



disciplinary proceedings amounts to victimization of the applicant in his capacity as a whistle blower, in violation of the cited articles of the constitution above and the provisions of the whistle blower's protection act 2010.

3. A declaration that the decision by the management of the 3<sup>rd</sup> respondent to transfer the applicant outside his areas of human resource management professional practice is, irregular and illegal and the same offends the process laid down in the Human Resource manual of the third respondent as well article 40(2) of the constitution of Uganda.
4. An order of Certiorari quashing the illegal, irregular, irrational and ultra vires decisions by the respondents to transfer the applicant from the department of Human Resources and Administration where his expertise lies and without any valid justification, to the position of senior officer monitoring and evaluation in the corporate affairs directorate, to suspend the applicant from office and reduce the applicant's salary.
5. The decision of the Executive Director to suspend the applicant and subject him to disciplinary proceedings is quashed by an order of certiorari as the said suspension and the subsequent disciplinary proceedings were intended to subvert the appeal by the applicant to the board of the 3<sup>rd</sup> respondent which is still pending disposal.
6. An order of Mandamus is issued against the board of the third respondent compelling them to act on the pending appeal by the applicant lodged before it against the irregular appointment of the director human resources and administration.
7. An order of Certiorari to quash the decision of the 2<sup>nd</sup> respondent to summarily dismiss the applicant from employment by a letter dated 16<sup>th</sup> September 2020.
8. General and punitive damages.

9. Costs are provided for.
10. An order for reinstatement as an employee of the 3<sup>rd</sup> respondent.
11. An order for payment of salary arrears and all relative benefits.
12. Any other relief deemed appropriate by this honourable court.

The grounds upon which this application was based are set out in the affidavit of in support of the notice of motion as amended sworn by Mr Alex Nathan Sserwanga and briefly state;

1. That the applicant was employed by the third respondent served in various positions and was holding the position of senior officer strategy and business planning at the time of his summary dismissal.
2. That sometime in July 2019, the applicant lodged an appeal, as a whistle blower against the decision of the third respondent's board to appoint and or affirm the appointment of Mrs Joyce Kasirye Kigozi into the position of director human resources and administration for the 3<sup>rd</sup> respondent, for want of compliance to the third respondent's human resource manual 2018.
3. That the board of the third respondent has irregularly, illegally and irrationally refused and or ignored the said appeal against the appointment of Mrs Joyce Kasirye Kigozi and the same has been pending since without furnishing the applicant with an explanation as to why the appeal remains undisposed, in contravention of the right to a fair hearing and due process as per the 3<sup>rd</sup> respondent's internal policies, procedures and processes.
4. That subsequent to the above mentioned appeal, the said director human resources and administration against whose appointment the applicant had appealed against, issued the applicant with a warning

letter dated 10<sup>th</sup> October 2019, which the applicant appealed against to the board and the same is still pending disposal to date.

5. That by a memorandum dated 11<sup>th</sup> October 2019 addressed to the 2<sup>nd</sup> respondent, the director human resources and administration levelled allegations of unbecoming and insubordinate behaviour against the applicant despite the same being falsehoods.
6. That the applicant was without any explanation transferred to the Directorate of industry affairs & content development on temporary terms of 3 months and the transfer was duly extended by the 2<sup>nd</sup> respondent.
7. That by an email correspondence dated 16<sup>th</sup> June 2020 addressed to the acting executive director of the third respondent, the applicant requested to be recalled back to the human resources and administration department which is aligned to the applicant's experience, qualifications, skills and competencies and by a memorandum dated 3<sup>rd</sup> July 2020, the applicant was duly recalled.
8. That on the 28<sup>th</sup> of July 2020, staff manpower changes were communicated affecting thirty-two staff wherein the applicant was again redeployed as senior officer monitoring and evaluation under the corporate affairs directorate against which the applicant petitioned the board chairperson in the capacity of a whistle blower, challenging the manpower redeployments for offending the human resource manual 2018.
9. That subsequent to the said whistle blowing petition, the 2<sup>nd</sup> respondent reprimanded the applicant for lack of respect and shortly suspended the applicant from office and set up a disciplinary hearing for violation of the code of conduct and that these disciplinary proceedings were a ploy to subvert the appeal/petition by the applicant to the board of the 3<sup>rd</sup> respondent in respect to the irregular redeployments, which appeal is still pending disposal.

10. That the applicant responded protesting the suspension on the basis that he was being harassed and victimized for his whistle blowing action/endeavours, that the suspension offended the whistle blowers protection act and the rules of natural justice.
11. That the 1<sup>st</sup> respondent dismissed the applicant's petition and instructed the management of the 3<sup>rd</sup> respondent to take out disciplinary proceedings against the applicant and completely ignored the issues raised in the petition challenging the irregular redeployments.
12. That by a letter dated 7<sup>th</sup> august 2020, the 2<sup>nd</sup> respondent suspended the applicant from the office with immediate effect to pave way for investigation into the alleged violation of the 3<sup>rd</sup> respondent's code of conduct and staff manual provisions thereby reducing the applicant's pay by half and ordered off the premises of the 3<sup>rd</sup> respondent.
13. That by a letter dated 20<sup>th</sup> august 2020, the 2<sup>nd</sup> respondent notified the applicant about the disciplinary hearing scheduled on the 3<sup>rd</sup> September 2020 with five counts espoused therein and the same letter extended the applicant's suspension.
14. That the applicant requested for a copy of the investigations report to adequately prepare his defence to all the cases/offences rose against him but the officials and management of the 3<sup>rd</sup> respondent denied the applicant a copy of the said report.
15. That the disciplinary hearing of the applicant nonetheless proceeded on the 10<sup>th</sup> day of September 2020 whereat the applicant raised the same objection against the participation of Mr Abdu Salam Waiswa and Mr Nyombi Tembo, both of whom implicated in the irregular appointments by the 3<sup>rd</sup> respondent without the requisite job qualifications and the applicant requested the two members to recuse themselves but to no avail.

16. That the said members of the committee dismissed the objection declined to recuse them and proceeded with the disciplinary hearing of the applicant and made recommendations inter-alia to dismiss the applicant summarily for “major offences” and “serious misconduct”.
17. That by a letter dated 16<sup>th</sup> September 2020 the 2<sup>nd</sup> respondent summarily dismissed the applicant from the employment of the 3<sup>rd</sup> respondent.
18. That the applicant having been aggrieved by the glaring excesses and procedural irregularities that preceded the hearing and inevitably resultant decision and or recommendation of the impugned committee, appealed the decision to summarily dismiss him from employment to the board of the 3<sup>rd</sup> respondent by a memorandum of appeal dated 19<sup>th</sup> September 2020.
19. That the board of the 3<sup>rd</sup> respondent ignored the applicant’s appeal as it did all earlier appeals and petitions until its tenure expired in December 2020.
20. That the applicant by way of this amended application seeks to have disciplinary proceedings and the resultant decision of the 2<sup>nd</sup> respondent to summarily dismiss the applicant to judicial review.

The respondent opposed the application through the affidavit in reply deposed by Eng. IRENE SEWANKAMBO who stated that;

The applicant made his appeal to the board of the 3<sup>rd</sup> respondent against the appointment of the Director, Human Resource on 11<sup>th</sup> February 2020 and not in July 2019 as alleged. In accordance with the 3<sup>rd</sup> respondent’s board manual, the board sits once every quarter and the board’s first meeting in 2020 was held on the 25<sup>th</sup> March 2020. At the said meeting, the board took note of the applicant’s appeal and constituted an ad hoc committee of the board to hear the appeal and make recommendations to the board.

The ad hoc committee’s ability to meet and hear the applicant’s appeal was hindered by the nationwide lockdown that subsisted from the late march 2020 until end of May 2020. The board duly notified the applicant of the

constitution of the ad hoc committee to hear his appeal and was also informed him that determination of the appeal was likely to be affected by the Covid-19 restrictions. Amidst the covid-19 challenges, the committee managed to sit and hear the applicant's appeal on 19<sup>th</sup> June, 2020, and subsequently, prepared and submitted a report to the board on the matter.

The 3<sup>rd</sup> respondent conducts the affairs of all staff in accordance with the employment act 2006, the UCC human resource manual and the respective contracts of service. Under the UCC human resource manual and individual staff contracts, the 3<sup>rd</sup> respondent may redeploy any staff at any time within the functions of the 3<sup>rd</sup> respondent. Vide internal memorandum dated 28<sup>th</sup> July 2020, a total of 32 [thirty-two] staff of the 3<sup>rd</sup> respondent were reshuffled and rotated within the different functions of the 3<sup>rd</sup> respondent.

The applicant was not the only affected staff in the above rotation since the exercise affected all departments of the 3<sup>rd</sup> respondent with a view of enhancing efficiency and building capacity amongst all staff of the 3<sup>rd</sup> respondent. The 3<sup>rd</sup> respondent followed the relevant internal processes in conducting the rotation and it is not true that the whole exercise was intended at victimizing one officer, the applicant.

In an attempt to express his dissatisfaction with the rotation, the applicant petitioned the 1<sup>st</sup> respondent vide an email dated 04<sup>th</sup> of august, 2020, and copied in more than forty other individuals, including non-UCC staff. For reason of disparaging and insolent language used by the applicant in the appeal, the applicant was cautioned on his language, and was urged to accord courtesy and respect to members of the 3<sup>rd</sup> respondent's management while expressing his dissatisfaction.

Considering that the applicant had, without approval shared with third parties information pertaining on the 3<sup>rd</sup> respondent's internal affairs, disciplinary proceedings and were initiated against him for unauthorized disclosure of information, and the applicant was temporarily suspended to avoid further leakage of information and interference with investigations and witnesses as the matter progressed.

It is therefore, not true that the applicant is being victimized in any way, but the 3<sup>rd</sup> respondent is simply conducting all matters of staff, including the

applicant, in accordance with the UCC staff human resource manual and their individual employment contracts.

The disciplinary committee heard the applicant on the 11<sup>th</sup> of September 2020 and was accorded a fair hearing by the disciplinary committee. Following consideration of the committee report, on the 16<sup>th</sup> of September, 2020, the management of the 3<sup>rd</sup> respondent made a decision to dismiss the applicant from his employment with the 3<sup>rd</sup> respondent due to breach of his employment contract.

The applicant was represented by *Professor John Jean Barya & Hudson Katumba* whereas the respondents were represented by *Counsel Kalule Ahmed Mukasa* together with *Abdulsalam Waiswa, Ismael Kibinge and Ms Rita Zaramba*.

### **PRELIMINARY OBJECTIONS**

The respondent in the affidavit in reply raised four preliminary objections which are as follows;

1. That there are alternative remedies in the law to which the applicant is entitled under the employment act, 2006 and the whistle blowers protection act, 2010 that have not been exhausted or turned to before commencing this action.
2. That the application is prematurely before the court in so far as the 3<sup>rd</sup> respondent's internal procedures are incomplete and the remedies there have not been exhausted.
3. That the current application for judicial review has in many ways been overtaken by events given the applicant's dismissal from employment.
4. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents being officers of the 3<sup>rd</sup> respondent and impleaded in their official capacity are improperly joined in this application.

**In regard to the first preliminary objection**, counsel for the respondents submitted that the scope of the applicant's application is employment related and as such the Employment Act, 2006 and the Whistle blowers Act provide



ample alternative remedies such as arbitration to the applicant, which the applicant has not fully exhausted before commencing this action.

Counsel for the applicant submitted in rejoinder that this dispute is not strictly an employment dispute as it seeks an inquiry into multiple questions of illegality, irregularity, ultra vires decisions and victimization of a whistle blower, which fairly and squarely fall under the ambit of judicial review. Counsel for the applicant also further submitted that although the contract of employment provides for arbitration, neither party has prayed for the same as provided for by the law.

**In regard to the second preliminary objection,** counsel for the respondents submitted that the applicant lodged his appeals challenging the hiring of Mrs Kasirye Joyce as Director Human Resources and Administration and the appeal challenging his dismissal from employment of the 3<sup>rd</sup> respondent at the difficult time of the COVID-19 pandemic and at the time when the third respondent's old board's tenure was expiring and that the court was severally updated on the same. He further submitted that the new board was not appointed until September 2021, making it impossible to have disposed the applicant's appeals within that period.

Counsel for the applicant submitted in rejoinder that the applicant's appeals and whistle blowing petitions were submitted way before the COVID-19 pandemic and as such it is dishonest for the respondents to blame the COVID-19 pandemic for their shortcomings, incompetence and impunity. Counsel for the applicant further submitted that the court was informed that the 3<sup>rd</sup> respondent's board sits every quarter and that the old board's tenure was coming to an end and so the applicant's appeals should have taken priority for disposal, yet it wasn't the case. The applicant further submitted that the other alternative remedies provided for in law would not sufficiently address the issues raised by the applicant and or grant the prayers prayed for.

**In regard to the third preliminary objection,** counsel for the respondents submitted that this application has been overtaken by events, and is moot, especially in regard to prayers 1,2 and 4 sought by the applicant due to the fact that the applicant has since been terminated from the employment of the 3<sup>rd</sup> respondent.

Counsel for the applicant submitted in rejoinder that the prayers sought by the applicant have not been overtaken by events because they are very central to the determination of the application. Counsel further submitted that the application is not moot because the applicant's appeals have not been disposed of by the respondents and that there are no statutory and internal remedies available to the applicant save for the present application.

**In regards to the fourth preliminary objection**, counsel for the respondents submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents in this application are improperly and unnecessarily impleaded because they are impleaded in their official capacity and it has not been pleaded by the applicant that they acted in bad faith in the exercise of their functions. Also that enforcement of any decision of the court against the 3<sup>rd</sup> respondent would not require the presence of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Counsel for the respondents further submitted that the 1<sup>st</sup> respondent has since left the 3<sup>rd</sup> respondent's board and therefore it is pointless to have her as a party and that they are unnecessary and improper parties having taken whatever action they did against the applicant for and on behalf of and in the name of the 3<sup>rd</sup> respondent.

Counsel for the applicant submitted in rejoinder that this application is *ipso facto* a derivative of the acts of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as some of the key individuals that form the directing mind of the 3<sup>rd</sup> respondent and the two were impleaded in their respective capacities.

Counsel for the respondents therefore prayed that on the basis of these four preliminary objections, the court should be pleased to dismiss this application with costs to the respondents while counsel for the applicant prayed that on the basis of their submissions in rejoinder answering to the preliminary objections, the same should fail.

### **ANALYSIS**

In regard to the existence of alternative remedies in law that the applicant has not exhausted, indeed there are various remedies stipulated in different laws governing employment that are at the exposure of an aggrieved person before they can seek court redress through an application such as this.

**Rule 5 of the Judicature Judicial review (Amendment) Rules 2019** which introduces **Rule 7A (1) (b)** provides as follows;

*“The court shall in handling applications for judicial review, satisfy itself of the following;*

- a) That the application is amenable for judicial review;*
- b) That the aggrieved person has exhausted the existing remedies available within the public body or under the law;”*

This court has previously dismissed matters which have been brought before it before exhaustion of all available remedies prior to coming to court, for example in ***Sewanyana Jimmy vs Kampala International University HCMC No. 207 of 2016***, where the court held that;

*“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 a specific statutory provision which would meet the necessities of the case. This is the only way institutions and their structures will be strengthened and respected.”*

When alternative remedy is available, the special jurisdiction of court in judicial review should be rarely evoked. Where a right or liability is created by a statute which gives a special remedy for enforcing the same, the remedy provided by the statute must only be availed of in the first instance. Ordinarily existence of an adequate and efficacious alternative remedy is regarded as a bar to invoking the jurisdiction of court in judicial review.

This application possesses some aspects in the form of grievances that ought to be directed to other avenues for redress other than this court. Arbitration being one of the options available as per the employment contract of the applicant and also should have been extensively explored before coming to court. Alternatively, since the applicant’s case hinges on the argument that his alleged persecution was premised on his whistle-blowing act on the discrepancies in the administration of the 3<sup>rd</sup> respondent, remedies such as making a complaint to the Inspectorate of Government or the Uganda Human Rights Commission for redress should have also been explored before resorting to court for judicial review.

It has been made clear and plain (in absence of exception circumstances) permission to proceed with judicial review will be refused where an applicant has failed to exhaust other possible remedies. Therefore, an applicant will not be required to resort to some other procedure if that other procedure is less satisfactory or otherwise inappropriate. In each case the question is whether the court should exercise its discretion.

Since there are alternative avenues created by law to provide redress to employment related matters and other circumstances such as in this case, it would be far-reaching for this honourable court to override the authority of those bodies by granting this application and as such, this preliminary objection succeeds.

Secondly, in regard to the application being prematurely brought before court in as far as the 3<sup>rd</sup> respondent's internal procedures being incomplete, the applicant has shown a reckless disregard to the unforeseeable yet unfortunate circumstances which had rendered the 3<sup>rd</sup> respondent's board's activities impossible as a result of the covid-19 pandemic. The applicant brought his first appeal in July 2019 against the appointment of Mrs Joyce Kasirye as Director Human Resources and Administration and another appeal in July 2020 challenging the redeployment of 32 staff of the 3<sup>rd</sup> respondent to different departments and the third appeal in September 2020 challenging his dismissal from the 3<sup>rd</sup> respondent's employment.

Considering the fact that the 3<sup>rd</sup> respondent's board only sits once a quarter, and factoring in the emergence of the Covid-19 pandemic which led to nationwide lockdowns on numerous occasions between 2020 and 2021, it cannot be concluded that the board intentionally or maliciously disregarded the applicant's appeals because there was no way the board would have sat to dispose of the appeals in the circumstances as such meetings would be against the presidential directives on controlling the spread of the coronavirus in Uganda.

Additionally, this court was also informed of the expiry of the tenure of the 3<sup>rd</sup> respondent's board towards the end of the year 2020 and that a new board was never appointed until towards the end of the year 2021 leaving no body to listen to the applicant's appeal in between that period. It is therefore

inconceivable that the applicant would have expected his appeals to be fast-tracked and disposed of by a 'non-existent' board.

The applicant had an available remedy of appeal to the board to challenge the decision or action taken and judicial review is essentially a mechanism to be used where there is no statutory right of appeal. The power of appeal will involve determination of the rights through scrutiny of the evidence and this would be in the best interest of the parliamentary intent in enacting such legislation. This explains the delay in hearing this matter as the applicant had to wait for the internal procedures to be exhausted or final decisions to be made by the board.

It therefore does not go without saying that the applicant has not fully exhausted the existing remedies available to him within the 3<sup>rd</sup> respondent institution as required by Rule 7A (1) (b) of the Judicature (Judicial Review) Rules and this preliminary objection too, succeeds.

**In regard to the application being overtaken by events given the applicant's dismissal from employment.** I have taken note that the applicant is no longer in the employment of the 3<sup>rd</sup> respondent and as such this application becomes toothless in as far as enforcement is concerned, in any case if it were to succeed. The applicant was summarily dismissed from the employment of the 3<sup>rd</sup> respondent on the 16<sup>th</sup> September 2020 following investigations and a disciplinary hearing into allegations of misconduct.

However, i would like to note that it is important that institutions of government maintain the highest level of discipline in regard to procedures and processes. This means that when it comes to recruitment of officers of these institutions, recruitment policies provided in the Human Resource Manuals must be followed to the letter in order to recruit the most qualified candidates to ensure the best service delivery to the country.

In that vein, when petitions are made challenging the credibility of processes in these institutions, it must been seen that these complaints are heard and decided upon fairly to avoid dragging of these matters to litigation. This preliminary objection succeeds.

**The last objection is in regards to the lawfulness of this action against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.**

It is trite law that a plaintiff (in this case applicant) is *dominus litis* which means that he or she has the right to choose who to sue and from whom he/she knows and/or believes he/she will have a remedy against. (***See: M/s Emmaus Foundation Limited & others vs M/s Emmaus Foundation Investments (U) Limited & Anor Miscellaneous Application No. 615 of 2019***)

And as such, it is within the applicant's right to make the 1<sup>st</sup> and 2<sup>nd</sup> respondents parties to this suit if he believes that including them as parties will remedy him in one way or the other. Persons holding office should only be sued in the official capacity in which they hold such office, otherwise it would be absurd to making a finding against such persons in their personal capacity as it may infer personal liability to their estate instead of the institution which they represent.

There may be instances when an office holder is personally liable for the breach of the law or violation of rights which are in the personal capacity. Then, such circumstances may invite the addition of the officeholder in person and by their names. In this case, the applicant has not made any justification of adding the names of the 1<sup>st</sup> and 2<sup>nd</sup> respondents and they ought not to have been added to these proceedings. Their addition was merely a 'scare crow' or an act intended to intimidate them as parties. This particular preliminary objection is also upheld.

The applicant seems to be challenging the transfer and subsequently the dismissal from employment. The said dismissal arose after the alleged whistle-blowing act about the appointment of the Director Human Resource. The Board is best suited to handle such matters and it should not be curtailed in its exercise of power vested under the law.

The act of the applicant allegedly whistle-blowing should not be used as a bar for any disciplinary issues that may have arisen or to be used as shield against the employer. The employer remains with the full powers to exercise disciplinary control against the applicant otherwise other employees would also use the same style to avoid any disciplinary action against them.

Once an employer has lost the confidence of an employee, it would not be safe in its interest to continue the employee in the service. The loss of confidence occupied the primary factor and not the amount of money and that the sympathy and generosity cannot be a factor permissible in law in such matters.

When the employee is found guilty of such indiscipline that warrants summary dismissal, there is nothing wrong in the employer losing its confidence or faith in such an employee and awarding punishment of removal. In such cases, there is no place of generosity or sympathy on the part of the judicial forums and interfering with the quantum of punishment.

The applicant was heard and found guilty of such misconduct that warranted a dismissal. The court would be very hesitant to overturn disciplinary decision handed down in proceedings where the applicant has been duly accorded a fair hearing.

This application fails and is dismissed with costs.

I so order.

**SSEKAANA MUSA**

**JUDGE**

**10<sup>th</sup> February 2023**