THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISCELLANEOUS CAUSE NO.515 OF 2019

1. **LUYOMBO ABBAS**
2. **JUDITH NALUKWAGO**
3. **MUGISHA MARIAM KYOMUGISHA**
4. **MUYAMBI MBABAZI JULIUS :::::::::::::::::::::::::::::: APPLICANTS**
5. **KIRABO MARION**
6. **MUSIRI DAVID**

VERSUS

MAKERERE UNIVERSITY:: RESPONDENT

BEFORE HON. JUSTICE SSEKAANA MUSA

RULING

This is an application for enforcement of fundamental human rights and freedoms pursuant to Article 50 of the 1995 Uganda Constitution and Section 3 of the Human Rights (Enforcement) Act, 2019.

The applicants filed this application seeking the following declarations and subsequent orders;

1. Regulation 6 (1) (d) of the Makerere University Students Regulations Statutory Instrument No. 37 of 2015 is overly broad, vague, arbitrary, illegal, null and void.

2. Regulation 6 (1) (d) of the Makerere University Students Regulations Statutory Instrument No. 37 of 2015 is subjective, imprecise and inimical to the principle of illegality.

3. Regulation 6 (1) (d) of the Makerere University Students Regulations Statutory Instrument No. 37 of 2015 threatens and violates the right to a fair hearing, natural justice and just administrative treatment guaranteed and secured by Articles 28, 42 and 44 of the Constitution of the Republic of Uganda.

4. Regulation 6 (1) (d) of the Makerere University Students Regulations Statutory Instrument No. 37 of 2015 is an unnecessary and disproportionate limitation or restriction of the students' right to a fair hearing with no place in a free and democratic society .

5. Regulation 6 (1) (d) of the Makerere University Students Regulations Statutory Instrument No. 37 of 2015 threatens and violates the right to education of the respondent's students as guaranteed by the general national standards, educational policy and Article 30 of the Constitution of the Republic of Uganda.

6. Regulation 8 (9) (a) of the Makerere University Students Regulations Statutory Instrument No. 37 of 2015 that makes police permission a mandatory precondition for holding student demonstrations is illegal null and void.

7. Regulation 8 (9) (a) of the Makerere University Students Regulations Statutory Instrument No. 37 of 2015 threatens and impermissibly limits students' freedom of expression, freedom of association, academic freedom, freedom of peaceful demonstration and assembly.

8. All decisions, orders and directives based on the said regulations are illegal, null and void ab initio.

9. Order stopping further reliance upon and enforcement of the said regulations forthwith.

10. The respondent pays costs of this suit to the applicants.

The grounds of the application where stated in the supporting affidavit sworn by the 2nd applicant.

1. The applicants are Makerere University students who bring this human rights enforcement suit against the respondent in public interest and to further the ends of good governance in academic institutions.

2. The application seeks to promote and safeguard democratic participation of the students in their governance at the Respondent University and align its disciplinary codes with Constitutional values and individual human rights and freedoms.

3. The Applicants are student leaders and human rights activists devoted to championing academic freedom and associated rights; and they lodged this application as a students' legal response to administrative and regulatory suffocation of their cherished constitutional freedoms and human rights.

4. The application is brought to promote and protect Makerere University Students from oppression and suffocation of students' freedoms triggered under Regulation 6(1)(a) and 8(9)(a) of the Makerere University Students Regulations Statutory Instrument No. 37 of 2015

The respondent filed an affidavit in reply sworn by **Yusuf Kiranda the Acting University Secretary** stating that the application lacked merit and the applicants are not entitled to any of the remedies sought hence the application ought to be dismissed with costs but briefly stated as follows:

1. That after consultations and in exercise of its mandate, the University Council passed the student regulations which where gazette as Makerere University Students Regulations Statutory Instrument No. 37 of 2015.

2. These regulations have been in place since 2015 and have been obeyed and followed by all subsequent Guild Councils and Students without any complaint since that time.

3. That these regulations have never been the subject of any litigation or complaint to the University Council on grounds of illegality but rather the regulations have ensured the smooth operations and running of student affairs at the University.

4. That the regulations give the Vice Chancellor powers to suspend or discipline any unruly behavior or who is about to engage in unruly behavior pending hearing before the University Students Disciplinary Committee.

5. That the Makerere University Students Regulations Statutory Instrument No. 37 of 2015 is therefore to prevent ungovernability of the respondent in times of students unrest and demonstrations and to ensure that students demonstrate and conduct themselves peacefully without damaging property or causing injury to the lives of others within and without the University campus.

6. That the Makerere University Students Regulations Statutory Instrument No. 37 of 2015 are therefore not intended to violate the rights of the Students to demonstrate or threaten their right to fair hearing but to ensure that the respondent's students always conduct themselves in a peaceful manner without violating the rights of other persons.

7. That therefore Makerere University Students Regulations Statutory Instrument No. 37 of 2015 ought to have been challenged by way of judicial review.

The applicants were represented by *Eron Kiiza* while the respondent was represented by *Hudson Musoke* and *Esther Kabinga*

The parties were instructed to file submissions however only the applicants' submissions are on the record of court.

Whether the application is competently before this court?

This application was brought as an enforcement of rights under Article 50 of the Constitution but the nature of the orders sought squarely fall with an ambit of judicial review. It is not by mistake but rather an ingenious way by counsel for the applicants to circumvent the set down procedure of challenging a statutory instrument.

It is clear from the court record that the Makerere University Students Regulations Statutory Instrument No. 37 of 2015 were passed over 5 years ago and the current student leaders or activists believe it should be challenged as infringing on their right to fair hearing.

This implies that the applicants and their counsel are trying to circumvent the set timelines for challenging a statutory Instrument by way of judicial review within 3 months. This court has been consistent on the manner of accessing court to avoid abuse of the court process.

In the case of ***Basile Difasi & 3 Others v The National Unity Platform & 8 Others High Court Misc. Cause No. 226 of 2020*** and also in ***Male Mabirizi v Attorney General (MISCELLANEOUS CAUSE NO. 237 OF 2019) "****this court found that the applicants have opted to run away from the strict rules of procedure after he realised that his application was well beyond the 3 months period prescribed for any application for judicial review.*

Rule 5 (1) of the Judicature (Judicial Review) Rules 2009 provides that;

> *(1) An application for judicial review shall be made promptly and in any event* ***within three months from the date when the grounds of the application FIRST arose,*** *unless the court considers that there is good reason for extending the period within which the application shall be made.(Emphasis added)*

This court will not allow such a litigant to devise alternative procedure in order to circumvent the set procedure. He is only trying to access court through the window instead of the door that has been prescribed by the Constitution.

Justice is to be rendered in accordance with the law and set principles and procedure. The Constitution is silent as to the procedure to be followed or how to access courts to seek redress outside constitutional interpretation and enforcement of human rights.

The necessary procedure must be followed from the existing legislation like the Judicature Act or Civil Procedure Act and not to invent any procedure the applicant finds convenient or comes to his imagination.

The nature of judicial review procedure is based on some clear policy consideration such that the state machinery or administrators are not bogged down with endless litigation over their actions.

This therefore means that if the applicants wanted to invoke the jurisdiction of a court, they should have come to court at the earliest reasonably possible

opportunity. Inordinate delay in making the application for judicial review will indeed be a ground for refusing to exercise such discretionary jurisdiction.

The underlying object of this principle is not to encourage agitation of stale claims and exhume matters which have already been disposed of or settled or where rights of 3rd parties have accrued in the meantime.

There is no proper limit and there is a lower limit of 3 months when a person can come to court. The court is allowed to exercise discretion depending on the facts to determine whether to extend the time to file/apply for judicial review. It will depend on how the delay arose."

The applicants in this case ought to have applied for judicial review within 3 months after the Makerere University Students Regulations Statutory Instrument No. 37 of 2015 had been gazette on 16th July 2015 that is by 16th October 2015.

The court is empowered to refuse relief and deny access to the judicial review reliefs on ground of laches because of several considerations e.g it is not desirable to allow stale claims to be canvassed before the court; there should be finality to ligation.

It cannot be argued that the Constitution intended to disregard all procedural rules in relation to access to justice or grant of reliefs and allow applications filed after inordinate delay. Constitutional provisions are not intended to supersede the available modes of obtaining relief before a civil court or deny the defences legitimately open in such actions.

The applicants like all other litigants should not be encouraged to circumvent the provisions made by a Statute providing a mechanism and procedure to challenge administrative action. Every potential litigant would rush to the court in any manner they deem fit and thus rendering the statutory provisions meaningless and non-existing.

Constitutional provisions are not intended to short circuit or circumvent established procedures and statutory provisions for accessing courts. See Article 126(2)(e) of the Constitution.

Every litigant who approaches the court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective.

The court must come with a very heavy hand on a litigant who seeks to abuse the process of the court; as the Supreme Court of India has observed;
"No litigant has a right to unlimited drought on the court time and public money in order to get his affairs settled in the manner he wishes. Easy access to justice should not be misused as a licence to file misconceived and frivolous petitions".
Budhi Kota Subbarao v K. Parasarab, AIR 1996 SC 2687;(1996) 5 SCC 530.

It is the responsibility of the High Court as custodian of justice and the Constitution and rule of law to maintain the social balance by interfering where necessary for the sake of justice and refusing to interfere where it is against the social interest and public good.

Limitations in other legislations are intended to restrict access to courts for seeking some other remedy apart from that provided by a statutory provision enacted specifically to deal with particular situations. Matters of procedure are just as important as matters of substance. Procedural matters are part of the due process and cannot be lightly treated.

It is an abuse of court process to use another remedy under the Constitution to avoid a set procedure. In the case of ***Harrikisson v Att-Gen(Trinidad and Tobago)[1980] AC 265 at 268*** *Lord Diplock* underscored the importance of limitation to the constitution right of access to courts:

> "*The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms: but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action….the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the*

jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate remedy…."

On this ground alone this application would fail since the applicants ought to have applied for judicial review as a way of challenging a statutory Instrument and not an application for enforcement of rights which is extremely misconceived and an abuse of court process.

This application stands dismissed with costs. But for completeness, I will proceed to consider the case on merits.

Whether the Makerere University Students Regulations Statutory Instrument No. 37 of 2015 violates Articles 28, 30, 42 and 44 of the Constitution

It is the applicants' case that Regulation 6 (1) (d) of the Makerere University Students Regulations Statutory Instrument No. 37 of 2015 violates Articles 28, 30, 42 and 44 of the Constitution of the Republic of Uganda.

The impugned regulation states; " ***The Vice Chancellor has powers to suspend a student from the University or to discipline him in any manner he thinks fit and seek approval of his action at the next meeting of the University Disciplinary Committee.***"

In the applicants' affidavit in support of this application, the 2nd applicant stated that the regulation threatens to deny the students their right to fair hearing, natural justice and just administrative treatment. It leaves the students uncertain as to whether or when a fair hearing will be given since the Vice Chancellor usually promises in suspension letters a hearing at an unspecified time.

Counsel for the applicants submitted that the indefinite suspension or any disciplinary action thought fit by the Vice Chancellor is done without giving the affected students a right to a fair hearing. This exposes the students to arbitrary punishment, disciplinary action and adverse action/decisions and thus threatens and violates the fundamental rights and freedoms of Makerere University students to a fair hearing as well as to just and dignified administrative treatment

as provided for by Articles 28, 42, and 44 of the Constitution of the Republic of Uganda, 1995. Counsel further submitted that the Regulation 6(1) (d) is also imprecise, overly broad and vague hence amenable to varying and subjective interpretations by the vice chancellor or other persons.

Counsel submitted that this suit invites a candid discussion of students' fundamental human rights and freedom to peacefully associate, assemble, demonstrate, opine and express themselves in the Respondent University; and the right to just and fair treatment as opposed to arbitrary treatment or denial of fair hearing by the Respondent University. The right to freedom of expression is the ark of the covenant of democracy. The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world (UDHR, 1948).

Students are members of the human family entitled to the same fundamental freedoms and enjoyed by the rest of humanity. They do not shed their rights to freedom of expression, and freedom to assemble, peacefully protest and demonstrate unarmed at the Respondent's gate. ***(Tinker v. Des Moines Independent Community School District U.S. 503 (1969) p 6.)*** Little wonder then that Article 8A(1) of the Constitution of Uganda, 1995 enjoins the Respondent to ground her governance on national interest and common good enshrined in the National Objectives and Directive Principles of State Policy. That is why Article 20(2) of the Constitution commands every person or authority in Uganda to not only respect but also protect and promote fundamental human rights and freedoms. It is also for this reason every citizen has a constitutional duty to promote democracy and the rule of law and on account of the same logic, the Constitution proclaims that the State shall be based on democratic principles that empower and encourage active participation of all citizens at all levels in their governance.

With regard to Regulation 8(9) (a) of the Makerere University Students Regulations Statutory Instrument no.37 of 2015 counsel submitted that it threatens and violates students' freedoms of expression, association, peaceful assembly and demonstration.
It states "*Demonstrations either within or outside the university shall be held only in accordance with the laws of Uganda provided the Vice Chancellor has been informed at least 24 hours in advance and police permission has been obtained*."

Counsel submitted that while freedom of assembly and association is not an absolute right, it cannot "be limited except by law, and then only to the extent that the limitation is reasonable, justifiable in an open democratic society. Any limitation must be subject to a three part test:-

1. A limitation will only be acceptable when '**prescribed by law**;
2. When it is **necessary and proportionate**; and
3. When the limitation **pursues a legitimate aim**.

This test must be observed by police and authorities at all times. The right to peacefully protest subject to just restrictions is now an essential part of free speech and the right to assemble. Additionally, it is an affirmative obligation of the State to make that exercise of this right effective. Freedom of speech, right to assemble and demonstrate or peaceful agitation are the basic features of a democratic system. The people of a democratic country like ours have a right to raise their voice against the decisions and actions of the Government or even to express their resentment over the actions of the government on any subject of social or national importance.

The Government has to respect, and in fact, encourage exercise of such rights. It is the abundant duty of the State to aid the exercise of right to freedom of speech as understood in its comprehensive sense and not to throttle or frustrate exercise of such rights by exercising its executive or legislative powers or passing orders or taking action in the name of reasonable restrictions (***Charles Onyango Obbo and Anor v. Attorney General, Constitutional Appeal No.2 of 2002 (Obbo decision), MULENGA J.S.C.,***).

Counsel for the applicants submitted that the impugned Regulations limit, restrict, derogate from, threaten or infringe upon guaranteed rights. In the celebrated ***Obbo decision***, Uganda's Supreme Court unanimously emphasized that:

I. Where a law prohibits an act, which is otherwise an exercise of a protected right, that prohibition is valid only if it fits within the parameters of **Article 43 of the Constitution**.

II. In **clause (2) (c) of Article 43, the Constitution** sets out an **OBJECTIVE STANDARD** against which every limitation on the enjoyment of rights is measured for validity. The provision in clause (2) (c) clearly presupposes the

existence of universal democratic values and principles, to which every democratic society adheres. It also underscores the fact that by her Constitution, Uganda is a democratic state committed to adhere to those values and principles, and therefore, to that set standard. While there may be variations in application, the democratic values and principles remain the same.

III. Legislation in Uganda that seeks to limit the enjoyment of the right to freedom of expression is not valid under the Constitution, unless it is in accord with the universal democratic values and principles that every free and democratic society adheres to. The court must construe the standard objectively.

IV. Under **Article 43(2)** democratic values and principles are the criteria on which any limitation on the enjoyment of rights and freedoms guaranteed by the Constitution has to be justified.

On the other hand, in the affidavit in reply sworn by Yusuf Kiranda the respondent stated that under the **University and Other Tertiary Institutions Act 2001 as amended**, the Vice Chancellor us responsible for the day to day management and supervision of the academic, administrative and financial affairs of the public university. That in exercise of this mandate as well as the **Makerere University Students Regulations Statutory Instrument No. 37 of 2015**, when it comes to the knowledge of the Vice Chancellor that unruly behavior is about to be engaged in by any students or that any student has committed any such behavior, he is mandated to suspend or discipline that student pending hearing before the University Student's Disciplinary Committee which he has no control over.

Mr. Yusuf Kiranda further stated that the regulations are to prevent un-governability of the respondent in times of student unrest and demonstrations as well as to ensure that students demonstrate and conduct themselves peacefully without damaging property or causing injury to the lives of others within and without the respondent university campus.

The affirmant stated that the regulations are not intended to violate the rights of the students to demonstrate or threaten their right to a fair hearing but to ensure

that the respondent's students always conduct themselves in a peaceful and lawful manner without violating rights of other persons. The respondent stated that the applicants are seeking to create a situation where the university administration will manage the students without regulations policy or sanctions against their activities.

The respondent sought this court to uphold the general interests of the university employees, other students and community surrounding the university campus over the applicant's individual interests by leaving the regulations in place.

The respondent's lawyers informed court that the applicants have an option to appeal to the University Council which is the appropriate body to settle matters of this nature in the respondent instead of resorting to judicial review.

Analysis

The Constitution of Uganda under **Article 50** provides that any person who claims that a fundamental or any other right or freedom guaranteed under the constitution has been infringed or threatened is entitled to apply to a competent court for redress.

According to the applicants, Regulation 6(1)(d) is illegal, vague, null and void whereas according to the respondent, the regulations as a whole are not intended to violate the rights of the students to demonstrate or threaten their right to a fair hearing but to ensure that the respondent's students always conduct themselves in a peaceful and lawful manner without violating rights of other persons which prevents un-governability of the respondent in times of student unrest and demonstrations.

Even though the right to fair hearing is an inherent non derogable right, it can be restricted in certain instances for example; in emergency situations and where it is administratively impracticable to have a hearing.

Whenever a public authority has to act very urgently, then it may be exempted from offering a hearing beforehand. In ***R v Secretary for State for Transport ex parte Pegasus Holidays (London) Ltd [1988] 1 WLR 1990*** *where the Court held the Secretary of State's decision to suspend the licences of Romanian Pilots without giving them a hearing was justified in circumstances in which he feared an*

immediate threat to air safety (pilots had failed a civil aviation authority test). **(Public law in East Africa by Ssekaana Musa pg 139-140)**

The second instance is where it is administratively impracticable to hold a hearing. *This can be reason for the court's to refuse a remedy even where a prima facie right to hearing exists. In* ***R v Secretary for state for social services ex-parte Association of Metropolitan Authorities [1986] WLR 1****, even though the secretary of state had failed in his statutory duty to consult before making regulations, the court would not quash the regulations because, by the time of the court's decision, the regulations had been in force for some while and would have caused great confusion to revoke them at that stage.* **(Public law in East Africa by Ssekaana Musa pg 140)**

From the respondent's affidavit in reply, the regulations were put in place to prevent un-governability of the respondent during times of student unrest and demonstrations which situations duly falls under emergency situations where the right to fair hearing can be restricted. During these student demonstrations, violence and tension have been witnessed at the respondent's campus which situation would not be ideal or even reasonable to expect the respondent to hold Council meetings to decide the appropriate punishment for an errant student.

The Makerere University Students Regulations Statutory Instrument No. 37 of 2015 has provided for a right to be heard at the next stage after suspension decision has be taken during the unrest and it may be practically impossible to even conduct a hearing at this stage.

Right to a hearing may excluded if prompt action needs to be taken by administration in the interest of public safety, public health, or public morality, or broadly in public interest. The reason is that hearing may delay administrative action, defeating the very purpose of taking action in the specific situation. In such situations, like the riotous moments, it may not be possible to give a hearing to a rioter/demonstrator because of the urgency with which the administrative action needs to be taken; here the need for immediate and rapid action outweighs the need for providing procedural safeguards to the person affected. This is the underlying justification for the regulations not to provide for a hearing at the preliminary stage of suspension until the University Council will conduct a hearing.

Furthermore, it is administratively impractical for University Council to sit every time a student errs or commits an offence that requires the Council deciding their punishment. The council sittings are scheduled considering the financial and social status of the respondent. It is unreasonable for the Council to sit every other day to listen to each student and make a decision.

As it has been stated by the respondent, these regulations have been in place for a while, quashing them now would cause great confusion to the Institution. Their greater good should therefore be considered to override the applicants' selfish interests as student leaders.

It is therefore most reasonable of the respondent to grant powers to the Vice Chancellor who is responsible for the day to day management and supervision of the academic, administrative and financial affairs of the public university.

With regard to **Regulation 8(9) (a) of the Makerere University Students Regulations Statutory Instrument no.37 of 2015** which provides that ***demonstrations either within or outside the university shall be held only in accordance with the laws of Uganda provided the Vice Chancellor has been informed at least 24 hours in advance and police permission has been obtained*.**

The applicants took issue in the requirement to seek permission of the Uganda Police before the demonstrations as infringing on their Constitutional freedom of assembly.

The freedom of assembly and association is not an absolute right. Counsel for the applicants' submitted that it cannot "be limited except by law, and then only to the extent that the limitation is reasonable, justifiable in an open democratic society. Any limitation must be subject to a three part test:-

1. *A limitation will only be acceptable when '**prescribed by law**;*
2. *When it is **necessary and proportionate**; and*
3. *When the limitation **pursues a legitimate aim**.*

I will adopt that test and apply it to our present circumstances; the limitation is prescribed by law, it is necessary to ensure student governability during demonstrations and protect the general interests of other students and the

community surrounding the respondent's campus hence the limitation pursues a legitimate aim.

In the premises, I find the application devoid of merit and thereby dismiss it with costs.

It is so ordered.

SSEKAANA MUSA
JUDGE
15th December 2020