REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CONSTITUTIONAL PETITION NO.13 OF 2020

IN THE MATTER OF ARTICLES 10,19,20,21,22,23,24,28,35,43,47,48,159 AND 165 OF THE CONSITUTION OF KENYA

AND

BETWEEN

GABRIEL TURIC DAK.....PETITIONER/APPLICANT

VERSUS

ELDORET COLLEGE OF PROFESSIONAL STUDIES.....1ST RESPONDENT

UNIVERSITY OF ELDORET.....2ND RESPONDENT

RULING

1. The petitioner/applicant filed an application vide a notice of motion dated the 2nd of July 2020 under **Articles 43, 47, 48, 159 and 165 of the Constitution of Kenya and Rules 4, 21 and 22 of the Constitution of Kenya (Protection of Fundamental Freedoms and Enforcement of the Constitution) Practice and procedure rules 2020** seeking orders that pending the hearing and determination of this application, the respondents be and jointly and or severally ordered to release to the applicant all final academic transcripts and academic certificate in Business Management as well as all final academic transcripts and Diploma Certificate in Public Administration. In the alternative, the petitioner/applicant requests the Court to expedite his petition.

2. The application is supported by the supporting affidavit of the petitioner/applicant, Gabriel Turic Dak dated the 2nd of July 2020. The application is opposed by the 2nd respondent vide a replying affidavit dated the 16th of October 2020.

3. The 1st respondent is yet to enter appearance despite being served on the 14th of October 2020.

4. The thrust of the application is that the petitioner/applicant enrolled at the 1st respondent institution in January 2017 and September 2017 to complete a certificate course in Business Management and a Diploma in Public Administration respectively with the expectation of graduating in 2017 (for the certificate course in Business Management) and 2018 (for the diploma in Public Administration) upon completion of his studies, the certificate and diploma certificates were to be issued by the 2nd respondent under a collaboration agreement with the 1st respondent. However, the petitioner avers that upon completion of his studies and payment of all fees due, he did not graduate neither did he receive his final transcripts despite receiving a provisional transcript indicating that he was eligible for graduation hence the current petition.

5. The application was canvassed by way of written submissions.

Applicant's case

6. The applicant/petitioner via his supporting affidavit dated the 2nd of July 2020 avers that he is of Sudanese origin living in Kenya as a refugee and enrolled at the 1st respondent institution, Eldoret College of Professional Studies in 2017 to pursue a certificate in Business Management, a course that the 1st respondent was offering in collaboration with the 2nd respondent that is University of Eldoret.

7. The applicant/petitioner further avers that he paid all fees due and attended all classes as required upon which he sat his exams and was subsequently issued with provisional academic transcript affirming that he had met all eligibility criteria for graduation but was not listed for graduation and as such did not graduate despite following up with both the 1st and 2nd respondents.

8. Subsequently, the applicant/petitioner states that he was forced to enroll for diploma course in Public Administration with the 1st respondent and completed the studies upon which he was issued with two provisional academic transcripts on the 8th of January 2020 but just like before, he was not included in the list of graduands and therefore did not graduate.

9. The applicant/petitioner contends that the failure of the respondents to issue him with original and final academic documents, has made him unable to proceed further with his education. In particular, he indicates that an attempt to enroll at the Jomo Kenyatta University of Agriculture and Technology or any other institution of higher learning is often declined for he lacks the requisite academic documents.

10. The applicant/petitioner ergo avers that this has affected his right to education and his sponsor has left him in limbo and suffering bordering on destitution despite the fact that he had a legitimate expectation to graduate and as such prays that the Court grants him the prayers sought.

Respondents Case

11. The 2nd respondent vide a replying affidavit dated the 16th of October 2020 indicated that the 2nd respondent following revised regulations issued by the Commission on University Education, directed the 1st respondent in 2015 to cease admission of new students and as a result the 2nd respondent has no direct agreements with the petitioner since the memorandum of understanding between the respondents was effectively brought to an end by operation of law. As such, allowing the petitioner/applicant to graduate would be illegal.

12. The 2nd respondent also avers that the petitioner/applicant was admitted to the 1st respondent institution in January 2017, well outside the collaboration period which ceased in 2015 and that the 2nd respondent did not participate in the admission, training nor examining of the petitioner and as such cannot be compelled to graduate and award him with academic certificates.

13. Finally, the 2nd respondent notes that the nature of the orders sought by the applicant/petitioner are final and the same ought not to be granted by Court at an interlocutory stage. Moreover, the 2nd respondent indicate that the orders sought by the applicant/petitioner are a copy and paste of the final orders sought in the main petition thus the current application seeks to determine the petition at an interlocutory stage.

14. The 2nd respondent lastly contends that the application lacks merit, is frivolous, vexatious and an abuse of Court process and should be dismissed.

Petitioner/Applicant's Submissions

15. The petitioner submits that he had a legitimate expectation of graduating and relies on the case of ***Pevans East Africa Limited vs Betting Control and Licensing Board & 2 others; Safaricom Limited & another 2019 Eklr.*** In particular, he submits that the 2nd respondent is a public body under the realm of legitimate expectation and ergo the applicant by paying fees, attending classes, siting and passing exams, being issued with provisional transcripts and school ID bearing logo of the respondents, had a legitimate expectation that he would graduate.

16. Secondly, as regards the validity and or effect of the collaboration agreement between the 1st and 2nd respondents, the petitioner submits that the doctrine of estoppel applies since at the time of admitting the petitioner, the respondents held themselves out as having the said MOU in force and did not take any steps to stop the alleged illegal conduct of the 1st respondent but encouraged the same. He relies on the case of **Nurdin Bandali v Lombank Tnaganyika Ltd [1963] EA 304** as cited by **Involate Wacike Siboe vs Kenya Railways Corporation & another [2017] eKLR**.

17. Finally, as regards nature of the orders sought, the petitioner admits that the orders sought in both the petition and the application are the same and this is because the Court might determine the matter summarily or require that for the orders to be issued, the matter should proceed to full hearing.

The 2nd respondent's submission

18. In its submission dated the 30th of November 2020, the 2nd respondent submits that the orders sought are final in nature and not interlocutory and as such the Court should reject any invitation to determine the substantive dispute at this interlocutory stage. To buttress this position, the 2nd respondent relies on the case of **East African Portland Cement Company Limited vs. Attorney General and another 2013 eKLR and Platinum Distillers Limited vs Kenya Revenue Authority [2019] eKLR.**

19. Similarly, the 2nd respondent submits that the applicant has not met the conditions set out for grant of interlocutory orders, that is prima facie case, irreparable harm and balance of convenience and relies on a number of cases namely **Giella vs Cassman Brown & Co Ltd [1973] E.A, Mrao Ltd. vs First American Bank of Kenya Ltd & 2 others [2003] KLR and Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others [2014] eKLR.**

20. Finally, the 2nd respondent submits that the petitioner/applicant has not established the existence of any link between the petitioner and the 2nd respondent's and further that the claim for legitimate expectation cannot be based on an illegality and submits that the application be dismissed with costs.

Issues for determination

21. From the submissions and material evidence placed before Court the following issues are identifiable for determination;

a. Whether the applicant has met the threshold for granting of the orders sought

b. Whether the orders/reliefs sought are final or interlocutory in nature and finally,

c. Who should bear the costs of this application.

22. In my view, issues a and b are closely related and will be addressed together.

Analysis and Determination

a. Whether the applicant/petitioner has made out a case for grant of interlocutory injunction

23. The conditions for consideration in granting an injunction are well settled in the case of ***Giella vs Cassman Brown & Company Limited (1973) E A 358,*** where the court expressed itself on the condition's that a party must satisfy for the court to grant an interlocutory injunction. The court held: -

> **"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience."**

24. The Court of Appeal in ***Mrao Ltd vs First American Bank Of Kenya Ltd & 2 Others*** held that: -

> **"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."**

25. The Court must therefore have a holistic evaluation of the evidence availed before it by all parties before granting the orders sought. Simply, the Court must not only look at the strength of the applicant's claim but also the weight of the defence before making a determination as to whether or not to grant the orders sought. This position is buttressed in the case of **Central Bank of Kenya & Another vs Uhuru Highway Development Ltd & 4 Others**, where the Court of Appeal held: -

> **"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules.**

26. The starting point therefore is that an applicant must demonstrate that he/she has a prima facie case with probability of success. In **MRAO LTD VS FIRST AMERICAN BANK OF KENYA LTD & 2 OTHERS (Supra),** the court while addressing what constitutes prima facie case held: -

> **"So, what is prima facie case? I would say that in civil case it is a case in 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".**

27. The learned judge further observed that;

> **"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"**

28. The second test is whether an applicant will suffer irreparable loss. In Francis **Jumba Enziano and Others vs. Bishop Philip Okeyo and Others Nairobi HCCC No. 1128 of 2001(Unreported)**, the learned judge noted that an interlocutory injunction will not normally be granted unless the applicant can show an irreparable injury which cannot be adequately compensated by damages.

29. 'Irreparable loss' was defined by Court in **Paul Gitonga Wanjau vs. Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015**, as simply injury or harm that cannot be compensated by damages and would be continuous.

30. The third and final threshold is the balance of convenience. As rightly noted by **Ringera J in Francis Jumba Enziano and Others vs. Bishop Philip Okeyo and Others** (supra) "The golden Rule in applications for injunctions is to maintain status quo." That is, the purpose of any injunction sought is to maintain *status quo* before a case is heard and determined.

31. In **County Assembly of Machakos v Governor, Machakos County & 4 others [2018] eKLR,** the Court while citing with approval the case of **Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR** opined;

> **"that at the interlocutory stage, the case has to be unusually strong and clear before a mandatory injunction will be granted,**

and that if a mandatory injunction is granted at all on an interlocutory application, it is granted only to restore the status quo and not granted to establish a new state of things, differing from the state, which existed at the date when the suit was instituted"

32. In preserving the status quo, the Court must look at the effect/impact that the grant or denial thereof will have on an applicant or defendant.

33. Where the effect of denial of the injunction sought may result in an inconvenience to a successful plaintiff/applicant, the court ought to issue the relief sought. Similarly, where the resulting inconvenience is greater to the defendants than the applicant/plaintiff, then the court cannot issue an injunctive relief.

34. In ***Bryan Chebii Kipkoech v Barnabas Tuitoek Bargoria & another [2019] eKLR,*** while addressing the balance of convenience, the court held that: -

"The Court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it."

35. In the present application the applicant/petitioner has not established that he has a prima facie case with probability of success. Without getting into the merits of his petition, the applicant/petitioner though has provided documents that show that he was issued with provisional certificate bearing the logo of both the 1st and 2nd respondents marked as GTD 3, GTD 5a and GTD 5b; has provided various receipts that show payment of fees to the 1st respondent on diverse dates marked as GTD 4(a) – 4 (e); And he, the applicant/petitioner has confirmed that he was issued with a school ID card bearing the logo of both the 1st and 2nd respondents, he has not addressed the raised issue by the 2nd respondent that their memorandum of understanding with the 1st respondent was brought to an end by the operation of the law in the year 2015 and the applicant was admitted by the 1st Respondent Institution in the year 2017, outside the two institutions collaboration period. If the 1st Respondent Institution proceeded to operate after the year 2015 as if the collaboration which had ceased was still in place, knowing very well it had ceased, then they are solely to blame for the predicament the applicant found himself in. The 2nd Respondent would have nothing to do with it and does not hold a solution to the applicant's predicament.

36. Secondly, as regards irreparable harm, the applicant/petitioner has established that any other institution he applies to has demanded final original transcripts and not provisional ones. To this end, the applicant/petitioner stated that without the original transcripts, he is unable to proceed with his education. To buttress this point, the applicant/petitioner has submitted a letter marked exhibit GTD 6(a) from the Jomo Kenyatta University of Agriculture and Technology dated the 24th of February 2020 requiring him to produce certified copies of original transcripts and not provisional transcripts for admission purposes. These are documents the applicant avers have been withheld by the 1st and 2nd respondent. Furthermore, the applicant/petitioner has indicated that due to his inability to proceed with further education, his sponsors have left him. These factors considered together shows he's suffering irreparable harm but in my view the current application, given the circumstances, does not offer him recourse.

37. Finally, as regards the balance of convenience, where any doubt exists, the doubt is resolved in favour of the applicant/petitioner. However, in this application there is a greater inconvenience to the 2nd respondent should the reliefs sought be granted in a situation where they are incapable of meeting such reliefs as they have demonstratively indicated the same would amount to an illegality.

38. It is well settled general proposition of law that mandatory injunction at the interlocutory stage should not be granted if it has the effect of granting the final relief. The law has been laid down in catena of cases.

39. In **Vivo Energy Kenya Limited -v- Maloba** ***Petrol Station Limited & 3 Others*** **(Supra)** and ***Stephen Kipkebut t/a Riverside Lodge and Rooms -v- Naftali Ogola (2009) eKLR the*** court stated that an order which results in granting of a major relief claimed in the suit ought not to be granted at an interlocutory stage.

40. This position was also affirmed by the Court of Appeal in ***Kenya Breweries Ltd & Another vs Washington O. Okeya [2002] eKLR***, where the court stated as follows as regards mandatory injunctions: -

"A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction."

41. However, there is no vivid mandate by any law that in all circumstances such a relief at an interlocutory stage has to be declined. Thus, general proposition of law is not an absolute principle of law. Needless to say, it is only under exceptional circumstances that a mandatory

relief at an interlocutory stage can be granted by the courts

42. In **Nation Media Group & 2 Others vs John Harun Mwau [2014] eKLR**, the court of appeal held:

> **"It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances… A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted."**

43. The court of appeal in ***Olive Mwihaki Mugenda & another v Okiya Omtata Okoiti & 4 others [2016] eKLR*** while addressing the issue of final orders at interlocutory stage rightly held that: -

> "Analysis of the persuasive decisions from India shows that if a trial court is inclined to grant final orders at the interlocutory stage, this can only be done in exceptional circumstances and the reasons for granting such final orders must be stated. In the Indian case of **Deoraj -v- State of Maharashitra & others, Civil Appeal No. 2084 of 2004**, it was held that balance of convenience and irreparable injury need to be demonstrated before interlocutory final orders can be granted. In the case, it was further stated further that a Court could grant such final interlocutory orders if failure to do so would prick the conscience of the Court resulting in injustice being perpetrated throughout the hearing and at the end, the Court would not be able to vindicate the cause of justice. In the case of **Ashok Kumar Bajpai - v- Dr. (Smt) Ranjama Baipai, AIR 2004, All 107, 2004 (1) AWC 88,** at paragraph 17 of the decision the Indian Court expressed as follows:
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> **"…It is evident that the Court should not grant interim relief which amounts to final relief and in exceptional circumstances where the Court is satisfied that ultimately the petitioner is bound to succeed and fact-situation warrants granting such a relief, the Court may grant the relief but it must record reasons for passing such an order and make it clear as what are the special circumstances for which such a relief is being granted to a party."**

44. As earlier on expressed, the applicant has not met the threshold for granting of the reliefs sought at an interlocutory stage. Granting such orders would also amount to granting final orders without according the parties a forum to fully ventilate the issues arising therefrom.

Given that the applicant in the alternative sought the petition be expedited, in the circumstance this would serve in achieving ends of justice.

45. The bottom line is that the application lacks merit and is dismissed. The petition should be expedited as urged.

Cost be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 23RD DAY OF MARCH, 2021

In the absence of:-

Mr. Aloo for the applicant.

Mr. Anditi for the respondent

Gladys - Court Assistant