

Kato v Makerere University
(Miscellaneous Cause 184 of 2023)
[2024] UGHCCD 165 (25 October 2024)
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- 1. A declaration that the actions and/or omissions of the respondent violated the applicant's rights enshrined under Articles 20(1) & (2), 21(1), 22(1), 24, 30, 33(1), (2), (3) & (6), 39, 44 and 50 of the Constitution of the Republic of Uganda 1995 as amended.
- 2. A declaration that conducting classes and /or any academic activity in unhealthy and insecure premises by the respondents is inhuman and

amounts to a violation of the Applicant's right to protection from cruel treatment and torture, suitable to life and education.

- 3. A declaration that as a result of the Respondent conducting academic activities in insecure premises, the applicant's right to life and education were violated and/ or abused.
- 4. A declaration that conducting lectures in the insecure hall of residence infringes on the applicant's rights and freedoms and that other students and lectures.
- 5. An Order that the infringement upon the rights of the Applicant herein merits redress by way of compensation of about UGX 250,000,000 to atone for the gravity and impact of the infringement on the Applicant's rights and freedoms.
- 6. An Order directing the respondent to offer special classes and exams to the Applicant, in secure and conducive environment for the classes and exams missed for the Academic Year 2022-2023.
- 7. A permanent injunction doth issue restraining the respondent herein from further conducting and/ or any academic activity within the Halls of Residence.
- 8. Costs for this application be provided for.

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

1. The respondent on the 5th day of April, 2023 scheduled and / or conducted a lecture in an unhealthy and insecure place which lecture was attended by the applicant as a student of the respondent.
- 2. As the lecture was going on at around 7:30 pm, the students who are Mitchell Hall residents demanded that the class should stop as they had their arrangements for the launch of the guild president.
- 3. The lecturer agreed to their demand for fear of his safety and begged that they get us another room for the class to continue but the students refused.
- 4. The lecture was cut short and the students including the applicant were ordered by the hooligans to leave the Mitchell dining hall where the lecture was being conducted.

- 5. The applicant was violently assaulted and battered rupturing his ear drum as a result of the Respondent's failure and / or its omission to provide security within the premises where lectures are conducted.
- 6. The respondent's action of organizing and/or scheduling lectures on premises which are unhealthy not only violates the Applicant's rights of other students especially the rights of female students as guaranteed under Article 33(1), (2), (3) and (6) of the Constitution of the Republic of Uganda 1995 as amended.
- 7. The applicant as a result of the respondent's actions and omissions missed classes and did not sit exams.

The respondent opposed the application and filed an affidavit in reply of Yusuf Kiranda – the University Secretary contending that;

1. The applicant was admitted by the respondent on the 2nd November, 2022 as a private student under the Academic Programme leading to a Bachelor of Arts in Social Sciences.
- 2. The respondent has several designated venues where students attend lectures including spaces under students' Halls of Residence, all venues approved for lectures in the Respondent are equipped with necessary facilities to support the classes and as a result lectures have always been conducted seamlessly on the respondent campus without any interruptions and in accordance with the laws and policies governing the respondent.
 - 3. The respondent was surprised when it was served with a demand notice by the applicant allegedly seeking for compensation for mischief occasioned to him by the respondent's students and its designated organs have never received any complaint of the applicant in regard to this matter.
 - 4. The Uganda Police report indicates that the applicant was assaulted on 5 th April 2023 at around 8:20pm by a "man known by face "following some misunderstandings and disagreements at Makerere University and yet the applicant's demand notice alleged that the applicant was assaulted by the respondent's students and the SD reference note from Makerere University Police Station indicated that the applicant reported that his assailant (accused) was unknown.
 - 5. The applicant had reported that he was assaulted and battered on his way out a lecture by "Michael Hall" students a Hall that doesn't exist in the University according to the demand notice.
 - 6. The applicant alleged that his ear drum was ruptured but the police form 3 marked as annexure C indicted that he slightly lost his sense of hearing.
 - 7. That it is unclear on who assaulted the applicant, where the applicant was assaulted from, what type of injuries he suffered and the circumstances of the applicant's assault if any.

- 8. The applicant was advised by the Respondent's lawyers M/s Makerere University Directorate of Legal Affairs to make an official complaint to the respondent's Dean of Students who is in charge of students' welfare for further management and the respondent's designated organs to wit the Dean of students, Mitchell hall Administration, Makerere University police post have not heard from the applicant since then.
- 9. The respondent was therefore shocked when it was served with pleadings in HCMC No.0184 of 2023 thereby necessitating the respondent to file the reply.
- 10. Any alleged loss suffered by the applicant was not occasioned by the respondent or any of its organs, this application lacks merit and the applicant is not entitled to any of the remedies sought.

The following issues were proposed for determination by this court by the parties.

- *1. Whether the actions and/or omissions of the Respondent violated the Applicant's Rights of other students and lecturers as enshrined under Articles 20(1) & (2), 21(1), 22(1), 24 ,30,33(1),(2),(3)&(6), 39,44 and 50 of the Constitution of the Republic of Uganda 1995 as amended ?*
- *2. Whether the Applicant is entitled to the remedies sought?*

The applicant was represented by *Counsel Enock Kayondo* whereas the respondent was represented by *Counsel Esther Kabinga*.

At the hearing of this application the parties were directed to file written submissions which this honorable court has read and considered in the determination of this application.

DETERMINATION.

1. Whether the actions and/or omissions of the Respondent violated the Applicant's Rights of other students and lecturers as enshrined under Articles 20(1) & (2), 21(1), 22(1), 24 ,30,33(1),(2), (3)&(6), 39,44 and 50 of the Constitution of the Republic of Uganda 1995 as amended ?

Counsel for the applicant raised a preliminary point of law that the respondent filed the affidavit in reply out of time since the applicant filed this application on 21st August,2023, was endorsed on 6th September,2023 and served on the Respondent on 12th September 2023 which deposed its affidavit in reply on 2nd October,2023 and that the principle of law on time lines for filing of pleadings including Miscellaneous applications, the practice of legal practitioners of filing an affidavit in reply at pleasure has to be discouraged and Order 12 rule 3 of the CPR should guide advocates on the time lines for pleadings and interlocutory applications according to the case of *Stop and See(U)Ltd vs. Tropical African Bank Misc. Appln No.333 of 2010*.

Counsel for the applicant submitted that the burden of proof is on the person who would fail if the evidence is not adduced to prove the existence of facts for which judgment is sought in his or her favor on the existence of a legal right of liability as it is provided for under sections 101,102 and 103 of the Evidence Act Cap 6. The burden of proof in civil matters is on the balance of probabilities according to the case of *Oketha Dafala Valenta vs. AG & Anor HCCS No.069 of 2004.*

Further submitted that the applicant was a student at the respondent University pursuing a Bachelor of Arts in Social Sciences and was attending classes diligently until 5th April, 2023 when he was assaulted or battered by Mitchell Hall residents on his way out from attending a lecture, he reported the incident at Makerere University police post where after recording his statement was referred to May Fair Medical Health Centre for examination. The applicant proceeded to the respondent's Hospital where he was informed that his ear drum was ruptured and since he was feeling intense pain he went to Kibuli Hospital for further medical advice and as a result the applicant missed classes and failed to sit exams.

It is uncontradicted evidence that the respondent schedules lectures in unsafe and uncondusive venues without necessary facilities to support the classes for example the Mitchell Hall dining hall where the respondent scheduled the class is a residence of male students with no ladies' toilets which is an inconvenience to both female lecturers and students.

Counsel for the applicant submitted that Article 24 of the Constitution of the Republic of Uganda 1995 as amended provides for freedom from torture or cruel, inhuman and degrading treatment and the same was upheld in the case of *Attorney General vs. Salvatory Abuki & Anor SCCA No. 1 of 1998*; where JSC Oder that the prohibition under Article 24 are absolute. The obligation is therefore absolute and unqualified. All that is therefore required is to establish a violation by a state organ which falls within one or other of the seven permutation of Article 24 set out above. No question of justification can ever arise.

Article 44 of the Constitution of the Republic of Uganda 1995 as amended ,Article 5 of the Universal Declaration of Human rights provide for derogation of the above right, Article 5 of the African Charter on Human and People's Rights provides that every individual has a right to the respect of the dignity inherent in a human being and to the recognition of his legal status all forms of exploitation and degradation of man particularly torture,cruel,inhuman or degrading punishment and treatment shall be prohibited.

Furthermore submitted that all persons are equal before and under the law in all spheres of political, economic, social and cultural life and every other

respect and shall enjoy equal protection of the law and no person shall be discriminated against on the grounds of sex, race, colour, ethnic origin or tribe, birth, creed or religion ,social or economic standing, political opinion or disability according to Article 21 of the Constitution of the Republic of Uganda 1995 as amended.

Article 33 of the Constitution of the Republic of Uganda 1995 as amended provides that women shall be accorded full and equal dignity of the person with men, shall be provided with facilities and opportunities necessary to enhance the welfare of women to enable them realise their full potential and advancement, it was the applicant's submission that the respondent never denied the fact that it conducts lectures in a hall of residence for male students with no ladies' toilets which is an inconvenience to female lectures and students therefore female students not only miss attending classes because of the respondent's actions which are discriminatory and inhuman as the female students who may want to use the toilet have to move a distance to access toilets unlike the male students.

Further submitted that Article 28 of the African Charter on Human and People's Rights also recognizes the freedom from discrimination and every individual shall have the duty to respect and consider his fellow being without discrimination and to maintain relations aimed at promoting safeguards and reinforcing mutual respect and tolerance therefore, prayed for this Honorable court to breathe life in the rights of applicant, female students and female lectures more so on the issue of scheduling classes within the halls of residence for male students without ladies' toilets which actions are discriminatory in nature and inhuman and degrading.

Counsel for the Respondent contended that the applicant failed to exhaust all the internal remedies before seeking recourse from this Honorable court according to the Students' grievance procedures under Section 6(4) of the Makerere University Students Regulations 2015 which provides that the applicant ought to have wrote a complaint to the Secretary of the Hall

Disciplinary Committee and that a student may appeal to the University Students' Disciplinary Committee if he/she is not satisfied by the decision of the Hall Disciplinary Committee and referred to the case of *Hajj Idd Lubyayi Isiki vs. Katushabe Ruth & NRM HCMC No.26 of 2020.*

The Respondent received a demand notice from the applicant regarding the allegations therein on 11th July,2023 and advised the applicant to report the matter to the Dean of students which the applicant rejected therefore he has failed to exhaust the remedies provided for by the law to address the grievance according to the case of Ssewanyana Jimmy vs. Kampala International University HCMC No.207 of 2018,therefore prayed for the application to be dismissed with costs for failure to exhaust the internal remedies.

Furthermore, counsel submitted that the applicant's affidavit in support indicates that when he reported the matter to Makerere Police Station indicated that the accused person is unknown, the applicant is seeking to use this Honourable Court to syphon public funds under the ruse that he was tortured by the respondent especially while under oath , the applicant made an absurd assertion that to his knowledge if anyone on the respondent's turf or on its premises assaulted him , the respondent is to blame and that the law on torture is very strict on matters that a complainant must prove that he /she suffered severe pain for a prohibited purpose at the hands of any person.

The respondent indicated that the applicant's demand raised a number of inconsistencies necessitating an investigation and when the Applicant was advised to report the matter to the Dean of students in-charge of the students' welfare, he refused thereby denying himself and the respondent a chance to ascertain the circumstances under which this alleged assault was occasioned.

Counsel for the respondent also submitted that during cross examination, the respondent's witness is not aware of any instances when lectures were interrupted and the only strike of students he is aware of occurred in 2019 and it was due to issues relating to tuition and not about classes, therefore the Respondent cannot be held liable for matters that are mere allegations and should not be held liable for the same.

In conclusion, the applicant failed to exhaust all the internal remedies before seeking recourse to this Honourable court therefore this application is premature before this Honourable court. Students should stop this habitual behavior of suing institutions whenever the matter can be resolved out of court. This application lacks merit.

Analysis

The mere fact of the involvement of the question of fundamental human rights does not automatically entitle the applicant to approach the court by the fundamental human rights procedure. It must form the main plank of the action. The court is to determine whether the matter brought before it is really one of fundamental human rights in spite of the urgency of the applicant or his counsel in crafting the case to so look. Enforcement of rights should be the main claim and not an accessory claim. See **University of Ilorin v Oluwadare (2006) 6-7 SC p 154; (2006) AFWLR (pt. 338) p 747 at 755**

Where the alleged breach of a fundamental right ancillary or incidental to the substantive claim, it is incompetent to constitute the claim as one for enforcement of fundamental human rights. Where enforcement of fundamental right is subsidiary, ancillary or incidental to the main claim, the action must be instituted by way of plaint for the claim in tort or other limbs of the specific law.

A claim rooted in tort cannot constitute the principal relief under the Fundamental Human Rights Enforcement Act. The principal relief, to qualify for the institution under Fundamental Human Rights procedure should be for enforcement or of securing enforcement of Fundamental Human Rights. The rights of studentship, on how to enjoy the right to

education in proper environment not in hall of residence (Mitchell Hall) is not one of the rights guaranteed in the Constitution. The courts should not unnecessarily interfere with the internal administration of an institution or University under the guise of enforcing human rights. See **University of Uyo v Essel (2006) AFWLR (pt. 315) 80 at 100**

Constitutional provisions like Article 50 are not intended to short circuit or circumvent established procedures and statutory provisions for accessing courts. Every litigant who approaches the court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective.

It is the responsibility of the High Court as custodian of justice and the Constitution and rule of law to maintain the social balance by interfering where necessary for the sake of justice and refusing to interfere where it is against the social interest and public good. Constitutional provisions like Article 50 or the Enforcement of Right Act are not intended to short circuit or circumvent established procedures and statutory provisions for accessing courts or seeking relief.

Every litigant who approaches the court, must come forward not only with clean hands but with clean mind, clean heart and with clean objective. The applicant's motive for the application appears sinister and indeed it is intended to seek 250,000,000/= without any basis. The applicant never reported through the established structures to remedy any alleged shortfalls in the University administration in managing lectures in diverse places.

It is the responsibility of the High Court as custodian of justice and the Constitution and rule of law to maintain the social balance by interfering where necessary for the sake of justice and refusing to interfere where it is against the social interest and public good. See **Lukwago Erias v Electoral Commission HCMC No. 393 of 2020**

Limitations in other legislations are intended to restrict access to courts for seeking some other remedy apart from that provided by a statutory provision enacted specifically to deal with particular situations. Matters of procedure are just as important as matters of substance. Procedural matters are part of the due process and cannot be lightly treated.

It is an abuse of court process to use another remedy under the Constitution to avoid a set procedure. In the case of **Harrikisson v Att-Gen (Trinidad and Tobago) [1980] AC 265 at 268 Lord Diplock** underscored the importance of limitation to the constitution right of access to courts:

"*The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms: but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action....the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate remedy...."*

In the case of *Charles Harry Twagira v AG & 2 others SCCA No. 4 of 2007* Justice Mulenga noted as follows;

"Article 50 of the Constitution proclaims the infringement of the rights and freedoms guaranteed under the Constitution to be justitiable. However, the right to apply to a competent court for redress on the ground of such infringement must be construed in the context of the whole Constitution generally and in the context of Chapter 4 in particular. In the instant case, the appellant's right to bring such an application must be construed together with the right and indeed obligation that the* *State has to prosecute the appellant in a competent court, for any offence he was reasonably suspected to have committed. Neither right could be exercised to defeat the other...."*

The applicant should not use the incident at the University to craft an action for redress for violation of the right to life, education, clean and healthy environment, freedom from torture, cruel and inhuman degrading treatment and rights of women. This would be a total abuse of the procedure for redress in tort. The court will not lightly presume violation of rights in public institution and will make allowance an assumption that the public institution is acting in accordance with the law since they are enjoined to protect the rights and uphold the Constitution.

This is not a proper case for enforcement of human rights under Article 50 of the Constitution and Enforcement of Human Rights Act.

The is application fails and is dismissed with costs.

I so Order

Ssekaana Musa Judge 25th October 2024

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Prepared on 14 October 2026 · Esheria