



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(CORAM: CHERERE-J)

JUDICIAL REVIEW APPLICATION NO. 08 OF 2019

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDER OF
JUDICIAL REVIEW IN THE NATURE OF CERTIORARI, MANDAMUS AND PROHIBITION**

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**

BETWEEN

INTERNATIONAL DEVELOPMENT

INSTITUTE-AFRICA(INDA).....APPLICANT

AND

THE VICE CHANCELLOR

GREAT LAKES UNIVERSITY.....1ST RESPONDENT

THE SENATE.....2ND RESPONDENT

THE GOVERNING COUNCIL OF

GREAT LAKES UNIVERSITY.....3RD RESPONDENT

RULING

1. By a chamber summons dated 22nd August, 2018, applicant herein, seeks 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 (*hereinafter referred to as the University*) to hold its graduation on 23rd August, 2019 or until the further orders of this court
2. That the court be pleased to grant an order of Certiorari removing to this court the decision of the Governing Council of the University, the Senate and the Voice Chancellor made on 05th July, 2019 to bar some 12 students named in the Petition and the Application from graduating on 23rd August, 2019 for the purpose of being quashed
3. That the court be pleased to grant an order of Mandamus compelling the Respondents to register, re-admit and register for graduation on 23rd August, 2019 some 12 students pending the determination of the main application

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 the orders made on 29th June, 2019 in Judicial Review No. 06 of 2016**

5. **That the graduation of some 12 students be allowed to proceed and the said students be awarded Certificates by the University**

6. **Costs of the Petition**

2. The Application is based on the grounds on the face of the Application and the supporting affidavit sworn by Charles Oyaya who describes himself as a director of the Applicant and annexures thereto.

3. When the matter came up for directions on 29th July, 2019, Mr. Kago, the Respondents' counsel informed the court that he had filed a notice of Preliminary Objection. Upon being served with the notice, Mr. Mwamu for the Applicant indicated that he would be ready to argue it and I fixed it for hearing at 2.30 pm.

4. The Respondents hold the view that the Petitioner and Respondents are not juristic persons and that they therefore lack the *locus standi* to sue and be sued. It was contended that the Petitioner, **INTERNATIONAL DEVELOPMENT INSTITUTE- AFRICA (hereinafter referred to as INDA)** is a business name and ought to have brought this petition in the name of its proprietors. It was also argued that the Petition ought not to have been brought against the Respondents but against the University which has capacity to sue and be sued in its name. In support of their contentions, Respondents placed reliance on the case of **MUKISA BISCUIT MANUFACTURING CO. LTD vs WEST END DISTRIBUTORS LIMITED [1969] EA. 696**, section 14 of the Universities Act Chapter 210B Laws of Kenya, **Juliana Akinyi Owino v Kiarie Shoe Stores [2014] eKLR**, **Republic v Registrar of Societies Ex-parte Narok Muslim Welfare Association [2017] eKLR**, **Mwai Limited & 5 others v Municipal Council of Mombasa & 5 others [2015] eKLR** and **Humphrey Makokha Nyongesa & another v Communications Authority of Kenya & 2 others [2018]**.

5. It was argued on behalf of the Applicant that the Respondents are sued in their capacity as the offices that make decisions at the University and that a person under the provisions of Article 258 includes a business name. Reliance was placed on **James Gacheru Kariuki & 22 others v Kiambu County Assembly & 3 others [2019] eKLR**, **Japhet Jesanga Songok V Director General National Intelligence Service [2018] eKLR** and **Misc Civil Application 16 of 2017**.

6. A preliminary objection is in the nature of what used to be a demurrer..... It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase cost and on occasion, confuse issues. This improper practice should stop. (See **MUKISA BISCUIT case supra**).

7. Applying the above tests, I am satisfied that the Preliminary Objection on locus of the parties herein is a point of law that has been raised properly at the earliest opportunity.

8. Article 258 of the Constitution provides:

1. Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by-

a. a person acting on behalf of another person who cannot act in their own name;

b. a person acting as a member of, or in the interest of, a group or class of persons

c. a person acting in the public interest; or

d. an association acting in the interest of one or more of its members.

9. A Judicial Review is in the manner of a civil suit. Order 30, rule 9 provides:

Any person carrying on business in a name or style other than his own name may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply

10. There is, from the pleadings, no dispute that the Petitioner is a business name registered in the name of CHARLES OMONDI OYAYA and MARY EDITH WARINDI ALOO. The persons carrying on the business are CHARLES OMONDI OYAYA and MARY EDITH WARINDI ALOO in the name of INDA. I have considered the holding in **Juliana Akinyi Owino v Kiarie Shoe Stores (supra)** and I am persuaded that a mere name registered under chapter 499 of our laws does not clothe it with the requisite juristic personality in the absence of the names of the owners and that a business name cannot sue or be sued in the absence of the proprietors.

11. With reference to the provision of Article 258, the same cannot come to the aid of the Petitioner since it does not fit into the category in Article 22(2)(a) as a person or persons "**acting on behalf of another person who cannot act in their own name**" for the reason that CHARLES OMONDI OYAYA and MARY EDITH WARINDI ALOO can act in their names trading as INDA and that INDA as a business name lacks locus to sue and be sued.

12. Section 14 of the Universities Act provides that

The Minister may, by notice in the *Gazette*, publish the charter and with effect from the date of publication of the charter the institution established by the charter shall be a body corporate by the name cited in the charter with perpetual succession and a common seal, and shall, in that name, be capable of—

(a) **suing and being sued;**

13. The acts complained of are alleged to have been made by the offices that make decisions at the **Great Lakes University**. It has not been alleged that the University has no capacity of suing or being sued in its name.

14. From the foregoing, I am persuaded that the P.O has merit for the reason that the parties named as the Petitioner and the Respondents have no locus to sue and be sued in the capacities in which they are described in this Petition. I however decline to strike out the Petition for the reason that the defect is curable under Order 1 rule 10 which provides for substitution of parties and Order 8 that provides for amendment of pleadings.

DATED, DELIVERED AND SIGNED THIS 31st DAY OF July 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistants - Felix & Okodoi

For the Petitioner - Mr Mwamu

For the Respondents - Mr Bosire/Mr Kogo