THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS CAUSE NO.142 OF 2018

THE JUDICATURE (JUDICIAL REVIEW) RULES No. 11 of 2009

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW BY APPLICANT FOR ORDERS OF PROHIBITION, CERTIORARI,INJUNCTION, MANDAMUS AND DECLARATIONS.

APIIMA ABEL ONYANCHA---------- APPLICANT

VERSUS

KAMPALA INTERNATIONAL UNIVERSITY---------- RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

The Applicant filed an application for Judicial Review under Section 33,36 & 38 of the Judicature Act as amended, Rule 6 & 7 of the Judicature (Judicial Review) Rules, 2009 seeking orders that;

a) An order of Certiorari doth issue to quash the decision of the respondent suspend the applicant for one academic semester.

b) An Order of injunction stopping the respondent from subjecting the Applicant to any further disciplinary proceedings or punishment arising from the alleged fraud.

c) An order of prohibition barring the applicant from seating his semester examinations due to non-attendance of class while on suspension.

d) An order of mandamus to permit the applicant to continue his academic semester and sit his forthcoming examinations.

e) The applicants as well prayed for costs of this application and damages for the embarrassment caused to the applicant.

The grounds in support of this application were stated in the supporting affidavit of the applicant but generally and briefly state that;

a) The applicant was suspended through a letter dated 8th May 2018 which also served as a notice of suspension of all his academic and clinical activities in the respondent.

b) The applicant who is a 4th year student and two other students were then arrested and charged with conspiracy to defraud vide Police case No. CRB 722/2018 and were released on police bond on 11th May 2018.

c) The applicant received an invitation on 17th May 2018 to appear before the respondent's student affairs Committee on 22nd May 2018.

d) On the 22nd May 2018, the applicant appeared before the respondent's committee wherein the applicant was not informed of his right to appear with counsel to represent him while answering charges neither were the particulars of the said fraud explained to him and nor was any evidence presented pinning him to the said offence but was rather asked why there was a ledger showing a sum of US$ 2027 on his student account and why he was on the committee which did not amount to a fair trial.

e) That the committee according to the applicant was improperly constituted and it included the police officer that arrested them and he too interrogated the applicant as a member of the committee.

f) That no evidence alluding to the said fraud was presented to the applicant to scrutinize nor any accuser presented for the applicant to cross-examine.

g) That the verdict did not reflect the proceedings of the Committee as the respondent made a decision to suspend the applicant from the respondent University for one academic semester and all his academic activities undertaken for the semester were cancelled premised on grounds that he was allegedly found guilty of being involved in acts of financial fraud and knowingly causing loss to the respondent, illegitimately utilizing university facilities without prior payment vide letter dated 23rd may 2018 which suspension letter was served on the applicant on the 31st May 2018.

h) That the applicant had been charged with one offence but was suspended for three offences which were never brought to his attention as required by the respondent's student handbook on policies and guidelines and procedures.

i) That the requirement for a student to have fully cleared his dues before using the university facilities is not a strictly followed requirement as most students pay tuition in instalments and this has never been a reason for suspension of any student and that the applicants suspension for the same stands as a discriminative punishment.

j) That the decision of the applicant is invalid because it was arrived at through unfair, illegal, irrational and unjustifiable manner.

k) That due to the respondent's unfair decision, the applicant has been forced to miss out on several lectures and is likely to fail to make the mandatory class attendance to sit his exams.

The respondent opposed this application and averred that the applicant was accorded a fair hearing before the decision to suspend him for one semester was reached at.

The respondent in its affidavit in reply of Yosia Steve Musisi (Internal Auditor) contends that during the Disciplinary committee hearing the applicant conceded to the charges against him, leading to suspension, apologize for his actions and or omissions, sought for a lenient punishment, other than outright dismissal from the University and explained what compelled him to engage in Financial fraud.

That upon evaluation of the evidence before the committee, the applicant was found guilty, was suspended and all his academic activities were cancelled. The applicant has since complied with the decision of the respondent rendering the application merely academic.

The applicant was suspended for 1 semester and opted not to appeal despite the notification of the right of appeal but instead, he has and continues to serve the suspension. In addition he has complied with the terms of his suspension, by paying to the respondent the sum of US$ 3,224 as set out in his suspension letter in line with the findings of the audit and findings at the hearing.

The decision to suspend the applicant has since been implemented by the respondent to the extent that the suspension took immediate effect on 23rd May 2018, and the applicant having had all his academic activities suspended and having not attended any classes since 23rd may 2018, has not attained the minimum academic requirement of 75% attendance of classes in order to qualify to sit for the end of semester examinations slated to start on the 16th July 2018 and it is no longer academically possible.

In early 2018, it was discovered that there were disparities between the students' ledgers and the bank statements and other financial records available. The respondent auditor conducted an exhaustive audit on all the students ledgers and it was discovered that a substantial number of ledgers reflected transactions that were however not reflected the University's bank accounts and the applicant's ledge was one of them.

The applicant was asked to produce his deposit slip in proof of an entry on his ledger which he failed he claimed was his payment but he failed to avail any such proof and this was a confirmation that the applicant had not paid tuition for this semester. The applicant and other students had over time connived with a one Ben Mutai, the now suspended Deputy Director of Finance of the University to post payments into their ledgers when no payment had been made to the University via the various bank accounts and both are now facing criminal charges relating to financial fraud.

The applicant was at all material times aware of the fraudulent dealings, sat his CATS well knowing that he had not paid his tuition and had further participated in clinical rotations in different hospitals, as is a requirement with 4th year students, well knowing that he did not qualify for the same, had not made any effort to confirm that any payment had been made on his behalf, but instead resorted to back-door transaction, in connivance with the Deputy Director Finance to reflect on his student ledger that he had paid whereas not.

The acts of the applicant constituted a breach of the university regulations and academic policy, which he was aware of since he is a 4th year student at the university. He knew the process of payment of tuition in the university. And failed to prove payment of the tuition.

The applicant appeared before a competently constituted disciplinary committee, which offered him an opportunity to be heard, and the respondent's decision to suspend the applicant was arrived at in a legal and fair manner as the applicant had committed and admitted committing the financial fraud against the respondent to get clearance and he had failed to prove his innocence. He had served his punishment otherwise the offence committed would have ordinarily merited an outright dismissal from the university.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

Four broad issues were proposed for court's resolution;

1. Whether the decision of the respondent was illegal?
2. Whether the decision of the respondent was irrational?
3. Whether the decision of the respondent was procedurally improper?
4. Whether the applicant is entitled to the remedies sought?

I shall resolve this application in the order of the issues so raised but respondent counsel has raised some preliminary objections which will be considered first. The applicant were represented by Mr Sseninde Saad whereas the respondent was represented by Mr Kyazze Joseph.

Preliminary Objections

The respondent's counsel contended that the said application is premature and incompetent for failure to exhaust the remedies available within the respondent's administrative mechanism.

Mr Kyazze contended that the relationship between the applicant and the respondent is primarily regulated by the University Charter, the University rules and regulations and the academic policies. These were drawn to the appellant's attention at admission in the admission letter together with the University handbook.

The applicant was duty bound to comply with the disciplinary mechanism set out in the University regulations by either lodging an appeal either at the University Senate or University Council. The relationship between the applicant and the respondent is premised on the simple understanding that the applicant shall comply with the university regulations and the charter.

Counsel further submitted that the reason advanced by the applicant that he was worried that the University Senate or Council takes long to sit, or that the sitting are uncertain is speculative. Indeed, there is in place , an appellate committee of the University Counsel which sits regularly to determine such appeals.

The applicant has not adduced any evidence to show that he attempted the to seek redress from the established bodies on appeal and he indeed straight away

started serving the punishment by paying the outstanding tuition as directed by the University Disciplinary Committee.

The applicant never made any reply to the preliminary objections raised.

This court is in agreement with submission of counsel for the respondent on the principle that an aggrieved party ought to exhaust the available alternative modes of addressing the grievance by way of appeal or review. The applicant has not advanced any reason why he did not appeal to the University Council or Senate.

The only inference that can be drawn is that the applicant accepted the decision handed to him and any subsequent attempt to make this application is an afterthought. The decision to suspend the applicant was made on 23rd May 2018 and he filed this application on 13th June 2018. The applicant on 6th June 2018 complied with the decision of the Committee by paying the tuition in Barclays Bank as per the deposit slip attached hereto marked "E".

Justice Geoffrey Kiryabwire (as he then was) in the case of **Classy Photo Mart Ltd vs The Commissioner Customs URA Miscellaneous Cause No. 30 of 2009** re echoed the position and the words of Bamwine J (as he then was) that " *I should perhaps add that it is becoming increasingly fashionable these days to seek judicial review orders even in the clearest of cases where alternative procedures are more convenient. This trend is undesirable and must be checked……. In this era of case management, it is the duty of a trial judge to see that cases are tried as expeditiously and inexpensively as possible….and this also means ensuring that unjustified short cuts to the judge's docket are eliminated."*

In the case of **Charles Nsubuga vs Eng Badru Kiggundu & 3 Others HCMC No. 148 of 2015** citing *Bernard Mulage vs Fineserve Africa Limited & 3 Others Petition No. 503 of 2014* in which Musota J (as he then was) with which he was in agreement, it was held interalia that;

> "*There is a chain of authorities in from the High Court and the Court of Appeal that where a Statute has provided a remedy to a party, this court must exercise restraint and first give an opportunity to the relevant bodies or state organs to deal with the dispute as provided in the relevant statute.*

This principle was well articulated by the Court of Appeal in Speaker of National Assembly versus Ngenga Karume [2008] 1 KLR 425 where it was held that; In our view there is merit……. That where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed".

The practice of running to court for judicial review by University students even before exhausting the internal disciplinary mechanisms or appeal processes obviates the relevance of such mechanisms and structures.

Therefore, where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first. A court's inherent jurisdiction should not be invoked where there is specific statutory provision which would meet the necessities of the case. This is the only way institutions and their structures will be strengthened and respect.

This preliminary objection is allowed.

The second preliminary objection is that the application and the reliefs sought are now moot.

The applicant did not appeal against the decision of the disciplinary Committee and it can be deduced that he was satisfied with the decision. Indeed he went ahead to effect payment of the unpaid tuition to the respondent on 6th June 2018.

In addition, he withdrew his application for interim orders simply because the suspension had been effected immediately, his CATS and all academic activities for the semester had been cancelled and he had already complied with the suspension.

The nature of the decision taken by the respondent took immediate effect and none of the orders would restore the applicant to the same position. This being a higher institution of learning, there cannot be special classes for the ones missed or examinations.

The position of the law is that judicial review remedies are discretionary and not guaranteed. The court does not issue orders in vain, even where it has jurisdiction

to issue the orders prayed for and would refuse to grant the judicial review orders, when it is no longer necessary or overtaken by events or where issues have become academic or moot.

The discretionary nature of the remedies enables the court to refuse to grant such orders for the sake of doing so, especially where it is clear that no useful purpose will be served. Courts do not decide cases for academic purposes because court orders must have practical effect and must be capable of enforcement. See **The Environment Action Network Ltd v Joseph Eryau Court of Appeal Civil Application No. 98 of 2005**

In the case of ***Uganda Corporation Creamaries Ltd & Another v Reamation Ltd Coourt of Appeal Civil Reference No. 11 of 1999*** the court observed;

> " *It is a well known principle of law that courts adjudicate on issues whci actually exist between litigants and not academic ones*"

It is clear that a lot of water has already gone below the bridge and no order would reverse the flow. The applicant has already served the suspension and paid all the tuition he was directed to pay and he did not attend class since 23rd May 2018 after he failed to get the set target of 75% attendance, and never sat the end of semester/term examination on 16th July 2018.

Therefore of the orders sought can be granted since they have all been overtaken by events and he never sought any declaratory orders.

This preliminary objection is also upheld.

Since the two objections are upheld, the application is dismissed with costs.

In the interest of justice and for completeness and better case management, I will consider the rest of the issues that were raised for determination.

In Uganda, the principles governing Judicial Review are well settled. Judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is rather concerned with the courts' supervisory jurisdiction to check and control the exercise of power by

those in Public offices or person/bodies exercising quasi-judicial functions by the granting of Prerogative orders as the case my fall. It is pertinent to note that the orders sought under Judicial Review do not determine private rights. The said orders are discretionary in nature and court is at liberty to grant them depending on the circumstances of the case where there has been violation of the principles of natural Justice. The purpose is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. ***See; John Jet Mwebaze Vs Makerere University Council & 2 Others Misc Cause No. 353 of 2005, DOTT Services Ltd Vs Attorney General Misc Cause No.125 of 2009, Balondemu David Vs The Law Development Centre Misc Cause No.61 of 2016.***

For one to succeed under Judicial Review it trite law that he must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

ISSUE ONE

Whether the decision of the respondent was illegal?

The basic idea behind the ground of review called illegality is that; a public authority must act within the four corners of its power or jurisdiction. When a power is vested in a public authority and is exceeded, acts done in excess of the power are invalid as being *ultra vires*. See ***Public Law in East Africa by Ssekaana***

The applicant contends that the decision of the respondent was illegal. He cites paragraphs 19,20 & 21 of the affidavit in rejoinder. The said paragraphs upon perusal only allude to failure to disclose other charges to the applicant, that the rule of full clearance of the school dues is a not strictly followed requirement and a denial of participation if any financial fraud.

With the greatest respect to counsel for the applicant, I donot see the relevance of the evidence he has cited to the ground of illegality of the decision of the respondent.

The case of ***John Jet Tumwebaza vs Makerere University Council High Court Civil Application No. 78 of 2005*** defined illegality to mean when the decision making

authority commits an error of law in the process of taking a decision or making the act, the subject of the complaint. Or acting without jurisdiction or acting ultra vires or contrary to the provisions of the law.

The applicant has not shown how the decision of the respondent was illegal or which law was disregarded in the taking of the decision.

ISSUE TWO

Whether the decision of the respondent was irrational?

Irrationality as a ground of review is about the nature of the decision that is being taken. It is important to appreciate the degree of scrutiny which the courts exercise when reviewing a decision for irrationality or what degree of irrationality or unreasonableness must be shown before court to establish a basis for judicial review.

The principle that powers must be exercised reasonably or rationally has to be reconciled with the doctrine that court must no usurp the discretion of the public authority which parliament appointed to make the decision.

In the case of ***Bismillah Trading Ltd & Another vs Kampala Capital City Authority High Court Miscellaneous Cause No. 123 of 2015*** Justice Yasin Nyanzi observed that;

"*Irrationality is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority addressing its mind to the facts and law before it would have made such a decision. Such a decision is usually in defiance of logic and accepted moral standards*" ***See: Council of Civil Unions Vs Minister of the Civil Service [1985] AC 374.***

The applicant's counsel has cited paragraphs 8,9 and 10 of his affidavit in rejoinder as the basis for the challenge of this decision as being unreasonable or irrational. The said paragraphs allude to the investigation stage and he complains that he was not availed the particulars of deposit slips of Mongina Emmaculate Omweri and how he was not asked to produce proof of payment.

I'm disturbed by the submission of counsel and it appears he does not comprehend this ground of review called irrationality/unreasonableness and he doesnot in anyway show how the decision was irrational.

The court notes that the decision was rational and reasonable in light of the fact the university Council would have dismissed the applicant under clause 29 of the University Policies, Guidelines and Procedures on grounds of fraud of a serious nature or for serious misconduct that contravenes University regulations e.g theft, defilement, rape.

This issue also fails and is resolved in the negative.

ISSUE THREE

Whether the decision of the respondent was procedurally improper?

The applicant challenges the decision of the applicant on allegations set out in his affidavit. He alleges the constitution of the panel to hear his case and the fact that the applicant was first arrested by police and later was invited for a hearing. He also alleges that he was not availed the evidence against him or the ledger that the respondent claimed had the amount of money found on his account and he did not access the audit report. He also alleges that he was not informed of his right to appear with an advocate/lawyer and that the particulars of fraud were never explained to him.

He submitted that according to him this was serious impropriety in procedure and there was non-observance of the rules of natural justice.

The minutes of the Disciplinary committee meeting show that the applicant was accorded a fair hearing and he was aware of the charges levelled against him and this why he pleaded and accepted the charges. He was asked to produce the said evidence of payment of the said amount that was reflected in his ledger and he never produced the same.

I wish to note he has not produced the same even in this court as proof that he was possessed of the same. But rather he went ahead to pay on 6th June 2018 in compliance with the order of the Disciplinary committee.

In the case of ***Peris Wambogo Nyaga vs Kenyatta University Miscellaneous Application No. 320 of 2013…….***

In addition, it is not a requirement of any student should to appear in the disciplinary committee with counsel. The applicant did not either request for assistance of counsel since he duly understood the nature of the complaint against him. He had sat mid semester examination while he had not paid any tuition.

In the case of ***Kenya Revenue Authority vs Menginya Salim Murgani Civil Appeal No. 108 of 2009***. The Court of Appeal delivered itself as follows;

> "*There is ample authority that the decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed*".

Whether the applicants are entitled to the remedies sought in the application.

Having resolved upheld the preliminary objections in the negative all the aforementioned issues for the Applicant, the application fails.

In the result I find this application to be lacking in merit and it's hereby dismissed with costs.

SSEKAANA MUSA
JUDGE
17th /08/2018