



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

PETITION NO. E007 OF 2021

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOM UNDER ARTICLES 24, 27 (5), 36 (1), 37, 43 (1) (f), 47 (1), 47 (2), 50 (1), 50 (2), 50 (3), 50 (4), 50 (5) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ARTICLES 2 (1), 2 (4), 3 (1), 10, 19, 20 (2), 22 (1), 22 (3), 27 (1), 28, 48, 165 (3) (b), 165 (6), 258 (1), 259 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 4 (1), 4 (2), 4 (3) (e), 4 (3) (f), 4 (3) (g), 4 (4) (a), 4 (4) (c), 6 (1), 6 (3), 7 (2) (a), 7 (2) (b) OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013

BETWEEN

PETER GLEN ONYNAGO.....PETITIONER

VERSUS

KENYA METHODIST UNIVERSITY.....RESPONDENT

RULING

1. By notice of motion dated 15th June 2021, the Respondent seeks principally an order for stay of proceedings pending appeal from the decision of the Court upon a preliminary objection taken by the Respondent University primarily on the ground of non-exhaustion of internal remedies as follows: -

i) Spent.

ii) That the Honourable Court be pleased to stay the proceedings in relation to the Petitioner's Application and Petition both dated 12th April 2021 pending the lodging and hearing of the intended appeal on the decision and ruling dated 10th June 2021.

iii) That the Honourable Court be pleased to grant leave to the Respondent to forthwith hear, determine or in any other manner process the appeal lodged by the Petitioner and currently pending before the Respondent's Students Disciplinary Appeals Committee.

iv) That costs of and incidental to this application be provided for.

v) That the Honourable Court be at liberty to grant such further or other reliefs that may be just and expedient.

2. The Respondent urged that it had been prevented by the adverse effects of COVID-19 to earlier conclude the hearing and determination of the Petitioner's said appeal.

3. The Petitioner's Counsel, Mr. Adrian Kamotho, urged that the Respondent's intentions were noble and aimed at securing a determination

in accordance with the Respondent's Regulations of the Petitioner's appeal pending before the internal disciplinary committee of the respondent as follows:

“By the Application of 15/6/2021, the Respondent wishes to seek a second view on the Preliminary Objection. The Respondent's counsel has considered the circumstances of the case. The petitioner is a student of the Respondent. He was tried. We are aware there could be errors. There is a mechanism for disciplinary appeal. Petitioner has lodged an appeal with the Students' Disciplinary Appeals Committee but we were not able to process. That is why we ask for the proceedings to be stayed to enable us to proceed with the appeal. We ask to be allowed to proceed with the appeal.

The appeal may reverse the decision of the committee if it finds that the decision was not procedural. The court proceedings would be superfluous.

The Respondent is keen to protect the rights of the petitioner. It may take longer if it is done through the court, taking into account that the Respondent equally has a right to heard.

For the sake of the student we plead that the Respondent proceeds with the appeal. It is not for the court to remedy the errors of the student committee but the Appeal process.

We pray that the application be allowed to the extent that the Respondent considers the appeal from the students' disciplinary committee for expeditious disposal and non-escalation of costs. The petitioner is a student. If the Student Disciplinary Committee is affirmed the student may take steps to seek alternative school and if it is reversed he may proceed with his studies.

The Respondent is not acting out of malice. The decision could have been right or wrong. If the decision is found to have been wrong it will be reversed.”

4. Counsel for the Petitioner, Mr. Okongo, in opposition of the application for stay which it considers only a tactic for the delay of fair determination of the Petition, seeks the dismissal of the application and the hearing of the Petition on priority basis as ordered by the court. He urged that every delay is adverse to the Petitioner's constitutional right to education, as follows:

“The petitioner came to court with a good reason. Why the appeal was not heard is part of the reason we are in court. The court proceedings need not be long and we have asked that the petitioner be allowed to go back to school. The petitioner will be in school pending determination of the court petition.

The court should come to the assistance of a litigant if the legal process has not been followed. The issue raised was taken in the Preliminary Objection. There is no urgency in the application for stay.

The court must balance between the interests of the parties. The petitioner is a student. The student cannot enroll in another school even if he wanted as he cannot get his transcripts. The application has been pending for 2 months. The respondents filed a Preliminary Objection which has been dismissed. The application is not urgent as it seeks to stay proceedings without good reasons. The prayer in Paragraph 3 seeks stay of the dismissal of the Preliminary Objection. What is the purpose of appeal when prayer 3 is granted. If granted there is no need of appeal. The petition should be expeditiously heard. The application should take priority. The court granted clear orders and paragraph 4 of the supporting affidavit acknowledged the orders. I rely on Section 8 of the Fair Administrative Action Act for the disposal of the applications within 90 days. The application was filed on 12/4/2021. We pray for the hearing of the application on priority basis and the petitioner should be in school while the petition is heard.”

Issue for Determination

5. The question for determination in this ruling is whether the court shall stay the proceedings in the petition to allow the consideration and administrative appeal in accordance with the internal disciplinary mechanism of the respondent university and whether the court shall direct the admission of the petitioner student into his studies at the university in the meantime.

Determination

6. Having considered the submissions of the Counsel for the parties, the Court views the following factors to affect the result of the application:

1. There is no appeal as of right from a determination of a Preliminary Objection; it would appear that leave of the court is necessary to bring an appeal from the decision of the court on a preliminary point.

2. The Court is enjoined under Article 20 to ensure that the rights in the Bill of Rights under which Article 43 on the right to education falls are upheld.

3. A balancing of the rights of the parties is necessary. On the one hand the right of the Petitioner to education under Article 43 and on the other hand, the Respondent University's right to a fair hearing under Article 50 (1) of the Constitution.

4. That both the rights of the Petitioner and the Respondent may be honoured by a composite order of the court which allows for the hearing of the appeal in accordance with the internal mechanisms of the Respondent University and the continuation of study by the Petitioner student in the meantime pending the consideration of the appeal expeditiously, in the interest of an early determination of

the dispute for mutual benefit of the parties.

5. A **“without prejudice”** consideration of the dispute between the parties through an administrative appeal in accordance with its internal rules is also an alternative dispute resolution mechanism within the meaning of Article 159 of the Constitution which the court is enjoined to promote.

6. Although the timelines of the Fair Administrative Action Act do not apply to the present Petition which is filed under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the expedited conclusion of the dispute is crucial for purposes of avoiding the protracted interference with the student’s studies.

7. Whatever the outcome of the administrative appeal, the court retains its jurisdictional competence to give further orders in the matter in this suit of which it is properly seized.

Balance of rights

8. The Court takes the view, that it is necessary at this stage before the final determination of the Petition on its merits, to balance the rights of the Petitioner student for the enforcement of his right to education under Article 43 of the Constitution and the Respondent’s right to fair hearing under Article 50 (1) in seeking to enforce good administrative management of the institution in accordance with its governance rules. The Court shall, therefore, seek to uphold the respondent’s internal procedure of appeal as an alternative dispute resolution mechanism in accordance with Article 159, without prejudice to the parties right to a full hearing in accordance with Article 50 (1) of the Constitution, if the internal mechanism does not resolve the dispute.

9. In order to protect the Petitioner from substantial loss of his education opportunity over a protracted length of time while the Respondent is considering the internal appeal, the court shall make directions that the hearing of the internal appeal be concluded within thirty (30) days and that while the appeal is under consideration and pending the determination of the appeal, the Petitioner shall be admitted into his classes, with complete access to both virtual and in-person tuition, the lecture halls, library and other resource centres, and all student portals in the relevant degree or other programme as applicable.

ORDERS

10. Accordingly, for the reasons set out above the Court makes the following orders: -

1. There shall be a stay of proceedings in the Petition herein for thirty (30) days.

2. The Respondent shall conclude the determination of the Petitioner’s Appeal to the Disciplinary Appeal Committee before it within thirty (30) days.

3. The Petitioner shall forthwith and until further orders of the Court and pending hearing and determination of his said appeal to the Respondent’s Appeal Committee be allowed into all the Respondent’s lessons or classes, with complete access to both virtual and in-person tuition, the lecture halls, library and other resource centres, and to all student portals in the relevant degree or other study programme, as applicable.

4. The matter will be mentioned for further directions on 23rd July 2021.

Order accordingly.

DATED AND DELIVERED ON THIS 24TH DAY OF JUNE, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Robi Kerato Partners, Advocates for the Petitioner

M/S Adrian Kamotho Njenga & Co. Advocates for the Respondent.