**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT MBARARA**

**HCT – 05 – CV – MA – 193 – 2011**

**IN THE MATTER OF THE JUDICATURE ACT CAP. 13**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW.**

**MUSINGUZI GEOFFREY ::::::::::::::::::::::::::::::::::::::::::::::APPLICANT**

**VERSUS**

**KIRUHURA DISTRICT LOCAL ADMINISTRATION ::::::::RESPONDENT**

**BEFORE HON. MR. JUSTICE BASHAIJA K. ANDREW.**

**RULING**

***MUSINGUZI GEOFFREY*** (*hereinafter referred to as the “Applicant”)* brought this application against ***KIRUHURA DISTRICT LOCAL******ADMINISTRATION*** (*hereinafter referred to as the “Respondent”*) under the relevant provisions of the ***Judicature Act (Cap 13)*** and the ***Judicature ( Judicial Review) Rules, 2009,*** seeking the following orders:-

1. ***An order of certiorari quashing the decision of the Chief Administrative Officer of Kiruhura District Local Government of 2nd September 2011, dismissing the Applicant from service.***
2. ***An order to the Chairman of Kiruhura District Service Commission to reinstate the Applicant into service.***
3. ***An order to the District Education Officer of Kiruhura District to reinstate and post the Applicant.***
4. ***An order that the Applicant be reinstated on the pay roll of Kiruhura District Service Commission.***
5. ***An order that the Applicant be paid his salary and other emoluments from the month of June 2010 up to date.***
6. ***An order that the Applicant be paid interest on the amount aforesaid with interest at the rate of 28% per annum from the 1st of June 2010 until payment in full.***
7. ***An order for the Applicant to be paid general damages.***
8. ***An order that the Applicant be paid interest on the general damages at court rate from the date of judgment until payment in full.***
9. ***An order that the Applicant be paid the costs occasioned for this application.***

The distinctive grounds upon which the application is based are specified in the motion, and were amplified by three affidavits in support of the application sworn by Applicant; and one Kamukama Wilson said to be the paternal uncle of the Applicant, and one Musinguzi Geoffrey of Nshakirabandi.

The Respondent also filed an Affidavit in reply sworn by Tumwebaze Patrick, now the Chairman, but formerly the Secretary to District Service Commission (DSC) of the Respondent at the time this matter arose.

The Affidavits of the Applicant and Respondent all bear various annextures to them and since these proceedings relate to an application for the writ of certiorari, the respective affidavits filed in court constitute the record with regard to the impugned decision and acts. See ***R. v. Southampton Justices ex – parte Green [1976] Q.B. 11 at page 22.***

The background to this application is rather long, but briefly is the Applicant was an employee of the Respondent as the headmaster of a primary school. Sometime in January 2010 allegations were made by Inspector General of Government (IGG) that, among others, the Applicant was in possession of forged academic documents, and falsely using the name of one *Musinguzi Geoffrey,* son of Mr. Nshakirabandi. On 19/4/2010, the Applicant was required by Chief Administrative Officer (CAO), of the Respondent to prove that he is the real owner of the documents in the name of *Musinguzi Geoffrey,* to which the Applicant made his response.

On 1st July 2010, again the CAO wrote to the Applicant also requiring him to respond to other allegations that:-

1. ***He was in possession of the academic documents of a one Musinguzi Geoffrey that were false, and passed them on as his.***
2. ***That he misused the UPE (Universal Primary Education) Capitation Grant without following the guidelines.***
3. ***That he illegally sold the Girl Education Movement items.***
4. ***That he retained the names of Mr. Bakunda Lawrence and Mr. Namanya Simon Kamuri on the list of Kanyabihara Primary School, whereas they had been dismissed from the Education Service.***

The Applicant responded to the allegations in writing, and also appeared physically before the Kiruhura DSC where he defended himself. The Applicant contends that although he presented his defence ably, the DSC wilfully and knowingly refused to investigate and analyse his case, and as a result dismissed him unfairly. Further, that since June 2010, he has not been paid his salary as a headmaster.

The Applicant also raised the complaint that he was not given a fed back after he appeared before the DSC until the 16/3/2011, six months later, when he received a letter replacing him as headmaster with one Muhanguzi David K. When he inquired about his fate from the CAO, the Applicant was only told to handover to the new headmaster, which he did. The Applicant continued checking with the CAO to find out what decision was made on his case but to no avail, until on 6/9/2011 when he received a letter from the CAO dismissing him from Service. In all, the Applicant denied that he was involved in the acts alleged against him.

On their part, Tumuzaire Patrick, the former Secretary of Kiruhura DSC responded that it was not on basis of being in possession of the false academic documents of another person which prompted the IGG to recommend the dismissal of the Applicant from service, because the matter was referred to police for investigations which were still underway. On the contrary, the Applicant was dismissed for the reasons that he utilized the UPE Capitation Grant funds without involving School Staff Finance Committee in budgeting for the same, sold the Girl Education Movement materials meant for girl-pupils, and retained former teachers who had been dismissed for possession of forged academic documents.

Further, that the IGG’s investigations found out that the Applicant falsified UPE accountabilities to the DEO, Kiruhura, and forged signature of Ms. Nasasira, a teacher at Kanyabuhara Primary School, to forward UPE accountabilities to the said DEO. Also, that anomalies were found in the Applicant’s expenditure as most transactions were not receipted and could not be verified. That it was on basis of the foregone that the IGG wrote directing the CAO of the Respondent to submit the Applicant to the DSC for dismissal. The Applicant was invited to appear before the CAO and defended himself on the issues raised in IGG’s letter. The said CAO wrote again to the Applicant that he should defend himself against the subsequent allegations, but all his defence was found to be lacking.

The CAO then submitted the findings to Secretary DSC recommending that disciplinary action be taken against the Applicant for dishonest conduct. The Applicant appeared before the DSC and presented his defence, which was once again found wanting, and the DSC directed that he be dismissed from service as headmaster. To that effect, the CAO wrote to the Applicant informing him of his dismissal as headmaster, and of his right to appeal against the decision to Public Service Commission, but he chose not exercise it.

It is all clear that the Applicant’s dismissal did not stem from his alleged use of forged academic papers of another person as he contends. Going by the evidence from the CAO’s letter (Annexture “J” of the Applicant’s Affidavit) the Applicant was dismissed on grounds of false accounting and improper utilization of UPE capitation grant, misuse of Girl Education materials, and retention of dismissed teachers on the pay roll. Even though the alleged use of academic documents features in the said letter as one of the accusations, it had been passed on to police to investigate it, and was no longer a matter against which the Applicant could defend himself before the DSC. As such no decision could be taken on it since investigations were still under way.

In addition, in the dismissal letter, marked as Annexture “N” and “H” to the Affidavits of the Applicant and Respondent respectively, the use of forged academic documents was not one of the reasons suggested for the dismissal of the Applicant. The relevant extract states as follows:-

***“Arising out of the investigations carried out by the Inspector General of***

***Government on allegations of your conduct contrary to what is expected of you as a civil servant as per Inspector General of Government’s report Ref: MBR/CF/04/08 and in line with the implementation of the directives therein, the District Service Commission Kiruhura District under Min. 141/2011(10) directed that you be dismissed from service as Head teacher Grade 111 Salary scale U5a w.e. f 9th July 2010 on dishonest conduct and forgery...”*** (Underlined for emphasis).

A closer scrutiny of recommendations of the IGG’s report also dispels the notion that the “dishonest conduct and forgery” referred to the Applicant’s use of the forged academic documents. For instance, on page 2 of the letter forwarding its report, the IGG explicitly stated the following in the “conclusion” remarks:-

***“Other than the issue of personation which was referred to police the complaint made against Mr. Musinguzi Geoffrey is upheld”***

This could only suggest that the grounds recommended for the dismissal of the Applicant expressly excluded use of forged academic documents. It becomes even clearer on further reading of the report that the Applicant was found culpable of other disciplinary shortcomings than the use of forged academic documents. For instance the recommendations (on page 12 of the report) are categorical that the Applicant should be submitted for dismissal on the following ground:-

***“... of dishonest conduct when he returned the name of a ghost teacher in the names of BAKUNDA LAWRENCE causing the latter to be irregularly paid Shs. 1,544,000/- which was financial loss to the Government of Uganda; forged signatures of teachers on UPE returns; and failed to account for the UPE capitation grant to the tune of Shs. 450,000/-.”***

Therefore, the Applicant’s claims on that point are quite unsupported, and as such, the several affidavits which were put in specifically to rebut that particular allegation are in vain since they seek to prove a non-existent issue.

The chief complaint, as I understand it, is that the Applicant was wrongfully dismissed from service, because he was never accorded a fair hearing; and that he was kept “in the dark” for so long about his fate; and finally, that he was never paid his dues for the time he was being investigated. It is in that light that the Applicant seeks for the prerogative order of certiorari to quash the decision of the Respondent dismissing him from service.

It is called for to first examine the extent and efficacy of the prerogative order of certiorari. This court derives its power to issue the same under ***Section 36(1) of the Judicature Act (Cap.13)*** read together with provisions of ***Order 52 of the Civil Procedure Rules,*** which stipulates the procedure for applying for the prerogative orders.

Prerogative orders are meant to control the exercise of power by those in public offices, and to give reliefs where a private person is challenging the decision or actions of a public or administrative or quasi - judicial bodies or persons acting in the exercise of a public duty. The orders are discretionary, and like all discretions, the court must act judicially and in accordance with settled principles, which include common sense and justice, whether the application is meritorious, whether there is reasonableness, vigilance and not any waiver of rights by the applicant. See ***John Jet Tumwebaze v. Makerere University Council and 2 or’s H.C Misc. Civ. Application No. 353 of 2005.***

Regarding the writ of certiorari, which is the particular subject of this application, the court may refuse to grant the remedy even when the requisite grounds for it exist for the reason that the court has to weigh one thing against another to determine whether or not the remedy would be the most efficacious in the circumstances obtaining, and the court must exercise its discretion judicially based on sound legal principles. See ***Halbury’s Laws of England (4th Ed) Vol.11 at page 805 paragraph 1508.***

It is now settled that prerogative orders of certiorari, such as sought in the instant suit, can be granted for correcting errors committed by administrative bodies/authorities in exercise of their jurisdiction; which is done improperly or with material illegality. See ***Sharp v. Welefield (1981) A.C 173*** cited with approval in ***Re: Interdiction of Bukeni Fred Misc. Application No. 139 of 1991 per Musoke – Kibuuka J.*** The administrative body is said to act improperly or illegally where it exercises its jurisdiction to decide a question without affording a party affected by the decision an opportunity to be heard, or where the procedure adopted in dealing with the dispute is contrary to principles of natural justice.

It needs to be emphasised that the High Court’s jurisdiction to issue a writ of certiorari is supervisory in nature, and the court is not entitled to determine the matter as if exercising its appellate jurisdiction to the impugned decision. The findings of fact by the administrative authority as a result of the appreciation of the evidence before it cannot be brought into question or be reopened in proceedings for certiorari. See also ***Chief Constable of North Wales Police v. Evans [1982] 1 WLR 1155 at page 1173.***

It is also settled position that while an error apparent on the face of the record can be corrected by certiorari orders, an error of fact, however grave it may appear to be, cannot be subject of writ of certiorari. Orders of certiorari will usually issue where it is shown that in reaching its finding, the administrative body had erroneously failed/refused/neglected to take into account matters it ought to have taken account and taken into account matters it ought not to take into account; which substantially influenced the impugned decision. This was a position taken in a Tanzania case of ***Sam marube & A’nor v. Mukerechahcha (1990) TLR 54*** which has since been adopted by courts in Uganda.See ***Kasoro William & 5 O’rs v.Bundibugyo District Local Administration H.C. Misc Application No.15 of 2004; Asiimwe Aggrey v. Attorney General, H.C. Misc. Application No.0098 of 2007.***

Similarly, if a finding of fact is based on no evidence that would inevitably be regarded as an error of law; which calls for correction through a writ of certiorari. It needs to be added here that the adequacy or sufficiency of evidence on an issue cannot be challenged through a writ of certiorari, but is the exclusive domain of the administrative body. See ***Syed Yakoob v. K.S Radhakrishanan (1964)5SCR 64.***

Mr. Cranmer Tayebwa, Counsel for the Applicant submitted the Applicant was not accorded a fair hearing nor was he treated justly. That although the Applicant was called to give his defence before the DSC; which he did, the defence was never considered, and the minutes of the DSC do not show that it was ever considered or taken into account. What the DSC did was only to adopt the Report of the IGG wholly, hence the Applicant was never treated fairly. Counsel further argued that the Applicant gave an explanation of the people he was alleged to have wrongly maintained on the payroll, which was never considered.

In addition, Mr. Tayebwa submitted that although the Applicant was finally given a termination letter in September 2011, he had since April 2010 not been receiving his salary. That as a result, the decision to terminate him was unfair and should be called and quashed and he should be reinstated paid his salary arrears with interest and general damages.

To back his arguments, Counsel cited ***Article 42*** of the ***Constitution*** to the effect that any person appearing before an Administrative Officer or body has a right to be treated fairly and justly and shall have a right to apply to court of law in respect of any administrative decision taken against him.

Further, that in the case of ***General Medical Council v. Spackman, (1945)*** - decision by House of Lords, it was held that an administrative body is legally duty bound to make due inquiry before it comes to a decision affecting the rights of a person; and that “due inquiry” involves a full and fair consideration of any evidence that the (accused) desires to adduce. Counsel also relied on the case of Board ***of Education v. Rice, (1911) AC 179*** page ***182*** to buttress his argument that in reaching a decision an administrative body must act fairly in good faith and listen to both sides for that is the duty lying upon them. Counsel maintained that the Applicant was not accorded a fair and just treatment.

In response learned Counsel for the Respondent, Ms. Kampaire, argued that the Applicant’s dismissal was not based on his alleged forgery of academic documents but dishonest conduct of returning a teacher and forging his signature on UPE accountabilities to the DEO, Kiruhura; and falsifying the accountabilities of UPE Capitation Grant, and forging signature of one Ms. Nasasira to forward UPE accountabilities; and failure to account for Shs. 450,000 being funds for Capitation Grant.

Regarding the issue of whether the Applicant’s defence was ever considered, Counsel submitted that it was, and that even the Applicant admits it in paragraph 2,3, and 4 of his application ( Notice of Motion) that he was called upon and he appeared before the DSC and made his defence verbally and written. Counsel maintained that the defence was considered but only found to be wanting. Counsel cautioned that the remedy of judicial review is not an appeal from the decision, but a review of the process by which a decision was reached or made. Counsel expressed a strong view that court should not go into the merits of the decision by the DSC, but only look at whether the process was proper. She maintained that the Applicant has not made out a case for the grant of prerogative orders sought, and that the application should be dismissed with costs.

Mr. Tayebwa, in rejoinder, maintained that merely calling the Applicant to appear does not amount a fair hearing, but that evidence brought should be the basis of the decision taken. Further, that the Applicant is not appealing but showing that principle of natural justice to a fair hearing of both sides was not exercised. Furthermore, that the DSC did not make its own independent decision nor did it consider the evidence presented to it. Counsel reiterated his earlier prayers.

The main issue, as I see it, is whether the Applicant was given a fair hearing by the Kiruhura DSC or not. The Applicant, in paragraph 16 and 17 of his motion, states that he responded to the allegations and appeared before the DSC, and presented his defence ably. But in rather contradictory stance, he argues that he was not given a fair hearing by the DSC when he gave his defence, because his defence was never considered by the DSC. The Applicant cites the minute of the DSC in respect of the matter, arguing that it does not show that his defence was ever taken into account.

The Respondent for its part argued that the IGG’s Report was not the basis for the dismissal, but that the Applicant was fairly treated and accorded a hearing, but his defence was only found to be wanting.

The issue of the false use of forged academic documents by the Applicant has been put to rest, and there is no need to repeat the same. The pertinent issue is whether or not the Applicant was accorded a fair hearing by the Respondent. As already expounded in the principles which underlay applications for judicial review, the court is typically not concerned with the merits of the decision taken, but with questions of fairness, impropriety, unreasonableness, or outright illegality.

After thoroughly examining the process leading to the impugned decision in the instant application, there is no instance which shows that the DSC exceeded its powers, or committed an error of law or breach of rules of natural justice. The Applicant by his admission clearly states (in paragraph 16 of the Affidavit in support) that he made his defence to the DSC, even though in paragraph 17 thereof he claims that his defence was never taken into account in arriving at the decision to dismiss him.

To determine the issue whether the defence was not taken into account or not, when on the other hand the Respondent maintains that the defence was considered but found to be wanting, would necessarily require this court to delve into the internal working of the DSC, which is not the court’s mandate under the prerogative writs. To my understanding the DSC reached its decision after the due process, and this court is precluded from inquiring into the merits of the decision.

The proper test to apply is whether along the way the DSC made an error and the decision or its contents are of such a nature as to require the intervention of court on account of irregularity, arbitrariness, bias or *mala fide*. By “fair hearing” is meant the “equality of arms” or the equal protection of the law which rules out any possibility of discrimination. In application for prerogative orders, this cannot in any way give rise to inquiry into the merits or otherwise of the decision taken by the administrative body. I have not found the instance of illegality or procedural impropriety alleged by the Applicant in this case.

Similarly, this court cannot be called upon to examine the sufficiency and adequacy of the material evidence adduced before the DSC by the Applicant, who participated by giving his defence. As was held in the case of Katamba ***Fred v. Mukono District Local Government and A’ nor, H.C.Misc. Application No.091 of 2009;*** when a party participates in investigations by recording his statement, it is taken that he or she has been accorded a right to be heard. Similarly, once one is accorded the opportunity to defend one’s self and a written defence is made, it is sufficient. See ***Onyait David Steven v. Busia Local Government & A’ nor H.C.Misc. Application No. 34 of 2006.***

I also find the claim of payment of salary and other emoluments for the time the Applicant was under investigations untenable in light of the ***Public Service Standing Orders Section F – t paragraph 7,*** cited in the dismissal letter. The effect of the manner of dismissal of the Applicant is that he forfeited his rights and privileges as a Public Officer including the claim to a period of notice. In other words, dismissal on the grounds of dishonesty and forgery disentitles an employee of his rights and privileges. A salary which was a right due to the Applicant was whittled away the moment he became a subject of dismissal the said grounds. The Applicant is not entitled to any payment. The application fails and it is dismissed with costs.

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**BASHAIJA K. ANDREW**

**JUDGE**

**05/06/2012**