



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**(CORAM: CHERERE-J)**

**JUDICIAL REVIEW APPLICATION NO. 08 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW IN THE**

**NATURE OF CERTIORARI, MANDAMUS AND PROHIBITION**

**AND**

**IN THE MATTER OF GREAT LAKES UNIVERSITY KISUMU NOT TO ADMIT**

**CERTAIN STUDENTS FOR ADMISSION TO GRADUATE AT THE UNIVERSITY**

**AND IN THE MATTER OF THE INTERNATIONAL DEVELOPMENT INSTITUTE-**

**AFRICA(INDA) & INDA COLLEGE OF TECHNOLOGY AND DEVELOPMENT**

**STUDIES**

**AND**

**IN THE MATTER OF THE UNIVERSITY ACT**

**AND**

**IN THE MATTER OF ARTICLES 1, 2, 3(1), 10, 12(1), 19, 20, 21, 22, 23(1)**

**& (3), 43, 47(1), 48, 160(1), 165(3) AND 258 (1) OF THE CONSTITUTION OF**

**KENYA 2010**

**AND**

**IN THE MATTER OF RULES 11, 12, 13, 20 AND 21 OF THE CONSTITUTION**

**OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL**

**RIGHTS AND FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE, 2006**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**THE VICE CHANCELLOR GREAT LAKES UNIVERSITY.....1ST RESPONDENT**

**THE SENATE.....2ND RESPONDENT**

EXPARTE

CHARLES OYAYA,

MARY WARINDA,

THE INTERNATIONAL DEVELOPMENT INSTITUTE-AFRICA(IDIA) &

IDIA COLLEGE OF TECHNOLOGY AND DEVELOPMENT STUDIES

RULING

1. **IDIA COLLEGE OF TECHNOLOGY AND DEVELOPMENT STUDIES** was on 06.07.2012 registered as a business name under the provisions of the Registration of Business Names Act. It was subsequently incorporated as a company known as **IDIA COLLEGE OF TECHNOLOGY AND DEVELOPMENT STUDIES LIMITED** on 04.09.2017.

2. The Ministry of Higher Learning, Science and Technology on 03.10.12 issued **IDIA COLLEGE OF TECHNOLOGY AND DEVELOPMENT STUDIES** with a certificate of accreditation to offer the following courses:

i. **Community Development and Social Work**

ii. **Sales and Marketing**

iii. **Information Communication Technology**

iv. **Business administration**

3. **GREAT LAKES UNIVERSITY (University)** is an institution of higher learning established by a Charter dated 19.09.12 issued by the Ministry of Higher Education, Science and Technology.

4. The Applicants' case is that on 02.09.2013, **THE INTERNATIONAL DEVELOPMENT INSTITUTE-AFRICA(IDIA) COLLEGE OF TECHNOLOGY AND DEVELOPMENT** entered into a Memorandum of Understanding (**MOU**) with the **University** where the **University** agreed to accredit and award certain academic programmes to be developed and offered by the **Applicants** as was to be approved from time to time by **THE SENATE (2nd Respondent)**.

5. The terms of the said **MOU** included but were not limited to the **University** accrediting and granting academic recognition to education programmes offered by the Applicant in so far as they satisfy the requirements of the **University**.

6. It is the **Applicants'** case that the students who are the subject of this application are the second batch of students enrolled under the **MOU**. It is further the Applicants' case that the **1st Respondent** had by a letter dated 05.07.2019 informed them through their advocate that the **MOU** had been outlawed in 2014 by an Act of Parliament (Universities Act 2012 [2015;2016]) as was notified to the **Applicants'** by a letter dated 22.07.2014 but that the **IDIA COLLEGE OF TECHNOLOGY AND DEVELOPMENT STUDIES** had continued to run and operate an illegal entity.

7. The **Applicants** then filed a chamber summons amended on 02.07.2020, seeking the following orders:

1. **That pending the hearing and determination of the main application, conservatory orders do issue staying the decision of the Great Lakes University (the University) to hold its graduation in August, 2020 or until the further orders of this court**

2. **That the court be pleased to grant leave to bring to this court an order of Certiorari removing to this court the decision of the Governing Council of the Great Lakes University, the Senate and the Vice Chancellor made on 05.07.19 for the purpose of being quashed the decision to bar the following students from graduating in August, 2020.**

3. **ODINGA CATHERINE OCHIENG**

4. **OWINO EFFIE AWOUR**

5. **ANDERE FREDRICK OWINO**

6. **JUMA VALARY AKOTH**

7. **OLOO EUNICE ANYANGO**

8. **AMEDA KEVIN OMONDI**

9. ONYANGO KENVIN ODHIAMBO

10. NDUWA YESU GODFREY

11. OOKO ELLIE ODIE

12. OTIENO ERICK ALOO

13. ÓWITI SHEILA ALOO

14. OYOLO WINFRED ATITO

3. That the court be pleased to grant leave for an order of Mandamus compelling the Respondents to register, re-admit and re-register for graduation in August, 2020 or any other date pending the determination of the main application or until the court orders otherwise the following students

1) ODINGA CATHERINE OCHIENG

2) OWINO EFFIE AWOUR

3) ANDERE FREDRICK OWINO

4) JUMA VALARY AKOTH

5) OLOO EUNICE ANYANGO

6) AMEDA KEVIN OMONDI

7) ONYANGO KENVIN ODHIAMBO

8) NDUWA YESU GODFREY

9) OOKO ELLIE ODIE

10) OTIENO ERICK ALOO

11) ÓWITI SHEILA ALOO

12) OYOLO WINFRED ATITO

4. That the court grants leave to the Applicant for an order of Mandamus seeking declaratory orders that the Respondent's decision amounts to contempt of court of the orders that the Respondents decision amounts to contempt of orders of Justice Majanja made on the 29.06.2029 in JUDICIAL REVIEW NO. 06 OF 2016

5. That the Graduation of the students in paragraphs (2) and (3) be allowed to proceed and the students be awarded Certificates by the University

6. That the court grants leave to the University for an order of Mandamus directing them to place the names of the students in the next graduation list

7. Costs of and incidental to this Petition and any other order that this court deems fit and just to grant in the circumstances

8. The Application is based on the grounds among others THAT:

a) The 1st and 2nd Respondents failed to appreciate the existing statutory constitutional provisions of the law on the right to fair hearing under Article 47

b) The students have satisfied the requirements as laid down by the University

c) That the rejection violated the agreement between them and the exparte Applicants

d) The rejection of the students from graduating is clearly illegal and discriminatory

e) The selection process of the graduates and the decision emanating therefrom was procedural, misinformed, unfair, unreasonable and lacks any sound legal reasoning

9. The Respondents though served did not oppose this application. The Applicants seek both conservatory orders and mandatory injunction orders.

10. I have considered the amended chamber summons in the light of the supporting affidavit sworn on 12.07.2016 by **CHARLES OYAYA**, the *1st ex parte Applicant* and his further affidavit sworn on 01.08.2019 and the annexures thereto and I have deduced the issues for determination as follows:

**1) Whether the application meets the legal threshold for granting of a conservatory order**

**2) Whether the application meets the legal threshold for granting of a mandatory injunction**

11. The applicable principles and the path to be followed by a court seized with an application for conservatory orders are to be found under Article 23 (3) (d) of the Constitution.

12. Foremost, the applicant ought to demonstrate a *prima facie* case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. As was stated by Musinga J (as he then was) in the case of **Centre for Rights Education and Awareness (CREAW) & 7 Others V Attorney General [2011] eKLR**:

**“[Arguments] in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the Petitioner’s application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution”.**

13. From the foregoing, it is apparent that it is not enough for an applicant seeking a conservatory order to merely establish a prima facie case but must also show that the case is potentially arguable. In this regard, Ibrahim J (as he then was) whilst agreeing with the holding in **Centre for Rights Education and Awareness (CREAW) & 7 Others V Attorney General (above)** had this to say in the case of **Muslims for Human Rights (MUHURI) & 2 others v Attorney General Petition No 7 of 2011; [2011] eKLR**, -

**“I would agree with my brother that an applicant seeking conservatory orders in a Constitutional case must demonstrate that he has a prima facie case with a likelihood of success” (emphasis).**

14. The foregoing principles have been reiterated in **Micro Small Enterprises Association of Kenya (Mombasa Branch) v Mombasa County Government [2014] eKLR**; **Jimaldin Adan Ahmed & 10 Others v Ali Ibrahim Roba and 2 Others [2015] eKLR** and **Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR** among other authorities.

15. Once a prima facie case has been established to the satisfaction of the court, the court is then to decide whether a grant or a denial of the conservatory relief will enhance the Constitutional values and objects of the specific right or freedom in the Bill of rights: see **Patrick Musimba v The National Land Commission & 4 Others HCCP 613 of 2014 (No. 1) [2015] eKLR** and **Satrose Ayuma & 11 Others v Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme [2011] eKLR**.

16. Thirdly, it is the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice by ensuring that the petition or its substratum will not be rendered nugatory if the conservatory order is not granted (See **Martin Nyaga Wambora v Speaker of the County of Assembly of Embu & 3 Others [2014] eKLR**).

17. The fourth principle was well articulated by the Supreme Court of Kenya in the case of **Gatirau Peter Munya -v- Dickson Mwenda Githinji & 2 Others [2014] eKLR** where it held that the court must also consider conservatory orders in the face of the public interest.

18. Finally, the court is under a duty to exercise its discretion in deciding whether to grant or deny a conservatory order by considering all relevant material facts which include the applicant’s credentials, the prima facie correctness of the availed information, whether the grievances are genuinely legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless: (See **Suleiman v Amboseli Resort Limited [2004] 2 KLR 589**).

19. To begin with, I have noted that to the further affidavit by the *1st ex parte Applicant* is annexed a certificate of incorporation for **THE INTERNATIONAL INSTITUTE OF HEALTH AND DEVELOPMENT POLICY AND RESEARCH IN AFRICA (IIHDPAR-AFRICA)** which is a stranger to these proceedings since it is neither, **THE INTERNATIONAL DEVELOPMENT INSTITUTE-AFRICA (IDIA) IDIA COLLEGE OF TECHNOLOGY AND DEVELOPMENT STUDIES** that entered into an *MOU* with the *University* nor **IDIA COLLEGE OF TECHNOLOGY AND DEVELOPMENT STUDIES** that was accredited by the Ministry of Higher Learning, Science and Technology to offer courses in **Community Development and Social Work, Sales and Marketing, Information Communication Technology and Business**

**Administration** as demonstrated by a Certificate of Accreditation dated 03.10.12 annexed to the further affidavit by the **1st exparte Applicant** and marked **CO-1A**.

20. Annexed to the supporting affidavit by the **1st exparte Applicant** and marked **CO8** is a list of the 12 students that are the subject of this application and it shows that they undertook training in **Public Health and Community Development** and not any of the 4 courses approved by the Ministry of Higher Learning, Science and Technology.

21. The Applicants did not present material before the court to demonstrate that the Ministry of Higher Learning, Science and Technology had accredited them to offer training in **Public Health and Community Development**. Consequently, I find that they have not established a *prima facie* case with a probability of success and the prayer for conservatory orders staying the decision of the **University** to hold its graduation in August, 2020 or until the further orders of this court is consequently declined.

22. Further to the foregoing, any order staying the intended graduation would adversely affect other innocent parties that are not parties to this application and such an order would for that reason not be in the public interest.

23. Having so found that the Applicants have failed to establish a *prima facie* case, I need not delve into the issue of the other 4 steps of the path to be followed by a court seized with an application for Conservatory Orders as per Article 23 (3) (d) of the Constitution.

24. Flowing from the foregoing analysis, I also find that the Applicants have not met the legal threshold for granting of a mandatory injunction that would warrant this court to issue an order directing that the aforementioned students be included as graduands and that the University be compelled to award them with Certificates.

25. From the foregoing, I find that the leave sought will serve no meaningful purpose and it is declined.

26. In the end, the chamber summons amended on 02.07.2020 is devoid of merit and it is dismissed.

**DATED AT KISUMU THIS 20<sup>th</sup> DAY OF August 2020**

**T. W. CHERERE**

**JUDGE**

**Court Assistants - Ms. Amondi/Ms. Okodoi**

**For the Applicants -Mr. Mwamu for Mwamu & Co. Advocates**

**For the Respondents - Antony Kago & Company Advocates**