THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 433 OF 2019

APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY

NAKISITA LATIFAH……APPLICANT

(Suing through her next friend Ms. Lubwama Babra Nakku)

VERSUS

BOARD OF GOVERNORS - KIBULI SECONDARY SCHOOL……RESPONDENT

BEFORE: HON. LADY JUSTICE ESTA NAMBAYO

RULING

Nakisita Latifah (hereinafter referred to as the Applicant), through her next friend Ms. Lubwama Babra Nakku, brought this application by Notice of Motion under **Article 42 of the Constitution of the Republic of Uganda, S.36 and S.38 of the Judicature Act, Cap.13 as amended**

by S.3 of the Judicature (Amendment) Act 2002 and Rules 3, 4, 5, 6, 7 of the Judicature (Judicial Review) Rules, 2009, against the Board of Governors - Kibuli Secondary School (hereinafter referred to as the respondent) seeking for declarations and orders of this Court that:

a) The purported dismissal of the Applicant by the Respondent was illegal, irregular and void ab initio and therefore a violation of the principles of natural justice.
b) An order of certiorari to quash the decision of the Respondent of dismissing the Applicant from school without being afforded an opportunity to be heard and/or without a reasonable cause.
c) An order that the Respondent pays damages for wrongfully suspending the Applicant indefinitely, and causing her to suffer anxiety, mental distress and inconvenience.
d) And that costs of this Application be provided for.

The grounds of this application are laid out in the affidavit in support of the application deponed by Ms. Lubwama Babra Nakku (next friend to the Applicant) attached hereto which have been read and relied upon but briefly are that:

a) The Applicant was in her senior two in third term at Kibuli Secondary School when she was indefinitely suspended.
b) The alleged offence leading to her suspension was said to have been committed in the month of July 2019 in second term.

c) At the end of second term, when the Applicant's parent went to collect her from school, she was given the end of term bank slip for paying third term school fees and the Applicant's property. There was no mention made of any disciplinary case against the Applicant to the parent or the Applicant.

d) On the 14th/09/2019 the Applicant paid Ugx. 823,000 which was part of her school fees for third term and reported back to school for third term on the 15th/09/2019.

e) On the 19th/09/2019, the Head teacher of the Respondent called the Applicant's mother and advised her to pick the Applicant from school on grounds that she was on indefinite suspension for a crime committed in second term. Upon reaching the school, the parent was instructed to take her daughter and leave the school premises immediately until further notice.

f) The Respondent without any notice to the Applicant to show reasonable cause and/or affording the Applicant an opportunity to be heard, suspended the Applicant indefinitely with effect from the 23rd September 2019 to date.

g) The Respondent arbitrarily suspended the Applicant indefinitely without investigating and verifying the allegations of the school matron; Nalwada Christine, which formed the basis of the indefinite suspension.

h) The impugned decision of the Respondent to indefinitely suspend the Applicant without giving her an opportunity to be heard was high handed, illegal and done in total disregard to the principles of natural justice and the provisions of the Constitution of the Republic of Uganda, 1995.

i) It is just, fair and equitable that this application be granted.

The Respondent filed the Affidavit in reply opposing the application.

When the matter came up for hearing, Learned Counsel Wandera Ismail together with Samson Wamimbi appeared for the Applicant while Counsel Abbas Bukenya represented the Respondent.

Counsel for the Applicant raised a preliminary objection on the affidavit in reply, stating that it offended Order 19 rule 3 of the CPR in that it did not indicate whether the facts in the affidavit are within the affirmant's knowledge or information and secondly, that the affirmant relies on documents which he cannot verify the source and the circumstances under which they were made. Counsel singled out annexure "B", "C", "D" & "E" to the Respondent's affidavit in reply. He prayed that the Respondent's affidavit be struck off the court record. Court advised Counsel to frame the objection as the first issue so that it is addressed when Court is dealing with the merits of the case.

The following Issues were set out for determination by Counsel for the Applicant:

1. Whether the Respondent's affidavit in reply is tenable at law
2. Whether the Respondent's decision and action can be challenged in a court of law
3. Whether the Respondent acted legally, rationally and properly in suspending or arriving at the decision to indefinitely suspend the Applicant from school
4. Whether the Applicant is entitled to the reliefs sought

Counsel for the Respondent raised two issues set out as follows:

1. Whether the application raises any justification for judicial review
2. Whether the Applicant is entitled to the remedies sought in the application

By answering the second and third issues set out by Counsel for the Applicant the first issue set out by Counsel for the respondent will be covered. So, I will first address the first issue on the preliminary objection and if necessary, consider the second and then the third issues set out by counsel for the Applicant and thereafter, I will look at the remedies. I believe this way, all the issues raised will be addressed.

Issue 1: Whether the Respondent's affidavit in reply is tenable at law

Counsel for the applicant submitted that the respondent's affidavit in reply offends ***Order 19 Rule 3 of the Civil Procedure Rules*** which provides that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his or her belief may be admitted, provided that the grounds thereof are stated. He explained that the respondent's affirmant does not indicate whether the facts in the affidavit are within his knowledge or information and that the affirmant relies on documents that he cannot verify the source or circumstances under which they were made. Counsel pointed out documents marked as annexures "B"," C"," D" and "E" attached to the respondent's affidavit in reply. Counsel for the Respondent made no response to this issue.

I have looked at the said documents and the paragraphs relating to them. I have also looked at paragraph 22 of the affidavit in reply. The affirmant clearly states what is to his knowledge and what is to his information. He specifically refers to annexures B- E to be to his information. I find no merit in the preliminary objection raised and it is hereby overruled.

Issue two: ***Whether the Respondent's decision and action can be challenged in a court of law.***

Counsel for the Applicant submitted that the Respondent is a public body and therefore under Art. 42 of the Constitution, it is enjoined to deal with individuals appearing before it justly and fairly. Anyone not satisfied with the treatment of the public body which in this case is the Respondent, has a right of action by way of judicial review under s. 36(1) of the Judicature Act.

Counsel further submitted on the essence of the remedy of judicial review, pointing out that prerogative orders are remedies for the control of the exercise of power by those in public offices and that judicial review controls administrative action under three heads of illegality, irrationality and procedural impropriety. He relied on the cases of ***John Jet Tumwebaze –vs – Makerere University Council and 3 others Civil Application No. 353 of 2005, Nazarali Punjwani vs Kampala District Land Board & Anor; HCCS No. 07 of 2005*** and; the case of ***Amiran Enterprises Ltd vs Uganda revenue Authority HCMA 06 of 2010*** where

Kiryabwire, J, (as he then was) observed that:

"it must always be borne in mind that prerogative orders are discretionary in nature and the Court must act judicially and according

to well settled principles. Such principles may include common sense and justice; whether the application is meritorious; whether there is reasonableness; vigilance and not any waver of rights by the Applicant. It must be remembered that prerogative orders look to the control of the exercise and abuse of power by those in public offices, rather than at providing final determination of private rights which is done in normal civil suits"

Counsel explained that in this case, the Respondent's actions and decision taken against the Applicant in respect of the indefinite suspension from school are subject to judicial review by this court.

In reply, Counsel for the Respondent submitted that this application is not properly before this court. He explained that regulation 21 of the Education (Board of Governors) regulation provides that;

"the Head teacher of a school shall, when considered expedient, in the interest of the school, exclude, suspend or expel a student from attendance at school and shall immediately report any such exclusion, suspension or expulsion to the Board and the Chief Education Officer for consideration and recommendation to the Minister whose decision on the matter shall be final"

Counsel submitted that according to paragraph 14 of the affidavit in reply, the suspension was interim pending the decision of the full Board,

which had statutory mandate to make it indefinite or not. Counsel relied on paragraph 2 of annexure "G", the letter of suspension written by the Head Teacher stating that;

"the administration is hereby requesting you to personally take your daughter back home for indefinite suspension pending the final decision of the Board"

He explained that the context in which the letter was written did not amount to an indefinite suspension but a procedural matter in the event of an indefinite suspension sanction by the Board. Counsel also relied on **S.91 of the Evidence Act** which provides that the meaning of the word is derived within and not outside, the case of ***Sewanyana Jimmy – vs- Kampala International University HCMC 207 of 2018*** where it was held that;

"where there exists an alternate remedy through statutory law, then it is desirable that such statutory remedy should be persued first. A court's inherent jurisdiction should not be invoked where there is specific statutory provision which would meet the necessities of the case. This is the only way institutions and their structures will be strengthened and respected" and S.15(2) of the Education Act No. 13 of 2008 which gives a remedy of not going to Court but to appeal the decision to the education Officer.

Counsel then submitted that the Applicant did not demonstrate in her application and in the affidavit in rejoinder that she exhausted all avenues prior to bringing this application to court. He went on to submit that the internal mechanisms of the Act had to be exhausted first, but before that could happen, the Applicant rushed to Court. Counsel prayed that Court finds that this application is premature and dismisses it with costs.

Resolution

This application was brought under Article 42 of the Constitution, S.36 and S.38 of the Judicature Act and the Judicature (Judicial Review) Rules, 2009.

In the case of **Kuluo Joseph & others vs the Attorney General & 6 others Miscellaneous Application No. 106 of 2010**, Yorokamu Bamwine J, (as he then was), observed that:

"judicial Review, involves the assessment of the manner in which the decision is made. The jurisdiction is exercised in a supervisory manner, not to vindicate the rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality."

In **Sylvia Nakitto versus The Management Committee of St. Lawrence Citizens High School (Creamland Campus-Nabbingo) MC No. 15 of 2017.**

Justice Masalu Musene held that:

"The powers of Judicial Review by the High court do not only cover Judicial and Quasi-Judicial bodies but also Administrative decisions and actions of statutory bodies, authorities or persons exercising Statutory Authority. The Respondent in this case, St. Lawrence and its Management Committee are created by the Education (Pre-Primary, Primary and Post Primary) Act of 2008 to manage a school declared or authorized by the Ministry of Education as enshrined in the Act. All schools and institutions of Higher learning are governed and licenced under the Education Act and the Regulations made there under. There is no distinction between private or government owned schools as far as the laws of Uganda, including the Supreme Law, (the Constitution) are concerned. St Lawrence Citizens High School, duly licenced to operate in Uganda under the Education Act and Regulations there under is therefore a body whose actions are subject to judicial Review." See also the case of **Harriet Grace Bamale through next Friend Vrs. The Board of Governors Makerere College (1993) KALR 10.**

The purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he/she has been subjected to. ***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.***

In the case of **Oyaro John Owiny versus Kitgum Municipal Council MC NO. 0007 of 2018** Justice Mubiru observed that in Judicial review a person who has been affected by a particular administrative decision, action or failure to act by a public authority, may make an application to the High Court, which may provide a remedy if it decides that the authority acted unlawfully.

In this case, the Respondent being the Board of Governors Kibuli Secondary School created by the Education (Pre-Primary, Primary and Post Primary) Act of 2008 under S.28 to manage a school authorized by the Ministry of Education under the Act and Regulations there under, is a body whose actions are subject to judicial Review.

With due respect to Counsel for the respondent, **S. 15 of the Education Act** that he relied on has nothing to do with this matter before court. It is concerned with the removal of a teacher's name from the register. Even then there is no S.15(2) d of the Education Act, No. 13 of 2.

Counsel's submission that the above provision of the law gives the Applicant a remedy of not going to court but appeal to the Education Officer is cited out of context.

However, ***regulation 15(2) d of the Education (Management Committee) Regulations*** provides that;

"it shall be the duty of the Head teacher to exclude any pupil from school, after consultation with the school disciplinary committee, which committee shall comprise all the members of the teaching staff of the school to deal with cases of suspensions or to consider cases of expulsion of pupils from school"

Under regulation 21(f) of the Education (Board of Governors) Regulations;

"the head teacher of a school shall, when considered expedient in the interest of the school, exclude, or suspend a student from attendance at school and shall immediately report any such exclusion or suspension to the Board and the Permanent Secretary, Chief Administrative Officer or Town Clerk for consideration and recommendation to the Minister or District Secretary for Education as the case may be, whose decision on the matter shall be final"

In this case, there is no evidence to show that the Respondent's Head teacher suspended the Applicant after consultation with the school disciplinary Committee, neither is there evidence to show that after excluding the Applicant from attendance at school the relevant authorities namely; the Permanent Secretary, the Chief Administrative Officer or Town Clerk were notified for consideration of the matter and recommendation to the Minister or District Secretary for Education for decision making.

Therefore, it is my considered view that the Respondent's decision making process of indefinitely suspending the Applicant without following the right procedure and actions can be challenged in a court of law. The argument by Counsel for the Respondent that the Applicant did not exhaust the internal mechanisms before coming to Court is not tenable. The Head teacher did not follow the right procedure as already shown above. The right of Appeal to the Education officer in Charge of education in the local Government envisaged under regulation 15(2) e of the Education (Management Committee) Regulations comes after the decision of the management committee, which would be the decision of the Board in this case. Unfortunately, this matter was messed up by the head teacher indefinitely suspending the Applicant without following the right procedure. In my view, after such a mess the Head teacher had nothing to refer to the board and indeed, there is no evidence of any referral of the Applicant's case to the board.

Therefore, it is my finding that this case is properly before this court for judicial review.

Issue Three: 3. Whether the Respondent acted legally, rationally and properly in suspending or arriving at the decision to indefinitely suspend the Applicant from school

Judicial Review can only be granted on three grounds, namely illegality, irrationality and procedural impropriety. This has been emphasized in many cases, including by the Court of appeal of Uganda in **Aggrey Bwire vs Attorney & another [2009] 1, U.L.R 240,** and in the cases of ***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.***

It is emphasized in the above cases that procedural impropriety is a procedural ground which aims at the decision making process rather than the content of the decision itself.

The concern of court in this case is whether a proper process and procedure was followed to indefinitely suspend the applicant.

Counsel for the applicant submitted that the applicant was not informed of any offence she had committed and was never heard by the disciplinary committee of Kibuli Secondary School. He explained that

failure to act with procedural fairness was not proper and was a violation of Natural Justice.

From the affidavit in reply, under paragraphs 8,14, and 15, the Applicant had reported back to School for her third term, when she was suspended without her case being taken before the disciplinary committee for consideration. According to annexure 'B' to the affidavit in reply, the Applicant was made to fill in a disciplinary form committing herself to have stolen sugar in July, 2019. Annexure "C" is a statement by the Applicant dated 29th/7/2019. In this statement she states that:

"***I have been caught by Swagg Maama when I'm catchng in her case with her tin of sugar when I was going to get some which I have not been doing before but she is accusing me that I have been doing. Yesterday, she cried that I stole her money and sugar but which I have not been doing and which I have not done"***

Counsel for the Respondent submitted relying on paragraph 14 of the affidavit in reply that the suspension was interim pending the decision of the full Board, which had the statutory mandate to make it indefinite or not. He relied on the letter that was issued by the head master of the School in regard to the suspension (annexure "G"). He explained that the context in which the letter was written did not amount to an indefinite suspension but it was a procedural matter in the event of an indefinite suspension to be sanctioned by the Board.

I have looked at Counsel's submissions and the evidence on the court record. The letter that was written by the Head teacher of the Respondent to the Applicant clearly states that the suspension was **indefinite,** pending the final decision of the Board of Governors.

I have already shown that the head teacher did not follow the provisions of **regulation 15(2) d of the Education (Management Committee) Regulations and regulation 21(f) of the Education (Board of Governors) Regulations** which deal with suspension of students. This makes the suspension of the Applicant in whatever form illegal.

All that happened was that the Head teacher received a Disciplinary case form, statements from the complainant and the Applicant and he then went ahead to suspend the Applicant. It would appear that the Head teacher did not even read through the documents that the Matron presented to hm. Had he read the documents he would have realized that the information presented needed a lot of issues to be clarified or paid attention to before a student is suspended from school. For instance, the Applicant stated that:

"***Yesterday, she (Shadia) cried that I stole her money and sugar but which I have not been doing and which I have not done"***

Towards the end of this statement, Latifah (the Applicant) states that the matron had caned her upon Shadia's complaint to the matron against

her and that Shadia (the complainant) had told the Applicant that the caning was not enough, she wanted the Applicant suspended from School. The disciplinary form (annexure "B") has a provision where a teacher responsible is supposed to sign. There is no signature in this provision. The teacher responsible did not sign. The Applicant was not heard. The disciplinary Committee was not consulted thereby making the whole procedure followed by the head teacher irrational and procedurally improper.

In **Misc. Cause No. 46/2011 Alhaji Nasser Ntege Ssebagala Vrs. The Executive Director KCCA.** It was observed that Judicial Review controls administration under 3 heads; Illegality, Irrationality and Procedural Impropriety. Under illegality, the test is whether the decision maker acted within the law, Irrationality accrues when the decision made was so outrageous in its defiance of logic or acceptable normal standards that no person in his normal senses would have arrived at such a decision and under procedural Impropriety – the rules of natural justice and fairness have not been observed by the decision maker to the prejudice of the affected person. The other party must be heard and not condemned unheard – **Audi Alterem Partem** (Let the other side be heard as well).

In the instant case, the Head teacher did not act within the law, there was no basis for the Head teacher to suspend the Applicant as he did

not consult the disciplinary committee, the rules of natural justice were not followed, the Applicant was not heard.

In the case of **Ridge Vs Baldwin & Others** [**1964] AC 40,** it was held that:

> ***"even if the respondents had power to dismiss the appellant without complying with regulations, they were bound to observe the principles of natural justice, and that a decision reached in violation of the principles of natural justice, especially the one relating to the right to be heard, is void and unlawful."***

I find that the Respondent's suspension of the Applicant was illegal, irregular, procedurally improper and a violation of the principles of natural justice.

Remedies

Certiorari.

The Applicant is seeking an order of certiorari to move this Court to quash the decision and orders of the respondent suspending the applicant indefinitely from school without according her a right to be heard. In the case of ***John Jet Tumwebaze vs Makerere University (supra)*** the Court stated that an order of certiorari issues to quash a

decision which is ultra vires or ciliated by an error on the face of the record.

I have already made a finding that the impugned decision and orders were made by the Head teacher of the respondent in total disregard of the rules of natural justice, were illegal, irrational and procedurally improper. This court therefore, has the discretion and the power to quash the said order. In the circumstances;

a) An order of certiorari to quash the decision of the Respondent to suspend the Applicant indefinitely from school without being afforded an opportunity to be heard and/or without a reasonable cause is hereby issued.

Damages

b) The Respondent prayed for damages for wrongfully suspending the Applicant indefinitely, and causing her to suffer anxiety, mental distress and inconvenience.

   Rule 8 of the Judicature (Judicial Review) Rules, 2009 permits this court to make an order for damages.

   Justice Stephen Musota in the case of ***Kampala University- Vs - National Council for Higher Education MC No. 053 of 2014*** observed that:

"***Damages that can be awarded under rule 8 are those that are not proven by detailed material facts or require one to set out necessary particulars. These are the type of damages envisaged under Rule 8 (2) of the Judicature (Judicial Review) Rules, 2009 which states that:***

"(2) Rules 1 to 5 of Order VI of the Civil Procedure Rules shall be applied to a statement relating to a claim for damages as they apply to a pleading."

The provisions of order 6 relate to the pleading of all material facts and the requirement to set out necessary particulars. Therefore, an application for judicial review cannot support a claim for general, punitive and exemplary damages. It appears the type of damages envisaged under the rules could be special damages only."

In the supreme court decision of ***Charles Harry Twagira Vs Attorney General and 2 others Civil Appeal No. 4 of 2007*** relied on by Musota, J (as he then was) in the case of ***Kampala University- Vs - National Council for Higher Education (supra)*** regarding a claim for punitive and general damages, Tsekooko JSC (as he then was), observed in regard to a Notice of Motion claiming for general damages that:

"Prayer 12 sought an order that the respondents should pay to the appellant general and exemplary damages for gross

violation of his constitutional rights. In my experience at the bar and the bench, I cannot understand how by his notice of motion the appellant would be able to call evidence to establish such damages without filing an ordinary suit".

In view of the nature of pleadings made by the notice of motion, no sufficient justification has been made to warrant the award of any type of damages to the applicant. I will consequently decline to award any damages to the applicant."

I find the above holding and reasoning of Hon. Justice Musota persuasive. The Supreme Court decision is still good law and is binding to this Court. (***See also Amuron Dorothy – vs- Law Development Centre MC No. 042 of 2016)***

Accordingly, the Applicant is advised to seek remedies for damages by way of an ordinary civil suit where full particulars and evidence of the damages and loss suffered by the Applicant would be proved and considered.

The Respondent will pay costs of this application.

I so order.

Dated, signed and delivered by email at Kampala this 13th day of May, 2020.

Esta Nambayo

JUDGE

13/05/2020.