



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

PETITION NO. 23 OF 2019

IN THE MATTER OF ARTICLES 2, 3, 20, 21, 22, 23,

29D AND 47 OF THE CONSTITUTION 2010

AND

IN THE MATTER OF AN ALLEGED CONTRAVENTION OF ARTICLES 27, 28,

43(f) AND 47 (1) AND (2) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE UNIVERSITIES ACT NO. 42 OF 2014

AND

IN THE MATTER OF THE KISII UNIVERSITY CHARTER, 2013

AND

IN THE MATTER OF RULE 3, 4, 10 AND 23 OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

MILDRED ALICE MBITA.....1ST PETITIONER

RACHEL AWINO NYABOLA.....2ND PETITIONER

JUMA MARYSTELLAH LILIAN.....3RD PETITIONER

VERSUS

KISII UNIVERSITY.....RESPONDENT

RULING

On 28th October 2019 the Petitioners, **MILDRED ALICE MBITA, RACHEL AWINO NYABOLA** and **JUMA MARYSTELLAH LILIAN**, filed a Petition against the Respondent, **KISII UNIVERSITY**.

1. All the Petitioners were students at the Kisii University (Main Campus), where they were pursuing **DIPLOMA IN LIBRARY & INFORMATION STUDIES**.

2. Initially the Petitioners were enrolled as students at the Kisumu Campus of Kisii University.
3. However, in July 2018, following the closure of the Kisumu Campus, the Petitioners relocated to the Main Campus.
4. Each of the Petitioners asserts that they had already successfully completed attending all the requisite classes, sat all Continuous Assessment Tests (CATS) and also sat for the Semester Examinations.
5. Secondly, the Petitioners asserted that each of them had paid all the requisite fees payable to the Respondent.
6. Therefore, when the Academic Registrar's Department declined to clear them because each of them had units which were not reflected in the university records, the Petitioners were shocked.
7. It was the Petitioners' case that they discussed with their respective lecturers about the marks that were allegedly missing from the University's records, and the said lecturers confirmed to the Petitioners that the marks in issue had been handed over to the Respondent.
8. As the Respondent continued to insist that the Petitioners had not sat for examinations in some (specified) units, the Respondent omitted the names of the Petitioners from the Graduation List of students who were scheduled to graduate in December 2019.
9. As the Petitioners hold the view that they had done everything required of them, to enable them graduate in December 2019, they filed the Petition, seeking, inter alia, to compel the Respondent to include their names on the Graduation List.
10. The Petitioners also sought orders to compel the Respondent to release their respective results, which the university was still withholding.
11. They not only want to graduate in December 2019, but also want the university compelled to release all their Academic Testimonials, including their respective Diploma Certificates and original transcripts.
12. Finally, in the Petition there is a prayer for General, Exemplary and Punitive Damages to be awarded against the university, due to the unwarranted, emotional, physical and mental destabilization of the Petitioners.
13. Simultaneously with the Petition, the Petitioners filed an application for interlocutory reliefs. The said interlocutory reliefs can be summarized as follows;

(1) Summons do issue, directing the Vice- Chancellor of Kisii University to Show Cause why the university was detaining the Petitioners' results, in the specified units;

(2) A Conditional Order for the immediate release of the detained results;

(3) An Order stopping the university from proceeding with the graduation unless the names of the Petitioners were included on the Graduation List;

(4) An Order directing the university to produce the lecturers who taught the missing units, so that they can clarify issues;

(5) An Order compelling the Registrar Academic Affairs to produce Examination Attendance Sheets for the exams taken by the Petitioners.

14. After the Petition and the Application were filed, the 3rd Petitioner's case was resolved, and she is now scheduled to graduate on 20th December 2019.

15. It is the Petitioner's case that the units which the university insists are still missing are two for each of the remaining 2 Petitioners.

The particulars are as follows;

1st Petitioner

(a) Research Methods - DLIS 0211

(b) Research Projects - DLIS 0227

2nd Petitioner

(a) Management of Electronic Records - DLIS 0215

(b) Industrial Attachment - DLIS 0300

16. Whereas the Respondent is the university, the Petitioners first prayer is directed against the **VICE-CHANCELLOR** of the University.
17. I find that it would be highly prejudicial to the Vice Chancellor to give orders directed at him, without having accorded him a hearing.
18. The said Vice-Chancellor cannot be condemned unheard.
19. The same reasoning would also apply to the Order being sought against the Registrar Academic Affairs.
20. In any event, it is disputed by the Respondent that the university was withholding or detaining the results of the Petitioners. Indeed, the university insisted that the Petitioners had never sat for examinations in the units in contention.
21. Therefore, if there were no results which the university was detaining, it would be an act in futility to order that the results be released forthwith or at all.
22. On the other hand, there is a possibility that the Petitioners wrote the examinations in contention. In that case, the results of the said examinations ought to be released.
23. The question that arises is about the person who was detaining the results.
24. It has not been demonstrated that the Vice-Chancellor or the Registrar Academic Affairs was holding onto the Petitioners' results.
25. If anything, there is a possibility that Mr. Bonface Simiyu and Mr. Charles Mboi, who are the lecturers said to have administered the exams in question, detained the results due to the alleged failure by the university to pay their respective salaries.
26. Of course, if the university failed to pay the salaries to the lecturers, and if that was the reason why the Petitioners' results were not available, the university would be held accountable for such failure.
27. It should be noted that the orders for the release of the Petitioners' results was raised both in the substantive Petition and in the application.
28. Therefore, if the court were to grant the orders at this interlocutory stage in the proceedings, the court would have also made a determination of that aspect of the substantive Petition.
29. Similarly, an interlocutory order, compelling the university to include the Petitioners' names onto the Graduation List for December 2019 would constitute a determination of that aspect of the Petition.
30. In the case of **OLIVE MWIHAKI MUGENDA & ANOTHER Vs OKIYA OMTATA OKOITI & 4 OTHERS [2016] eKLR**, the Court of Appeal pronounced itself thus;

“It has often been said that an order which results in granting a major relief claimed in the suit, ought not to be granted at an interlocutory stage.”

31. Meanwhile, in the case of **EAST AFRICAN PORTLAND CEMENT COMPANY LIMITED Vs ATTORNEY GENERAL & ANOTHER [2013] eKLR**, the Court held as follows;

“Interim Orders are not suitable if by their grant, they finally determine the substantive dispute. The Courts must be wary of prejudgement of the substantive merits.”

32. In this case, the results for each of the two Petitioners are missing, in the specified units.
33. In the light of that fact, it is unknown how the Petitioners performed in the said units.
34. Therefore, it would be premature to conclude that the results would reveal that the Petitioners had passed the exams in question.
35. I have no basis in law, or in fact for concluding that the Petitioners had passed the exams in the units whose results were missing, so as to become entitled to an order compelling the university to put them on the Graduation List.
36. The Petitioners asked the court to order the university to produce the lecturers who taught the missing units;

“..... so that they can clarify issues.”

37. To my mind, that prayer constitutes a concession by the Petitioners that the lecturers who taught the units whose results were missing, were required, for purposes of giving clarity to the issues pertaining to the missing results.

38. If there was still a need for those lecturers to clarify issues, I find that until the necessary clarifications are made available, the court would not yet have been provided with all the requisite material and information to enable it make an appropriate determination.

39. It is the obligation of the party seeking reliefs from the Court, to provide the necessary evidence to satisfy the requirements for the issuance of the orders sought. When the Applicants still require attendance Sheets for the exams they sat for; and when the Applicants require the lecturers who administered the exams to come and clarify matters in court, there is a gap in the information and material which could persuade the court to hold that the Applicants had made out a prima facie case.

40. I also hold that the stoppage of the Graduation Process would be extremely prejudicial to both the university and the students who had successfully completed their trainings.

41. Nonetheless, the university must appreciate that if the court were to ultimately find that the Petitioners ought to have graduated in December 2019, the dignity of the Petitioners would have been severely dented by the university's decision to lock them out from the said graduation.

42. At this interlocutory stage I am not called upon to make any definite findings about the scope of the loss and damages that the Petitioners could suffer by the decision to bar them from graduating at this moment. Such a decision can only be made when the court is determining the substantive Petition.

43. For now, I find no merit in the application dated 28th October 2019. It is therefore dismissed.

44. On the issue of costs, I order that the same shall be in the cause, so that the court's final orders will also incorporate an order in respect to the application.

DATED, SIGNED and DELIVERED at KISUMU This 19th day of December 2019

FRED A. OCHIENG

JUDGE