THE REPUBLIC OF UGANDA

THE HIGH COURT OF UGANDA AT KAMPALA.

CIVIL DIVISION

MISCELLANEOUS CAUSE NO. 162 OF 2021.

JAMES KISORO :: APPLICANT

VERSUS

1. **MAKERERE UNIVERSITY**
2. **MAKERERE UNIVERSITY APPOINTMENTS BOARD**
3. **MAKERERE UNIVERSITY COUNCIL.**
4. **MAKERERE UNIVERSITY STAFF TRIBUNAL::::::::::::::::::::RESPONDENTS**

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING.

This application is brought under Article 42 of the 1995 Constitution of the Republic of Uganda, Section 33 and Section 36(1) of the Judicature Act Cap. 13 and Rules 3, 5, 6, 8 of the Judicature (Judicial Review) (Amendment) Rules 2009, for the following prerogative reliefs;

1. An Order of Mandamus directing the 1st, 2nd and 3rd Respondents to comply with the ruling and orders of the 4th Respondent vide staff Tribunal No. 12 of 2019, James Kisoro v Makerere University.
2. An Order of Prohibition forbidding the 4th Respondent from reviewing, varying, revising, re-hearing and/or setting aside its own decision and orders issued in staff Tribunal Appeal No. 12 of 2019, James Kisoro v Makerere University.

3. A Declaration that the 1st, 2nd and 3rd Respondents are in contempt of the decision and orders of the 4th Respondent delivered on the 10th day of December 2020.
4. A Declaration that 1st, 2nd, and 3rd Respondent's actions of refusing, failing, and/or ignoring to comply with the decision and orders of the 4th Respondent vide Staff Tribunal Appeal No. 12 of 2019, James Kisoro v Makerere University are ultra-vires, illegal, irrational and unlawful.
5. A Declaration that the 4th Respondent's actions of reviewing, re-hearing, it's own decision vide staff Tribunal Appeal No. 12 of 2019, James Kisoro v Makerere University are ultra-vires, illegal, irrational and unlawful, and that the proceedings thereof are null and void.
6. An award of General damages for the inconvenience and emotional turmoil suffered by the Applicant as a result of the conduct of the Respondents.
7. An award of punitive damages for the high-handed conduct of the Respondents.
8. The costs of this application and in proceedings before the 4th Respondent be provided for.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavit of **JAMES KISORO** the Applicant but generally and briefly state;

1. That the Applicant was an employee of the 1st Respondent as a Web administrator in the College of Agriculture and Environmental Sciences from April 2011.
2. That at its 582nd meeting held on 21st November 2018, the 2nd Respondent charged the Applicant with counts of failure to perform

one's duties, absence from duty without justification and absconding from duty.

3. That the Applicant was subsequently dismissed from university service by the 2nd Respondent vide a letter dated 7th January 2019 and the dismissal was made to apply retrospectively effective 25th January 2017.
4. That the Applicant appealed the decision of the 2nd Respondent to the 4th Respondent which allowed the appeal and ordered his reinstatement in the University Service, payment of his salary arrears and transfer, vide its ruling dated 10th December 2020.
5. That the 1st, 2nd, and 3rd Respondents have, without any lawful justification, refused, ignores and/or defaulted to comply with the decision and orders of the 4th Respondent.
6. That on the 12th March 2021, the Applicant was served with an application by the 1st Respondent to the 4th Respondent seeking for review, revision, setting aside and/or re-hearing by the 4th Respondent to Staff Tribunal Appeal No. 12 of 2019, James Kisoro v Makerere University.
7. That the 4th Respondent is not vested with statutory mandate/power to re-hear, review, set aside, vary or revise its own decisions and mandates and such an action is ultra-vires its powers.
8. That the 4th Respondent is functus officio in Staff Tribunal Appeal No. 12 of 2019, James Kisoro v Makerere University.
9. That the 1st, 2nd and 3rd Respondents have not complied with the decision and the orders of the 4th Respondent vide Staff Tribunal Appeal No. 12 of 2019, James Kisoro v Makerere University.

10. That the Applicant has exhausted all the internal mechanisms within the system of the Respondents, and there are no other mechanisms left to provide the appropriate remedies.
11. That the Applicant has suffered untold physical, mental and psychological trauma, torture and stress as a result of the Respondents' actions/omission.
12. That it is in the interests of justice that this application be allowed.

The 1st, 2nd and 3rd Respondents opposed this application and filed an affidavit in reply through **YUSUF KIRANDA**, the University Secretary and stated briefly as follows;

1. That on the 10th of December 2020, the 4th Respondent Tribunal allowed the Applicant's Appeal and ordered among others, that the Applicant be reinstated in the 1st and 3rd Respondent's service, transferred to another College and paid salary arrears.
2. That the 1st and 3rd Respondents were genuinely dissatisfied with the ruling in that:
    a. The power to transfer/appoint staff in the 1st and 3rd Respondent is vested in the 2nd Respondent Board.
    b. The order of the 4th Respondent usurped the said powers.
    c. The order of the 4th Respondent created a financial charge of the finances of the 1st and 3rd Respondents by the Public Finance Management Act, 2015 (as amended).
    d. The Transfer of staff is a management mandate, only informed by the existence by a need and a vacancy.

3. That it is with the above grounds that the 1st and 3rd Respondents filed for a review/variation of the orders of the 4th Respondent, which application is still pending.
4. That I pray that this court dismiss this application in order to allow the Applicant exhausted all the internal mechanisms of dispute resolution within the 1st and 3rd Respondents.
5. That I affirm this affidavit in reply, in opposition to the above application and pray that the same be dismissed with costs.
6. That all that I have stated is true and correct to the best of my knowledge and belief, except that on information the source of which is as revealed.

Representation.

The Applicant was represented by *Francis Tumwesigye* and the Respondents were represented by *Hudson Musoke*-Makerere University Directorate of Legal Affairs. Both counsel filed their written submissions that were duly considered by this court.

The main issue for determination is:

1. ***Whether the decision to make an application for review of the 4th respondent's decision is illegal?***
2. ***What remedies are available?***

Preliminary Objections.

Counsel for the Respondents raised two preliminary objections which are;

1. *That the suit was brought against non-existent entities.*
2. *That the application was filed out of time.*

Determination of the Preliminary Objections

The first preliminary objection was in regards to the application being brought against non-existent entities.

Counsel for the Respondents submitted that the 2nd Respondent and 4th Respondent cannot be sued or sue anyone in its own names and cited and relied on the provisions of **section 50 and 56 of the Universities and Other Tertiary Institutions Act, 2001** together with **Order 7 rule 11 (a) and Order 6 rule 30 (1) of the Civil Procedure Rules.**

In Reply, Counsel for the Applicant submitted that it has long been settled that a public official or public body exercising statutory functions is liable to be sued in an application for Judicial Review, regardless of whether or not they ordinarily have legal capacity to sue or be sued. Counsel relied on **Rule 2(1) of the Judicature (Judicial Review) (Amendment) Rules, 2019** which defines Judicial Review.

Having read and determined submissions from both counsel it is my view that the 2nd and 4th Respondents which are created as a requirement for every University and Tertiary Institution that is governed by the University and Other Tertiary Institutions Act, 2001 exercise statutory functions and therefore also fall under the ambit of the definition of a public body hence were sued within that capacity by the Applicant hence the first preliminary objection fails.

The second preliminary objection was in regards to filing for judicial review out of time.

Counsel for the Respondents submitted that the tribunal gave its ruling on 10th December 2020. And therefore, the Applicant should have filed for judicial review immediately after and should not have waited till 26th May, 2021 after a period of 5 months to apply for Judicial Review. Counsel Relied on **Rule 5 of**

the Judicature (Judicial Review) (Amendment) Rules, 2019 and the case of **IP Mugumya v Attorney General.**

In reply, Counsel for the Applicant submitted that the application was not brought against the ruling of the 4th Respondent which was delivered on 10th December, 2020 but it was brought against the application by the 1st Respondent to have the 4th Respondent review or rehear their decision of 10th December 2020 vide Miscellaneous Application No. 5 of 2020 which notice of motion was served on the Applicant's lawyer on 12th March 2021 when the grounds in this application first arose. And the Applicant further challenges the 4th Respondents power to rehear its own decisions as sought in Miscellaneous Application No. 5 of 2020 and the 1st and 2nd and 3rd Respondents' persistent and ongoing refusal to comply with the decision of the 4th Respondent. Counsel relied on the case of ***Mukasa John v Attorney General and Secretary to the Treasury Miscellaneous Cause No. 0094 of 2019.***

Rule 5(1) of the Judicature (Judicial Review) (Amendment) Rules 2019 provides that 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.

And having read the submissions from both counsel I have come to a conclusion that this application was not filed out of time since the grounds of the application first arose on 12th March 2021 when the 1st, 2nd and 3rd Respondents served a notice of motion on the Applicant notifying him of their application seeking for rehearing and reviewing of the decision of the 4th Respondent decision which does not have power to do what they sought and

therefore the Applicant filed an application on 26th May 2021 within the umbrella provided for by the law which is a period of 3 months.

Thus, the second preliminary Objection raised by counsel for the Respondent fails.

Determination.

Issue 1: Whether the decision to make an application for review of the 4th respondent's decision is illegal?

The Applicant's Counsel submitted that the Respondents were simply abusing their own internal processes and procedures provided for by statute. Counsel further submitted that the 1st, 2nd, and 3rd Respondents refusal to comply with the ruling of the 4th Respondent was unlawful, irrational, unreasonable and procedurally improper and relied on the case of ***Juma Nkunyingi Ssembajja v The Secretary Public Service Commission Miscellaneous Cause No. 82 of 2019*** to argue out his point.

He also submitted that the 4th Respondent is not vested with statutory power and jurisdiction to review its own decisions, and relied on **section 57 of the Universities and Other Tertiary Institutions Act, 2001** and for it to do so would be it acting ultra-vires and it is an illegality.

The Respondents Counsel contended that the said application is frivolous, without merit and does not raise any matters for judicial review.

Analysis.

The respondents have failed or refused to comply with the decision of the 4th respondent on ground that they genuinely dissatisfied with the ruling;

(i) The power to transfer/appoint staff in the 1st and 3rd respondents is vested in the 2nd respondent Board.

(ii) The order of the 4th respondent usurped the said powers.

(iii) The Order of the 4th Respondent created a financial charge of the finances of the 1st and 3rd respondent that had been budgeted for which is illegal as it is prohibited by the Public Finance Management Act, 2015.

(iv) The transfer of staff is a management mandate, only informed by the existence by a need and a vacancy.

The 1st and 3rd respondent filed for a review/variation of the said orders and the application is still pending. They contend that the said action of applying for review was intended to avoid any future distortion in the management of staff placement within the 1st and 3rd respondents and to highlight illegalities within the decision.

Rule 3 of the Judicature (Judicial Review) (Amendment) Rules, 2019 defines judicial review as the process by which the high court exercises its supervisory jurisdiction over the 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. It is a fundamental requirement of a democratic state that all forms of state action must be supportable by law. Illegal state action is incompatible with a democratic society and this preposition lies at the heart of law.

Lawful administrative action means in essence that administrative actions and decisions must be duly authorised by law and that any statutory requirements or preconditions that attach to the exercise of the power must be complied with. The first principle of administrative law (and of the rule of law) is that the

exercise of power must be authorised by law. Therefore, any exercise of power in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. Public bodies have no inherent powers and every incident of public power must be inferred from a lawful empowering source, usually the Constitution and legislation. See ***Fedsure Life Assurance Ltd v Greater Johnnesburg Transitional Metropolitan Council (1999) (1) SA 374 (CC)***

Therefore, the logical concomitant of this is that an action performed without lawful authority is illegal, unlawful and ultra-vires. The decision makers purport to make decisions for which they have no authority in law. The respondents are trying to circumvent a lawful decision made by the Staff Tribunal through an application for review. The Universities and Other Tertiary Institutions Tribunal establishes the tribunal with power to manage dismissal and discipline of the staff or other related issues like promotion or demotion arising from appointments board.

Section 57 of the Universities and Other Tertiary Institutions Act provides;

(1) A member of staff may appeal to the University Staff Tribunal against a decision of the appointments Board within fourteen days after being notified of the decision.
(2) In any appeal under subsection (1), the Tribunal shall within forty five days confirm, vary, amend or set aside the decision appealed against or give such decision as it thinks appropriate.
(3) A member of staff aggrieved by the decision of the Tribunal under subsection (2) may within thirty days from the date he or she is notified of the Tribunal Decision apply to the High Court for judicial review.

The above provisions do not give the tribunal any powers or vest in them any inherent powers to review or vary their decisions once handed down. The 1st 2nd and 3rd respondents have no right to challenge the decision of the tribunal whatsoever. It is only the staff member who may apply for judicial review to challenge the tribunal decision.

Once a decision is made by the staff tribunal, then it is final and it becomes *functus officio* once a decision has been made. According to this doctrine, an official who has once 'discharged his official function' by making a decision is unable to change his/her mind and revoke, withdraw or revisit the decision.

It is a well-established principle that an adjudicatory authority has no inherent power to review or revise its own orders, or reopen the case, or nullify an earlier order made by it, unless there is an express provision in the parent act giving it such a power. An adjudicatory body has no inherent power to review or revise a decision it has rendered itself. Such a power must be conferred by law specifically. ***See H.C. Suman v Rehabilitation Ministry Employees Coop. House Building Society Ltd. [1991] 4 SCC 485; AIR [1991] SC 2160***

Therefore, once an adjudicatory body makes a decision, it becomes final and can be reopened only if power to review is conferred on the authority by the statute under which it is functioning. If it seeks to reopen the case without having authority to do so, its acts wholly without jurisdiction and the order passed on review would be a nullity.

This principle is very applicable in this case since the Act does not envisage such a situation and it may be subject to serious abuse if the 1st to 3rd respondents are not satisfied with the decision. They could resort to arm-twisting the staff tribunal to change any decision they may deem unfavourable like in the present case. The legislature did not confer on the staff tribunal any

power to review or vary their decision and any attempt to so would unlawful and illegal

It bears emphasis however, that the *functus officio* doctrine is not absolute and there are circumstances when the decision-maker or administrator may be justified in altering or rescinding its own decision, typically where the decision turns out to have been induced by fraud or based on non-existent jurisdiction. Even where the legislation does not make any explicit provision for it, there may be some scope of implied authorisation for revocation or variation depending on the legislation and language in which it is expressed. The present case does not fall in any of the allowable exceptions and it is contrary to Universities and Other Tertiary Institutions Act. See ***President of the Republic of South Africa v South African Rugby Football Union 2000 (1) SA 1 (CC)***

It bears emphasis further, that although there may not an express provision in the relevant Act or rules for the purposes of review, a tribunal in exceptional circumstances should be considered to be endowed with such ancillary or incidental powers as are necessary to discharge its functions effectively for purposes of doing justice between the parties. ***See Grindlays Bank v Central Govt. Industrial Tribunal [1981] AIR SC 606.***

An adjudicatory body has an inherent jurisdiction to recall orders obtained by practising fraud on it. A tribunal does not become *functus officio* for it inheres in it to review by recalling its orders on grounds of fraud, misrepresentation or any similar grounds. ***See C.I.T v Bhattacharya [1979] AIR SC 1725: P. Satyanarayan v Land Reforms Tribunal, [1980] AIR AP 149***

The review powers should not be exercised in an “arbitrary, vague or fanciful manner”; it must be guided by relevant considerations.

The decision of the respondent to seek to review the decision of the Staff Tribunal is illegal and unlawful.

Whether the Applicant is entitled to the reliefs sought?

1. *An Order of Mandamus is hereby issued directing the 1st, 2nd and 3rd Respondents to comply with the ruling and orders of the 4th Respondent vide staff Tribunal No. 12 of 2019, James Kisoro v Makerere University.*
2. *An order of prohibition is hereby issued forbidding the 4th Respondent from reviewing, varying, revising, re-hearing and/or setting aside its own decision and orders issued in staff Tribunal Appeal No. 12 of 2019, James Kisoro v Makerere University.*
3. *It is declared that the 4th Respondent's actions of reviewing, re-hearing, it's own decision vide staff Tribunal Appeal No. 12 of 2019, James Kisoro v Makerere University are illegal and unlawful.*
4. *The applicant is granted costs of the application.*

I so Order.

Ssekaana Musa
JUDGE.
10th February 2023