



**REPUBLIC OF KENYA**

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

**PETITION NO.24 OF 2018**

**SIMON OKWARO HABU.....PETITIONER**

**-VERSUS-**

**EGERTON UNIVERSITY.....RESPONDENT**

**JUDGMENT**

1. The petitioner filed petition dated 12<sup>th</sup> November 2018 seeking the following orders:

- a. Declaration that his rights guaranteed and protected under the constitution Articles 10,27,28,43 and 47 of the constitution have been violated by the respondent.**
- b. A declaration that the petitioner does not owe the respondent any fees band is eligible for graduation**
- c. An order of mandamus to issue for purposes of compelling the respondent to graduate the petitioner for the graduation scheduled for December 2018**
- d. An order that the respondent pays the petitioner general damages for violation of petitioner's right**
- e. Cost of the petition**
- f. Any other relief that this Honorable court may deem fit and just to grant**

**PETITIONER'S CASE**

2. The petitioner averred that on or about 3<sup>rd</sup> April 2010, the Respondent admitted the Petitioner to its **Bachelor of Science in Agricultural Education and Extension Academic Programme**. He averred that following admission, he pursued his studies continuously, except in early 2011 when he deferred his studies, and sat for his final examination in 2014. He was issued with a course completion notification letter and a recommendation letter on 3<sup>rd</sup> June 2014.

3. That sometime in October 2014 the Petitioner applied for graduation but by his application was declined department of Science in Agricultural Education and Extension Academic Program on account of alleged missing grades in his provisional transcript. He further averred that on or about the 22<sup>nd</sup> October 2014, the Petitioner sought clearance from the Respondent's Finance office and upon verification of completion of course, his records were reconciled and he was required to pay an outstanding sum of Kshs.3,360/=.

4. He stated that throughout 2015 he followed up on the issue of missing grades and when he ultimately acquired all his grades he was cleared by the Respondent's department of finance on 27<sup>th</sup> August, 2015. On or about February 2016, he applied for graduation which was scheduled to take place in June 2016 but his name was omitted from the graduation list for the said graduation.

5. He averred that sometime in the month of August 2016 he again applied for graduation, which was scheduled to take place on 9<sup>th</sup> December 2016; he was asked to pay for credit transfers which he paid on 3<sup>rd</sup> November 2016. Subsequently the Petitioner was cleared to graduate in the ceremony scheduled for 9<sup>th</sup> December 2016. On or about 6<sup>th</sup> December 2016 he paid all prescribed graduation and alumni charges but on 7<sup>th</sup> December 2016 when he went to collect his gown, he found out that his name was not in the graduation list.

6. The Petitioner further averred that he was directed to the department of finance where he was informed that he had not paid credit transfer charges and that having been caught up in the system he owed the respondent Kshs.200,000/= alleged to be fees arrears.

7. on or about 2<sup>nd</sup> January 2017 the Petitioner lodged a complaint with the Respondent's integrity office which responded on the 23<sup>rd</sup> May 2017 indicating that he had been caught up in the system and ought to pay the alleged outstanding fees arrears. At the time of filing this suit, the petitioner was aware that there is a graduation ceremony scheduled for the 7<sup>th</sup> December 2018.
8. He averred that despite several attempts to have this dispute resolved amicably, the Petitioner's efforts have borne no fruit; and as a result of the actions of the Respondent, the Petitioner has suffered loss of employment opportunities due to failure to attain a Degree Certificate thus resulting in gross violation of the his rights as enshrined under Article 41 of the Constitution.
9. The petitioner aver that the Respondent has infringed and continues to infringe the Petitioner's rights as follows:
- a. By barring the petitioner from graduating when all the petitioner's classmates who have taken the same course as the petitioner have been graduated the respondent has discriminated against the petitioner contrary to and inconsistent with **Article 27** of the **Constitution**.
  - b. By barring the petitioner from graduating when all the petitioner's classmates who have taken the same courses as the petitioner have been graduated the respondent has violated the petitioner's dignity contrary to and inconsistent with **Article 28** of the **Constitution**.
  - c. By barring the petitioner from graduating when all the petitioner's classmates who have taken the same courses as the petitioner have been graduated the respondent has subjected the petitioner to psychological torture and cruel, inhuman and degrading treatment the respondent has discriminated against the petitioner which is contrary to and inconsistent with **Article 29 (d) and (f)** of the **Constitution**.
  - d. By adopting a policy on "**being caught up in the system**" and applying the same to the petitioner who has previously been cleared for graduation the respondent has subjected the petitioner to unfair administrative action which is contrary to and inconsistent with **Articles 10 and 47** of the **Constitution**.
  - e. By barring the petitioner from graduating when all the petitioner's classmates who have taken the same courses as the petitioner have been graduated, the respondent has denied the petitioner his right to education which is contrary to and inconsistent with **Article 43(i) (f)** of the **Constitution**.
10. The petitioner filed a further affidavit sworn on 2<sup>nd</sup> May 2019 in response to averments in the replying affidavit sworn on 9<sup>th</sup> April 2019.
11. He averred that the respondent failed to disclose that it set up a special programme where students would complete their studies in 3 years a shorter period than the 4 years now claimed by the respondent. He averred that he completed his course in 3 years in a programme termed/ designated as Level 3 Block 3 by the respondent; and that he did not attend the institution for 4 years as he had completed his courses by October 2014.
12. The petitioner further averred that while it is true that he was not cleared initially on account of missing marks, this was due to fault of lecturers who failed to submit the marks on time and not his fault. He added that when he was informed of missing marks, he followed up and the marks were eventually submitted and he did not have to resit any exam on account of missing marks and by a letter dated 1<sup>st</sup> April 2019 where the respondent's Advocate confirmed through its Advocate that he cleared his accredited program.
13. Petitioner averred that it is unreasonable for the respondent to demand payment of fees for a year that he did not study; this being done after he was issued with financial clearance on 27<sup>th</sup> August 2015.
14. That the requirement to pay for 4 years was introduced in June 2016 2 years after he had completed his course and one after being cleared by finance department for graduation
15. The petitioner averred that the results were not being released on time and by the time he was notified that he was to resit for AGEN 131(Basic Power and Resource Utilization) he was in 3<sup>rd</sup> year and the course had been renamed AGEN 174 (Farm Power Sources and Utilization) which he resat in 3<sup>rd</sup> year as shown by 3<sup>rd</sup> year transcript which he attached to his petition; and was issued with course completion certificate and recommendation letter on 3<sup>rd</sup> June 2014; and student clearance form on 29<sup>th</sup> October 2014.
16. The petitioner averred that while alleging that he did not resit AGEN 131, it did not adduce evidence to show that the course is still named AGEN 131(Basic Power and Resource Utilization) and not AGEN 174 (Basic Power and Resource Utilization).
17. Petitioner averred that he learned from the respondent's officer that the term "**Caught up in the system**" which was introduced in June 2016 mean that students are require to pay fees even if the complete their studies earlier which was introduced after he had completed his course and cleared for graduation.
18. He urged the court to intervene to stop continued violation of his constitutional rights.

#### **RESPONDENT'S CASE**

19. The respondent filed replying affidavit sworn by **Jane Bii** who is the defendant's legal officer on 9<sup>th</sup> April 2019. She averred that in the year 2014, the petitioner was not approved to graduate on account of missing grades and outstanding fee balance. To the tune of kshs

241,000; that the petitioner failed to satisfy the board of examination by reusing and/or neglecting to resit a pending unit in Basic Farm Power Source Utilization (AGEN 131) which was being offered in the first year of the study which the petitioner contend was covered in 3<sup>rd</sup> year which is misleading, misplaced and misguided.

20. Further that the petition has failed, neglected and/or refused to settle his accounts with the respondent. She averred that in response to a letter dated 2<sup>nd</sup> January 2017, the respondent asked the petitioner vide letter dated 23<sup>rd</sup> may 2017 to clear fees to enable him graduate.

21. The respondent attached transcript for first year of study showing that the petitioner got 30 marks in Basic Farm power source utilization reflecting which mean fail.

### **ANALYSIS AND DETERMINATION**

22. I wish to consider whether the respondent has violated the petitioner's rights provided in the constitution by failing to graduate him.

23. I have considered averments by the parties herein. I have also perused documents attached to affidavits filed. The respondent's contention is that the petitioner has to resit a unit namely Basic Farm Power Source Utilization (AGEN 131) and pay fee arrears of kshs 241,000 before being allowed to graduate.

24. On the other hand, the petitioner has not denied having failed the unit in first year but contend that the results were released late and by the time he resat the unit in 3<sup>rd</sup> year, the unit had been renamed AGEN 174 from AGEN 131.

25. On payment of fees arrears, the respondent contend that the petitioner was caught up by the system and was therefore required to pay. Respondent never explained what they meant by being caught up in the system.

26. Record show that the petitioner completed his studies in April 2014 but could not graduate with his classmates due to missing marks. He said he followed up the missing marks with lecturers who had delayed in submitting the marks; and by letter dated 3<sup>rd</sup> June 2014, the university confirmed that he had completed his studies. Documents attached show that the petitioner was cleared by chair of the department, dean and finance.

27. Further, the petitioner attached his third year transcript which showed that he resat unit No.174 (Basic Power and Resource Utilization) whose number was changed from AGEN 131 and got 45 marks.

28. The petitioner further attached finance clearance form dated 27<sup>th</sup> August 2015. He averred that, despite the clearance, he was not listed for graduation in June 2016. He applied again in August 2016 to graduate in December 2016. He was asked to pay credit transfer fees which he paid. After the payment, his name was included in the list for graduation on 9<sup>th</sup> December 2016 but when he went to pick graduation gown, he realized his name was not in the graduation list/booklet; reason given to him was failure to pay fees arrears.

29. The respondent has not challenged authenticity of the third year transcript or finance clearance form. My view is that the department's chairperson, dean and finance officer must have checked the marks and fees for all units before signing the clearance form.

30. Further, graduation intend form is signed as approved and checked by Chairperson Department of Agriculture Education and Extension and Dean Faculty of Education & Community Studies on 3<sup>rd</sup> November 2016. Petitioner attached receipt of kshs 4000 being graduation fee plus Alumni charges of 1000 and graduation fee of 500 dated 6<sup>th</sup> December 2016.

31. The letter dated 23<sup>rd</sup> may 2017 indicate that the petitioner had been "caught up in the system" requiring payment of fees for the four years and he must pay. The only explanation giving for the term "Caught up in the system" is the one given by petitioner to mean requirement to pay for 4 years even if the course took 3 years. Petitioner explained that the system was introduced in June 2016 whereas he had been cleared in all the units and finance in the year 2015. The clearance of petitioner in 2015 is not rebutted.

32. Petitioner averred that reason for failure to graduate in 2015, was missing marks not submitted by lecturers. This was not in petitioner's control. There is no evidence that he failed the delayed courses. They were finally submitted and he never resat the courses meaning he had passed them before the scheduled graduation ceremony.

33. From the foregoing, I find that the petitioner has demonstrated that he resat the unit which he failed in 1<sup>st</sup> year in 3<sup>rd</sup> year and passed as shown by transcript filed. Apart from the unit number changing from 331 to 174, the course description is the same. No evidence was adduced to rebut evidence that it was the same course offered in first year. Petitioner was also cleared by department of finance and it would not be fair for the respondent to demand arrears again after clearing him; there is therefore no justification to deny the petitioner opportunity to graduate

34. In respect to damages, there is no doubt that the petitioner has been inconvenienced by delayed graduation; there is no doubt that he may have lost employment opportunities and that the delay has subjected him to mental torture and hardship. The issue of missing marks was not his making. He had to follow up lecturers for the marks and even after being cleared, he took time to negotiate with the respondent and was later forced to institute this suit. For what the petitioner has been subjected to due to fault of the respondent, he deserves general damages as prayed in the plaint. It is not easy to quantify the loss occasioned due to delayed graduation, as it is difficult to point out and quantify lost opportunities as a result of delay. This is because one is never guaranteed a job upon graduation. It largely depends on the nature of the course taken and luck for the each graduate. From the foregoing, find that an award of kshs 250,000 will be reasonable to compensate the plaintiff.

35. **FINAL ORDERS**

I hereby declare the following:-

- i. That the petitioner is eligible for graduation.
- ii. That the respondent is hereby compelled to graduate the petitioner in the next graduation ceremony.
- iii. I award general damages of kshs 250,000.00.
- iv. Costs of the petition to the petitioner.

**Judgment dated, signed and delivered at Nakuru this 31<sup>st</sup> day of July 2019.**

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**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:-**

**Schola/Jenifer Court Assistant**

**Ms. Ogange Counsel for Petitioner**

**Mr. Kimaru holding brief for Kisila Counsel for Respondent**