



**Aluku & 9 others v Technical University of Mombasa (Constitutional Petition E068 of 2024) [2024] KEHC 16727 (KLR) (28 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16727 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CONSTITUTIONAL PETITION E068 OF 2024**

**G MUTAI, J**

**NOVEMBER 28, 2024**

**IN THE MATTER OF ARTICLES 2, 3, 20, 21, 22, 23, 27, 28, 29 (D) & (F)  
43, 47, 159, 165 AND 259 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE UNIVERSITIES ACT, NO 42 OF 2012**

**AND**

**IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATIONS**

**BETWEEN**

**JOEL COLLINS ALUKU & 9 OTHERS & 9 OTHERS ..... PETITIONER**

**AND**

**TECHNICAL UNIVERSITY OF MOMBASA ..... RESPONDENT**

**RULING**

1. Vide a Notice of Motion dated 11<sup>th</sup> November 2024, the applicants, who are all students of the Technical University of Mombasa, seek the following orders: -
  1. Spent;
  2. That this honourable Court be pleased to issue an order restraining the respondent, its servants and or any person or body of persons, from conducting the graduation ceremony slated for 5<sup>th</sup> December 2024 pending the hearing and determination of this application;
  3. That this honourable Court be pleased to issue an order restraining the Respondent, its servants and or any person or body of persons from conducting the graduation ceremony slated for 5<sup>th</sup> December 2024 pending the hearing and determination of this petition herein;



4. That the respondent herein be compelled to graduate and or include the petitioners on the graduation list slated for 5<sup>th</sup> December 2024;
  5. That this honourable Court issues a declaration that the applicants/petitioners are eligible for graduation and are entitled to equal rights as fellow students listed for graduation; and
  6. That the costs of this application be provided for.
2. The grounds upon which the application was sought, as disclosed in the body of the motion and in the supporting affidavit sworn by Joel Collins Aluku on 5th November 2024 was that he and his co-petitioners were admitted to the Technical University of Mombasa to study a diploma course in Supply Chain Management vide admissions letters dated 23<sup>rd</sup> August 2020. They were informed on admission that their course would take 2 years. However, it took them four years to complete the course due to the actions of the respondents who varied the calendar by introducing a trimester system and long holidays.
  3. The applicants averred that as they were about to complete their studies, the respondent, through its staff, verbally stated that they would have to undertake the Kenya National Examination Council Examinations (KNEC) exams before graduating. They contend that such a requirement was not in their respective admissions letters and that they knew that the respondent had its own internal examination system.
  4. They stated that after writing to their heads of department and the vice chancellor, they were called for a meeting during which they were advised that the KNEC exams were optional.
  5. Upon clearing their studies in August 2023, the respondent issued them recommendation letters for industrial attachment affirming that they had cleared final exams. Subsequently they were issued with provisional transcripts “to affirm that we have cleared our studies pending final graduation.”
  6. They were, however, surprised to see that they were not on the provisional graduation list posted in the portal. Their names were missing. Upon applying pressure, they were informed that they would not graduate because they did not take the KNEC exams, which was surprising to them as they had been told it was optional.
  7. They, therefore, prayed that the university be compelled to put them on the list as they would suffer irreparably if they did not graduate. They averred that having studied for 4 years, they had legitimate expectations that they would graduate.
  8. Upon being served with the application, the respondent, through its counsel, Hamisi Mwadzogo, filed a Notice of Preliminary Objection dated 12<sup>th</sup> November 2024 in which they contented as follows: -
    1. That restraining orders are not constitutional remedies recognized under *the constitution*, thus cannot be granted in a constitutional jurisdiction forum;
    2. That orders to compel the Respondent to graduate and or include the petitioners in the graduation list are final orders which cannot be granted at an interlocutory stage;
    3. That a declaration that the applicants/petitioners are eligible for graduation is, as well, a final order which cannot be granted at the interlocutory stage.
  9. The respondent also filed a replying affidavit sworn by Mr. Samson Kitheka on 12th November 2024. In his affidavit, Mr Kitheka accused the applicants of dishonesty and non-disclosure of material facts. He said the applicants approached the Court with unclean hands and that they were, therefore, underservant of the remedies sought.



10. He deposed that the applicants didn't fulfil the university requirements and could not, therefore, graduate. He stated that due to the COVID-19 pandemic, the applicants actually reported in 2021 and not 2020, as alleged. The requirements for the course they were undertaking were explained to them during their orientation.
11. He accused the applicants of failing their examinations and engaging in examination malpractice. Mr Kitheka stated that other classmates of the applicants would be graduating. He deposed that stopping the examination was a drastic remedy that would be injurious to thousands of students.
12. Lastly, he deposed that allowing the applicants to graduate when they are not qualified would not be in their best interest. He, therefore, urged that the application be dismissed.
13. The application was canvassed orally before me on 13<sup>th</sup> November 2024.
14. Mr Wafula, learned counsel for the applicants, reiterated the contents of the application. He urged in his submission that the applicants ought to be allowed to graduate as no logical reason had been given for their exclusion.
15. In support of his contention, he relied on the decisions of the court in the following cases; Violet Ombako & 12 others vs Moi University [2019] eKLR and Simon Okwaro vs Egerton University [2019]eKLR.
16. Counsel urged that provisional transcripts confirm their qualifications. He further urged that if there was any problem with their qualifications, it should have been communicated.
17. Mr. Mwadzogo, learned counsel for the respondent, similarly reiterated the contents of the respondent's response. He submitted that granting the prayers sought would render the main petition moot. He, therefore, urged that the application be denied. He accused the applicants of not having disclosed material information. The non-disclosure was ground to deny them the prayers they seek.
18. It was urged that the application lacked precision and was based on contested facts that required verification. Counsel submitted that the applicants knew about KNEC exams since 2021, sat the said exams, and some of their classmates were due to graduate.
19. Mr. Mwadzogo urged that under Article 24 of *the Constitution* Court could issue conservatory orders, not restraining orders as urged herein. Counsel submitted that they should have exhausted remedies available to them. He distinguished the authorities relied on saying that they were inapplicable to this matter or were based on a different set of facts than those herein.
20. It is evident that prayers 1 and 2 of the said Notice of Motion are spent in as far as the application was certified urgent. The court declined to issue prayer No. 2 *exparte*.
21. In my view, at this point the Court is called upon to determine whether to issue prayer three only. I say so as prayers 4 and 5 are, by their nature, seek final orders. This Court cannot possibly determine whether or not petitioners should be included in the graduation or that they are entitled to graduate without hearing the petition in its merits.
22. I am guided by the decision of Odunga, J, as he then was, in Kenya Consortium To Fight AIDS, TB & Malaria & another vs Brigitte Mukui Kitenge & 4 Others [2013] KEHC 3731 (KLR)  
wherein he stated as follows: -

“ 16. In their Notice of Motion dated 17<sup>th</sup> July 2012, apart from prayer (5) thereof all the prayers seeking injunction are not expressed to be interim, temporary



or interlocutory. In fact, the way the said prayers are crafted, they seem to be seeking perpetual injunctions. In The *Headmaster Kiembeni Baptist Primary School & Another vs. The Pastor of Kiembeni Baptists Church Mombasa HCCA No. 103 of 2004*, Maraga, J(as he then was) held that when dealing with applications for interlocutory injunctions it is wrong to grant a permanent injunction whose effect is to conclusively decide the suit as issues of fact should be decided after hearing evidence and that Courts should be wary of parties who make applications for interlocutory injunctive orders which if granted as prayed would have the effect of granting permanent or mandatory injunctions and sometimes even eviction orders as order 39 does not provide for grant of permanent injunctions at interlocutory stage. The same position was taken by Tanui, J in The Official Receiver ex parte Paul Rotich Cheor vs. Barclays Bank of Kenya Kisumu HCCC No. 17 of 2004 and Samuel Benjamin Obura vs. Kenya Commercial Bank Ltd Kisumu HCCC No. 91 Of 2003. In the said cases the learned Judge variously held that Order 39 [now Order 40] of the Civil Procedure Rules does not empower the Court to grant a permanent injunction and an application seeking such orders is incompetent and that where an application for injunction is couched in words which appear to convey that the application is for perpetual injunction such an application is for dismissal.

23. Although the above decision was in regard to permanent injunctions, it is my view that the reasoning applies in this case. For this Court to issue prayers 4 and 5 would be wrong as the petition would be wrong as the petition would have been determined prematurely.
24. Although the petitioners aver that they enrolled for a two-year diploma course on Supply Chain Management that was later changed to a three-year, three-semester course, the Court notes that there was consultation between the respondent and students, as evidenced by the minutes provided. It is evident that the petitioners knew about the changes to their course, and that is why they sat for the KNEC examinations, as is now evident.
25. The university asserts that the petitioners did not pass their examination. They also say that some of the classmates of the students who qualified are graduating.
26. This Court agrees with the respondent that stopping the graduation would be a drastic remedy. More than 4000 students expect to graduate. Given the disputed facts and the real possibility that the petitioners may not have passed their examination, engaged in exam malpractice, or are not otherwise qualified, the balance of convenience/interest of justice tilts towards denying the prayers sought.
27. The authorities relied on by the applicants are distinguishable.
28. It would not be in the student's interest to graduate if they lack qualifications. Thus, their qualifications need to be first ascertained.
29. In the circumstance, I dismiss the Notice of Motion dated 11th November 2024. I make no orders as to costs.
30. I order that the petition be heard on a priority basis.
31. I further order that each party bears its own costs.
32. Orders accordingly



**DATED AND SIGNED AT MOMBASA THIS 28<sup>TH</sup> DAY OF NOVEMBER 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Mr Wafula, for the Applicant;

Mr Mwadzogo, for the Respondent; and

Arthur - Court Assistant.

