



**Gatwiri & 7 others v Egerton University (Petition E026 of 2021)
[2022] KEHC 10940 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 10940 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION E026 OF 2021
HK CHEMITEI, J
JUNE 23, 2022**

BETWEEN

**MAUREEN GATWIRI 1ST PETITIONER
VOREEN KWAMBOKA 2ND PETITIONER
SHARON CHEPKEMOI 3RD PETITIONER
SHEILEEN WAMBARI 4TH PETITIONER
SUSAN MUHIA 5TH PETITIONER
JANE OGALO 6TH PETITIONER
NYANCHAMA ELIZABETH 7TH PETITIONER
MARGARET KAINGU 8TH PETITIONER**

AND

EGERTON UNIVERSITY RESPONDENT

JUDGMENT

1. The petitioners herein moved the court through an amended petition dated 28th July 2021 against the respondents jointly and severally claiming damages as hereunder.
 - a. A declaration that the action of the Respondent of not allowing the Petitioners to sit for the special exams despite having cleared school fees, course work and attended classes infringed on the Petitioners rights to fair administrative action under Article 47 of the constitution is illegal, unconstitutional and void.
 - b. A declaration that the action of the Respondent of not clearing the Petitioners to sit for special exams despite having cleared school fees and attended classes and allowing other students who



have cleared school fees to take the exams is discriminatory in nature. The same contravenes Article 27 of the *Constitution of Kenya* is illegal, unconstitutional and void.

- c. A declaration that the action of the Respondent of advising the Petitioners to either defer the entire semester and wait for an entire year till next year in 2022 when normal exams will be administered or sit for the resist exams contravenes the Petitioners right of legitimate expectations, constitutional rights to a fair administrative action under Article 47 on the right to a fair administrative action, is illegal, unconstitutional and void.
 - d. A declaration that the action of the Respondent of directing the Petitioners to wait for re-sits yet the maximum marks and grade a student can score in a re-sit is 40%, D grade. The Petitioners did not take the 1st attempt of the normal exams and failed, thus cannot be subjected to re-sits. The same contravenes the Petitioners right of legitimate expectations, constitutional rights to a fair administrative action under Article 47 on the right to a fair administrative action, is illegal, unconstitutional and void.
 - e. A declaration that the action of the Respondent of not clearing the Petitioners to sit for the special exams exposes the Petitioners to anxiety, psychological torture and stress and contravenes the Petitioners rights to freedom from psychological torture under Article 29 (d) of the *Constitution of Kenya 2010*. The same is illegal, unconstitutional and void.
 - f. A declaration that the action of the Respondent of not clearing the Petitioners contravenes the Petitioners rights of dignity under Article 28 of the *Constitution of Kenya* 2010. The same is illegal, unconstitutional and void.
 - g. Writs of mandamus directed at the Respondent to issue the Petitioners with exam cards and administer special exams to the Petitioners compute and compile their marks forthwith.
 - h. Writs of mandamus directed at the Respondent to include the names of the Petitioners who will successfully pass the special exams in the graduation list of the graduation ceremony scheduled on 10th December 2021.
 - i. Writs of certiorari quashing the Respondent's directive *vide* the letter dated 27th August 2021 that the Petitioner defer the entire semester or await to sit for the re-sits exams.
 - j. An order of prohibition directed at the respondent prohibiting it from proceedings with the graduation ceremony scheduled on 10th December 2021 without including the petitioners who would have successfully passed the special exams in the graduation.
 - k. An order that the Petitioners be compensated for violation of their constitutional rights by the Respondent.
 - l. Any other further orders, directions, declarations and remedies as this Honourable court may deem fit and just in the circumstances.
 - m. Any order on costs.
2. The petitioners claimed that they are duly registered final year students of the Respondent's Faculty of Law Pursuing Bachelors of Law Degree (LLB) under registration numbers LI11/10764/17, L11/07358/17, L11/10882/17, L11/07355/17, LPII/11/01533/17, L11/07350/17, L11/07360/17, LP11/11463/16 respectively. That they intended to have graduated in December 2021 as they had completed coursework, projects and paid school fees.



3. They went on to state in their petition that due to the pangs and effects of the Covid-19 pandemic they slightly delayed in clearing the school fees charged by the Respondent. That they then prayed to be accorded more time to clear the school fees an obligation that they met after the Respondent promised them that they will be allowed to sit for special exams upon clearing the said fees.
4. They stated further that they were stopped from sitting for their final year exams on September 2021, on account of having paid school fees late and that the Chair of their department assured them that they would sit for their special exams which are being rolled out from 1st of November 2021. That the said exams were pushed to 8th November 2021 and the respondent had irrationally and high handedly without any cause barred them from sitting for the same.
5. The petitioners stated that the Respondent's actions were against their legitimate expectations and amounted to discrimination contrary to Article 27, 28, 29 and 47 of the Constitution as other students who have cleared school fees and attended classes have been cleared to sit for the said exams.
6. The petition is supported by an affidavit sworn by the 1st petitioner which reiterates the contents of the petition.
7. The respondent filed a replying affidavit in response to the petition dated 15th November 2021. It averred that it was a public university established under and governed Act no. 42 of 2012 and before that, the Egerton University Act (Cap 214, Laws of Kenya repealed). That the Universities Act (no. 42 of 2012) provided that a university shall be governed in accordance with the provisions of its Charter or Letter of Interim Authority granted under and statutes promulgated by its Council, and that a university shall have specified organs of governance. That further, Section 33 of the Egerton University statutes provides that the senate is in charge of all academic matters of the university, the Egerton University Rules and Regulations. Section 4 moreover stated that it was the university policy that students pay full amount of fees as required before registering online on the first day of reporting. Students are required to register online at the beginning of the semester on the date designated in the calendar for the academic year.
8. The respondent averred further that the Egerton University Statute (2013) under Section 5 provided that for every candidate to be eligible to take university examinations, shall pay to the University in respect of the examinations such fees as the Council shall prescribe. That the Egerton University Rules and Regulations Section 18 provided that a student who completed his/her course work but due to unavoidable circumstances acceptable to the Senate, was unable to sit the end-of semester examinations shall on written request be authorized to sit for special examination, when such examinations are next offered.
9. The respondent stated that the petitioners herein being its students agreed and accepted to be bound and or otherwise became party to a university student contract when they accepted the offer by it that they be its students under its rules and regulations subject to aforesaid statutes. That the petitioners missed the said exams on their own personal reasons unknown to the university and or their faculty. That further, although framed as a constitutional petition, the matters at the foot and center of the same are not even statutory, much less constitutional but revolve around examination rules within a university and the same are governed purely by the university rules.
10. The respondent went on to aver that it had been advised by its counsel and which advice it believed to be honest and sound, that where there was a domestic process established to address grievances in the first place, the petitioners were duty bound to exhaust the domestic or internal process and procedure and constitutes abuse of court process to rush to court the way the petitioners herein did or have sought to do. That the petitioners did not seek to exhaust internal mechanisms to have their grievances



addressed and they did not for example seek audience with Deputy Vice Chancellor Academics or the Vice Chancellor himself but instead decided to rush to institute these needless, premature and unjustified proceedings that are entirely abusive of the court process.

11. The respondent stated that the petitioners did not meet their contractual obligation in due time as stipulated in the Egerton University Rules and Regulations. That therefore the petitioners' allegations of violations of their right to equality and freedom from discrimination, fair administrative action, freedom from psychological torture and right to dignity have no basis both in fact and in law as the petitioners were not ignorant and all they needed to do was well within their knowledge.
12. The respondent in further response to the petition filed a supplementary affidavit dated 22nd November 2021. In the said affidavit it attached documents in support of its averments in the replying affidavit dated 15th November 2021.
13. When the matter came up for hearing the court directed the parties to file their written submissions which they have complied.

Petitioners' Submissions

14. The petitioners in their submissions raised the following issues for determination by the court namely; whether there was infringement on the petitioners' rights and freedoms under the fair administrative action. The petitioners submitted that due to the effects of Covid-19 pandemic they slightly delayed in clearing the school fees charged by the respondent but paid the same a week later before the regular students paid fees and thereafter the respondent promised them that they will be allowed to sit for the special exams. The petitioners submitted that they were selectively identified among the other students and barred from taking the regular exams. That it was common ground that all of them had not attempted the first sitting and thus could not be subjected to re-sit exams. That they were further not cleared and given exam cards to sit for the said exams as promised by the respondent. That the same went against their legitimate expectation and amounted to discrimination Contrary to Article 27 of the Constitution.
15. On the second issue, whether there was an infringement on the petitioners' rights and freedoms under Article 47 of the Constitution and the fair Administrative Action Act No. 4 of 2015 the petitioners submitted that the respondent having curtailed them from sitting for special exams despite having promised them and that there existed a legitimate expectation on them that notwithstanding the late payment of school fees, they were to sit for the exams. That the same amounted to a breach of their right to fair administrative action by the respondent.
16. On the third issue, whether the petitioners were entitled to orders being sought, they submitted that they were entitled to the orders being sought except those overtaken by events, having established that the conduct and action of the respondent were unlawful, arbitrary and thus null and void. On the last issue, on who should bear the costs of the proceedings they submitted that the respondent should foot the same.

Respondent's Submissions

17. The respondent in its submissions identified three issues for determination namely, whether or not the petitioners have set out their case with reasonable degree of precision. The respondent submitted that the whole petition hinged on its failure to allow the petitioners sit for the special examinations scheduled for 8th November 2021. That the same was grounded on the provisions of Article 47 Constitution but it was not clear how the administrative action by it was not expeditious, efficient, lawful, reasonable and procedurally fair. That further, the Covid-19 pandemic was global and not



peculiar to just the petitioners and that the notice was issued to every student and staff members of the university and those that complied with the requirements set in were not locked out of the portal. That therefore the petitioners had failed to outline the particulars of its failure to comply with the rules of fair administrative action thus failing the test of reasonable precision.

18. On the second issue, whether or not the respondent was in violation of the petitioners right to legitimate expectation and fair administrative action under Article 47 of the *Constitution of Kenya* the respondent submitted that the petitioners failed to demonstrated exactly how there was a legitimate expectation for them to sit a special examination considering that the whole assertion was pegged on mere statements that had not been proved to be true. That if at all the chairperson of the department promised the petitioners that they would sit a special exam, that decision maker for registration of examinations was only the academic registrar.
19. On the third issue, whether or not the Respondent was in violation of the petitioners' right to freedom from psychological torture under Article 29 (2) and freedom from discrimination under Article 27 of the *Constitution* the respondent submitted that the same had not been proven or demonstrated by the petitioners.
20. Lastly, on whether or not the petitioner should be granted the prayers sought herein the respondent submitted that the orders sought by the petitioners in the petition were overtaken by events and it urged the court to dismiss the petition together with application herein.

Analysis and Determination

21. Upon analyzing the facts of the case, evidence and the submissions tendered by the petitioners, the following issues arise for determination namely: -
 - a. Whether this Court has jurisdiction to entertain the Petition.
 - b. Whether there was a violation of the Petitioners' rights and fundamental freedoms.
 - c. Whether the petitioner is entitled to damages.

A. Whether this Court has jurisdiction to entertain the Petition.

21. The petitioners in their submissions argued that there existed a legitimate expectation on their part notwithstanding the late payment of fees and thus they would be allowed to sit for the exams. That therefore the respondent breached their right to fair administrative action and the only way they could seek redress was through filing of the petition herein.
22. The respondent in its replying affidavit contends that the issues raised in the petition herein belonged purely to the domestic forum of the university which has its own governing rules pertaining examinations. That there are various hierarchical offices running from the department, faculty, senate and the university council equipped and mandated to consider whatever grievances the petitioners might have had with respect to their exclusion from the examination before the invocation of the court's jurisdiction. That further, the petitioners were duty bound to exhaust the domestic or internal process and procedure.
23. Its noted that the students' conduct at the university is governed by the Rules and Regulations Governing the Conduct and Discipline of students and Egerton University Student's Handbook (Revised 2020) and on page 23 paragraph 15 and page 37 paragraph 19 (a) of the said rules and



handbook respectively, as attached in the respondent's supplementary affidavit dated 22nd November 2021 provides as follows: -

“A student may lodge a complaint through telephone call, personal visit, letters, email, short messages service (SMS), suggestion box and feedback form in the various relevant offices in the University. Reports should be made to Integrity Promotion Committee whose mandate is:

- a. To receive and ensure resolution of complaints on injustices, maladministration, unethical conduct, breach of integrity, discourtesy, misbehaviors, inefficiency or ineptitude.
- b. To receive and investigate reports on alleged corruption.
- c. Physical location: Utafiti Building room 330/331- hotline 051-2111111 or 051-2112222. Mobile No. 0702-200015, Email: intergrity@ergerton .ac.ke

24. In view of the above, it should be noted that Section 9(2) of the *Fair Administrative Actions Act*, (an act of parliament) that was enacted to bring into operation Article 47 of the *Constitution* 2010) provides that the High Court or subordinate court under subsection (1) shall not review an administrative actions or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. In addition, it is a well settled legal principle that where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed before a party reverts to a judicial process. That is commonly referred to as ‘the exhaustion doctrine’.

25. The Mombasa High Court in Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR elaborately dealt with the doctrine of exhaustion. The Court stated as follows: -

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in *R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR, where the Court opined thus:

“This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:

“Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.....”



26. Further the court in *Geoffrey Muthiga Kabiru & 2 others – v Samuel Munga Henry & 1756 others* [2015] eKLR, the Court of Appeal stated that:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution.”

27. The said Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows:

“However, our case law has developed a number of exceptions to the doctrine of exhaustion. In *R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA)* (*supra*), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (*supra*), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others vs Aeolus (K) Ltd and 9 Others.*)

As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.

The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR.

In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of



Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

28. In Civil Appeal 158 of 2017, *Fleur Investments Limited v Commissioner of Domestic Taxes & another* [2018] eKLR, the Learned Judges of the Court of Appeal relied on an earlier decision in *Speaker of National Assembly v Njenga Karume* (1990-1994) EA 546 to assume jurisdiction by by-passing the mechanism under Income Tax Tribunal. They observed as follows: -

“For the reasons we have given earlier and others that will become apparent, there were definitely exceptional circumstances that existed in this case that were outside the ambit of the Income Tax Tribunal which called for intervention by way of judicial review. Whereas courts of Law are enjoined to defer to specialized Tribunals and other Alternative Dispute Resolution Statutory bodies created by Parliament to resolve certain specific disputes, the court cannot, being a bastion of Justice, sit back and watch such institutions ride roughshod on the rights of citizens who seek refuge under the Constitution and other legislations for protection. The court is perfectly in order to intervene where there is clear abuse of discretion by such bodies, where arbitrariness, malice, capriciousness and disrespect of the Rules of natural justice are manifest. Persons charged with statutory powers and duties ought to exercise the same reasonably and fairly.

29. In the instant case, the petitioners argue that the respondent by failing to allow them to sit for the special examinations despite them clearing the school fees, infringed their rights as enshrined under Articles 27, 29(2) and 47 of the *Constitution of Kenya* 2010 thus a result they filed the instant petition. The respondent on the other hand argue that the petitioners ought to have exhausted the avenues available to them within the university structure before proceeding to court. I find this argument plausible and meritorious and in line with the doctrine of exhaustion.
30. In applying the doctrine of exhaustion and its exceptions against the instant case, it’s clear that the exceptions do not apply in this case for two reasons; first, that there is no evidence to suggest that the respondent’s internal dispute resolution mechanisms will not serve the values enshrined in the Constitution or law. Secondly, there is evidence that the internal mechanisms provide for elaborate appeal avenues like the senate, university council, the deputy Vice Chancellor or the Vice Chancellor such that all issues in contention can be reasonably determined. The said process in my view presents the petitioners with adequate and reasonable audience which is sufficient to all the parties’ interests. Upon perusing the courts record I note that there is no evidence that the petitioner’s lodged or made any attempt to lodge their complaints to the Integrity Promotion Committee, the senate or any other dispute resolution avenues available to them at the respondent’s institution in resolving the same.
31. In view of the forgoing, i find that the petitioners intentionally by- passed the respondent’s internal dispute mechanism by framing the petition herein in the language of the Bill of Rights, hence a pretext to engaging the court and therefore such pursuits must be estopped by the application of the doctrine of exhaustion. In other words, the Petitioners must first submit to the clearly established respondent’s internal dispute resolution mechanisms as this court lacks jurisdiction to hear and determine the Petition herein on account of the doctrine of exhaustion.
32. At any rate all is not lost for the petitioners since after exhausting the said internal dispute resolution mechanism can still approach this court in the event that they feel dissatisfied in any way.
33. For the foregoing reasons, there is therefore no need to consider the other issues raised above. The court shall however not punish the petitioners on costs as prayed by the respondent.



34. The petition is otherwise dismissed with no order as to costs.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 23RD DAY OF JUNE 2022.

H K CHEMITEI

JUDGE

