



**Alfred v Egerton University (Petition E023 of 2024)
[2024] KEHC 16668 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION E023 OF 2024
SM MOHOCHI, J
NOVEMBER 28, 2024**

BETWEEN

OPETU TAABU ALFRED APPLICANT

AND

EGERTON UNIVERSITY RESPONDENT

RULING

1. The Petitioner/Applicant by way of Notice of Motion dated August 21, 2024 seeks the following orders:
 - i. Spent
 - ii. That pending the hearing and determination of this Petition, this Honourable Court do issue Orders;-
Conservatory Order Against The Respondent
 - a. That pending hearing and determination of the Petitioner’s Petition, the Respondent be halved from instituting commencing disciplinary proceedings against the Petitioner.
 - b. That pending the hearing and determination of this Petition a conservatory order be issued against the Respondent from further violating the Petitioners rights and Fundamental freedoms as guaranteed and protected by Articles 22, 26, 27, 28, 29, 40(1) (11) 47, and 50 of *the Constitution*
 - c. That costs of this Application be borne by the Respondent
 - d. Any other order or relief as this Honourable Court claims just and expedient to grant for the interest of justice as provided for under Article 259 of (1) (b) of *the Constitution*



Applicant's Case

2. The Application was premised on the grounds on its face and the undated Supporting Affidavit sworn by the Applicant wherein he deposed that he joined the university in the year 2016 pursuing a degree in Education and Community Studies and registered under registration number E13/14674/2016. He later graduated in the year 2022 and was issued with a degree certificate and transcripts.
3. It was his case that on or about October, 2022 the Respondent's security department in the company of police officers from Njoro Police Station raided his house and confiscated his academic documents. He added that he tried in vain to reach the Respondent's registrar of academics to inform him of the reason for the confiscation.
4. It was his case further that he later learnt that it was due to allegations of interfering with online results at the university's online student's portal. He depones that he is not a staff member of the Respondent and could not have access to the university's online date.
5. He deposed further that he served the Respondent with a demand letter when his request for the release of the academic documents were futile. In response, the Respondent alleged that he had outstanding failed units. He stated that the response defied logic on how he was issued with a degree certificate having fulfilled all requirements and then arbitrarily confiscated by the university without due process.
6. He argued that he was never summoned by the university's disciplinary committee on account of the said allegation thereby violating his fundamental freedoms as guaranteed and protected by *the Constitution*.

Respondent's Case.

7. The Respondent opposed the application by way of Replying Affidavit sworn on by Prof. Saidi Mwanarusi the Respondent's Academic Registrar. He deponed that the Applicant was cleared to graduate in the graduation ceremony held on 29th July, 2022 and attempted to have the degree certificate released to him on 20th December, 2023 but was informed that he had not met the requirements for award of degree and would not have the certificate released to him.
8. That the Applicant's marks were interfered with and upon verification of the original marks sheets it was discovered that he had 8 Fs. That when the alleged manipulation was discovered, the Respondent reported to the police through the office of the Chief Security Officer. A laptop and 3 cellphones that belonged to the Applicant were confiscated and forwarded to the DCI Njoro for investigations.
9. It was the Respondent's case that to date the investigations have not been concluded and the Applicant's personal belongings are still with the police. That through the letter dated 11th October, 2024 the said office requested for additional information and the Applicant's admission number is in the request.
10. That Section 36 (1) of the Egerton University Statutes 2013 provides that the university may rescind any degree of diploma awarded to a graduate who committed an academic offence or an error was committed while registered in a particular program which if had been detected before graduation would have resulted in expulsion and the notification of a rescission communicated and gazetted.
11. It was further the Respondent's case that the Applicant has not met the threshold for grant of the orders ought.



Applicant's Submissions

12. It was submitted that the Applicant complied with the Respondent's rules and regulations for the award of degree and was conferred bachelor's degree. That it was unfair and unlawful to raid his house confiscate his documents on mere suspicion denying the Applicant an opportunity to be heard.
13. He relied on *New Kenya Cooperative Creameries v Sigei (Appeal E002 of 2022)* (KLR), Geothermal Development Company Limited v Attorney General & 3 Others [2013] eKLR and Nelvin v Kenyatta university (Petition E381 of 2022) (KLR) to submit that the Respondent has infringed on the rights and fundamental freedoms of the Applicant under Article 47 of *the constitution* and Section 3 of the Fair Administrative Act by acting on mere suspicion in failing to issue the Applicant with any details of his alleged misconduct
14. It was further submitted that the Petitioner has met the threshold for grant of conservatory orders as was established by the Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2024] eKLR.
15. It was argued that by allowing the Respondent to continue infringing on the petitioner's rights and fundamental freedoms as guaranteed and protected by the following articles of *the constitution* 22, 25, 27, 28, 29d, 40, 43(1) f, 47(1) and (2) and 50 of *the Constitution*, the Petitioner stands to suffer irreversible loss despite having a case with high probability of success.
16. It was also submitted that awarding costs the Court should consider the facts as addressed in Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR.
17. On the prayer of any other order or relief as this Honorable Court deems just and expedient to grant reliance was placed in Institute of Social Accountability & Another v National Assembly & 4 others [2015] eKLR where it was held inter alia that the Court is enjoined this under Article 259 of *the Constitution* to interpret it in a manner that promotes it's values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and that contributes to good governance.

Respondent's Submissions

18. The Respondent submitted that the Court is not required to engage in a detailed analysis of the facts and the law or to make a definitive finding thereon in an application for conservatory orders and sought guidance in the case of Platinum Distillers Limited v Kenya Revenue Authority [2019] eKLR.
19. It was submitted further that the Respondent has not violated the Applicant's rights and that the grant of conservatory orders is a discretionary one exercised in exceptional circumstances. It relied on the finding in the case of Mutura v Director of Criminal Investigations & 3 Others [2023] KEHC 491 (KLR) to submit that the discretion cannot be exercised in favour of the Applicant in the circumstances.
20. It was argued that the prayers sought are unconstitutional as they seek to inhibit the Respondent from performing its duties and mandate under Section 36 (19) of the Egerton University Statutes 2013. That the conservatory orders can only be issued after the investigations are concluded and the Petitioner is found culpable and the Respondent is in the process of commencing disciplinary proceedings.
21. It was the Respondent's submission that there is no sufficient ground to grant conservatory orders and it relied on Republic v Kenya Anti-Corruption & 2 Others Ex-Parte Wildlife Lodges Limited [2014] eKLR and Jonathan Kilonzo Kisee v Inspector General of Police & 3 Others [2019] eKLR.



22. On costs it was submitted that the Respondent has established that the Application lacks merit and urged the Court to award the Respondent costs.

Analysis and Determination

23. I have considered the application and the affidavits in support and against. I have also considered the written submissions by the parties' respective counsels. The issue for determination is whether or not the Applicant's Conservatory order sought should be issued.
24. The Court on the nature on conservatory orders stated in *Judicial Service Commission vs. Speaker of the National Assembly & Another* [2013] eKLR that: -
- “Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under *the Constitution*, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”
25. The Supreme Court in *Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Others* (supra) stated:
- “Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the “prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success' in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”
26. The Court further in *Bundid & another v Ministry of East African Community (EAC), the Asals and Regional Development & 3 others* [2024] KEHC 3479 (KLR) stated that: -
- “It is worth noting that should not be lost that potential arguability is not enough to justify a conservatory order but rather there must also be evidence of a likelihood of success...”
27. Article 23 (1) and (3)(c) in accordance with Article 165 of *the Constitution*, gives this Court the jurisdiction to grant any appropriate relief including a conservatory order on allegations of violations or infringement or threats of violation or infringement of a right or fundamental freedoms.
28. Conservatory orders are therefore not issued on a whim given that the intended purpose in preserving the basis of a case pending the determination of the prime disputation. In this case this Court is not called to make a finding on facts or the law but to evaluate the material placed before it and make a finding in whether the Applicant has demonstrated a prima facie case with the likelihood of success. Further in that in the absence of such an order the Applicant is likely suffer prejudice.
29. A prima facie case was defined in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others* [2003] eKLR by the Court of Appeal as follows:
- “A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly



directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter ...

A prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

30. In other words, has the Applicant shown that he has a case which discloses arguable Constitutional issues.? The rider here is that the issues must not just be arguable but they must have potential of succeeding.
31. The Applicant's position is that he undertook a degree program, graduated and was issued with the certificates and transcripts. That the act of the Respondent and the police to confiscate his academic documents and allege that he had failed 8 units did not adhere for fair administrative processes and violated his constitutional rights and fundamental freedoms.
32. The Respondent has not denied raiding the Applicant's home with the assistance of the police and confiscating his academic documents on allegation that he accessed the university's online data and altered results. The Respondent insists it is within its mandate to recall any degree or diploma that is found to have been without conferred by error of without merit.
33. The Applicant vehemently argues that fair administrative action was not adhered to and in the main there were violation of his rights and fundamental freedoms under Articles 22, 25, 27, 28, 29d, 40, 43(1) f, 47(1) and (2) and 50 of *the Constitution*.
34. The applicant thus seeks to stop the violations of his constitutional rights and also stop the Respondent from commencing disciplinary proceedings. The conduct of the Respondent must be looked into as it touches on a number of things to wit how it found out the student portal was tampered with or how the Applicant was identified as one of the students that were involved in tampering with the data. But those are issues to be canvassed in the main suit and not at the interlocutory stage.
35. The Court in *Muslim for Human Rights (Milimani) & 2 others v Attorney General & 2 others* [2011] eKLR, stated as follows;

“The Court must be careful for it not to reach final conclusion and to make final findings. By the time the application is decided; all the parties must still have the ability and flexibility to prosecute their cases or present their defences without prejudice. There must be no conclusivity or finality arising that will or may operate adversely vis-a vis the case of either parties. The principle is similar to that in temporary or interlocutory injunctive in civil matters. This is a cardinal principle and happily makes my functions and work here much easier despite walking a tight legal rope that I could easily lose balance with the slightest slip due to any laxity or being carried away by the passion or zeal of persuasion of any one side”.
36. At this point it cannot however be said that the Petition is not unarguable and the issues raised cannot also be wished away as they are worth the Court's consideration. The Applicant has nonetheless not demonstrated a prima facie case with any likelihood of success and that the substratum of the Petition will be rendered nugatory if the conservatory orders are not granted. He has also not demonstrated that he will suffer any prejudice if the Orders sought are not issued.
37. The other point of consideration is whether the Applicant is deserving of the orders sought by stopping the Respondent from commencing disciplinary proceedings. it is worth noting that the matter at



hand is still at the investigation stage by the Director of Criminal Investigations and by extension the Respondent.

38. The Applicant is not seeking orders compelling the Respondent to follow *the Constitution* or to follow due process as outlined by the Respondent's disciplinary procedure or statute. What the Applicant is seeking is for the Respondent to be stopped in commencing an administrative process. The Respondent on the other hand has submitted that that it will only be performing its mandate under Section 36 (19) of the Egerton University Statutes 2013.
39. Courts are very careful in interfering with internal administrative and disciplinary processes. It is not in dispute that the Respondent has the power to conduct the disciplinary proceedings against the Applicant and even recall the Applicant's degree certificate should there be reason to. The Applicant is contesting the repossession of his degree and the allegation he was involved in altering the results in the student's portal.
40. Reliance in this regard placed in *Alice Njeri Ngichiri v Kenyatta University [2012]eKLR* where it was held thus:

“The matter before me concerns two important but competing interests, which interests are in turn underlain by two troubling possibilities. The first is the right of a student, who has undergone a course of study at the respondent University, to realize the purpose of that course of study in a timely and efficient manner. The other relates to the interest that the University has in ensuring that those qualifying from its academic training do so with the grades that they deserve, and that there is no cheating or tampering with grades which would undermine the credibility and integrity of degrees awarded by the institution”.
41. There are public interests involved on the nature of certifications conferred by the Respondent and their credibility. The Letter from the Director of Criminal Investigations dated 11th October, 2024 appears to list a number of students being investigated for forgery which is a very serious offence where the Applicant is among those investigated.
42. The Respondent has demonstrated that there are investigations undergoing which are yet to be concluded. The Disciplinary process has not been instituted. If the Respondent was to institute disciplinary proceedings and do not follow proper process, then Applicant is justified to seek to stop the injustice and demand due process.
43. In *Jonathan Kilonzo Kisee v Inspector General of Police & 3 others [2019] eKLR* the Court in declining to issue conservatory orders held that: -

“A Court of Law would not interfere with investigations because the individual suspected is apprehensive of being arrested and charged. The Court can only interfere with investigations if it is demonstrated that the purpose of investigations is to abuse due course of investigations”
44. This Court therefore finds that the Applicant has not on a prima facie basis demonstrated with satisfaction that there is a justifiable basis to stop the Respondent a public statutory body from conducting a reasonably legal process.
45. In the circumstances, I believe that the Respondent cannot be said to be violating the Applicant's rights as the process is still at the inquiry level. The Applicant has not even been summoned. No prejudice shall visit the Applicant if the orders sought are not issued.



46. I therefore decline to grant the orders sought. The Application dated August 21, 2024 is dismissed with no orders as to costs.

It is so ordered.

SIGNED, DATED AND DELIVERED AT NAKURUON THIS 28TH DAY OF NOVEMBER, 2024

MOHOCHI S.M

JUDGE

