

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISCELLANEOUS CAUSE NO.04 OF 2021**

MUGABE ROBERT=====APPLICANT

VERSUS

UGANDA NATIONAL EXAMINATIONS BOARD=====RESPONDENT

BEFORE HON. MR. JUSTICE SSEKAANA MUSA

RULING

The Applicant brings this application for judicial review against the Respondent, under section 38 of the Judicature Act Cap 3, Rule 6 & 7 of the Judicature (Judicial Review) Rules of 2009. The Applicant seeks others for the following judicial relief namely;

1. The Prerogative Order of Certiorari does issue to quash the Decision/Ruling and order of the respondent dated 22nd December, 2020 to cancel the applicant's Uganda Certificate of Education (UCE) No. U1558/057-2014 and Uganda advanced Certificate of Education (UACE) No. U2759/524-2016 with immediate effect without a fair hearing;
2. That the respondent pays costs of this Application.

The grounds of the application are set out in the affidavit of the applicant but briefly as follows;

- a) That the Applicant is the Interim Chairman for Kitagwenda District Local Government and the NRM Flag bearer for the position of Chairman Kitagwenda District Local Government 2021-2026.
- b) That the applicant's Uganda Certificate of Education (UCE) No. U1558/057-2014 and Uganda Advanced Certificate of Education (UACE) No. U2759/524-2016 have been cancelled illegally without a fair hearing.

- c) That the applicant sat for primary leaving education from Kabirizi Primary School in Kabarole District then in 1997 under index number 33165/004 when he was called Bikorwomuhangi Sarapio.
- d) The applicant was condemned unheard by the respondent on 21st December, 2020 which is illegal and unconstitutional.
- e) That the applicant had no legal basis for cancelling academic papers of the applicant for which he seeks redress.
- f) That the respondent in effect, failed to observe and comply with cardinal rules of natural justice in reaching the decision to cancel the applicant's academic papers.
- g) That after the ruling of Court on 17th December, 2020, the applicant was required to appear on 21st December before the respondent over his academic papers.
- h) That he could not appear before the respondent because he was under self-isolation having been in contact with a Covid-19 positive people and had been advised by District Health Officer to go for self-isolation for atleast 14days.
- i) That the applicant's lawyers wrote a letter requesting for an adjournment on 18th December, 2020. That the Senior Legal Officer of the respondent withheld the letter requesting an adjournment and only signed on it on 21st December, 2020 at 4:00pm stating that she was busy.
- j) That the respondent refused to consider the request for adjournment and they proceeded without the applicant and made an unfair decision on 21st December 2020.

- k) That the decision to cancel all academic papers of the applicant is illegal, irrational and in accordance with the law.

The respondent on the other hand filed affidavit in reply through Anne Kemaali the Senior Legal Officer briefly stating as follows;

1. That the applicant's academic qualifications allegedly issued by the respondent were brought into issue and questioned, it is only the respondent that is competent to conduct any inquiry regarding academic qualifications claimed to have been obtained by any individual in primary and secondary examinations.
2. That the respondent issued a notice dated 19th November, 2020 to appear before the Respondent's Examinations Security Committee on 7th December, 2020 to appear and defend his academic documents in accordance with the cardinal rules of natural justice.
3. That instead of the applicant appearing before the Respondent, the applicant ran to the High Court of Uganda at Fortportal seeking to restrain the respondent from inquiring into the authenticity of the certificates in issue.
4. That on 14th December, 2020 the high Court made an Order directing the applicant to submit to the respondent for hearing of Pass slip No. 33269/1999, UCE Certificate No. 1558/2014 and UACE certificate No. 2579/254 2016.
5. That pursuant to the said Order of High Court, the Respondent further notified and summoned the applicant to appear before it on the 21st day of December, 2020 at 10:00am at the respondent offices at Ntinda for a hearing which the applicant had earlier sought to injunct.
6. That the applicant was duly notified of the hearing date, time and venue of the scheduled hearing and that the applicant duly received the letter inviting him for the said hearing. A copy of the letter is dated 15th

December 2020 and was received on 17th December, 2020 and the hearing was scheduled for 21st December, 2020.

7. That the said letter requesting for adjournment was only served upon the respondent on 21st December 2020 at 4:00pm long after the scheduled hearing had taken place and hearing concluded.
8. That the said letter requesting for adjournment was received and acknowledged as soon as it was served and not later as alleged by the applicant.
9. That the letter inviting the applicant expressly stated that in the event that the applicant did not appear at the said hearing, the respondent would proceed to hear the matter in his absence and deliver its decision based on the evidence before it.
10. That the scheduled hearing took place but neither the applicant nor any counsel representing, the applicant appeared when the matter was called for hearing and that the respondent upon confirmation of service having been effected upon the applicant, proceeded with the hearing on the basis of evidence before it.
11. That the respondent carefully considered the evidence before it and rendered its decision on the same day.
12. That the applicant was duly notified of the nature of allegations against him, given an opportunity to attend and defend his qualifications but elected not to, and that therefore he was not condemned unheard.

ISSUES

- 1) *Whether the applicant was given a fair hearing before the decision cancel his academic certificates was made.*

2) What remedies are available to the parties

Both parties made brief oral submissions that this court has considered in its ruling.

The applicant was represented by *Mr. Mujurizi Jamil* and *Mr. Tumwebaze Godfrey* while the respondent was represented by *Mr. Ssekatawa Mathias*.

Whether the applicant was given a fair hearing before the decision to cancel his academic certificates was made.

The applicant's counsel submitted that the applicant was denied a fair hearing when the respondent proceeded in his absence and without according him a fair hearing. It was his contention that on the day the matter was called for hearing, he was under isolation after having been in close contact with a Covid-19 patient.

The applicant further submitted that his lawyers wrote a letter to the respondent informing them about his inability to attend the hearing and he contended that they should have adjourned the matter to enable him defend himself and his academic papers.

The respondent counsel submitted that Judicial review is premised on the three tenets of illegality, irrationality and procedural impropriety. The application lacked merit since it does not satisfy any of the three grounds and is devoid of any merit and it ought to be dismissed with costs.

The respondent counsel contended that the applicant was duly served with the notice of the hearing and allegations about his challenge to his academic documents, venue and time of hearing. He opted to run to court to stop the investigations which the court later dismissed and directed him to appear before the respondent.

That the applicant failed to attend on the day scheduled for hearing and neither did his advocate or representative attend the scheduled hearing. That the purported letter seeking an adjournment was delivered 4:00pm after the hearing had already concluded. The letter inviting the applicant was categorical about

failure to attend the hearing; that the board shall proceed to make a decision based on evidence available before them.

Analysis

According to the *Black's Law Dictionary at page 1013 Black's Law Dictionary 11th Edition Thomson Reuters, 2019* Judicial review is defined as a court's power to review the actions of other branches or levels of government; especially the court's power to invalidate legislative and executive actions as being unconstitutional. Secondly, a court's review of a lower court's or administrative body's factual or legal findings.

The power of Judicial review may be defined as the jurisdiction of superior courts to review laws, decisions and omissions of public authorities in order to ensure that they act within their given powers.

Judicial review per the Judicature (Judicial Review) (Amendment) Rules, 2019 means the process by which the High Court exercises its supervisory jurisdiction over proceedings and decisions of subordinate courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.

Broadly speaking, it is the power of courts to keep public authorities within proper bounds and legality. The court has power in a judicial review application, to declare as unconstitutional, law or governmental action which is inconsistent with the Constitution. This involves reviewing governmental action in form of laws or acts of executive for consistency with constitution.

Judicial review also establishes a clear nexus with the supremacy of the Constitution, in addition to placing a grave duty and responsibility on the judiciary. Therefore, judicial review is both a power and duty given to the courts to ensure supremacy of the Constitution. Judicial review is an incident of supremacy, and the supremacy is affirmed by judicial review.

This court agrees with the authorities cited by the applicant on the principles of natural justice and its general application. However, it is also well settled that the concept of 'natural justice' is not a fixed one. It has many colours, shades, shapes

and forms. Rules of natural justice are not embodied rules and they cannot be imprisoned within a strait jacket formula.

In order to sustain a complaint of non-compliance with principles of natural justice, one must establish that one has been prejudiced thereby for non-compliance with principles of natural justice.

The question whether the principles of natural justice have to be applied or not, is considered bearing in mind the express language and basic scheme of the provision conferring the power; the nature of the power conferred and the purpose for which the power is conferred and the final effect of the exercise of the power. It is only upon a consideration of all these matters that the question of application of the principles of natural justice can properly be determined. See *Sahara India(Firm), Lucknow v Commissioner of Income Tax, Central-1, [2008] 14 SCC 151*

In the present case, the respondent had to take immediate action since the applicant who was supposed to appear and defend his academic papers had refused to appear and yet the election for the Local Government elections were due on 20th January 2021. The conduct of the applicant upon being summoned to appear before the respondent for the first time gave the impression that the applicant was never interested in attending a hearing to defend himself.

On 19th November, 2020 the applicant was summoned and he duly received a notice and instead of preparing for appearance on slated date of 7th December, 2020, the applicant run to court and obtained an Interim Order issued by an Assistant Registrar of High Court Fortportal.

The High Court had the matter on merit and ordered the Applicant to submit to the respondent for hearing in respect of pass slip No. 33269/1999, UCE Certificate No. 1558/2014 and UACE Certificate No. 2579/254 2016. The court reconfirmed the powers of the respondent to inquire into the certificates it issued to the successful candidates under UNEB Act since it is the examining body.

The applicant was issued a second notice dated 15th December 2020, and the same was duly received on 17th December 2020 inviting the applicant for hearing

on 21st December 2020 at 10:00am in UNEB Boardroom. The letter further stated as follows;

“You are advised to appear in person, or with a lawyer, or send a legal representative, present witnesses if any, and present any other documents to enable you defend your case.

In case of your failure to appear for the hearing, the Committee shall proceed to make a decision as if you were present”

The applicant did not appear but rather his advocates of *Kaahwa, Kafuuzi, Bwiruka & Co. Advocates* wrote a letter informing the respondent about the applicant’s inability to attend and requesting for rescheduling of the hearing since he got in contact with a covid-19 patient. The said letter was received by the Senior Legal Officer at 4:00pm.

This court is satisfied that the letter was indeed delivered at 4:00pm since the allegation of the delayed receipt are not supported by cogent evidence to support the applicant’s assertion. The affidavit does not state at what time the person delivered the letter went to UNEB offices. Secondly, the applicant does not mention the said person who delivered the letter to UNEB on the said date and lastly that person has not deposed any affidavit to support those allegations of delayed receipt of the letter that sought an adjournment.

In addition, on reading the said letter, the applicant’s counsel were not ready to attend a hearing and indeed they brought it to the attention of the respondent that they are dissatisfied by the ruling of Hon. Mr. Justice Vicent Mugabo delivered on 14th December, 2020 and had already filed a Notice of Appeal intending to appeal to Court of Appeal to set aside the decision.

The conduct of the applicant from the initial attempt to investigate his academic documents indeed created reasonable suspicion of intended delay of any inquiry as the election date drew closer. The respondent had no duty to inquire into the absence of the applicant at the hearing as his counsel tried to imply a duty to establish why he had not appeared for hearing.

The decision of the respondent was indeed urgent since it was necessary in resolving an election complaint lodged with Electoral Commission by a one Tumwebaze Kenneth to denominate the applicant. It is upon the said decision of the UNEB that the Electoral Commission has indeed denominated the applicant from the Elections for Local Government LC V elections for Chairperson.

It is also true that natural justice cannot be sacrificed in the name of urgency unless the clearest case of public injury flowing from the least delay is self-evident. The cancellation of the applicant's academic documents definitely had far reaching consequences and it would automatically affect the operations of the Electoral commission who had a duty to dispose of an election complaint as soon as possible before the election date.

It is clear the respondent attempted to follow rules of natural justice by issuing a notice or inviting the applicant for hearing but the applicant failed and/or refused to submit to the jurisdiction of the respondent as the issuer of academic certificates in question. Under such circumstances, the respondent had to take immediate action since the applicant had refused to appear before the UNEB Examinations Security Committee at least twice.

In court's view the applicant ought to have taken the matter at hand so seriously instead of taking it in casual or light manner. The applicant had every right to send his advocates to appear for hearing or any other representative together with any potential witnesses or make written representations in support of his case together with the necessary documents to defend himself.

In the case of *Lloyd v Mc Mahon* [1987] AC 625 at 702 Lord Bridge succinctly put it:

" the so called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirement of fairness demands when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making, the kind of decision it has to make and the statutory or other framework in which it operates."

When a party having been given a notice of hearing or an opportunity of being heard does not present himself at the time of the hearing, he may be regarded as

having waived his right to be heard and the concerned adjudicators body does not infringe natural justice or fair hearing right by proceeding with the matter *ex parte*.

Everyone has a right to waive an advantage or protection which the law gives him and cannot later turn around to say there was non-compliance of natural justice. See *Accounting and Secretarial Services Pvt Ltd v Union of India [1993] AIR Cal 102*

When an opportunity to be heard is offered and the party does not respond then the decision maker is at liberty to proceed and take a decision. There was no need for adjournment since it would be an idle formality. See *Glynn v Keele University [1971] 1 W.L.R 487; Pine v Law Society [2001]EWCA Civ 1574*

The decision of the respondent was legally and rationally made within the powers of the UNEB Act. The principles of natural justice were not violated in the circumstances of the case.

This application fails in the circumstances and is dismissed with costs.

I so order

SSEKAANA MUSA
JUDGE
19th January 2021