

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**CIVIL DIVISION**  
**MISCELLANEOUS CAUSE NO.268 OF 2017**

- 1. BAKULUMPAGI DANIEL**
- 2. NABAGEREKA GRACE MUSOKE**
- 3. MUNYEGERA MOSES GODFREY }===== APPLICANTS**
- 4. KAUMA JOAN BRENDA**
- 5. KABUYE GEOFFREY**
- 6. STEVEN KIBISI**

**-VERSUS-**

- 1. UGANDA NATIONAL BUREAU OF STANDARDS**
- 2. NATIONAL STANDARDS COUNCIL }===== RESPONDENTS**
- 3. CHIEF EXECUTIVE DIRECTOR**

**BEFORE HON. JUSTICE SSEKAANA MUSA**

**RULING**

The Applicant filed an application under Section 36 of the Judicature Act as amended, Rules 3(1)(a), 5 & 6 of the Judicature (Judicial Review) Rules, 2009 for the following reliefs;

- a) A declaration that the audit report, its compilation and the disciplinary proceedings conducted by the 1<sup>st</sup> Respondent and all actions taken thereunder were done improperly and without due recourse to the law.
- b) A writ of certiorari doth issue quashing the audit report and all the decisions/recommendations made arising from it.
- c) A writ of certiorari doth issue quashing the findings of the disciplinary committee proceedings in as far as the said proceedings were unlawfully conducted by one Jackson Mubangizi who had no legal mandate to conduct the same whatsoever.

- d) A Writ of mandamus doth issue compelling the 2<sup>nd</sup> Respondent to reinstate the Applicants as full employees as inspectors in the 1<sup>st</sup> Respondent organisation.
- e) A writ of prohibition doth issue prohibiting the 2<sup>nd</sup> Respondent and the National Council of Standards of the 1<sup>st</sup> Respondent from implementing any recommendations based on the Disciplinary proceedings conducted in respect of the Applicants.
- f) An injunction doth issue restraining the Respondents jointly and severally from terminating the employment services premised on the findings or recommendations of an unlawfully constituted disciplinary committee.
- g) An order for general and exemplary damages.
- h) Costs of the Application be provided for.

The grounds in support of this application were stated briefly in the Notice of Motion and in the affidavits in support of the applicant but generally and briefly state that;

- 1) The decision of lifting the applicants suspension by calling them back to work and yet maintain them on half pay was tainted with illegality and irrationality in as far as the said suspension exceeded one month period contrary to the provisions of Section 63 of Employment Act of 2006.
- 2) That the decision by the 1<sup>st</sup> respondent to subject the applicant to an indefinite suspension or interdiction was tainted with illegality and irrationality in as far as the decision of calling the applicant's back to work bore the necessary implication of conclusion of investigations as well as the end of any disciplinary proceedings whatsoever.
- 3) The disciplinary proceedings conducted on behalf of the 1<sup>st</sup> respondent by a one Jackson Mubangizi were illegal in as far as the said Jackson Mubangizi did not hold any lawful office or status in the respondent's organisation at the time he presided over the impugned disciplinary proceedings.
- 4) The decision of the 1<sup>st</sup> respondent in omitting or failing to reinstate the applicant's full salaries after calling her to work as well as creating an apparent indefinite suspension amount to continuous illegality for which the 1<sup>st</sup> respondent ought to be compelled to act according to the law.
- 5) The decision to act or implement the findings of the compliance report and the disciplinary committee which were themselves conducted unlawfully and without due regards to the applicants' right to be heard as well as the rules of natural justice shall

inevitably result into an abuse of powers and as such this highly probable outcome has to be avoided by prohibition.

The respondents opposed this application and they filed joint affidavit in reply through Hellen Wenene a legal counsel to the 1<sup>st</sup> respondent conversant with all matters pertaining to this application.

The respondents contended there was unprofessional conduct of imports inspectors and this prompted them to carry out an Audit Compliance report in January 2017. The said report implicated all the applicants as being involved in the unprofessional conduct of not following Imports inspection procedures.

That following receipt of the complaints from the Deputy Executive Director, the applicants were asked to submit written explanations over their unprofessional conduct exhibited in the Audit Compliance Report which they submitted by 9<sup>th</sup> April 2017.

The 3<sup>rd</sup> respondent reviewed the explanations and on 8<sup>th</sup> May 2017, he constituted Disciplinary Committee to receive and review defences of the applicants in accordance with UNBS Human Resource Manual, 2014.

That by letters dated 8<sup>th</sup> May 2017, the applicants were interdicted from office with half pay to pave way for investigations for a period of one month starting 11<sup>th</sup> May 2017 and ending 11<sup>th</sup> June 2017. The 3<sup>rd</sup> respondent constituted Disciplinary Committee and asked the applicants to submit written defences and invited them for hearings between 7<sup>th</sup> June 2017 and 8<sup>th</sup> June 2017.

The 3<sup>rd</sup> respondent extended the investigatory suspension period of the applicants by one month in order to allow the conclusion of investigations.

That upon the conclusion of the investigations into the alleged unprofessional misconduct, the applicants were recalled from investigatory suspension/interdiction by letters dated 5<sup>th</sup> July 2017 and they were re-instated into their jobs.

That on 13<sup>th</sup> July 2017, the disciplinary Report for the inspection of cases of unprofessional conduct was presented to the management of the 1<sup>st</sup> respondent Management requested that the investigations committee be strengthened and given two more weeks to provide necessary information and/or data to management and provide clarity on its recommendations under section 8 of the Disciplinary Report.

That on 11<sup>th</sup> September 2017, the addendum to the Disciplinary Report for the Inspection of cases of unprofessional conduct was presented to the management of the 1<sup>st</sup> respondent. At this meeting, it was clearly stated that the management had upheld the earlier findings of the Disciplinary Committee and the recommendations to be made were based on the upheld findings and the addendum.

That at the time of filing this application, there is no decision made by the 1<sup>st</sup> respondent to terminate or dismiss the applicants. Accordingly there is no decision in the circumstances of the instant case to merit grant of orders of judicial review.

That if any decision were to be made in future in relation to the employment of the applicants, the applicant's remedy would be to sue for damages for unlawful dismissal/termination before the labour officer/industrial court. Such a claim would not be by way of judicial review which is a preserve of cases where the aggrieved party has no alternative remedy.

That the general public believes that there is rampant corruption at the 1<sup>st</sup> respondent that is contributing to the importation into Uganda of substandard products. The 1<sup>st</sup> respondent's Audit Compliance report of 2017, the Disciplinary Committee hearings and its recommendations are focused at correcting the problem. It is therefore of natural importance and in the interest of justice that the 1<sup>st</sup> Respondent is given an opportunity to complete the disciplinary process to address this problem.

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

Three issues were framed by the applicant for court's determination;

- (1) *Whether the case is a proper case for Judicial Review?*
- (2) *Whether the decisions of the first respondent followed the correct procedure and were arrived at in accordance with the law?*
- (3) *Whether the Applicants are entitled to the remedies sought?*

I shall resolve this application in the order of the issues so raised but the respondents' counsel has raised some preliminary objections which will have to be addressed first. The applicants were represented by *Ms Claire Amanya and Nuwasasira Horae* whereas the respondents were represented by MMAKS Advocates.

### **Preliminary Objections**

#### ***Whether the Application as filed discloses a cause of action as against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents***

The 2<sup>nd</sup> Respondent is established under Section 4 of the **Uganda National Bureau of Standards Act, Cap 327 (the "Act")** with functions inter alia to declare standard specifications, certification marks and codes of practice, conduct general administration of the 1<sup>st</sup> Respondent, formulate and carry out the policies of the 1<sup>st</sup> Respondent and is empowered to do all things necessary for carrying into effect the provisions and purposes of the Act.

Whilst the 2<sup>nd</sup> Respondent is the governing body of the 1<sup>st</sup> Respondent, it has no legal capacity to sue or be sued. If Parliament intended so, it should have clearly stipulated so. On the contrary,

Section 2 (2) of the Act establishes that 1<sup>st</sup> Respondent as a body corporate with perpetual succession and a common seal, which can sue or be sued in its corporate name. The liabilities and obligations of the 2<sup>nd</sup> Respondent are all imputed on the 1<sup>st</sup> Respondent. This is because the Applicants were employed by the 1<sup>st</sup> Respondent and not the 2<sup>nd</sup> Respondent. The inclusion of the 2<sup>nd</sup> Respondent as a party to this suit was unnecessary, erroneous and misplaced. We therefore pray that the 2<sup>nd</sup> Respondent is struck off this suit with costs.

The Applicants were employed by the 1<sup>st</sup> Respondent and their contracts of employment were executed with the 1<sup>st</sup> Respondent. The disciplinary proceedings from which the instant Application arose were being conducted by the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent only being an agent of the 1<sup>st</sup> Respondent, a fact known to all the Applicants. On this basis, the 2<sup>nd</sup> Respondent should be struck off this Application with costs.

The respondent's counsel objected to the inclusion of the 3<sup>rd</sup> Respondent as a party to this Application. The office of the 3<sup>rd</sup> Respondent, the "Executive Director" of the 1<sup>st</sup> Respondent is established under Section 11 of the Act. Section 14A of the Act as amended provides thus;

*"14A Immunity of officials."*

*A suit, prosecution or other legal proceedings shall not be brought against the Director, a member of the council, a member of staff or an inspector and any other official in their capacity for anything done in good faith under this Act"*

He submitted that the Applicants have not anywhere in their Affidavits pleaded any particulars of bad faith as against the 3<sup>rd</sup> Respondent. This a fatal omission that cannot be remedied by submissions of Counsel for the Applicants. When **Justice Stephen Musota** considered a similar provision, Section 48 of the Financial Institutions Act, in the case of **Amandua & Ors v Bank of Uganda & Anor; Civil Suit No. 395 of 2006**, he held thus;

*"As rightly submitted by learned counsel for the defendant, the plaintiffs did not plead bad faith in their plaint nor did they prove that whatever the 1<sup>st</sup> defendant did was done in bad faith.*

*In Mwesigwa & Another Vs Bank of Uganda HCCS No. 588 of 2003 (Bamwine J.) (as he then was) held inter alia that:*

*"Under S.49 of the Statute, no suit shall lie against the Bank of Uganda or any of its officers for anything which is done or intended in good faith pursuant to the provisions of the statute. Accordingly Bank of Uganda is protected against suits arising out of seizures of Financial Institutions unless the aggrieved party is able to show that what the Bank of Uganda did was not in good faith."*

*Consequently I will find that in view of the reasons I have given herein above, I agree with the submissions by learned counsel for the defendant that the plaintiffs have no valid claim against Bank of Uganda. I will find issue 1 in the negative."*

According to counsel since the Applicants have not proved any bad faith in the actions of the 3<sup>rd</sup> Respondent, his inclusion as a party to this Suit is estopped by Section 14A of the Act and has no basis in law.

In any event, the Applicants were employed by the 1<sup>st</sup> Respondent and not the 3<sup>rd</sup> Respondent. The actions of the 3<sup>rd</sup> Respondent, if any, are those of an agent of a disclosed principal, the 1<sup>st</sup> Respondent, who is already a party to this suit. It was there submission that the 3<sup>rd</sup> Respondent was unlawfully and/or unnecessarily added to this Suit and should be struck off with costs.

The applicants counsel contended that the Council can be sued under section 8(1) of the Uganda National Bureau of Standards Act as the general governing body for the 1<sup>st</sup> respondent.

In respect of the 3<sup>rd</sup> respondent, the applicants counsel submitted that, the 3<sup>rd</sup> respondent can be sued for actions or omissions done in *malafide*. According to counsel the decision to dismiss the applicants shows *malafide* intent and arbitrary exercise of power.

It should be noted that the nature of proceedings for judicial review remedies sometimes be sought where some specific remedies can be made for the aggrieved persons i.e declarations against the specific entities.

It is sometimes acceptable to join the decision maker in order to clarify to the court their decision or the decision making process which is the subject of challenge or to enable the court given specific declarations in order to avoid condemning such decision maker unheard.

In the present case the applicants are seeking for an Order of Mandamus to compel the 2<sup>nd</sup> respondent or the 3<sup>rd</sup> respondent to reinstate the applicants as full employees as inspectors in the 1<sup>st</sup> respondent organisation.

The nature of such order being sought warrants the addition 2<sup>nd</sup> and 3<sup>rd</sup> respondent in order to give clear orders to the concerned bodies or office holders. Otherwise sometimes the judicial review orders may be given omnibus without any specific directive by court to any specific decision maker and may be misdirected and hence not complied with.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were properly joined to the judicial review proceedings.

### ***Whether the Application is properly before the Court without an affidavit in Support***

This Application was filed on 14<sup>th</sup> September 2018, being supported by the undated Affidavit of Irene Nakagya. By a letter dated 22<sup>nd</sup> September 2017, the 2<sup>nd</sup> Applicant unequivocally denied involvement in this Application and stated that her signature was forged. The said uncontroverted evidence of forgery being in respect of the Affidavits in Support of the Applications for the Interim Order, Temporary Injunction and Judicial Review.

*Copies of Nakagya Irene's letters dated 22<sup>nd</sup> September 2017, 25<sup>th</sup> September 2017 and printed telephone messages between Nakagya Irene and Ms. Claire Amanya, Counsel for the Applicants are attached to the Affidavit in Reply as "A (i)," "A (ii)" and "A (iii)" respectively.*

In the telephone messages referred to above, Counsel for the Applicants in retaliation unprofessionally called Irene Nakagya a **"snake, Judas Iscariot, betrayer, traitor, enemy of progress"**. Subsequently, by a letter dated 12<sup>th</sup> October 2017, Counsel for the Applicants requested Court to disregard Irene's evidence and strike out her Affidavit in Support of the Application.

Nakagya Irene deponed a Supplementary Affidavit filed in this Court on 19<sup>th</sup> February 2018 to set the record straight. She averred that the Affidavits in Support of this Application was neither written by herself nor shown to her before it was filed at Court.

The respondent's counsel submitted that the instant Application is not supported by an Affidavit in Support and cannot stand in law. In the case of ***Kasaala Growers Co-operative Society v Kakooza Johathan & Anor, Supreme Court Civil Application No. 19 of 2010***, their Lordships held thus;

*"I do agree with what this court had stated in Banco Arabe Espanal - vs. - BOU, Civil Appeal No. 8 of 1998, that;*

*"-- - - - a general trend is towards taking a liberal approach in dealing with defective affidavits. This is in line with the Constitutional directive enacted in article 126 of the Constitution that courts should administer substantive justice without undue regard to technicalities Rules of Procedure should be used as handmaidens of justice but not to defeat it."*

*However, a distinction must be drawn between a defective affidavit and failure to comply with a statutory requirement. A defective affidavit is, for example, where the deponent did not sign or date the affidavit. Failure to comply with a statutory requirement is where a requirement of a statute is not complied with. In my view, the latter is fatal."*

He submitted that the absence of an Affidavit in Support to the instant Application is fatal as opposed to being a mere technicality. The Supplementary Affidavits filed by the other Applicants herein cannot supplement a non-existent Affidavit in Support.

In the case of ***Kasaala Growers Co-operative Society v Kakooza Johathan & Anor (Supra)***, the Court concluded that once the Affidavit in Support was struck out, the Application was left without the requisite supporting Affidavit and was thereby rendered incompetent. He submitted that the instant Application is incompetent for not being supported by an Affidavit in Support and should be struck out with costs.

The applicant contended that the application was supported by supplementary affidavits of the other applicants since the said Nakagya never swore her affidavit in a representative capacity and therefore the absence of her affidavit does not affect the rest of the applicants who each swore an affidavit (Supplementary) in support of the application.

The absence of an affidavit does not necessarily render an application incompetent as counsel for the respondent has submitted. It may only affect it to the extent of the evidence but the application can stand on grounds of law which may not need any evidence to support them. See *Odongkara v Kamanda [1968] EA 210 or [1971] HCB 156*

In the present application, it is clear all the applicants have sworn affidavits in support (Supplementary) and the respondents indeed replied to the said supplementary affidavits. Therefore the application is properly before the court.

Secondly the said Nakagya does not deny signing except that she is merely contending that she never appeared before a commissioner for oaths or never signed in the presence of a commissioner for oaths.

What she alleges in paragraph 6 of her supplementary affidavit as a forgery is very suspect and it appears she stated that in the internal memo in order to save her employment or betray the cause of the rest.

The application was filed on 14<sup>th</sup> September 2017 and yet the internal memo is dated 22<sup>th</sup> September 2017. Indeed the lawyer noted on her letter dated 25<sup>th</sup> September 2017, “*at the time of filing documents on 14<sup>th</sup>/09/2017, you had not withdrawn instructions*”.

This court is satisfied on a balance of probabilities that she executed the said affidavit and her signature was never forged as she wanted this court to believe.

#### ***Whether the case is a proper case for Judicial Review?***

The applicants counsel submitted that this is an application for Judicial Review brought by a Notice of Motion brought under Rules 3 and 6 of the Judicature (Judicial Review Rules) S.I No. 11 of 2009, Sections 36 and 38 of the Judicature Act, Cap 13 Laws of Uganda, Article 42 of the Constitution of the Republic of Uganda.

According to the *Black's Law Dictionary at page 852*, 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.

In Uganda, the relevant laws pertaining the subject of judicial review are; the Constitution, the Judicature Act Cap 13 and the Judicature (Judicial Review) Rules 11/2009.

In *Ridge v Baldwin [1964] AC 40*, it was held that a decision reached in violation of the principles of natural justice especially one relating to the right to be heard is void and unlawful.

The applicant contend that they are seeking remedies set out under the Judicature Act are the remedies that are prayed for in this application and therefore this is a proper application for judicial review.

The respondents counsel submitted that this matter concerns private rights and they have cited the case of *Commissioner of Land v Kunste Hotel Ltd [1995-1998] 1 EA (CAK)*, Court noted that;

“Judicial review is concerned not with the private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that an individual is given fair treatment by an authority to which he is being subjected.”

The Applicants contend that this Application is premised on the 1<sup>st</sup> Respondent’s decision contained in its letter of 13<sup>th</sup> September 2017. The said letter informed each of the Applicants that Management of the 1<sup>st</sup> Respondent (the “Management”) had received the disciplinary report from the Disciplinary Committee and upon discussions resolved that they were in breach of the Human Resource and Procedures Manual 2014. In this letter, it also stated that the matter is forwarded to the 2<sup>nd</sup> Respondent for further management and the Applicants are requested to vacate their offices until the 2<sup>nd</sup> Respondent pronounces itself on the matter.

The said letter emanated from the Management meeting of 11<sup>th</sup> September 2017, where Management deliberated on the recommendations of the Disciplinary Committee on each of the Applicants and made resolutions on whether or not have the Applicants dismissed.

The 2<sup>nd</sup> Respondent, being the governing body of the 1<sup>st</sup> Respondent has never made a decision on whether the Applicants should be dismissed or reinstated in their positions. The 2<sup>nd</sup> Respondent was estopped from making a decision by an *ex parte* Interim Order of 23<sup>rd</sup> September 2017 issued on appeal by this Court.

The Applicants are therefore still employees of the 1<sup>st</sup> Respondent who are still receiving salary, a fact admitted by the Applicants in their submission.

It was their submission that since the 1<sup>st</sup> Respondent has never made a decision in the circumstances of the instant case to merit grant of orders of Judicial Review. The recommendations of the Disciplinary Committee and resolutions of Management of the 1<sup>st</sup> Respondent cannot form basis for an action in judicial review proceedings. The said recommendations and resolutions are not binding on the 2<sup>nd</sup> Respondent, which is the governing body of the 1<sup>st</sup> Respondent and makes the final decisions on behalf of the 1<sup>st</sup> Respondent.

In the case of ***Wakiso Transporters Tour & Travel Ltd & 5 Others vs Inspector General of Government & 3 Others; Misc. Cause No. 53 of 2010***, Court held that;

“This case yet again raises the issue as to whether or not these findings, recommendations, suggestions and observations as opposed to decisions can be a subject of the prerogative orders of certiorari. In the case of *DOTT SERVICES LTD Vs ATTORNEY GENERAL AND AUDITOR GENERAL (Misc Cause No. 125 of 2009)* (unreported) the Hon. Justice V.F Musoke Kibuuka discussed the distinction and held as follows:-

“*Certiorari issues to quash decisions made by a statutory body or by a public officer or an inferior court or tribunal. It cannot issue against mere findings, recommendations, suggestions or observations. In the instant application the report of the 2<sup>nd</sup> respondent against which the prerogative order is being sought clearly contains no decision that can be quashed by way of issuance of certiorari.....*” (emphasis added)

Similarly, in the case of *Akombe Gildon & Anor vs Uganda National Examinations Board, Misc. Cause No. 72 of 2015*; this Honourable Court held thus;

*“In the result, whereas the Respondent had the Minister’s authority to withhold the results, as she did, there is at the moment no definite decision on the part of the Minister of Education, on the basis of which this application can be considered on the orders sought”*

In light of the above authorities, we submit that the instant Application is grossly premature. The letter of 13<sup>th</sup> September 2017 does not contain a definite decision on the fate of the Applicants’ employment and the resolutions of the Management and recommendations of the Disciplinary Committee cannot sustain an action in Judicial Review.

The fate of the Applications was to be determined by the 2<sup>nd</sup> Respondents as clearly set out in the said letter. The Interim Order issued in this matter injunct the 2<sup>nd</sup> Respondent from making a decision that would be amenable to judicial review. Therefore the instant application is premature and not a proper case for judicial review and should be struck out with costs.

The respondents’ counsel contends that the substance of the claims herein and the remedies sought by the Applicants are issues which are a preserve of the labour office and/or Industrial Court, the issue of the unlimited jurisdiction of the High Court being immaterial.

Section 93 (1) of the Employment Act provides that the only remedy available to a person who claims an infringement of any of the rights granted under this Act is by way of complaint to a Labour Officer. This position was reiterated by the Supreme Court in 2010 *Former Employees of G4S Security Services Uganda Ltd v G4S Security Services Uganda Ltd, SCCA No. 18 of 2010*.

In *Uganda Broad Casting Co-operation v Ruthura Agaba Kamukama, Misc. Application No. 638 of 2014*, Hon. Justice Stephen Musota held that;

*“Much as this Court (High Court) has unlimited jurisdiction, if one looks at the intention of Parliament in conferring jurisdiction on the Labour Officer and the creation and operationalization of the Industrial Court with appellate jurisdiction it would be prudent if these two institutions are put to good use. This is our current court policy. Avoiding these institutions would be defeating the intentions of the legislature since the Industrial Court is now operational. I find it proper to refer this matter to the Labour Officer for appropriate handling.”*

The respondent’s counsel submitted that this application, being a disguised labour complaint, ought to have been filed before the Labour Office and not before this Honourable Court by Judicial Review. This Court has rejected such Applications for being an abuse of Court process. In *Catherine Amal v Equal Opportunities Commission, HCMA No. 233 of 2016*; Hon. Lady Justice H. Wolayo held that;

*“In effect, the applicant wants this court to believe that her failure to attend the disciplinary proceedings and the decision to terminate her employment contract give rise to two distinct causes of action. I am of a contrary view because her dismissal from employment is what gives her a cause of action is remedied by ordinary suit and not by judicial review. Her failure to attend the proceedings forms part of the evidence in a suit for wrongful dismissal but does not*

*give rise to a possible remedy in judicial review. The non-attendance of disciplinary proceedings and the final decision are closely interlinked.*

This point was considered by Hon. Justice Y. Bamwine as he then was in Miscellaneous Cause No. 93 of 2009 ***Machacha Livingstone and anor v LDC*** where the applicants were dismissed from employment and complained that they were not heard. The court held that the *applicants did not show lack of an alternative remedy or that the alternative remedy was ineffective whereupon the application for judicial review was dismissed.*

*Prerogative orders will only issue where there is no alternative remedy and the applicant has one. In the premises the first issue is answered in the negative. This issue disposes of the application and I need not belabor the remaining two issues. This application is accordingly dismissed with costs to the Respondent.”*

In reliance on the above authorities, the Applicants’ alternative remedy for the alleged unlawful termination/dismissal was not only available but also very effective. In the case of ***Microcare Insurance Limited vs Uganda Insurance Commission; Misc. Application No. 218 of 2009***; Justice Yorokamu Bamwine held thus;

*“From the authorities also prerogative orders, like mandamus sought herein, are available to an Applicant who demonstrates:*

*A clear legal right and a corresponding duty in the respondent;*

*That some specific act or thing, which the law requires a particular officer or body to do has been omitted to be done; or*

*Lack of an alternative remedy; or*

*Whether the alternative remedy exists but is inconvenient. Less beneficial, less effective or less effective”*

***(Oil Seeds (U) Ltd vs Chris Kassami (Secretary to the Treasury) HCMA NO. 136 of 2008)***

*...when all is said and done, I find that the Applicant has not demonstrated lack of an alternative remedy. They have not shown that any such remedy as exists herein is inconvenient, less beneficial or less effective...*

*...I should perhaps add that it is becoming increasingly fashionable these days to seek judicial review orders even in the clearest cases where alternative procedures are more convenient. This trend is undesirable and must be checked. I uphold the second objection and order as I should that as a matter of law, the Applicant first pursues the statutory remedy of appeal availed to it under Section 32 (4) of the Act against the Respondent’s refusal to grant it a license. Otherwise, the Applicant must fail for this reason on account of being premature in law and it fails. It is accordingly struck out.*

In light of the above authorities, the respondents contend that the Applicants’ claims of unlawful dismissal/termination, orders of payment of salary arrears, reinstatement into their jobs, terminal benefits, gratuity, general, exemplary and punitive damages, which are expressly denied by the 1<sup>st</sup> Respondent, could be a basis for a labour complaint before a Labour Officer/Industrial Court and not an action for judicial review.

The Applicants have not shown that the alternative remedy as exists herein is inconvenient, less beneficial or less effective. In fact, the Industrial Court has been fully operational since 2014 and judicial notice has been taken of its expeditious disposal of labour claims, such as those sought by the Applicants in this Application.

The respondents prayed that the entire Application be struck out with costs for being premature, an abuse of Court process and not being a proper case for Judicial Review.

Additionally, at page 17 of the Applications' submission, it is submitted that the Applicants' appeals against the 1<sup>st</sup> Respondent's alleged decision are still pending determination by the 1<sup>st</sup> Respondent. The Applicants, without awaiting the outcome of the alleged appeals, rushed to this Court to seek prerogative remedies.

The main issue of contention is whether there was a decision made by the respondent to the applicants to warrant an application for judicial review.

According to the applicants in their application before the court is that they are challenging the actions respondents lifting their suspension bay calling them back to work and yet maintain them on half pay.

The applicants are challenging the 1<sup>st</sup> respondent decision of subjecting them to an indefinite suspension or interdiction and to them this is an illegality or irrational in as far as the decision calling them back bore the necessary implication of conclusion of investigations as well as the end to any disciplinary proceedings.

They are also challenging the legality of disciplinary proceedings conducted on behalf of the 1<sup>st</sup> respondent by a one Jackson Mubangizi who never held any lawful office or status in the 1<sup>st</sup> respondent organisation.

The applicants are challenging the decision of the 1<sup>st</sup> respondent in omitting or failing to reinstate them to their full salaries after calling them back to work as well as creating an indefinite suspension which is an illegality.

The respondents further challenge the decision to act or implement the findings of the compliance report and the disciplinary committee which themselves were conducted unlawfully and without due regards to the applicants right to be heard as well as the rules of natural justice which shall result in an abuse of power.

The above grounds are clearly within the purview of judicial review and they do not in any way transcend into the law of Employment in order for the dispute to become an employment dispute so as to qualify to be handled by the labour officer or industrial court.

It is true the resultant decision once taken will end up as a labour dispute but the current dispute is to challenge the decision making process that will lead to the determination of this judicial review.

The argument by counsel for the respondent that there is no decision for judicial review is totally misconceived and devoid of merit.

The issue of whether there is an alternative remedy will also arise after the final decision is made but in the interim the applicant is entitled to challenge the decision making process before the resultant decision.

In Uganda, the principles governing Judicial Review are well settled. Judicial review is not concerned with the decision in issue but with the decision making process through which the decision was made. It is rather concerned with the courts' supervisory jurisdiction to check and control the exercise of power by those in Public offices or person/bodies exercising quasi-judicial functions by the granting of Prerogative orders as the case may fall. It is pertinent to note that the orders sought under Judicial Review do not determine private rights. The said orders are discretionary in nature and court is at liberty to grant them depending on the circumstances of the case where there has been violation of the principles of natural Justice. The purpose is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. *See; John Jet Tumwebaze vs Makerere University Council & 2 Others Misc Cause No. 353 of 2005, DOTT Services Ltd vs Attorney General Misc Cause No.125 of 2009, Balondemu David vs The Law Development Centre Misc Cause No.61 of 2016.*

For one to succeed under Judicial Review it is trite law that he must prove that the decision made was tainted either by; illegality, irrationality or procedural impropriety.

The 1<sup>st</sup> respondent as a public body is subject to judicial review to test the legality of its decisions if they affect the public.

***Whether the decisions of the first respondent followed the correct procedure and were arrived at in accordance with the law.***

In determining whether the decisions of the first respondent are in accordance with the law, consideration must be made to the three heads of Judicial Review. These were discussed in *Misc. Cause No. 46/2011 Alhaji Nasser Ntege Ssebagala v the Executive Director KCCA*, wherein it was observed that Judicial Review controls administration under 3 heads namely; Illegality, Irrationality and Procedural Impropriety.

#### ***ILLEGALITY***

The elements of illegality in the actions of the 1<sup>st</sup> respondent were depicted by the management committee which made a decision that the applicants be terminated from employment by issuing termination letters dated 13<sup>th</sup> September 2017. According to the UNBS Human Resource Manual, Clause 10.4 which governs disciplinary hearings, section 10.4.c provides "having heard from the employee and considering all the evidence the disciplinary committee SHALL advise management on the decision to be taken" and further under Section 10.4.d "Management SHALL consider the disciplinary report from the disciplinary committee and take appropriate action"

The disciplinary committee submitted its First REPORT FOR THE IMPORTS INSPECTION CASES OF UNPROFESSIONAL CONDUCT (Attached and marked "G" on the Respondent's Affidavit in Reply) with recommendations to the Management Committee that all the applicants be recalled and reinstated in service but served with a written warning. The Management ordered

that fresh investigations be carried out upon which an additional report- “ADDENDUM TO THE DISCIPLINARY REPORT FOR THE IMPORT INSPECTION CASES OF UNPROFESSIONAL CONDUCT” was produced. (Attached and marked “I” on the Respondent’s Affidavit in Reply).

The Addendum maintained their earlier recommendations that all the applicants be served with written warnings. The said report was presented to the management committee meeting on the 11<sup>th</sup> day of September 2017; however to the Applicants’ shock and dismay, the committee completely disregarded the said recommendations and instead reached a decision to dismiss the applicants.

Further, in the instant case, whereas all the Applicants appeared before the Disciplinary Committee with their written defences, none of them was ever allowed to interface with any of the witnesses brought to testify against them for purposes of cross examination. The Applicants were also never furnished with the single most piece of evidence used to implicate them that is, the Audit report of January 2017 authored by a one Leatitiah Namubiru, prior to their appearance before the said disciplinary Committee. The Disciplinary Committee’s report is clear that each party was heard in absence of the other and more evident is the fact that the evidence brought against the Applicants was instead used by the disciplinary Committee to assess the truthfulness of the Applicant’s defences which was grossly unfair.

The Disciplinary Committee regarded the evidence brought against the Applicants as truthful without questioning it’s the authenticity and veracity especially in respect of the said Audit Report of January 2017. It is further apparent that the author of the said Audit Report Leatitiah Namubiru, did not testify anything in regard to how it was generated yet it was the principal document used to charge them with offences and subject them to Disciplinary proceedings. In that regard it remains strange how the said Audit Report was introduced to the Disciplinary Committee without any witness presenting it. It is also apparent that the said Audit report was supposed to be used as a corroborative evidential document and not the basis of proving the charges brought against the Applicant as was the case. In that regard without any other evidence initial evidence brought against the Applicants the said Audit Report was rendered irrelevant and of no evidential value to implicate the Applicants. Therefore, it is our submission that the proceedings before the Disciplinary Committee were tilted against the Applicants in as far as their liability seemed to be afore one conclusion other than a question under inquiry. This was unfair and contrary to the rules of natural justice.

The role of the Management Committee in the UNBS disciplinary procedures is to receive the recommendations of the Disciplinary Committee and take an appropriate action which action MUST be forwarded to the 2<sup>nd</sup> Respondent for approval before implementation by the 1<sup>st</sup> respondent. In this case, the 1<sup>st</sup> respondent ordered the applicants to vacate office with immediate effect which amounted to a dismissal from employment, thereby implementing its own decision without the approval of the 2<sup>nd</sup> respondent.

The applicants counsel contended that the Applicants were entitled to sufficient disclosure and the right to cross-examination is part and parcel of a fair hearing and in as far as the same was denied to the Applicants, they were condemned unfairly.

*IRRATIONALITY:*

Diplock J in the case of *Council of Civil Service Union vs Minister for Civil Service (supra)* defined the element of irrationality as follows:-

“By ‘irrationality’ I mean what can by now be succinctly referred to as ‘Wednesbury unreasonableness’ enunciated in *Associated Provincial Picture Houses Ltd Wednesbury Corp [1947]2 ALL ER 680, [1948]1 KB 223*). It applies to a decision which is outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our Judicial System. To justify the courts’ exercise of this role, resort I think today is no longer needed to viscount Radliffs ingenious explanation in *Edwards (Inspector of Taxes) Vs Bairstow [1955]3 ALL ER [1956] AC 14* of irrationality as a ground for court’s reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision maker. ‘Irrationality’ by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.

The applicant’s counsel submitted that the Compliance Audit Report, its compilation, the resultant disciplinary hearing and its findings were done without due recourse to the law and was therefore irrational. The main objective of the said audit was to test the new systems put in place by the 1<sup>st</sup> respondent and not to assess individual performance.

The disciplinary committee report does not show any form of evaluation subjected to the evidence brought to implicate the applicants on the charges levelled against them. This is especially in respect of the audit report, which was not examined as to its authenticity and accuracy but was arbitrarily taken and treated as a measure upon which the applicants’ evidence was weighed. This clearly showed that the disciplinary committee acted in disobedience of the rules applicable and made a decision in bad faith. It is inevitable to infer that no reasonable tribunal could have forfeited, neglected, failed or ignored to evaluate evidence of one side and yet use that unscrutinised evidence to assess the truthfulness of the evidence of the opposite side. The disciplinary committee in so doing acted mala fide and as such was unreasonable.

Secondly, the disciplinary committee did not consider the various defences of the applicants as reiterated in their affidavit in rejoinder sworn by the 1<sup>st</sup> Applicant. The common denominator of the said defences was that the E-portal computer program used to implicate them was a new system which was still prone to errors and as such most of the discrepancies cited were as a result of “system errors” other than human default. This was even conceded to in the testimonies of both Letitia Namubiru and Andrew Othieno who were the key witnesses for the Bureau.

The applicants had further averred that most of the commodities lacked standards under the standards manual 2016 and as such could not be sampled or tested which explained the lack of action for Bedcovers, 3 phase generator sets, porcelain tiles, used Helmets, untreated mosquito nets, pneumatic tryres and worn clothing.

The major default of the said Audit report was that it was a “systems Audit” and not a “performance Audit”. Therefore, the report mainly focused on how effective the system was coping with the inspection requirements of the Bureau and not on how well the Applicants were performing their duties. Therefore, the issue of “personal performance” was extraneous to the

said audit report and as such the “Audit report” itself was an extraneous matter is investigating and assessing the conduct and performance of the Applicants.

Therefore in as far as the said “Audit report” was relied on as the main piece of evidence against the Applicants; the disciplinary committee took into consideration extraneous matters and as such was “Unreasonable” within the Wednesbury principle.

In *Baldwin & Francis Ltd Versus Patents Appeal Tribunal And Others [1959]2 All ER 443* Lord Denning MR held that no tribunal has any jurisdiction to be influenced by extraneous considerations or to disregard vital matters. That this amounted to acting in excess of jurisdiction which in turn amounted to an error of law for the simple reason that the tribunal did not determine according to law.

The audit was carried out solely by Laetitia Namubiru, an employee of the 1st respondent who had just been recruited and had not acquired sufficient training in the operations of the new system. None of the applicants was interviewed on their experience using the system and therefore were unable to explain to the auditor the challenges and system failures that were being experienced by themselves as supervisors and their supervisees. The audit report is null and void in as far as it was carried out solely by an inexperienced person and the applicants, who are Inspection Supervisors were not given an opportunity to be heard by the auditor and present viable explanations and challenges that their respective work stations were facing.

This aspect of unreasonableness also renders the decision null and avoid for being extraneous or in excess of jurisdiction.

***PROCEDURAL IMPROPRIETY:***

Lastly ‘procedural impropriety’ which is defined by Diplock as follows:-

“I described the third head as ‘procedural impropriety’ rather than failure to observe basic rules of natural or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head also covers also the failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.....”

It also covers non-observance of the Procedural rules in the empowering legislation and its test is whether the duty to act fairly and the right to be heard were observed. Articles 42 and 28 (1) of the Constitution provide for natural Justice in the determination of the applicant’s rights. The non-observance of the principles of natural justice renders the entire process a nullity. The essence of procedural impropriety is the violation of the Cardinal rules of natural justice “AUDI ALTERAM PARTEM”, the right of a party to a cause not to be condemned unheard and the rule against bias embodied in the Latin phrase “NEMO JUDEX IN RE CAUSA SUA” which means “no man shall be a judge in his own cause”.

The procedures contained in the Respondent’s Human Resource Management Policies and Procedures Manual are not statutory in nature but derive force from the prerogative powers of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. As such compliance with the said procedures is as much required as if the same were statutory.

According to section 10:2.7 of the Manual, a complaint is always lodged by a Departmental Head upon completion of counseling proceedings. In the instant case the complaint was lodged by the Deputy Executive Director who for all intents and purposes had no locus standi.

According to Section 10:6.1(c) 10:2(b), (c) and (d) of the Respondent's Human Resource Manual, the said complaint was supposed to be reviewed by the internal Audit Department and upon establishment of a prima facie case, an independent investigative panel would be set up by the Management committee. There was no indication that these procedures were followed in respect of the complaints brought against the Applicant.

The investigative suspension imposed on the Applicants on 8<sup>th</sup> May 2017 was lifted on 5<sup>th</sup> July 2017 and at that time the 3<sup>rd</sup> Respondent referred to it as an "interdiction". This was a period of about 2 months.

Section 63(2) of the Employment Act prescribes a maximum period of 4 weeks for an investigative suspension. And a punitive suspension under section 62(4) of the Employment Act, 2006 is for a duration of fifteen (15) days only. The Applicants were also subjected to half salary pay since 8<sup>th</sup> May 2017, until to date which is contrary to the provisions of section 63(1) of the said Act.

On 5<sup>th</sup> July 2017, the 3<sup>rd</sup> Respondent lifted the interdiction or suspension upon the Applicants pending the conclusion of disciplinary proceedings. This was not only procedurally contradictory but also enormously unfair to the Applicants in as far as the said act prima facie indicated the closure of all investigative and disciplinary measures against the Applicants, and as such purported continuation of those Proceedings amounted to a witch-hunt and was totally contrary to the letter and spirit of sections 62 and 63 of the Employment Act, 2006.

### ***Bias by the 1<sup>st</sup> respondent***

In principle, bias is assessed on "Actual" bias where the decision making body was influenced by partiality in reaching the decision and "apparent bias" where the circumstances exist which give reasonable apprehension or suspicion that the decision making body may have been biased.

In the instant case, both "actual" and "apparent" bias is depicted by the 1<sup>st</sup> respondent in their procedure followed to arrive at the decision to dismiss the applicants from employment. Apparent bias specifically by the management committee is illustrated in the Special Management Meeting held on the 13<sup>th</sup> day of July 2017 when the Disciplinary Committee were ordered to take an additional two weeks for further investigations in the matter. This points to the fact that the Management Committee expected a rather different recommendation. (A copy of the minutes of this meeting are attached and marked "H" on the Respondent's Affidavit in reply)

Actual bias in this matter is depicted by the Management Committee when it disregarded the addendum Disciplinary Committee report that recommended that the applicants be served with written warnings. The Management committee relied on extraneous matters such as the illegally conducted audit report which clearly falls out of the matters to be considered by the Management Committee in disciplinary actions as per the UNBS human resource manual and therefore occasioned a miscarriage of justice. Without stating clear reasons for doing so, the Management Committee made the recommendation to dismiss the applicants, which recommendation appears

to have considered matters that were extraneous to the Disciplinary Committee report and recommendations. This shows that the decision was pre-determined and the appointment of the Disciplinary Committee was a mere formality.

In light of the foregoing, we submit that the decision made by the Management Committee to order the applicant's out office, is tainted with both Actual and Apparent bias on the face of the records, in as far as Management without any clear reason passed resolutions contrary to what had been recommended by the disciplinary committee. Further, bias is depicted in the reliance on extraneous matters, not indicated in the disciplinary report. We pray therefore that this Honourable Court, finds the decision of the respondent, to be tainted with bias and therefore null, void and of no legal consequence.

### ***Right to be heard***

This position was restated in *Council of Civil Service Union v. Minister for the Civil Service 1985 AC 374* held that it's a fundamental principle of natural justice that a decision which affects the interests of any individual should not be taken until that individual has been given an opportunity to state his or her case and to rebut any allegations made against him or her.

In the applicants' case, they were denied the right to be heard during the carrying out of the Compliance Audit. The Auditor didn't accord the applicants the right to present their defences and explanations to the inconsistencies found at their work stations. *In case of Bwowe Ivan & Ors V Makerere University Miscellaneous Cause No 252 and 265 of 2013* wherein Hon. Justice Benjamin Kabiito labored to explain the universal principles of a fair hearing, he cited that the right to a fair hearing imposes on decision making bodies the duty to disclose all evidence and materials that are to be used against the affected party and the obligation to give the party an adequate opportunity to the affected party to rebut such evidence and materials which may be done through cross examination to test the truth and expose falsehoods of accusations levelled against him or her.

First and foremost, the applicants were not availed with a copy of the said audit report which raised the charges levied against them and this was in violation of the right to have complete disclosure of information to allow them adequately prepare and make their defences. In the instant case, the Disciplinary Committee and the Auditor did not give the applicants the right to cross examine the complainant in the matter as well as the auditor. The applicants prayed that the decision of the 1<sup>st</sup> respondent be quashed due to the fact that the applicant's right to a fair hearing was violated and as a result are null and void ab initio.

The respondents counsel in reply submitted that at page 9 of the Applicants' submissions, it is claimed that the elements of illegality in the actions of the 1<sup>st</sup> Respondent are contained in the decision to terminate the Applicants by issuing dismissal letters dated 13<sup>th</sup> September 2017. Clearly, the Applicants' submission is both misleading and misconceived. The letters dated 13<sup>th</sup> September 2017 are not dismissal letters by title and/or by content.

The Applicants correctly submit at pages 9 and 10 of their submissions that Clause 10.4 of the 1<sup>st</sup> Respondent's Human Resource and Procedures Manual, 2014 allows the 1<sup>st</sup> Respondent to undertake disciplinary action against its employees.

It was the submission of the respondent that the incidence of the 1<sup>st</sup> Respondent taking disciplinary action against its employees cannot be said to be illegal and/or not authorized by

law. In fact, the Applicants' submissions under the title "illegality" at pages 9 to 11 of their submissions are challenging the procedure followed at the disciplinary hearings as opposed to confirming that the 1<sup>st</sup> Respondent was not authorized by law to conduct the disciplinary hearings.

The respondents submitted that the 1<sup>st</sup> Respondent was at all material times authorized by law to conduct disciplinary proceedings against the Applicants and this ground cannot be a basis to sustain an action for judicial review. We accordingly pray that this Application is struck out with costs.

The Applicants contend that there was procedural impropriety in contravention of Articles 42 and 28 (1) of the 1995 Constitution of the Republic of Uganda, Section 63 (2) of the Employment Act and rules of natural justice in relation to the disciplinary hearings conducted by the 1<sup>st</sup> Respondent and that accordingly they were not given fair hearings.

The respondents submit that a disciplinary hearing need not apply the strict procedures applied in a Court of law. The cases of **General Medical Council of Medical Education and Registration of the United Kingdom vs Spackman (1943) 2 ALLER 337** and **Caroline Karisa Gumisiriza vs Hima Cement Limited H.C.C.S NO. 84 of 2015** both concluded that a disciplinary committee need not follow the procedure as applied in the Courts of law, but merely required that an employee appearing before it, is given an opportunity to defend him/herself without the requirement of the standards of a Court of law.

In the case of *Ebiju James v UMEME Ltd; H.C.C.S 133 of 2012*, Her Lordship Justice Elizabeth Musoke put the matter succinctly at page 7 of her Judgment wherein, in relation to the right to be heard, she states thus;

*"Such rights would include the right to respond to the allegations against him orally and/or in writing, the right to be accompanied at the hearing, and the right to cross-examine the defendant's witnesses or call witnesses of his own."*

As averred in paragraphs 6 to 14 of the Affidavit in Reply of Hellen Wenene, the Human Resource Department of the 1<sup>st</sup> Respondent received a complaint from the Deputy **Executive Director dated 3<sup>rd</sup> April 2017 which alleged unprofessional conduct of** imports inspectors from various stations detected by the Audit Compliance Report of January 2017 (**the "Audit Report"**) **(Annexure "C" to the Respondent's Affidavit in Reply).**

The Applicants aver that such a complaint can only be made by a Head of Department. They rely on Sections 10.2.1 and 10.5 (g) and (h) of the 1<sup>st</sup> Respondent's Human Resource and Procedures Manual, 2014 (the "Manual") in support of this submission. We submit that this claim is clearly misconceived.

The respondents' counsel contends that Section 10.2.1 of the Manual contemplates disciplinary action being commenced by a supervisor after counselling, which is not the case in the instant Application. A clear reading of Section 10.5 (g) and (h) of the Manual unmistakably shows that this Section only relates to management of minor offences. Management of serious and grave

offences as those allegedly committed by the Applicants in this the instant case is provided for under Section 10.6 as opposed to Section 10.5 of the Manual as alleged. Section 10.6 of the Manual does not specify the designation of the official responsible for making complaints of this nature. We submit therefore the Deputy Executive Director's complaint was lawfully and properly made.

The Audit Report referred to above implicated all the Applicants as being involved in the unprofessional conduct which included misdeclaration of inspected consignments, non-inspection of consignments, deliberate non-charging of the 15% CIF surcharge, testing fees and non-collection of samples, clearance of a number of consignments by use of one CoC, selective inspections, deliberate wrong categorization of consignments, non-sampling of consignments from East African Community (EAC) partner states, misuse of Pre-Verification of Conformity (PVoC) exemption letters, delays in clearance of consignments, non-inspection of groupage consignments and consignments inspected and released for personal use.

Following receipt of the complaints from the 1<sup>st</sup> Respondent's Deputy Executive Director, the Applicants were asked to submit written explanations over their unprofessional conduct exhibited in the Audit Compliance Report, which they submitted by 9<sup>th</sup> April 2017.

The 3<sup>rd</sup> Respondent reviewed the explanations and on 8<sup>th</sup> May 2017, he constituted a Disciplinary Committee to receive and review the defenses of the Applicants. By letters dated **31<sup>st</sup> May 2017**, the constituted Disciplinary Committee asked the Applicants to submit written defenses and invited them to appear before the Committee for hearings between **7<sup>th</sup> June 2017 and 8<sup>th</sup> June 2017**. The copies of the 1<sup>st</sup> Respondent's letters asking the Applicants to submit written defences and inviting them for disciplinary hearings are annexed to the Affidavit in Reply as "F (i)" to "F (viii)".

The Applicants duly submitted their written defenses and/or explanations to the Committee. Copies of the written defenses and/or explanations are annexed to the Applicant's supplementary witness statements. The Disciplinary Committee also summoned Mr. John Paul Musimani, Mr. Andrew Othieno, Ms. Leatitiah Namubiru, Ms. Innocent Namara, Mr. Matthias Kaleebi and Mr. Allan Mugisha to appear before it on 19<sup>th</sup> June 2017 as witnesses in relation to the disciplinary hearings of the Applicants.

The Applicants duly attended the disciplinary hearings whereat the charges of unprofessional conduct were read over to them and they were cross-examined. The Applicants also presented their oral defences at the hearings.

In light of the foregoing, the Applications were adequately informed of the allegations against them, seven (7) days before the disciplinary hearing. The Applicants responded to the allegations both in writing and orally at the hearings. Whilst the Applicants claim that they were not furnished the Audit Report of January 2017, nowhere in their written responses or the minutes is it indicated that they requested for the said report and the request was denied by the 1<sup>st</sup> Respondent.

Similarly, the Applicants never requested to cross-examine the author of the Audit Report or the other witnesses called at the hearings. These allegations in the Applicants' submissions are mere

afterthoughts that cannot invalidate the disciplinary proceedings conducted by the 1<sup>st</sup> Respondent against the Applicants.

On the authority of the cases of **General Medical Council of Medical Education and Registration of the United Kingdom vs Spackman (supra)** and **Caroline Karisa Gumisiriza vs Hima Cement Limited (supra)**, the Applicants were given an opportunity to defend themselves without the requirement of the high procedural standards of a Court of law.

The extension of the suspension period was bonafide and done in the interest of justice to all parties herein to ensure that the Disciplinary Committee thoroughly carries out the investigations and comes to just but not haste and unfounded conclusions.

The claims of bias are quite unfortunate. The Disciplinary Committee evaluated the accusations against the Applicants, the defenses presented by the Applicants and all the information provided by the witnesses and made recommendations that were presented separately for each of the Applicants.

On 13<sup>th</sup> July 2017, the Disciplinary Report was presented to the Management of the 1<sup>st</sup> Respondent. Management requested that the investigation committee be strengthened and given two (2) more weeks to provide the necessary information and/or data to Management and provide clarity on its recommendations under Section 8 of the Disciplinary Report. This cannot be a basis for “apparent bias” as alleged in the Applicant’s submissions. Management is not bound by the recommendations of the Disciplinary Committee and the claim that it disregarded some of the recommendations of the Committee is evidence of “actual bias” is misconceived.

It is also important to add that discrimination (although a total non-starter in this case) cannot be a foundation for a cause of action. The Applicants are party to individual and not to group employment contracts and thus fall to be judged on compliance or otherwise on those contracts on their own and without reference to others. It follows from the above that this aspect of the claim cannot form a basis of bias and must also fail.

The Applicants’ Counsel’s submission that some of the Applicants who withdrew from this Application **were promised preferential treatment in return for betrayal of other Applicants** is not supported by any evidence on record. This is an exceptional attempt by the Applicant’s Counsel to mislead this Honourable Court.

The 1<sup>st</sup> Respondent followed the disciplinary procedures laid out in its Manual and the laws of Uganda and accorded the Applicants a fair hearing. In light of the foregoing, the claim that the audit report, its compilation and disciplinary proceedings conducted by the 1<sup>st</sup> Respondent and the actions taken thereunder is tainted with procedural impropriety and without due process is misconceived, without merit and should be rejected.

The Claim that Eng. Jackson Mubangizi chaired the Disciplinary Committee without holding a lawful office with the 1<sup>st</sup> Respondent is to the least malformed and to the most an attempt to perpetuate another falsehood by the Applicants. Jackson was employed by the 1<sup>st</sup> Respondent on 1<sup>st</sup> December 1998. His employment was initially on permanent terms and is now on contractual terms as averred in the uncontroverted evidence of Hellen Wenene.

The 1<sup>st</sup> Respondent has not made any decision that is harsh and arbitrary without following due process to merit judicial review. This Application should therefore be struck out with costs.

On the facts at hand, the Applicants were all implicated as being involved in the unprofessional conduct which included misdeclaration of inspected consignments, non-inspection of consignments, deliberate non-charging of the 15% CIF surcharge, testing fees and non-collection of samples, clearance of a number of consignments by use of one CoC, selective inspections, deliberate wrong categorization of consignments, non-sampling of consignments from East African Community (EAC) partner states, misuse of Pre-Verification of Conformity (PVoC) exemption letters, delays in clearance of consignments, non-inspection of groupage consignments and consignments inspected and released for personal use.

The 1<sup>st</sup> Respondent notified the Applicants about the allegations against them, afforded them adequate time to prepare their defences and an opportunity to be heard orally and in writing. There is no irrationality in the actions the 1<sup>st</sup> Respondent undertook and this ground is also not available to the Applicants.

The submission that the Audit Report was not challenged but taken as gospel truth is erroneous, the truth being that each of the Applicant was allowed to ask to respond to the allegations in the Report, to which they did. The Disciplinary Committee evaluated findings of the Audit Report, the accusations against each of the Applicants, the oral and written defenses presented by the Applicants and all the information provided by the witnesses and made findings that were presented separately for each of the Applicants.

The Applicants contend that the accusations against the Applicants were as a result of computer system errors and not human default. Further that the Audit Report is null and void in as far as it was solely conducted by an inexperienced employee of the 1<sup>st</sup> Respondent without interviewing the Applicants about the challenging of using the E-Portal Computer program. This submission is clearly misconceived.

The Applicants who are well trained in the use of the E-portal Computer program cannot blame system errors for their alleged misconduct. In the event that the system was indeed prone to some errors, which is denied, the Applicants have not adduced any evidence to confirm that the system errors are the basis of the allegations of misconduct as against them.

The allegations of misdeclaration of inspected consignments, non-inspection of consignments, deliberate non-charging of the 15% CIF surcharge, non-collection of samples, clearance of a number of consignments by use of one CoC, selective inspections, non-sampling of consignments from East African Community (EAC) partner states, misuse of Pre-Verification of Conformity (PVoC) exemption letters, delays in clearance of consignments were not offences committed due to computer system errors.

The Applicants were required to record all their transactions in the E-portal computer System. This system could therefore be used to assess performance of the Applicants as well as other

employees of the 1<sup>st</sup> Respondent. The claim that the issue of personal performance was extraneous to the Audit Report is misconceived.

It was the contention of the applicant's counsel that the actions of the 1<sup>st</sup> Respondent were guided by reason or fair consideration of the facts. Additionally, the general public believes that there is rampant corruption at the 1<sup>st</sup> Respondent that is contributing to importation into Uganda of substandard products injuring the safety and health of people they are supposed to protect. The 1<sup>st</sup> Respondent's Audit Compliance Report of 2017, the Disciplinary Committee hearings and its recommendations and the 1<sup>st</sup> Respondent's Management recommendations are focused at correcting this problem.

It is therefore of national importance and in the interest of justice that the 1<sup>st</sup> Respondent is given an opportunity to complete the disciplinary process to address this problem. On this basis, the disciplinary proceedings being conducted by the 1<sup>st</sup> Respondent cannot be said to be irrational or unreasonable. The respondents prayed that this Application is struck out with costs.

#### Determination

The circumstances as set out in the application are quite peculiar than the ordinary disciplinary proceedings. This court has had to critically examine the purpose of the intended disciplinary proceedings and how they were conducted.

The 3<sup>rd</sup> respondent extended the investigatory suspension period of the applicants by one month in order to allow the conclusion of investigations.

That upon the conclusion of the investigations into the alleged unprofessional misconduct, the applicants were recalled from investigatory suspension/interdiction by letters dated 5<sup>th</sup> July 2017 and they were re-instated into their jobs.

That on 13<sup>th</sup> July 2017, the disciplinary Report for the inspection of cases of unprofessional conduct was presented to the management of the 1<sup>st</sup> respondent Management requested that the investigations committee be strengthened and given two more weeks to provide necessary information and/or data to management and provide clarity on its recommendations under section 8 of the Disciplinary Report.

That on 11<sup>th</sup> September 2017, the addendum to the Disciplinary Report for the Inspection of cases of unprofessional conduct was presented to the management of the 1<sup>st</sup> respondent. At this meeting, it was clearly stated that the management had upheld the earlier findings of the Disciplinary Committee and the recommendations to be made were based on the upheld findings and the addendum.

The 3<sup>rd</sup> respondent recalled all the suspended staff from interdiction on 5<sup>th</sup> July 2018. The effect of the recall would ordinarily mean that they have concluded the investigations and the parties are absolved. But this appears never to have been the case since in the same letter they indicated that they are awaiting completion of the disciplinary process.

It would appear that indeed, the investigation process was completed and the disciplinary committee had been satisfied except that the management was not satisfied with the findings of the investigation report and the proposed disciplinary actions to be taken.

The proposal to strengthen the disciplinary committee was intended to achieve a hidden objective and or guide proceedings to arrive at a pre-determined outcome of the disciplinary proceedings.

The applicants had a legitimate expectation that upon conclusion of the whole process they would be redeployed to their positions. The actions of the 1<sup>st</sup> respondent of making the investigation achieve a given outcome of dismissing the applicants' makes the whole process of disciplinary action look suspect.

The applicants were obliged to appear and legitimately expect that the respondents would respect the findings of the disciplinary committee and not to subject the proceedings of the investigations to any control or guide it in directing the investigations towards a set outcome.

The recall of the applicants from the interdiction and redeployment meant that the outcome of the investigations did not establish the any culpability. The actions of the 1<sup>st</sup> respondent's management to force a further investigation by disciplinary committee created some suspicion to the whole process.

It would appear that the Management Committee of the 1<sup>st</sup> respondent was exercising its powers for improper purposes. Improper purposes may include malice or personal dishonesty on the part of officials making the decision and mainly arising out of mistaken interpretation by a public authority of what it is empowered to do, and sometimes contributed to by an excess zeal in the public interest.

It appears they wanted a given outcome of the investigation in order to make a statement to the public as indicated in the affidavit that “ *the general public believes that there is rampant corruption at the 1<sup>st</sup> respondent that is contributing to importation into Uganda of substandard products*”

The disciplinary process were geared towards appeasing the general public or make a general statement to the public that the 1<sup>st</sup> respondent was indeed fighting corruption and to that effect some people had to be fired by hook or crook.

The powers of the Management committee was to consider the disciplinary report as provided under the human resource manual and not to reconstitute the disciplinary committee under the guise of providing clarity on recommendation to enable management make informed decisions.

This illegality taints the whole process and this court does not agree with the reason advanced by the respondents and whatever was agreed to in that meeting was intended to perpetuate an illegality.

The effect of the complaint initiated from the top management-Deputy Executive Director downwards to the Head Human resource equally influenced the nature of investigations and this meant that certain procedures were omitted. There is no evidence of involvement of the respective heads of departments in the investigation in order to establish prima facie case for disciplinary action.

The major default of the said Audit report was that it was a “systems Audit” and not a “performance Audit”. Therefore, the report mainly focused on how effective the system was coping with the inspection requirements of the Bureau and not on how well the Applicants were performing their duties. Therefore, the issue of “personal performance” was extraneous to the said audit report and as such the “Audit report” itself was an extraneous matter is investigating and assessing the conduct and performance of the Applicants.

It appears this contention was never properly responded to by the respondents. The applicants had understood the audit to be in respect of the newly introduced systems against their respective performance. It would erroneous and illegal to victimise the applicants over failures of the system in order to be used as a performance audit in a bid to make a statement on corruption in the entire organisation.

There were inherent errors in the system and the report confirms that the inspection was made visually and the results of the inspection was done manually by the inspectors on the given Notebook and then later entered into the E-portal system.

The use of such a report to punish the applicants would indeed be very unfair and an illegality if the systems are not corrected to be used or applied in a proper manner.

The decisions made on the 13<sup>th</sup> day of September 2017 against the applicant based on a second disciplinary report (addendum) were tainted with illegality. The same could not be the basis of ordering the applicants to vacate their positions

### ***ISSUE THREE***

#### ***What remedies are available to the applicant?***

The ever-widening scope given to judicial review by the courts has caused a shift in the traditional understanding of what the prerogative writs were designed for. For example, whereas *certiorari* was designed to quash a decision founded on excess of power, the courts may now refuse a remedy if to grant one would be detrimental to good administration, thus recognising greater or wider discretion than before or would affect innocent third parties.

The grant of judicial review remedies remains discretionary and it does not automatically follow that if there are grounds of review to question any decision or action or omission, then the court should issue any remedies available. The court may not grant any such remedies even where the applicant may have a strong case on the merits, so the courts would weigh various factors to determine whether they should lie in any particular case. See *R vs Aston University Senate ex p Roffey [1969] 2 QB 558*, *R vs Secretary of State for Health ex p Furneaux [1994] 2 All ER 652*

The applicants have satisfied the court that the decision of the respondents relying on the addendum to dismiss them or order them to vacate their offices or positions is hereby quashed.

The 1<sup>st</sup> respondent should only consider the original disciplinary report in arriving at any decisions to be made against the applicants and in order to conclude the disciplinary process.

The applicants have not made out any case for damages to be award in their affidavits in support and but the same has been made in their submissions.

*Plaintiffs (applicants) must understand that if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and so to speak, throw them at the head of the court, saying, "This is what I have lost, I ask you to give these damages" They have to prove it. See **Benedicto Musisi vs Attorney General HCCS No. 622 of 1989 [1996] 1 KALR 164 & Rosemary Nalwadda vs Uganda Aids Commission HCCS No.67 of 2011***

The applicants are entitled to their full pay for the salaries and other allowances until the disciplinary process is concluded.

### **Punitive Damages**

The applicants have not set out any evidence to justify the award for punitive and exemplary damages.

The applicants are awarded costs of this application.

I so Order.

**SSEKAANA MUSA**  
**JUDGE**  
**20<sup>th</sup>/12/2018**