



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CONSTITUTIONAL PETITION NO. 12 OF 2019

MUTIMBA CRESER MASAYI JOSEPH.....PETITIONER

AND

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY.....RESPONDENT

RULING

1. I am called upon to determine an application dated 29th August 2019. It seeks, among other orders, for a conservatory order to suspend the respondent's decision to cancel the petitioner's degree certificate issued on his graduation day, on 6th December 2012, and communicated to him by a letter dated 13th June 2017, and to suspend the decision by the respondent to reprint another degree certificate, pending hearing and determination of the petition. The application is opposed. A replying affidavit and grounds of opposition were filed.
2. Looking at the filings herein, by both sides, the only issue for me to determine, is whether the petitioner has met the conditions precedent for grant of conservatory orders pending the hearing and determination of the petition.
3. The case by the petitioner is that the respondent had written to him a letter, on 6th May 2019, canceling his degree certificate, serial number 071030, and reprinted another certificate for him without reference to him. He says that he got employment with the Teachers Service Commission using the degree certificate that the respondent was purporting to cancel, and he feared that he could lose his employment should the cancellation be upheld. He complains that the reprint of another certificate was unnecessary and would be inconsistent with a court order made in Kakamega CMCCC No. 384 of 2017. He states that he was making efforts to settle the arrears of fees owing, but the regular effort was frustrated by the cancellation of the certificate. He has listed his reason for holding that the cancellation of the degree certificate was illegal, unfair, disproportional and unjust. I shall not expend energy discussing them here, since that is what shall be canvassed at the hearing of the petition itself. He states that he was still in the employ of the Teachers Service Commission, on the strength of orders that he had obtained in Nairobi ELRC No. 7 of 2018, in which he had challenged the decision of his employer to stop his salary after the cancellation of the degree certificate. He explains that that the stoppage of salary followed communication by the respondent, through the media, that his degree certificate, amongst others, had been withdrawn on account of various grounds. When he enquired from the respondent, he was informed that he owed the respondent a sum of Kshs. 198, 800.00 in tuition and other fees arrears. He fears that if the orders that seeks in the application are not granted, he stood to suffer irreparable damage by way of loss of employment.
4. The respondent's case, on the other hand, is that the petitioner's degrees certificate and examination results transcripts were forged or obtained by fraudulent means. It argues that it would be against public policy to allow the petitioner get away with an illegality in the guise that his rights were violated. It avers that the prayers sought had been overtaken by events, going by what transpired in Kakamega CMCCC No. 384 of 2017. The respondent concedes that the petitioner was one of his students, he had a lot of financial problems during his studies, and on many occasions he sought and obtained deferment of studies and registered late for examinations, but managed to complete his studies, sat all the examinations as required and passed them. All that happened despite him owing the respondent a lot of money. It is admitted that the name of the petitioner was included in the graduation list, but by error, since the petitioner had not cleared outstanding fees amounting Kshs. 198, 800.00. It is conceded too that a degree certificate was prepared for the petitioner, to be collected after he had settled the fee balances.
5. It is averred that at some point the respondent realized that the petitioner's degree certificate and transcripts, among others, were missing from its stores. When that discovery was made, a report was made to the police, and the respondent's senate sat and resolved to cancel all the certificates that it established were missing from their stores, and further that the graduates be issued with fresh certificates to avoid the illegal use of the missing certificates and transcripts by unscrupulous persons. A notice was subsequently published in one of the daily newspapers cancelling all the degrees certificates that had not been officially collected by the graduands and which were found to be missing from the respondent's stores. The respondent contends that when the notice was published, the petitioner made no effort to contact it, and that it was his sister who made contact after his salary was stopped by the Teachers Service Commission. It was after the stoppage of salary that the respondent established that the degree certificate and examination transcripts for the petitioner were in his possession, which meant that he had obtained them fraudulently or illegally or unofficially, without clearing outstanding fees owing to the respondent. It is contended that the petitioner has not so far explained how he came by the degree certificate and transcripts without signing for them in the certificate

collection register and without clearing with the respondent, and before paying the outstanding fees. The respondent avers that the petitioner obtained employment with the Teachers Service Commission using a certificate and transcripts that had been stolen.

6. Conservatory orders are issuable by the High Court in exercise of the jurisdiction granted to it by the Constitution with respect to proceedings brought under Article 22 of the Constitution. Under Article 23(3) of the Constitution it is stated:

“23. (1) *The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.*

(2) ...

(3) *In any proceedings brought under Article 22, a court may grant appropriate relief, including—*

(a) ...

(b) ...

(c) *a conservatory order;*

(d) ...”

7. A number of courts have pronounced variously about the said conservatory orders. I have looked at *Simeon Kioko Kitheka & 18 others vs. County Government of Machakos & 2 others* [2018] eKLR, *Gatirau Peter Munya vs. Dickson Mwenda Kithinji and 2 others* [2014] eKLR, among others. I find the statement by the court in *Judicial Service Commission vs. Speaker of the National Assembly & another* [2013] eKLR, quite apt, where it was said:

“*Conservatory orders ...not ordinary civil law remedies, but ... 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.*”

8. Am alive to the fact that at this stage I am not called upon to determine the main dispute, that shall be dealt with at the hearing of the petition. What I have before me is an application where one party is asking for preservation of the *status quo* pending the disposal of the main petition, on grounds that the subject matter of the dispute may be lost or destroyed, if conservatory orders are not made, which would, more or less, render the whole exercise of the filing and hearing of the petition academic. In deciding whether or not to grant the conservatory relief sought, I have to be careful not to venture into matters that shall be the mandate of the Judge who shall ultimately hear the petition. If I do so, I am likely to put him in an embarrassing situation.

9. The petitioner has come to court complaining that the respondent cancelled his degree certificate, without as much as a notice to him, nor asking him to render some explanation. In the context of public law, it is referred to as affording the other party a fair hearing or a chance to offer an explanation or defence. He complains that the cancellation was accompanied by publication of the fact to the larger world, which communication reached his employer, who, in turn, activated a system to stop his salary. He pleads that he would suffer loss, should the exercise of cancellation of the certificate go ahead to final conclusion, as he stood to lose his employment and livelihood. The respondent has offered an explanation, that the petitioner had not been officially cleared by it and officially issued with the certificate, as he still owed huge sums of money to it. While the respondent was waiting for the petitioner to clear his fees arrears and redeem his degree certificate, and other academic documents, it discovered that the said degrees certificates and transcripts, including those of the petitioner, had disappeared from its stores. A report of the loss was made to the police and it was decided by the respondent's organs that the missing certificates be cancelled lest they had fallen into the wrong hands. It was on that basis that a notice was published in the media. That is the case that will be on trial at the main hearing.

10. I should not try to get into merits of the dispute herein. I should not venture to try those facts to assess who, as between the petitioner and the respondent is telling the truth, or has a more reasonable case. Mine is to assess whether the subject matter should be preserved pending trial. It would appear from the facts that the petitioner was indeed a student of the respondent, he went through the motions of attending classes, sitting examinations, eventually graduating, and, generally, completing his education. The certificate in question is a genuine document from the respondent. The dispute is not on its legitimacy, but on the circumstances under which the petitioner got to be in possession of it when he had not cleared with the respondent, by settling college fees, among other requirements. He is in employment on the basis of that document. Cancellation of the document would possibly cause problems with his employer. That is the *status quo* as of today.

11. The court that shall hear the main suit, shall grapple with questions as to whether the process leading up to the cancellation of the certificate was proper, whether there was need for the respondent to hear the petitioner before the decision to cancel was made, whether the petitioner got hold of the certificate in a lawful manner, whether the respondent is within its rights to cancel the certificates in question and issue fresh ones, among others.

12. I am persuaded that the petitioner stands to suffer prejudice should the conservatory orders not be granted. I take into account that the legitimacy or authenticity of the certificate in question is not really in contest, to the extent that the respondent admits preparing it, and the cancellation exercise only became necessary following the disappearance of the document from the store. The only prejudice that the respondent will suffer, should the conservatory orders be made, is that it will be kept away from its money, in terms of the outstanding fees, during the pendency of the petition.

13. Having said that I do hereby grant the Motion, dated 29th August 2019, in terms of prayer (iii) thereof. Costs shall be in the cause. The matter shall be mentioned, on a date to be appointed, at the delivery of this ruling, for directions on the disposal of the main suit.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 27TH DAY OF FEBRUARY 2020

W MUSYOKA

JUDGE