

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

MISCELLANEOUS CAUSE NO. 70 OF 2022

1. GESA ELLY DENNIS
2. KINALWA SULAIMAN
3. NAJJUMA JULIAN
4. LUZIGE CHARLES
5. LUSIBA JOEL ADRIAN

:..... APPLICANTS

VERSUS

MAKERERE UNIVERSITY :..... RESPONDENT

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

The Applicants brought application against the respondent by way of Notice of Motion under Articles 50, 28, 42, 44 (c) of the Constitution, Sections 33 and 36 of the Judicature Act and Rules 3, 6, 7 and 8 of the Judicature (Judicial Review) Rules seeking for;

1. A declaration that the Respondent's refusal and/ or failure to entertain the Applicants' appeal dated 21st February, 2022 against the decision to reject their applications for admission/ entry into the 2nd year of Bachelor of Medicine and Bachelor of Surgery Program for the Academic year 2021/ 2022 was unlawful, highhanded, unjust, unfair, arbitrary, irrational, a violation of the Applicants' right to a fair hearing and fair administrative treatment protected under Articles 28, 42 and 44 (c) of the Constitution.

2. A declaration that the Respondent's refusal and/ or failure to admit the Applicants into the 2nd year of Bachelor of Medicine and Bachelor of Surgery program for the Academic year 2021/ 2022 is an unjustified departure from the practice of admitting graduates of Cytotechnology into the course and the same is a breach of the Applicants' right of legitimate expectation, illegal, highhanded, unfair and arbitrary.
3. An order of mandamus compelling the Respondent and its relevant organs to consider the Applicants' applications for admission and admit them into the 2nd year of Bachelor of Medicine and Bachelor of Surgery program.
4. An order directing the Respondent to pay general, aggravated, punitive and exemplary damages to each of the Applicants for breach of their right, legitimate expectation, fair hearing and fair administration action.

The grounds in support of this application are stated in the affidavits of the Applicants; Gesa Elly Dennis, Kinalwa Sulaiman, Najjuma Julian, Luzira Charles, Lusiba Joel Adrian which briefly state that;

1. The applicants are graduates of Makerere University's Bachelor of Cytotechnology program who were unreasonably denied admission into the 2nd year of the Bachelor of Medicine and Surgery program (MBChB) for the academic year 2021/2022.
2. The respondent ran a call for applications for admission of degree and diploma holders for MBChB program for academic year 2021/2022 to which the applicants responded by submitting their respective applications.

3. The respondent released the admission lists for MBChB program for academic year 2021/2022 but unreasonably rejected the applicants' applications.
4. The applicants lodged an appeal dated 21st February, 2022 with the respondent's senate against the unfair, arbitrary and irrational admission procedures adopted by the Respondent to reject their applications but the same was ignored.
5. The respondent's refusal and/or failure to entertain the applicant's appeal is unlawful, unjust, unfair, arbitrary and unreasonable.
6. The respondent's conduct is discriminatory, irrational, unlawful, unjust, unfair, arbitrary and unreasonable.
7. The respondent's failed to obtain the requisite accreditation of the Bachelor of Cytotechnology from the National Council for Higher Education before admitting and graduating the applicants.
8. Therefore, the respondent's breach of statutory duty can only be remedied by admitting the applicants into the 2nd year of MBChB program.
9. The applicants have a legitimate expectation to be admitted to be admitted into the 2nd year of the MBChB program owing to the respondent's consistent practice of admitting graduates of Cytotechnology for study of the said course.
10. The actions of the respondents complained of hereinabove impinged on a bundle of the applicants' constitutionally guaranteed rights, namely; the right to a fair hearing, right to just and fair treatment and

the right to a livelihood protected under Articles 28, 42, 40 and 44 (c) of the Constitution.

The Respondent filed its affidavit in reply to the application sworn by Alfred Masikye Namoah, its acting academic registrar opposing this application on grounds that;

1. The respondents stated that the college of health sciences has a practice of admission in which graduate applicants can apply to be admitted to Bachelor of Medicine and Bachelor of Surgery.
2. Due to limited capacity, it is specifically stated that there exists only 5% of the available slots that the degree holders compete for.
3. Even when not admitted to MBChB, a graduate of Bachelor of Cytotechnology, may apply to other courses such as pharmacy and not necessarily only to MBChB. The applicants applied for the said course and failed owing to their low grades as compared to others that were admitted.
4. The respondent's senate has never received any appeal by the applicants against non-admission.
5. The non-admission of the applicants to the degree of bachelor of medicine and bachelor of surgery was not discriminatory, but as an act of fair play and fair competition among the many aspiring applicants.
6. The respondent has never promised expressly to the applicants that they would be admitted to the degree of bachelor of medicine and bachelor of surgery.

7. The respondent stated that the applicants still have an opportunity and chance of applying to it to reconsider the decision not to admit them.

The applicant proposed the following issues for determination by this court.

Whether this is a proper application for judicial review.

What remedies are available to the parties?

The applicants were represented by *Mr. Tukwasibwe Derrick and Mr. Byansi Henry* whereas the respondent was represented by *Mr. Musoke Hudson*.

The parties were ordered to file written submissions which were accordingly done by the parties. This court considered the pleadings, evidence adduced and submissions in determining the issues raised.

DETERMINATION OF ISSUES

The applicants stated that they shall submit on the issue of remedies since issue 1 was concluded between the parties following an undertaking by the Acting Academic registrar to hear the applicant's appeal in November, 2022 and were granted provisional admission letters for admission to the Bachelor of Medicine and Surgery Program of academic year 2022/ 2023.

Counsel stated that the applicants prayed for damages as they have suffered mental distress, humiliation, inconvenience and frustration as a result of the respondent's oppressive actions keeping them at bay since February, 2022 to date. He further stated that the applicants have in addition lost another academic year as they cannot be admitted into the current lot of 2022/ 2023 and will have to wait an additional year making it 3 academic years of inaction.

Counsel for the applicants submitted that in the circumstances, it is prudent for court to invoke and apply its power under section 3 of the Judicature Act as amended, Rule 8 of the Judicial Review Rules and Article

42, 50 (1) and 162 (2) (c) of the Constitution to award damages as prayed for as this case.

He prayed that each applicant is awarded general damages of Ugx. 60,000,000/= to atone for the mental distress, humiliation, inconvenience, frustration and anxiety of not knowing their fate while their peers have already embarked on medical school, loss of three academic years, loss of dignity and psychological injury suffered by the applicants as a result of the respondent's actions.

Counsel for the applicants also submitted that general damages are such as the law will presume to be direct or a probable consequence of the act complained of. He stated that the applicants were awarded a fake unaccredited degree of Bachelor of Cytotechnology hoping that at the very least, they would be admitted into the 2nd year of medical school upon application as had been the practice by the respondent.

It was also submitted that the applicants are entitled to aggravated damages of Ugx. 20,000,000/= to atone for the hurt feelings, distress, humiliation, loss of dignity and psychological injury suffered by each of the them as a result of receiving an unaccredited degree of Bachelor of Cytotechnology from the respondent. counsel submitted that aggravated damages reflect extra compensation for damage to feelings and dignity caused by aggravating factors in the manner in which the respondent acted in arbitrarily refusing to admit the applicants who had qualified for admission to the course, deliberately refusing and/ or ignoring the applicants' appeal which was lodged on 22nd February 2021 and denying ever receiving the appeal.

Counsel relied on the case of Alex Methodius Bwayo vs DFCU Bank Ltd HCCS No. 78 of 2012 at page 27 where it was held that failing to justify wrongful conduct is an aggravating factor. He submitted that the respondent has failed to justify its wrongful conduct as they denied ever receiving the applicants' appeal and had no lawful excuse for not hearing

the applicants' appeal. The applicants were in the circumstances treated unequally under the law and with less dignity compared to their peers who received preferential treatment in admission.

He therefore stated that the discriminatory treatment of such kind would aggravate distress, anxiety and embarrassment caused to any reasonable person of ordinary sensibilities placed in any of the applicant's shoes.

In regards to punitive and exemplary damages, the applicants claimed Ugx. 15,000,000/= to reflect a sense of public outrage against the respondent's misconduct and emphasize the sanctity of constitutional rights that were violated, the gravity of the breach of these rights and to deter further breaches.

Counsel for the respondent submitted that the applicants are not entitled to any damages. He stated that the degree course of Bachelor of Cytotechnology was accredited by the National Council of Higher Education on the 13th December, 2021, long before the applicants lodged their appeal with the senate on 21st February, 2022. He submitted that this meant the applicants had an option to register with the Allied Health Professional Council and start practicing their profession. Indeed, their colleagues who were 79 in number were admitted and registered on the 4th April, 2022 where the respondent paid Ugx. 100,000/= per person as registration fees. Counsel stated that the applicants by not exploring other available options, assumed the risk which cannot be visited onto the respondent.

Counsel also submitted that the applicants' claim for damages was based on their hopes of being admitted to the degree course of bachelor of medicine and bachelor of surgery. However, at no point in time had the respondent university and/ or any of its officials promised the applicants in writing or otherwise that they would be admitted to the bachelor of medicine and bachelor of surgery. Failure to prove evidence of promise disentitles the applicants of any award of damages.

Counsel therefore submitted that the applicants are not entitled to general, aggravated and punitive damages. Counsel further stated that the applicants are not entitled to costs on the ground that they have prolonged the hearing intentionally.

He therefore prayed that this application be dismissed for lack of merit with costs.

Analysis

I have carefully considered the application and the grounds thereof. The applicants brought this application against the respondent for among other orders compelling the Respondent to consider their applications for admission into the 2nd year of Bachelor of Medicine and Bachelor of Surgery program, general, aggravated and punitive damages.

During the hearing, the applicants raised two issues above for determination. However, the 1st issue was disregarded by the applicants since they had been given provisional admission letters thereby admitted by the respondent as sought. As such, the applicants proceeded to have this court determine the issue of remedies for which the parties are entitled to which is subject determination.

Counsel for the applicant relied on Rule 8 of the Judicature (Judicial Review Rules which provides as follows;

Claims for damages

On an application for judicial review the court may, subject to sub rule (2), award damages to the applicant, if—

He or she has included in the motion in support of his or her application a claim for damages arising from any matter to which the application relates; and

The court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his or her application, he or she could have been awarded damages.

The applicants after obtaining the remedy sought through the appropriate channels of being admitted to Bachelor of Medicine and Surgery are now seeking a sum of 95,000,000/= each as general damages, aggravated damages and punitive and exemplary damages. The claim for damages seems not be supported or justified by any iota of evidence by any of the applicants.

Judicial review is not intended to enrich litigants by way of award of damages and it is only in exceptional circumstances that the court will award damages and it is never categorized in the limbs of general damages, aggravated damages and punitive and exemplary damages.

The applicants erroneously combined an action for judicial review as well as enforcement of human rights which is quite irregular and this seems to be the basis of the confusion that resulted in making claims for all manner of damages as if it were an application for enforcement of human rights.

Under judicial review proceedings, damages are awarded in the rarest of the rare cases upon court being satisfied of a possible tort of misfeasance. Otherwise judicial review proceedings will turn into ordinary proceedings for damages and yet it is not intended for that purpose. It is confined to correcting public wrongs through prerogative orders under the Judicature Act. *See Ochengel Ismael & Another v Attorney General HCMC No. 274 of 2019*

In *X v Bedfordshire County Council [1995] AC 633* it was held that ordinarily an individual may seek compensation against a public body over harm caused by wrongful act of such public body. The decisions or measures which are ultra vires their power may be set aside by means of judicial review. The fact that the act was ultra vires does not and could not of itself entitle the individual to damages for any loss suffered. The aggrieved individual must have established the unlawful action also constitutes a recognized tort.

Damages are only awardable in judicial review when the tort of misfeasance in public office (tort of abuse of office) is proved;

When a public official acts maliciously in the performance of his duty and with the intent of inflicting or injury on a person; or where an official knowingly acts without lawful authority and causes damage to some person.

This tort comes into being when there is conscious abuse of power on the part of a public authority, either by malice or knowledge of invalidity on the part of the concerned official. It includes malicious abuse of power, deliberate maladministration and other unlawful acts committed by a person holding a public office.

In the case of *Dunlop v Wollahara Municipal Council* [1981] 2 WLR 693 Lord Diplock stated that; “the tort of misfeasance in a public office was well established. If the action of the authority is actuated by malice, it would amount to “tort of misfeasance by a public officer”. The tort of misfeasance in public office is of limited coverage as under it damages are payable for ultra vires action done malafide or maliciously or knowingly i.e when there is conscious abuse of power. See also *Calveley v Chief constable* [1989] 1 All ER 1025; *Racz v Home Office* [1994] 2 AC 47; *Jones v Swansea City Council* [1990] 1 WLR 1453; *Three Rivers District Council v Bank of England* [2000] 2 WLR 1220

The applicants have not showed this court any element of tortious liability and their claims have basis in law and evidence on court record. They seem to have been interested in making some money instead of being admitted for the degree program. This is a bad practice which should discouraged under judicial review applications.

It is also crystal clear in the circumstances of this matter that the applicants’ dispute from which this application for judicial review arises was

overtaken by events since the respondent issued provisional admissions to them and the issue in respect of this dispute was abandoned. The applicants are only before this court for damages as stated above and there is thus no dispute “stricto sensu”.

It is an abuse of court process for the applicants to proceed with a matter seeking relief before this court where the dispute between the parties has been solved. From the evidence on record, it is clear that the applicants received their admissions from the respondent for the course of Bachelor in Medicine and Bachelor of Surgery program during the pendency of this suit. Merely withdrawing this application would have served the applicants in this situation and further saved this court’s time. This application is thus academic and hypothetical in nature and having been resolved between the parties. There was no basis and evidence for the claim of general damages, aggravated damages and punitive and exemplary damages

In the final result, this application fails for the above reason stated herein and is accordingly dismissed with costs to the respondent.

I so Order

SSEKAANA MUSA

JUDGE

8th September 2023