***“The court has a duty to protect the interests of parties pending the disposal of the substantive suit. The subject matter of a temporary injunction is the protection of legal rights pending litigation*”**

Counsel Kimaze submitted to this Honourable Court that the impugned decision of indefinite suspension is still on-going. It is continuing and served daily therefore he was seeking Court’s intervention in the continued enforcement of the suspension. He referred to paragraphs 5-7 & 15 of Sam Akorimo’s Affidavit where the Respondent claims that the circumstances sought to be prevented had already taken place as the Applicants are out of the University. Counsel Kimaze however maintained the fact that the circumstances under which the Applicants’ were suspended were unfounded and hence prayed Court for an order for a temporary injunction to a practical effect to the Applicants’ because the examinations are yet to be done.

It was Counsel Kimaze’s submission that the tests and course works are yet to be concluded. He told Court that there is a strike at Kyambogo which has lasted for 3-4 weeks giving reprieve the Applicants’. Counsel Kimaze sought

for Court's intervention to enable the Applicants' to participate as students because they are still innocent till proven guilty as per **Article 28(3) (a) of the 1995 Constitution**. According to Counsel Kimaze, the Applicants' should get fair and just treatment like all other students. He submitted that mere allegations are not enough and that if the tests and course work had been done, then there would be nothing to give a temporary injunction for. He maintained that there is a Status Quo which ought to be preserved because the students would like to access the University. Hence, the Court's order would be of importance.

Counsel Kimaze drew this Court's to paragraph 6 of Mr. Akorimo's Affidavit which is to the effect that that Applicants' were no longer in their Halls of residence on campus. Therefore, no Status Quo. The Applicants' filed their Affidavits in which there was a common paragraph 5 where the Applicants' state that they are forced to stay away fearing being arrested/detention. Mr. Kimaze told Court that the Applicants' do not want to engage in a running battle for their rights and that they do not want to portray bad behaviour by entering campus by force. Learned Counsel Kimaze further submitted that the acts of the Respondent can be ended by a temporary injunction to end the enforcement of the Acting Vice Chancellor's orders.

Counsel Kimaze argued that the students want to return to class and would wish to take their exams. He explained that the first and second Applicants' are all Government funded students and are indigent. They have no alternative accommodation in Kampala city. He referred Court to Abel Ochar's Affidavit page on 12 where he states that he has been deprived of "on campus meals and a decent place of accommodation" which is inconveniencing and demeaning. According to him, this paragraph was not rebutted by the Respondent yet they could have showed that the Applicants' are not indigent and have next of kin in Kampala. In fact, Mr. Kimaze's argument was that the Applicants' pose no threat to the University as

nocrisis is being created by them. There is no evidence that they have violent/dangerous streak or history of violence. In any case, there is no such record about them for all the three years they have been at the University. Counsel Kimaze submitted that the Applicants Government grants to study and should not be curtailed. He prayed that Court should believe the Applicants' Sworn Affidavits.

It was Counsel Kimaze's submission that the reason for suspension was fallacious. He was of the view that for the sake of harmony, the University should be patient and not suspend the students. He made reference to ***Justice Remmy Kasule's ruling of Board of Governors of Kawempe Muslim Secondary School and Another vs. Hussein Kasekende - (Suing as next friend) and ors, Miscellaneous Application No. 637 of 2006*** at Page 8, Court stated that in order to ensure that the ends of justice are met by issuing interim orders by providing an opportunity to the Respondents to sit the "O" level examinations which are only held once a year. Court continued to state that denying the Applicants' an opportunity to sit for the "O" level National Examinations before determining their innocence or guilt is to deny them the protection of the law and to punish them before they are heard in the cause. Counsel Kimaze submitted that the Applicants' are Finalists, in their last year (3rd year) and have to take their exams. According to Mr. Kimaze, the Applicants' have strived for 16 years (7 primary, 6 secondary, & 3 years at University) to reach this milestone. He said that the exams in this particular application question are more than those in Kawempe case. It was Counsel Kimaze's submission that the exams and tests to which the Applicants' are interested in are exclusive to Kyambogo University and no other Institution can offer the same. He prayed Court to make it possible for the Applicants to do their exams.

Mr. Kimaze viewed Mr. Akorimo's paragraph 14 where he states that the Applicants' will not suffer any irreparable harm as being the height/climax of unfairness and arrogance by a Public Institution. The statement ignores

what the students have put in next 16 years yet failure to sit for exams will cause them to lose opportunities. He contended that the nature of suspension was **TIMELESS** and it was served on a day to day basis. It's not a once for all. Paragraph 5-7 of Akorimo's Affidavit envisages a once for all situation yet it's a continuous act. Mr. Kimaze argued that after conclusion of Court proceedings, the University can continue with its punishment.

Reply by Counsel Kisubi Sarah

In reply, Counsel Kisubi conceded to the fact that the suspension was ongoing as per letters of suspension of different Applicants (Annexure A1 - A3). She contended that Regulation 42 of the Kyambogo Regulations is separate in that the Acting Vice Chancellor may suspend a student if accused of misconduct. She continued to submit that the Applicants' were accused by virtue of a letter dated 14th October 2013 from the Acting Vice Chancellor. Counsel Kisubi made reference to the case of ***C & A Travel Operations vs. TPS (U) Ltd Misc. Application 195/12*** where Justice Hellen Obura underscored Status Quo on page 5 stating that the purpose of temporary Injunction is to preserve Status Quo which is the most vital factor. She therefore submitted that the Applicants' have no Status Quo to preserve because they are outside the University. Secondly, Counsel Kisubi submitted that the Applicants were suspended but not DISMISSED from the University and therefore, there is no Status Quo to be preserved. She concluded by stating that if the Court grants a temporary injunction, it will be lifting that suspension and not preserving the Status Quo.

Counsel Kisubi submitted that the issues of doing tests and course works as contended by the Applicants' was not true and in addition, the Applicants Affidavits do not show any urgency concerning the same. She is of the view that the Applicants will take their examinations beginning from 9th December 2013. Counsel Kisubi intimated to Court that the University has been undergoing a Lecturers' strike and would not be in a position to constitute

the Students' Affairs Committee. Therefore, it was premature for the Applicants to run to Court as there was still an opportunity for them to be heard even before the tests do come up. Counsel told Court that it is possible to constitute a Students' Affairs Committee. She reiterated that there is no Status Quo to preserve and a temporary injunction should not be granted.

Rejoinder by the Applicants'

In rejoinder, Counsel Kimaze prayed to Court to grant all or any of injunctions asked with regard to S.33 of Judicature and S.98 Civil Procedure Act and grant all the reliefs necessary to meet ends of justice. He told Court that the Applicants need to access the campus for meals. Counsel Kimaze further submitted that to allow the Vice Chancellor to have his way and suspend Activist students will also give other Vice Chancellors chance to act arbitrarily. It will be a bad example to allow University authorities to use a mere label that the students are activists. This will be unjust. He said that what the Applicants' are seeking are their rights and the University's Rights can be realized later because the rights of the Applicants should take precedence at this stage and fairness should ensue. According to Mr. Kimaze, there will be no winner between the Applicants' and Respondent. He told Court that it is impracticable to convene a Student Affairs to which the students may never be called to testify Committee in their final year. Therefore, it is not plausible for the Student Affairs Committee to sit and hear the case of the three Applicants' before the examinations are done on the 9th of December, 2013.

Resolution of the matter

Counsel Kisubi has raised very important points which I must address. She submitted that **Regulation 42** of the Kyambogo Regulations is separate and the Vice Chancellor may suspend if accused of misconduct. I beg to disagree with her on this issue. Regulation 42 flaws from the decision of the Student

Affairs Committee. As I have already pointed out, the law must be read as a whole. **See Supreme Court of Uganda Constitutional Appeal No.1 of 1997: TINYEFUNZA VS THE ATTORNEY GENERAL, and the Kenyan High Court PETITIONS NOS. 65, 123 & 185 OF 2011: JOHN HARUN MWAU & 3 OTHERS VS ATTORNEY GENERAL OF KENYA & 20 OTHERS [2012] KLR.** The Vice Chancellor's powers are not absolute and if he has to exercise them, then it must be done so cautiously. According to the letter dated 14th October 2013 from the Acting Vice Chancellor to the Applicants' which I have already reproduced on page 8, the Applicants' were suspended on the allegations of misconduct and indiscipline. During the submissions by Counsel Kisubi, I have not heard that the Applicants appeared before the Students Affairs Committee for them to be heard. Meaning that the offences there in are unfounded and baseless and their continued indefinite suspension is illegal.

She further submitted that preserving the Status Quo is the most vital factor when granting a temporary injunction as per Hon. Lady Justice Hellen Obura in **C & A Travel Operations vs. TPS (U) Ltd, supra.** It was Counsel Kisubi's submission that the Status Quo is outside the University because the Applicants' were suspended but not DISMISSED from the University. Therefore, there is no Status Quo to be preserved. She concluded by stating that if the Court grants a temporary injunction, it will be lifting that suspension and not preserving the *Status Quo*. I beg to defer from Counsel Kisubi and refer her to the suspension letters to the Applicants' which states that the Applicants are not to appear on Kyambogo University Campus at all while on suspension lest they be dismissed from the University.

The suspension here in its strict sense is as good as a dismissal because the Applicants' are not allowed to be seen within the vicinity of the University. Besides, an injunction is an extraordinary remedy that courts utilize in special cases where preservation **of the status quo or taking some**

specific action is required in order to prevent possible injustice. The purpose of the order for temporary injunction is primarily to preserve the *Status Quo* of the subject matter of the dispute pending the final determination of the case, and the order is granted in order to prevent the ends of justice from being defeated. See ***Daniel Mukwaya v. Administrator General, supra; Rainbow Musoke v. Ahamada Kezala, supra.*** “*Status Quo*” is purely a question of fact and simply denotes the existing state of affairs existing before a given particular point in time and the relevant consideration is the point in time at which the acts complained of as affecting or likely to affect or threatening to affect the existing state of things occurred. Depending on the facts of the case, a party may apply for an injunction in order to preserve the *Status Quo*. In my view, the overall Status Quo is that the Applicants’ are still students of Kyambogo University and must be left so. They should not be treated as if they are dismissed through the enforcement of an indefinite suspension.

I am concerned with the violation of a right that is being violated regardless of the jurisdiction. It is such an act that must be stopped if the Applicants are to enjoy their rights. It is indeed a cardinal principle of law that a temporary injunction is intended to preserve the Status Quo until the dispute to be investigated in the suit can be finally disposed of. See **Mastermind Tobacco Uganda (PTY) Ltd v Bjugiro Ayabatwa & Another Misc. Application No. 713 of 2002** (arising from **Misc. Application No. 712 of 2002**); (arising from **Civil Suit No. 497 of 2002**).

In my view, the Applicants have made their case and I accordingly allow their application on this ground.

Issue 3

Whether 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;

The other cardinal consideration is whether in fact the Applicant would suffer irreparable injury or damage by the refusal to grant the application. If the answer is in the affirmative, then Court ought to grant the order. **(See: *Giella v. Cassman Brown & Co. [1973] E.A 358*)**. By irreparable injury it does not mean that there must not be physical possibility of repairing the injury, but it means that the injury or damage must be substantial or material one that is; one that cannot be adequately atoned for in damages. See: ***Tonny Wasswa v. Joseph Kakooza [1987] HCB 79; NTCO Ltd.v. Hope Nyakairu [1992 - 1993] HCB 135.***

Counsel Kimaze invited Court to consider averments of each student/Applicant especially first Applicant (Daniel Jakisa) paragraphs from 9-12, paragraphs 9-12 for second Applicant (Abel Ochar) and third Applicant (Nathan Okure) from paragraph 9-12. Court takes cognizance of the fact that there is an even present threat against students that they stand to be dismissed if they are seen within the vicinity of the University. The Applicants cannot go near the University for fear of being dismissed and arrested. According to Mr. Kimaze, the irreparable harm which cannot be compensated is the “common law harm” of “Loss of chance.” He submitted that no other Institutions have organized the tests that students want to sit this year. There is also the mental distress from students, parents, and guardians. This is not quantifiable and is not trivial. The Applicants are confused and embarrassed which this Court should treat as serious effects or “Harms.”

Counsel Kimaze further submitted to this Honourable Court that there is a bundle of high altitudes which stand to be violated each day. That the Applicants’ suspension is alive see ground 6 in Notice of Motion, that is,

enforcing the Vice Chancellor's order would violate rights to a fair hearing (Article 28 of Constitution), Article 42 of Constitution and their rights to dignity. He submitted that because of these violations, it is beyond the Applicants means to bring the matter before this Honourable Court. He brought it to the attention of Court that he was representing the Applicants on Legal Aid.

Counsel drew the attention of Court to the case of **Ananias Tumukunde** , **supra at page 7** and to the fact that the Applicants have spent fees on their studies for 16 years. In the Tumukunde case, the Constitutional Court held that 'where there is breach of chapter 4 (fundamental rights)' they are jealously guarded by Court and therefore a temporary injunction should be given as a redress pending the hearing on the merits. He referred to Mr. Akorimo's Affidavit and contended that it showed no harm if students are allowed to participate in lectures, discussions and use amenities of the University and achieve highest standards of excellence. Mr. Akorimo's Affidavit has not shown the students who were beaten and therefore having no report from the Warden and other Administrators. Counsel invited this Honourable Court to find that the Applicants have proved that they will suffer irreparable damage.

In reply by Counsel Kisubi, she stated that there will be no "loss of chance" or irreparable damage because if the University clears them, it could set supplementary exams. She told Court that it can use its inherent powers to order the University to set for them exams in case they are cleared. She submitted that the Applicants were suspended as a disciplinary measure. Hence they cannot disregard the Management's regulations or decisions as it can set a bad precedent to other students since strikes are common in all Institutions of learning. Additionally, Court would be setting a bad precedent which would be detrimental to the other students who are not involved in the strikes resulting to some deaths.

In rejoinder, Counsel Kimaze asked Court to disregard Counsel for the Respondent's submission about separate tests being set for the Applicants. He submitted that if the Applicants miss the tests, they could demand them from good cause during a Semester but the semester has passed, there would be no tests. He regarded the indefinite suspension as being a punishment yet a punishment can come after a process a process. In the Applicants' case, according to Mr. Kimaze, the Vice Chancellor sat alone. Therefore, he could not suspend the students on his own. Counsel Kimaze prayed Court not to choose sides between University and students but to consider the conflict as a result of poor conflict resolution without following the Regulations which have a mechanism. He invited Court to interpret the Regulations and give best practice for resolving conflicts. He alluded to the fact that the Court cannot regulate strikes and that the Applicants are not career "strikers" but are proud of being able to use every avenue to petition and demonstrate for their rights and those of others. Therefore, Court should not demonize activism especially where no evidence is shown that their activism is unsafe and harmful. Counsel Kimaze asked to Court to grant all Prayers asked for and costs be provided by Respondent.

On irreparable damages, I find very instructive the words of **Lord Diplock** in the case of ***American Cyanamid Cov Ethicon [1975] 1ALL E.R. 504*** . He states;

"The governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in

the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted...”

In ***Francis Kanyanya V Diamond Trust Bank, HCCS No. 300 of 2008*** Hon. Mr. Justice Lameck N. Mukasa relying on ***Kiyimba Kaggwa*** (supra) held that:-

“Irreparable damage does not mean that there must not be physical possibility of repairing injury, but means that the injury must be a substantial or material one, that is, one that cannot be adequately compensated for in damages” (emphasis added)

It was strongly argued for the Applicants’ that they will suffer irreparable damages if the temporary injunction is not granted. On the other hand, they will also not be in a position to continue doing the tests and their course work. More so, they stand a risk of missing the upcoming examinations which will affect them since they are in their last years and being indigent with the two of them being on a Government sponsorship, they will miss out yet the examinations are set once and that no other institution will set for them examinations to do. This will also affect them as they have struggled throughout the sixteen years of their lives as students trying to achieve their goal, a fact that cannot be compensated by way of damages.

It is my considered opinion that the said injury will not be capable of compensation in terms of damages. Thus, the Prayer by the Applicants’ that the Respondent be restrained from preventing them from accessing campus, attending lectures, sitting for tests, course works and/ or examinations pending the disposal of the main suit, In my view, the Applicants’ will suffer

irreparable injury which cannot be adequately compensated for by way of damages.

Issue 4

Granting an injunction on the balance of convenience.

It is trite law that if the Court is in doubt on any of the above two principles, it will decide the application on the balance of convenience. The term balance of convenience literally means that if the risk of doing an injustice is going to make the applicants suffer then probably the balance of convenience is favourable to him/her and the Court would most likely be inclined to grant to him/her the application for a temporary injunction. The "balance of harms" refers to the threatened injury to the party seeking the preliminary injunction as compared to the harm that the other party may suffer from the injunction.

The Court will consider where the "balance of convenience" lies, that is, the respective inconvenience or loss to each party if the order is granted or not. The Court will consider all the circumstances of the case. Counsel for the Applicants submitted that the Court should find the balance of convenience in his favor as it is more likely to suffer greater damage if the temporary injunction is not granted. He referred Court to page 7 of **Ananias Tumukunde** paragraph 31-40, in that case a Presidential Aide was convicted of corruption in London. When the President heard about it, he issued a directive to the Public Service for Tumukunde's dismissal and an order that he should never to be employed in any public service again. Tumukunde challenged its constitutionality and sought for Court's intervention in his continued interdiction. (See paragraph 31-34 which was read verbatim in Court). In that case, the process to bar Tumukunde from his office was on going. The Constitutional Court was not treating this lightly.

Counsel Kimaze submitted that the Applicants are permanently suspended. Moreover, the Vice Chancellor who is the Chairperson of Students' Committee is already a Judge as well. The impugned punishment of suspension has lasted for a month. Mr Kimaze argued that in Tumukunde's case in paragraph 37, there was no formal communication. According to Mr. Kimaze, the Respondent should wait for final disposal of Petition. He prayed Court to order that the Respondent should wait for Final Disposal of Notice of Motion Cause. Hence, his conclusion that the balance of convenience favours the Applicants'. He referred to Justice Kasule's Ruling in the **Kawempe Muslim Secondary School case on page 7-8**, where the Judge held that the students are protected by being innocent until found guilty. Similarly, Kyambogo should enforce fair trial and allow the Applicants' to defend themselves. The offences preferred against students were those against the Regulations which fall also under Penal Code Act. But are criminal offences. (See Reg 23(a) - Breach of Peace and Reg 22 (b) - closure of road). There is an offence committed contrary to Reg. 18 (a) (e) (u) (w) which concerns the good image of University. As such, Mr. Kimaze argues that the students have criminal offence hovering over them without being settled. He also referred page 8 of *Justice Kasule's* decision and contends that neither the student nor Vice Chancellor should be an Arbitrator in this situation as the efforts of doing ADR with University have failed. The Court should play its role.

Counsel Kimaze told Court that Nathan Okure is a relative of University Secretary who has treated him in a cheeky manner. He also enunciated the reasons why the University of Kyambogo wants to treat the Applicants badly: they are looked at as students' rights activists because the University will not listen to students grievances. He made reference to paragraph 4 & 5 of the Students' Affidavits of 28th September 2013 where it is shown that the Warden had arbitrary taken a decision to expel them from their places of lodging. They protested and were allowed to stay until 18th October 2013 when they were served with the suspension letter. According to Mr. Kimaze

University has not rebutted this evidence because they acted in bad faith. Counsel Kimaze asked this Honourable Court to come to the Applicants rescue.

In reply, Counsel Kisubi drew Court's attention to the fact that the Applicants' are accused and have allegations to answer. She argued that it is a normal administrative procedure that they are arrested and taken to Court. The University could open up a criminal proceedings but this would mean that they are not answerable to the University itself. She said that there has not been any abuse or violation of Human Rights as there is still an intention by Kyambogo to give students a right to be heard. They are on indefinite suspension though temporary but not final. Counsel Kisubi further submitted that although the Applicants seek to enjoy their Constitutional Rights they should not trample on others' rights. She said that the Applicants' blocked roads, breached peace and caused chaos. She prayed that the Application be found on lack merit and be dismissed.

In the case of **Victoria Construction works Ltd Versus Uganda National Roads Authority HMA No. 601 of 2010** the High Court while citing the decision in **J. K. Sentongo vs. Shell (U) Ltd [1995] 111 KLR 1**, Justice Lugayizi observed that if the Applicant fails to establish a prima facie case with likelihood of success, irreparable injury and need to preserve the status-quo, then he/she must show that the balance of convenience was in his favour.

I wish to say that the Applicants' have satisfied Court that all the four ingredients exist. This application, therefore, ought to succeed.

In the result and for the reasons given hereinabove in this ruling the Applicant demonstrated that this application has merit. It ought to succeed. I am aware of the decision in the case of **Francis Babumba & Others vs. Erusa Bunju (1992) 111 KALR 120**, where it was held that a temporary

injunction would not be granted if its effect is to dispose of the whole case. The application before me seeks for an order of a temporary injunction. This does not dispose off the main suit as it is still pending before me with different remedies sought therein. Accordingly, this application is allowed. I therefore grant the orders sought in this application. Costs shall be in the main cause. I so order.

Signed.....
HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA
JUDGE
29TH NOVEMBER, 2013