

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
MISCELLANEOUS CAUSE NO. 61 OF 2016

BALONDEMU DAVID ::: APPLICANT

Versus

THE LAW DEVELOPMENT CENTRE ::: RESPONDENT

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

RULING:

This is an application by Notice of motion for Judicial Review of the decision of the Management of the Law Development Centre cancelling the Applicant's post of Graduate Diploma in legal practice communicated to the Applicant on 26th February 2016. The Applicant seeks the prerogative orders of Prohibition, Certiorari Damages Declaration and costs of the application. The application is brought under Rules 3,4,6,7 and 8 of the Judicature (Judicial Review) Rules 2009, Articles 21, 28 and 42 of the Constitution of the Republic of Uganda and all enabling laws.

Briefly the background of this application is that the applicant was admitted to the Bar Course at the respondent institution. He pursued his studies successfully up to the final term where he passed all subjects except criminal procedure in which he sat for supplementary examination and eventually passed. When the results were published on the respondent's institution's notice board it was indicated that he had failed both commercial transactions and criminal proceedings. At the bottom of the published results it was indicated that any person dissatisfied with the results could seek verification of the results from the authorities. On 12th April 2010 the Applicant wrote to the

Head Bar course of the respondent institution seeking verification of his commercial transactions results which he believed was his favorite subject. Upon verification it was discovered that he had actually passed because there had been an error in the tally of marks. On the basis of this discovery he did only one supplementary examination in criminal proceedings and passed. He then graduated on 3rd September 2010 and was awarded a Post Graduate Diploma in Legal Practice. He enrolled as an advocate of the High Court in 2011 and had practiced law since then. On the 11th of August 2015 the respondent's Management Committee Subcommittee invited him for a hearing. The Committee then found that some four marks in the Applicant's commercial transactions answer script appeared to be in different handwriting from the other marks awarded. The Management Committee Subcommittee did not invite the internal and external examiners to explain the variance in handwritings. On the basis of the recommendations of the respondent Institution's Management Committee Subcommittee the respondent institution's Management Committee recalled the Applicant's Post Graduate Diploma in Legal Practice. The Applicant was dissatisfied with the manner in which this was done and filed this application.

The grounds of the application are briefly set out in the application. In summary they are that the decision of the respondent institution was irrational and irresponsible in as far as it was punishing the Applicant for the weaknesses of their own system. That the decision of the respondent to cancel the Applicant's Diploma in Legal Practice was manifestly biased, discriminatory, incoherent and should be purged for contravention of Article 21,28 and 42 of the Constitution and rules of natural justice. That the Applicant did not participate in marking of exams at Law Development Centre nor did he access that mark sheet at all material times. That the finding of the committee that four marks were added to the Applicant's answer script in a different handwriting without interviewing the internal examiner or seeking his explanation or that of an expert was ultra vires. That it is the interest of justice that court allows the application.

The application is supported by the affidavit of the Applicant dated 4th May 2016. He also filed further supplementary affidavits in support of the application sworn by a one Patrick Machika Mugisha dated 18th July 2016. The Respondent filed an affidavit in reply dated 16th May 2016

sworn by the Director Frank Nigel Othembi. The Applicant also swore and filed an affidavit in rejoinder dated 18th July 2016.

Written submissions were filed. Applicant filed on 1st August 2016. The respondent filed on 23rd August 2016. The Applicant filed a rejoinder on the 16th September 2016. Lists of authorities were also filed.

I have considered the application, submissions of both parties and the affidavits on record.

Counsel for the respondents raised preliminary points of law. He faulted the Applicant's affidavit in support of the application by Patrick Machika Mugisha which was filed on 18th July 2016 for having been filed two months later after filing the application. Further that the Applicant did not seek leave of court to file the additional affidavit in support. He then prayed that the affidavit be struck out with costs. Secondly counsel submitted that all the affidavits in support of the application filed by the Applicant are incurably defective and therefore this leaves the application with no supporting evidence. Counsel added that the affidavits contravene O. 19 r 3(1) of the Civil Procedure Rules. Further that these rules are not mere technicalities. Specifically counsel took issue with paragraph 9 of Mugisha's affidavit, and paragraph 7, 20 and 36 of the Applicant's affidavit in support of the application. Counsel also cited several authorities to support his submissions.

In reply counsel for the Applicant submitted that the attack on the affidavit is baseless. No single rule of Judicial Review Rules was flouted by such affidavits. That no prejudice occasioned to the respondent is outlined or is capable of being set up. That since in the affidavit in reply the respondent mentioned and replied to Mr. Mugisha's affidavit in advance even before it was filed, the respondent's counsel cannot be heard to complain about the same affidavit since they envisaged it. They knew what Mr. Mugisha was going to say and replied even before the affidavit was filed. That nevertheless this court should take liberal approach to the affidavits filed by the Applicant.

I do not find merit in the submissions of counsel for the respondent. Courts have establishment in the Uganda Legal System the practice of severance when dealing with affidavits containing hearsay and facts based on knowledge. When considering such type of affidavits courts have followed a liberal approach.

In *Col (rtd) Dr. Kizza Besigye Vs Museveni & anor, Election Petition No. 1 of 2001* Odoki JSC (as he then was) stated that:

“In the present case the only method of adducing evidence is by affidavit. Many of them have been drawn in a hurry to comply with the time limits for filing pleadings and defend the petition. It would cause great injustice to the parties if all the affidavits which do not conform to all the rules of procedure were rejected. This is an exceptional case where all the relevant evidence that is admissible should be received in court. I shall reject those affidavits which are based on hearsay, and only parts which are based on knowledge will be relied upon. O. 17 r 3 of the Civil Procedure Rules S.I 71-1 provides that costs of affidavits which contain hearsay matter should be borne by the party filing such affidavit.” (underling for emphasis)

I agree. The facts which counsel for the respondent is trying to dispute are clearly referred to in the report of the management committee subcommittee. The paragraphs which the respondent’s counsel refers to I find do not really exhibit mere belief. These are matters that the applicant was told by the committee and is well aware of. Just because he added the statement at the end that he said them to the best of his knowledge and belief does not make them matters of belief rather than fact. As to the filing of an affidavit without leave of court I find that it is up to court to determine whether or not in its discretion it can allow the affidavit to remain on record. In this case I find that it will be in the best interest of justice that the affidavit be allowed to remain on record. I therefore find no merit in the preliminary points of law and I accordingly overrule them.

The principles governing Judicial Review are well settled. Judicial Review is concerned with Prerogative Orders which are basically remedies for the control of the exercise of power by those in public offices. They are not aimed at providing final determination of private rights which is done in normal civil suits. The said orders are discretionary in nature and court is at liberty to refuse to grant any of them if it thinks fit to do so even depending on the circumstances of the case where there had been clear violation of the principle of natural justice; **John Jet Mwebaze Vs Makerere University Council & 2 others Misc. Cause No. 353 of 2005.**

The discretion I have alluded to here has to be exercised judicially and according to settled principles. It has to be based on common sense as well as justice. See: **Moses Ssemanda Kazibwe Vs James Ssenyondo Misc Application No. 108 of 2004.**

Factors that ought to be considered include; whether the application has merit or whether there is reasonableness, vigilance without any waiver of the rights of the applicant. Court has to give consideration to all relevant matter of the cause before arriving at a decision in exercise of its discretion. It was held in the case of **Koluo Joseph Andres & 2 others Va Attorney General Misc. Cause No. 106 of 2010** and I agree that:

“It is trite law that Judicial Review is not concerned with the decision in issue per se but with the decision making process. Essentially Judicial Review involves the assessment of the manner in which the decision is made. It is not an appeal and the jurisdiction exercised in a supervisory manner, not to vindicate rights as such but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality”.

The purpose of Judicial Review was summed up in Lord Hailsham St Marylebone in **Chief Constable of North Wales Police Vs Heavens [1982] Vol. 3 All ER as follows:-**

“The purpose of Judicial Review is to ensure that the individual receives fair treatment not to ensure that the authority after according a fair treatment reaches on a matter it

is authorized or enjoined by law to decide from itself a conclusion which is correct in the eyes of the court.”

This court agrees with the above principles.

Counsel did not raise issues in their submissions. However, this application being for Judicial Review, this court finds the most important issues to be, the grounds and the remedies. As such this application raises two issues for determination which cover all the issues raised by the applicant in submissions:

1. Whether the application raises any grounds for Judicial Review”
2. Whether the applicant is entitled to the remedies sought in the application?

Issue 1: Whether the Application raises any grounds for Judicial Review?

There are three broad grounds for judicial review which court must consider. That is illegality, irrationality and procedural impropriety. Proof of any of the grounds is sufficient for the application to succeed. In this case the applicant appears to rely on two grounds, namely; Irrationality and procedural impropriety.

This was the position in the case of *Pastoli Vs Kabale District Local Government Council and others [2008]2 EA* where it was held while citing *Council of Civil Unions Vs Minister for the Civil Service [1985] AC 374* and *An Application by Bukoba Gymkhana Club [1963] EA 478 at 479* that:

“in order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality or procedural impropriety Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a

law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a district interdicts a public servant on direction of the Executive Committee, when powers to do so are vested by law in the District Service Commissionirrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness maybe in non-observance of the Rules of Natural Justice or to act with procedural unfairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision”.

It is also important to note that proof of one ground is sufficient for the application for judicial review to succeed.

I shall deal with grounds one by one.

Irrationality

On this ground counsel for the applicant submitted that according to Black’s Law Dictionary 9th Edition page 906 irrational means not guided by reason or by a fair consideration of facts. That the applicant was simply a student with no role to play in marking and awarding marks, that the Internal Examiner who was Mr. PM Mugisha said in his affidavit that the Management Committee Subcommittee (MCSC) consulted him in respect of other candidates but did not consult him on the results of the applicant. That there was no expert opinion on whether or not there was a change in handwriting as alleged. That it was irrational for the committee turn itself into handwriting expert or document analyst, since none of the members had qualification as a handwriting expert. That at page 24 of the report of the MCSC the head bar course who did the

verification told the committee that he only verified the marks and did not say at any one time that he added marks. That further no original answer script was used or placed before the MCSC. That they were acting on photocopies which could have affected the mark sheet. For this submission counsel relied on the case of **Hon. Kipol Tonny Vs Ronny Waluku Wetaka & ors CAEPA No. 17 of 2011.** He also relied on **Kampala University Vs National Council for Higher Education Misc. Cause No. 53 of 2014.**

In reply counsel for the respondent submitted that the respondent had power to revoke the diploma awarded to the applicant. That it does not matter whether or not there was any wrong doing on the part of the applicant and whether or not the decision made against him was right or wrong because this would amount to going into the merits of the decision. That as long as there is misconduct, fraud, error, misrepresentation of results etc the diploma can be cancelled. That it does not matter that the holder is innocent beneficiary of the fraud.

I have considered the submissions of both parties.

Irrationality is when there is such gross unreasonableness in the decisions taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....

Therefore this ground goes to the decision itself given the evidence or facts before the administrative body. The court in deciding this ground must balance between on the one hand the general interests of the community and the legitimate aims of the state and on the other hand the protection of the individual's rights and interests. Therefore what this court usually does is to adopt the four question test. If all are answered in the affirmative then the ground must fail. The four questions are:

1. Is the public body's objective legitimate?
2. Is the measure taken by that body suitable for achieving that objective?
3. Is it necessary in the sense of being the least intrusive means of achieving the aim?
4. Does the end justify the means overall.

The onus to prove that these conditions can be met lies on the administrative body, in this case on the respondent.

The objective of the respondent in this case is to ensure the respondent institution reforms itself to eliminate malpractices. In my view this is a legitimate objective. However the measure taken of cancelling the applicant's diploma is not suitable for achieving the objective. The facts ascertained by the respondent's subcommittee placed the misconduct squarely on the respondent's academic staff therefore to clean up the respondent institution requires that staff be reprimanded; the institution sets its rules clearly for its staff and revises its procedures. Therefore the end did not require cancellation of the diploma as the only solution. This makes the decision irrational basing on the facts and law available to the management committee of the respondent institution.

In my considered view it defies logic why the Management Committee decided to cancel the applicant's postgraduate diploma in legal practice without fault on his part. As a governing body the decisions made by that MCSC body must be rational. It was the submission of counsel for the respondent that this court must refrain from interfering with the decisions of academic institutions.

It was suspected that the applicant could have been guilty of examination malpractice by altering marks on his answer script after final marking had been done. However it is not clear who altered the marks. All the applicant did was to make an application for verification which was accepted

by the respondent institution's officials. Although the respondent attempts to argue that the verification procedure adopted was illegal, the applicant in his affidavit in support of the application clearly stated in paragraph 5 which evidence was not challenged that when the results were published on the notice board there was an instruction that anyone could apply for verification of results. The assertion, that at the time of the applicant's request for verification the rules did not allow verification, doesn't make any sense because the procedure had been sectioned by the respondent.

I also agree with the reasoning in the decision of the High Court of KwaZulu-Natal South Africa in Potwana Vs University of KwaZulu-Natal case No. 5347 of 2012 ZAKZHC 1DECISION OF 24th January 2014. In this case the applicant sought to set aside the decision of the senate of the respondent to withdraw the applicant's PHD degree which had been conferred on her. Court held that if the university has found fault with the processes and procedures not followed by its own academic staff this is hardly reason to prejudice the applicant by revoking her degree. It was not proved at all that the applicant was in any position to influence any of the decisions made in the process leading to her graduation. How was she to know that less time was spent than necessary in reviewing her revised thesis?

Court also accepted that once a final decision is made and conferred on the persons affected by it, then it becomes irrevocable because the decision maker is *functus officio*. **The decision is only revocable before it becomes final. Court then concluded that a decision to confer a degree on a student should never be permitted to be revoked save in exceptional circumstances where the student is guilty of fraud or misconduct affecting the qualification at the time of award. The court went on to set aside the decision of the respondent institution.** (*emphasis is mine*) I agree with this reasoning.

The case in my view lays down very important standards required to confer power on an institution to revoke an award. First it must be statutorily provided for, secondly it must be

established that the student was personally guilty of malpractice, misconduct or fraud at the time of award which caused an erroneous award or made him or her unfit for an award. All these are lacking in this case because the then internal examiner and head of bar course denied altering marks.

I therefore find that on the evidence available to the management committee and the findings of the subcommittee no reasonable tribunal would let the decision of the management committee stand. The applicant has therefore proved the ground of irrationality.

Procedural Impropriety:

“Procedural impropriety is when there is a failure to act on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

It was the case of the applicant that Annexure CR-A to the applicant’s affidavit in support of the application clearly shows that at pages 23-26 the Management Committee Subcommittee (MCSC) of the respondent relied on a Forensic Audit Report which had never been availed to the applicant or any other student. That this approach was unfair and as held in **Kamba Saleh Vs Jennifer Namuyangu Court of Appeal E P No. 27 of 2011** such is contrary to the principles of

natural justice. Further that he was discriminated against because other persons with similar queries were allowed to reseat their papers. This according to counsel for the applicant amounted to discrimination which relying on *Healy Vs Larson 323 NYS 2 625* invites a close scrutiny by the judiciary to the decision. Counsel also submitted on impropriety that the Management Committee Subcommittee relied on photocopies of the applicant's answer script which was procedurally improper.

In reply the respondent submitted that the applicant cannot wake up now to claim that the committee did not consider relevant evidence. That he should have been more vigilant and exercised his right to ask for more time. He should have asked for any witness whom he wanted to cross-examine. On the issue of discrimination counsel submitted that the applicant's case is different from those others therefore it could not be handled the same way.

In this case I am inclined to agree with the submissions of the applicant. The management committee of the applicant did not afford the applicant a chance to be heard before his diploma was cancelled. The applicant was also not allowed sufficient time to present his defence. He was also not informed of his right to call and cross-examine any witnesses. The applicant was also ambushed at the meeting with subcommittee with a copy of the Forensic Audit report of which he had no prior knowledge. In my considered opinion this was not a fair hearing. The standard in this case should have been higher, this being a case dealing with a matter that had the potential of paralyzing the applicant's source of income, livelihood and pride. The management committee should have given the applicant due regard as a practicing advocate and an alumni of the institution. It was also important that the applicant ought to have been given due audience because none of the findings of the Management Committee Subcommittee implicated him in any misconduct, fraud, or any other form of malpractice. All the blame was on the staff of the respondent. Clearly if the respondent institution had given the applicant a fair hearing perhaps they would have received the testimony of the internal examiner who would have given evidence in favour of the applicant.

I therefore find that the proceedings of the respondent were tainted with procedural impropriety and denied the applicant a fair hearing. I therefore find that the ground of procedural impropriety has been proved.

Issue 1: Whether the Applicant is entitled to the remedies sought in the application?

I have held that the applicant was not accorded fair hearing. Where a prejudicial decision has been made by a public authority in the course of exercise of its statutory authority without according the affected party a right to a fair hearing then a writ of certiorari should often be freely granted by the courts. See: *Ridge Vs Baldwin [1964] AC* and *Eng William Kaya Kizito Vs Attorney General HCMC No. 38 of 2006*.

The proceedings and the decision of the management committee of the respondent cancelling the applicant's Post Graduate Diploma in Legal Practice is hereby quashed.

Prohibition

I grant this prayer. The respondent is hereby prohibited from recalling the applicant's post graduate diploma in legal practice in any manner basing on the impugned proceedings without evidence of fraud, misconduct or error on the part of the applicant.

Injunction

An injunction is hereby issued against the respondent and all stakeholders as served with copies of the decision restraining them from acting upon the decision of the management committee until a proper procedure and hearing is given to the applicant in accordance with the rules of natural justice.

A declaration that the applicant duly passed his bar course final exam.

I find that this goes beyond the scope of Judicial Review. I therefore decline to grant the same.

Special and General Damages:

I do not find it proper to grant damages in a matter proceeding on affidavit evidence. I therefore decline to grant this prayer.

Costs and interest:

The respondent shall pay the applicant the costs of this application. I decline to grant interest in this case since no damages have been awarded.

I so order

Stephen Musota

J U D G E

05.12.2016