



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 364 OF 2015

In the matter of: The violation and or threatened violation of the Petitioner's constitutional Rights

and

In the matter of: Articles 2,19, 20, 22, 23, 27 (5), 28, 35 (1), 47 (1) & (2), 258 & 259 of the Constitution of Kenya, 2010

and

In the matter of: The Supremacy of the Constitution pursuant to Article 2 of the Constitution

Between

Penina Wothaya Wachira.....Petitioner

and

Kenya Methodist University.....Respondent

JUDGMENT

The Parties

1. The Petitioner was a student at Kenya Methodist University (hereinafter referred to as the University), the Respondent herein, a University with campuses in Nairobi and Meru offering various courses at its School of Medicine and Health Sciences among them Bachelor of Science in Medical Laboratory Sciences Degree.

The petitioners' case

2. The petitioner avers that in 2009 she applied for admission at the University to pursue a Bachelor of Science Degree in Medical Laboratory Science using her Ugandan "O" level Certificate of Education. She avers that her acceptance at the University was made on the basis of the copies of certificates she presented. Further, she states that she was required to submit the original certificates for verification at the time of registering. She further avers that she completed registration forms and submitted the required documents and she was enrolled at the University on 4th May 2009 to study the said course for three years which she completed and attained the average grades for award of Bachelors in Medicine degree in Medical Laboratory Science. She also avers that it is a requirement that for her to practice she registers with the Kenya Medical Laboratory Technicians Board.

3. The Petitioner states that in order for the University to assist her in the said registration, the University requested her to avail her Ugandan results even though the Board did not require them. In the intervening period, the Petitioner avers that she completed her degree course, settled the outstanding fees, paid fees for the graduation gown, but in June 2012, the University informed her that she will not be awarded a degree but a Diploma certificate for a Diploma course she never registered or studied without offering reasons for the said decision. The Petitioner further avers that her numerous visits to the University have been fruitless and that the entire course plus related expenses costed her over **Ksh.1,200,000/=**.

4. The Petitioner also states that vide a letter dated 15th June 2012, the University acknowledged she had completed the degree course, hence the University's refusal to graduate her with the said degree is unfair, unjust, unreasonable and an infringement of her constitutional rights. Further, she avers that she is unable to secure employment or pursue further studies, and her constitutionally guaranteed rights to livelihood, realize her potential, right to be given reasons for the decision, right not to be subjected to unequal treatment, right to dignity, and unfair

administrative action were violated. As a consequence of the foregoing, the Petitioner prays for the following reliefs:-

- a. A declaration that the Respondent has subjected the Petitioner to unlawful and unfair treatment by the refusal to award the Petitioner a degree a degree in Bachelor of Science in Medical Laboratory Sciences and the right to participate in a graduation ceremony.
- b. A declaration that the Respondent has no lawful cause to refuse to award the Petitioner a degree in Bachelor of Science in Medical Laboratory Sciences.
- c. An order directed to the Respondent to award the Petitioner a degree in Bachelor of Science in Medical Laboratory Sciences and to allow the Petitioner to participate in a graduation ceremony without hindrance whatsoever.
- d. A declaration that the Petitioner is entitled to damages from the Respondent for the unlawful act of refusing to award the Petitioner her degree certificate and mental anguish which commenced as from June 2012 and is continuing.
- e. Costs of and incidental to this Petition.
- f. Such other order as this Honourable Court shall deem fit just.

Respondents' Response to the Petition

5. **Caroline Ndumia**, the Respondents' Legal Officer swore the Replying Affidavit filed on **10th** October 2017. She avers that the University received a letter on **15th** February 2012 from the Kenya National Examinations Council stating that the Petitioner's "**O**" Level UCE equivalent was admissible for a Diploma programme in Kenyan Institutions, hence, the University took the view that the Petitioner was not eligible to graduate and be awarded the degree in question, hence the University opted to award the Petitioner a Diploma in Medical Laboratory Sciences for which she was eligible.

6. She also avers that the above information was received when the Petitioner was about to complete her degree course, hence, the Department proposed that in order for the Petitioner to successfully complete her Bachelor's training, it would be necessary that she applies for a change of academic programme from Bachelor of Science in Medical Laboratory Sciences to Diploma in Medical Laboratory Sciences and later complete the Degree programme within a period of one year after attaining the Diploma. She avers that the University in good faith and in the best interests of the Petitioner proposed to waive **12** courses and awarded the Petitioner **75** credit hours to fast track her completion of the Degree programme to be within one year after attainment of the Diploma and that she would get recognition by the Regulatory Board.

7. She also avers that the said decision was reasonable in the circumstances of the case and it is within the powers of the University to scrutinize student's files and academic records so as to satisfy itself of the students' eligibility to be awarded a degree and make a decision in that regard. She states that in exercise of its powers, the University considered that the Petitioner was not eligible for the award of a degree at the time, but opted to award her a Diploma and that the University engaged with the Petitioner to ensure that the certificate awarded to her would not be invalidated on account of her "**O**" level results, and that the Petitioner was not qualified to be enrolled for the degree course.

8. She further avers that in early 2012, the University at its Meru campus, through the Department of Finance, received a duly filled application form from the Petitioner, seeking to change her academic programme from Bachelor's to a Diploma Course. Consequently, she was allocated a new registration number, hence the change was not unilateral as alleged and that she was actually scheduled to graduate with the Diploma in 2012. This, she avers was the basis for the decision to transfer her credit units and waiver of credit transfer fees. She also averred that the University has at all material times acted in good faith and in the best interests of the Petitioner, and that the Petitioner was consulted before the decision to award her a Diploma was made and she completed the requisite forms for the said change. She further avers that the Petitioner has failed to demonstrate the alleged violation of Constitutional Rights.

Petitioners' further Affidavit

9. In a further affidavit filed on **22nd** January 2018, the Petitioner states that:- **(i)** it is the responsibility of the University to scrutinize and verify academic records of any candidate before admission for any academic programme; **(ii)** she was admitted into a degree programme after her documents were scrutinized; **(iii)** she filled the form referred to above in order to register with the regulator Board hence she was fraudulently made to sign the said forms.

Issues for determination

Upon analysing the facts presented by the parties, I find that the following issues fall for determination, namely, **(a)** whether the doctrine of estoppel applies against the Respondent in the circumstances of this case; **(b)** whether in the circumstances of this case this court can direct the Respondent to award the Petitioner a degree in Bachelor of Science in Medical Laboratory Sciences; **(c)** Whether the Petitioners Rights to a fair administrative action were violated; **(d)** Whether the Petitioner's rights under Article 35 were violated; **(e)** Whether the Petitioner has established a case for an award of damages.

(a) Whether the doctrine of estoppel applies against the Respondent in the circumstances of this case;

10. The Petitioners' counsel submitted that the Respondent is estopped from denying the Petitioner to graduate having admitted her to the degree programme on the basis of the documents she presented. To buttress his argument, Counsel cited *John Owino Obunde vs Technical University of Mombasa & Another*. [1]

11. The Respondents' counsel argued that the decision in *John Owino Obunde vs Technical University of Mombasa & Another*^[2] cited by the Petitioners Counsel was distinguishable from the facts of this case in that it involved omission to include the Petitioners in the graduation list while in the present case the University considered that it was proper for the Petitioner to graduate with a Diploma which she qualified rather than a Bachelors degree in Medical Laboratory Science which she was not qualified. He underscored the importance of meeting mandatory requirements as a means of enforcing standards in the various professions and argued that the Petitioner did not meet the mandatory qualifications for the degree in question. To buttress his argument, he cited *R vs Catholic University of Eastern Africa & Another Ex-parte Edmund Kiiru Wambui & 41 Other*^[3] and *Eunice Mwikali Maema vs Council of Legal Education & 2 Others*^[4] Also, he submitted that the Petitioner submitted her application to change to a Diploma Course in early 2012, hence, the doctrine of estoppel cannot apply. (*Serah Njeri Mwobi vs John Kimani Njoroge*^[5]cited).

12. Regarding the authorities cited by the Petitioner in support of the issue under consideration, it is settled law that a case is only an authority for what it decides. This was correctly observed in *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:-^[6]

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it, ... every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. ...a case is only an authority for what it actually decides..."

13. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.^[7] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.^[8] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive.

14. It is convenient to state that estoppel generally means "a bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true."^[9] There are three kinds of estoppels:- **(a)** by deed; **(b)** by matter of record; and **(c)** by matter in *pais* (by conduct).^[10]

15. Estoppel by deed "prevents a party to a deed from denying anything recited in that deed..."^[11]. Estoppel by record means that "when a fact has been agreed on, or decided in a court of record, neither of the parties shall be allowed to call it in question, and have it tried over again..., so long as judgment or decree stands unreversed. Estoppel by conduct,^[12] is the principle by which a party who knows or should know the truth is absolutely precluded ... from denying, or asserting the contrary of, any material fact which, by his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words or conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion was allowed.^[13]

16. The whole doctrine of equitable estoppel is a creature of equity and is governed by equitable principles."^[14]Equity in its turn denotes fairness and justice. This parallel between justice and equitable estoppel is very important. This concept evolved as a tool to prevent fraud and injustice and must serve this purpose. When claiming that the doctrine of equitable estoppel should be applicable to the facts and circumstances of a particular situation, no matter whether in private or administrative law, the following elements of the doctrine must be proved:- **(a)** conduct that amounts to a false representation or a concealment of material facts and **(b)** the person knows or should know the real facts and **(c)** intends or expects the other party to act upon such representation, **(d)** there must be another party who does not know the truth and who in fact acts in good faith in reliance upon such representation, **(e)** results in his detriment. All these elements must be present and proved to establish the applicability of the doctrine of equitable estoppel. If any of these elements is missing, the equitable estoppel cannot be asserted.

17. A study of the above statement indicates that the doctrine's elements can be phrased in three separate questions:- **(i)** Was there a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee? **(ii)** Did the promise induce such action or forbearance? **(iii)** Can injustice be avoided only by enforcement of the promise?

18. Broadly speaking, there must:- **(a)** exist some form of legal relationship or is anticipated between the parties; **(b)** a representation or promise by one party; **(c)** Reliance by the other party on the promise or representation; **(d)** The party relying on the promise must suffer a detriment; **(e)** Unconscionability. A party seeking to raise estoppel must make out a clear case and show that it would be unconscionable for the promisor to go back on their promise. Unconscionability is really the backbone of estoppel.

19. Lord Cairns summarized the doctrine of estoppel in the following words:-

"It is the first principle upon which all Courts of Equity proceed if parties, who have entered into definite and distinct terms involving certain legal results . . . afterwards by their own act, or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, that the person who otherwise might have enforced these rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have taken place between the parties."^[15]

20. This principle of equity laid down by Lord Cairns made sporadic appearances in stray cases now and then but it was only in 1947 that it was disinterred and restated as a recognized doctrine by Justice Denning (as he then was) in *Central London Property Trust Ltd vs High Trees House Ltd* ^[16] (or the *High Trees case*) in which he held that estoppel is applicable if:-

"... a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on."

21. The true principle of promissory estoppel, therefore, seems to be that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or affect a legal relationship to arise in the future, knowing or intending that it would be acted upon by the other party to whom the promise is made and it is in fact so acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it, if it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties, and this would be so irrespective of whether there is any pre-existing relationship between the parties or not.

22. The Petitioner states at paragraph 2.3 of her Petition that the Respondent in the admission letter dated 31st March 2009 informed her that *"the offer of admission to the University had been made on the basis of the copies of certificates that the Petitioner had presented with her application and that the Petitioner would be required to forward to the Respondent the original certificates for verification on the registration day."* This clearly shows that the Petitioner was informed right from the beginning that her admission was subject to her producing the original certificates. It follows that the question of misrepresentation which is one of the elements of estoppel does not arise. The Petitioner knew from the outset that her admission was subject to her results being verified. She accepted the offer subject to the said condition and commenced her studies with full knowledge that her certificate will be subjected to verification. Clearly, the offer was subject to her availing her original certificate.

23. At paragraph 2.6 of the Petition, she states that she furnished the Respondent with her certificate to facilitate her registration with the board. However, it is notable that she did not state the exact date when she availed the certificate nor has the Respondent done so. This could have assisted the court in determining whether there was a delay on the part of the Respondent in obtaining the verification. **Caroline Ndumia** in her Replying Affidavit states that on 15th February 2012, the Respondent received a letter from the Kenya National Examinations Council stating that the Petitioner's "O" level UCE equivalent was admissible for a Diploma programme in Kenyan institutions.

24. The question of misrepresentation has not been proved nor can it arise from the facts of this case. None of the ingredients of estoppel discussed above have been proved in this case. It follows that the facts of this case can be distinguished from the decision relied upon by the Petitioner's counsel in support of his argument that the doctrine of estoppel applies in this case. The upshot is that the plea of estoppel raised in this case fails.

(b) Whether in the circumstances of this case this court can direct the Respondent to award the Petitioner a degree in Bachelor of Science in Medical Laboratory Sciences

25. The Petitioner seeks an order that this court directs the Respondent to award the Petitioner a degree in Bachelor of Science Degree in Medical Laboratory Sciences.

26. It is common ground that the Petitioner's offer letter was explicit that the Petitioner was offered the admission on the basis of copies of her certificates she provided and that she was required to avail the original certificates for verification on the registration day. The Petitioner did not state the exact date when she availed the certificate nor has the Respondent done so. The Respondent states that on 15th February 2012, it received a letter from the Kenya National Examinations Council stating that the Petitioner's "O" level UCE equivalent was admissible for a Diploma programme in Kenyan institutions. She promptly notified the Petitioner to change her programme and Register for a Diploma course. The Petitioner completed the necessary forms and she was allocated with a registration number.

27. The decision having emanated from the Kenya National Examinations Council, the body charged with the mandate of verifying the certificates, can this court lawfully issue such an order. Further, the profession is regulated by the Kenya Medical Laboratory Technicians Board. Can this court compel the Respondent to issue a degree that will not be recognized by the Board. Both the Board and the Kenya National Examinations Council are not parties in this Petition yet such an order if granted will have an impact on their respective mandate. The Respondent did not refuse to award the degree in question. It is the KNEC that verified the petitioner's certificate and issued the communication that prompted the decision complained of. Upon qualification, the Petitioner will be required to register with the professional body that regulates the profession.

28. I am alive to the fact that truly academic decisions are to be distinguished from the administrative decisions of the academic bodies. This is because administrative decisions are subject to judicial review. Purely academic decisions are treated as beyond the courts reach though, on facts, in several cases the courts can interfere. Therefore, as demonstrated by the authorities cited below, the guiding principle and the proposition of law in so far as judicial review of academic decisions is concerned stands as at to-day undisturbed is that the court should be slow to interfere and should only seldom interfere in academic decisions of academic bodies.

29. The reluctance for interference of the court is evident from the following decisions. In the Indian case of ***Maharashtra State Board -VS- Kurmarsheth & Others***,^[17] it was stated as follows:- ***"So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations....."*** (Emphasis added)

30. In the above case, the court emphasised the need:- ***"....to be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formatted by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and departments controlling them."***

31. In ***University of Mysore and others vs. Gopala Gowda and another***^[18] the Supreme Court of India held:- ***"The Academic Council is invested with the power of controlling and generally regulating teaching courses of studies to be pursued, and maintenance of the standards thereof, and for those purposes the Academic Council is competent to make regulations, amongst others, relating to the courses, schemes of examination and conditions on which students shall be admitted to the examinations, degrees, diplomas, certificates and other academic distinctions. The Academic Council is thereby invested with power to control the entire academic life of the student from the stage of admission to a course or branch of study depending upon possession of the minimum qualifications prescribed"***.

32. Power to maintain standards in the course of studies confers authority not merely to prescribe minimum qualification for admission, courses of study, and minimum attendance at an institution which may qualify the student for admission to the examination, but also authority to refuse to grant a degree, diploma, certificate or other academic distinction to students who fail to satisfy the requirements.

33. In *Jawaharlal Nehru University vs. B. S. Narwala*[19] the court held that in the absence of any allegation as to bias or *mala fides*, there would be no basis to interfere. Also relevant is the decision in *R vs. Council of Legal Education*[20] where the court stated thus: “*The other reason why this court has declined to intervene is one of principle in that academic matters involving issues of policy the courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should be largely non-justiciable...*”

34. Self-restraint adopted by the judiciary in exercising the power of review in academic matters has left certain academic decisions or regulations governing training and qualifications of professionals untouched. These areas are not disturbed by the courts unless the decisions under challenge are constitutionally so fragile and unsustainable. Academic decisions of the universities and other educational institutions requiring expertise and experience belong to this category. If the decision is legal and lawful, the reasonableness and propriety of the same may not be questioned by the courts. In other words, among the Wednesbury principles of ‘illegality’, ‘irrationality’ and ‘impropriety’, if the decision can get over the first test, it may withstand the other two tests, unless it is shockingly unreasonable, perverse or improper.

35. It is true that Courts have upheld the constitutional right of every citizen to select a profession or course of study subject to a fair, reasonable, and academic requirements. But like all rights and freedoms guaranteed by the Constitution, their exercise may be so regulated pursuant to the power of the Regulating body to safeguard general welfare of the public.

36. Thus, persons who desire to engage in the learned professions requiring scientific or technical knowledge may be required to possess the requisite qualifications for admission or take an examination as a prerequisite to engaging in their chosen careers. This regulation takes particular pertinence in the fields like law and medicine, to protect the public from the potentially deadly effects of incompetence and ignorance among those who would practice in these professional fields.

37. It must be stressed, nevertheless, that the power to regulate the exercise of a profession or pursuit of an occupation cannot be exercised by the Respondent or its agents in an arbitrary, despotic, or oppressive manner. A body that regulates the exercise of a particular privilege has the authority to both forbid and grant such privilege in accordance with certain conditions. Such conditions may not, however, require giving up ones constitutional rights. In this regard, it should be pointed out that the Respondent must comply with the requirements of the Kenya National Examinations Council which is the regulatory body.

38. The examinations council is mandated to verify the certificate. It did so and decreed that the Petitioner had qualified for a Diploma and not a degree course. Sadly, that is the position. The Petitioner took the risk of commencing the course prior to verification of her certificate.

The Board and the Kenya National Examinations Council have a duty to ensure that only persons qualified for the degree in question are admitted to study the degree programme. The Respondent cannot be compelled to award a degree to the Petitioner against the set standards and more so, a degree that cannot be recognized by the regulatory body.

39. As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded.

40. It is equally important that the court should also as far as possible, avoid any decision which would bring about the result of rendering the system unworkable in practice or create a situation that will go against clear provisions of the governing regulations. This court cannot compel the Petitioner to defy the directions and Regulations issued by the Kenya National Examinations Council, the body vested with powers to make the decision in question, namely, ensure that the Petitioner graduates for the degree or course she qualified.

41. Qualifications here are not restricted to going through the degree programme, but ensuring that the person admitted for the programme had the requisite qualifications. No abuse of such powers has been alleged or proved. The refusal to award the degree to the Petitioner can only be challenged on grounds of **illegality, irrationality and procedural impropriety**. A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be *illegal* or *ultra vires* and outside the functions of the Respondent. On the contrary, the Respondent is bound to adhere to the regulations and directions issued by the Kenya National Examinations Council. This court cannot issue an order that will be tantamount to compelling the Respondent to disobey clear and lawful directions from the Kenya National Examinations Council or compel the Respondent to issue the Petitioner with a degree that will not be recognized by the body regulating the profession in question.

(c) Whether the Petitioners Right to a fair administrative action were violated

42. Counsel for the Petitioner citing *R vs Kenya National Examinations Council Ex parte Ian Mwamuli*[21] and *Fursys (K) Limited vs Public Procurement Oversight Authority & 2 Other*[22] argued that the Petitioner was not accorded an opportunity to be heard nor invited to attend proceedings. On his part, counsel for the respondent submitted that the Petitioner was accorded a fair Administrative action, and that the University acted within its powers and acted in good faith and that the University did not violate the alleged constitutional rights as alleged.

43. I find comfort in the Court of Appeal decision in *J.S.C. vs Mbalu Mutava*[23] which succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article 47 is a distinct right from the right to a fair hearing under Article 50 (1) of

the Constitution. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.^[24] Fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies.

44. A similar finding was arrived in *Dry Associates Limited vs CMA & Another*^[25] where the court held that Article 50 applies to a court, impartial tribunal or a body established to resolve a dispute while Article 47 applies to administrative action generally.

45. Whereas Article 47 codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair^[26] and the right to be given reasons for any person who has been or is likely to be adversely affected by administrative action,^[27] the question that begs for answers is whether the Respondent acted in a manner that constituted a breach of Article 47.

46. As I resolve this question, I must point out that administrative, statutory bodies, schools or academic institutions are created for a variety of reasons to meet a variety of needs and in some instances, some functions are a necessary element to fulfilling their mandate. For example, it is a function of the University to ensure that persons admitted to a degree or Diploma programme possess the required qualifications and persons graduating have satisfied all the requirements for the award of the degree or Diploma. Provided that the decision-maker is not acting outside its authority such functions may stand court scrutiny.

47. The function under consideration here is whether the decision by the Respondent requiring the Petitioner to change her programme to a Diploma course and refusing to award a degree on the grounds that her "O" level certificate was found to be ineligible for a degree programme violated the Petitioner's rights in any manner. It is not disputed that the Kenya National Examinations Council in the exercise of its mandate found that the Petitioner's "O" level certificate did not qualify her for a degree programme but a Diploma course. There is evidence that this information was communicated to the Petitioner and she even completed an application form to change to a Diploma Programme and was even allocated a new registration number. The allegation in the further affidavit that she was misled to signing the said form is totally unconvincing and must be an afterthought. Such a serious allegation was not mentioned in the original Petition or affidavit.

48. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the courts unless the decision under challenge is constitutionally fragile and unsustainable. If the decision is legal and lawful, the reasonableness and propriety of the same may not be questioned by the courts. In other words, among the *Wednesbury* principles of 'illegality', 'irrationality' and 'impropriety', if the decision can get over the first test, it may withstand the other two tests, unless it is shockingly unreasonable, perverse or improper.

49. The test of reasonableness is not applied in a vacuum but in the context of life's realities. The Respondent cannot ignore the decision by the Kenya National Examinations Council. As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to those formulated by educational institutions or professional bodies possessing the expertise and experience of actual day to day working of their institutions. The Petitioner was given the option of graduating with a Diploma, was granted credits on some units and informed that she can complete the degree course within one year. To me this is a reasonable option considering that the Petitioner was fully aware from the inception that she was admitted on the basis of copies of her certificate and the admission was subject to her providing the originals which were to be verified. The decision is not only reasonable, but the Respondent acted fairly and in good faith.

50. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to a problem of this nature, isolated from the actual reality and circumstances of the case. In essence, the Court must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list, but without losing sight of the ultimate values to be protected, that is the value of ensuring that Degrees offered are not compromised or open to challenge or put the Petitioner to a situation whereby the regulating body may ultimately fail to recognize her Degree. The degree certificate must be worth the paper it is written. It must not be open to assault or challenge on its integrity. An assault on the integrity and credibility of the degree will be an affront to the institution granting it.

51. To sum up limitations on constitutional rights can pass constitutional muster only if the Court concludes that, considering the nature and importance of the right and the extent to which it is limited, such limitation is justified in relation to the purpose, importance and effect of the provision which results in the limitation, taking into account the availability of less restrictive means to achieve the purpose. A close attention to the facts of each individual case is required in order to decide on what is required to meet the need for vindication of the constitutional right which is at stake. The Respondent has a duty to comply with the laid down requirements for degree programmes.

52. Section 7 (2) of the Fair Administrative Action Act^[28] provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power. None of these has been proved in this case.

53. What constitutes a "fair" procedure will depend on the nature of the administrative action and circumstances of the particular case. The circumstances of this case are clear. The Petitioner commenced the degree programme fully aware that her certificate was to be verified. Upon verification, she was offered the next available option which she accepted and completed the requisite form and was issued with a registration number. She changed her mind later and filed this Petition. I find and hold that the Petitioner has not proved that her rights under Articles 47 of the Constitution were not violated in the circumstances of this case.

(d) Whether the Petitioner's rights under Article 35 were violated

54. The Petitioner's counsel submitted that the Petitioner was not furnished with reasons contrary to Article 35 (1) of the Constitution. The Respondent's counsel argued that the Petitioner was notified promptly after the Kenya National Examinations Council made the decision and she completed the requisite forms to change to a Diploma programme. The form is exhibited to the Replying Affidavit.

55. Section 6 of the Fair Administrative Action^[29] entitled Request for reasons for administrative action provides that "Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with [section 5.](#)" Sub-section 2 of Section 6 of Fair Administrative Action Act^[30] provides that the information referred to in subsection (1), may include- the reasons for which the action was taken, and any relevant documents relating to the matter.

56. Though the short title to Section 6 is entitled "Request for reasons for administrative action", the subject of the section is really access to information on administrative action. To this end, the section entitles persons affected by any administrative action to be supplied with information necessary to facilitate their application for appeal or review.^[31] The information, which must be supplied in writing within three months, may include reasons for the administrative action and any relevant documents relating to the matter.^[32] Where an administrator does not give an applicant reasons for an administrative decision, there is a rebuttable presumption that the action was taken without good reason.^[33]

57. However, the Act provides that an administrator may be permitted to depart from the requirement to furnish adequate reasons if such departure is reasonable and justifiable in the circumstances.^[34] The administrator must inform the person of such departure.^[35] The implication of this provision is that the section allows a limitation of the right to information under Article 35 and the right to fair administrative action under Article 47.

58. As stated above, it is clear that the Petitioner was notified of the decision and completed the form referred to above, hence the argument that he was not supplied with reasons fails since no evidence was tendered to establish violation of Section 6 of the Fair Administrative Action Act^[36] or Article 35 of the Constitution. I find that no contravention of constitutional right to information has been proved at all. The evidence tendered on behalf the petitioner in my view does not demonstrate the alleged violation.

(e) Whether the Petitioner has established a case for an award of damages

59. It is not disputed that there exists a binding contract signed by the Petitioner and the University. The terms are clear. The Petitioner was admitted on the strength of copies of his certificates and the offer of acceptance was subject to her submitting her original certificates for verification. No date has been offered on when she submitted her original certificate for verification or an explanation as to why this issue resurfaced early 2012 yet the Petitioner was admitted in the Institution in 2009. Scanty information from the Petitioner shows that she submitted the original to register with the Board, possibly because she was on the verge of completing her degree. But the confusion is added by the Petitioner's own admission that it was not a requirement by the Board to see the original to register her nor is it clear why she would register with the Board prior to graduating. The court takes judicial notice of the fact that such professional bodies only register those who have qualified and it beats logic that the Petitioner states she submitted the originals to register with the Board prior to graduating. The irresistible conclusion is that she submitted the original for verification as per the admission requirements and sadly in early 2012 or thereabouts despite having been admitted in 2009. If she had submitted it earlier than that, there would have been nothing easier for her to do than to state so in clear terms in which event the court could have had no difficulty blaming the Respondent.

60. Further, there is no evidence that during the period of the study, the Petitioner pursued the issue. Silence on this pertinent question is worrying. Some light on it could have made a difference. The burden of proof lies on he or she who asserts. A court of law cannot purport to re-write a contract voluntarily executed by parties. It **cannot** be denied that the relationship between the parties in this case is governed by the admission terms and or contract. The petitioner is now inviting this court to **rewrite** the **contract** in question.

61. In exercise of jurisdiction under the Constitution, this Court cannot rewrite binding contracts voluntarily entered into between parties. The court cannot rewrite the contract by decreeing that the Respondent was to blame when it is not even clear when the Petitioner submitted the originals. There is a *bona fide* defence raised by the Respondent which has not been rebutted, that is, in early 2012, it received a letter from the Kenya National Examinations Council and as soon as the communication was received from KNEC, it conveyed the information to the Petitioner and suggested the most viable and reasonable option in the circumstances. This ties with the Petitioner's own admission that she submitted the original at or around that time. The point of departure which I have addressed above is that she states that she submitted it for purposes of registering with the Board, a position I have found untenable owing to the truth that such professional bodies ordinarily register persons who have qualified, that is, those who have successfully graduated.

62. It is trite law that "the courts do not make contracts for the contracting parties. It is a matter purely between them *sepe ipse*".^[37] This position is informed by the concept of freedom of contract. Contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the Court does not have the right nor ability to substitute its judgment for that of the parties. When a contract is clear and unambiguous, a Court's role is to apply the parties' contract as written and not rewrite the contract. The admission in question was subject to the Petitioner submitting her original certificate for verification. She evidently took time to do so to her detriment, and when the worst happened, she completed forms and submitted them to change to a Diploma course. This case was therefore an afterthought, but albeit, ill conceived. By now she would have earned both the Diploma and the Degree.

63. I therefore find no basis at all toward damages as prayed.

Conclusion

64. In view of my analysis of the facts of this case and the law as shown above, I find that the petitioner has failed to prove her case against the Respondent to the required standard. The upshot is that this petition fails. Accordingly, I dismiss this petition with no orders as costs.

Orders accordingly.

Dated at Nairobi this 19th day of April, 2018

John M. Mativo

Judge

[1] Counsel cited a ruling in *John Owino Obunde vs Technical University of Mombasa & Another* {2015} eKLR

[2] *Supra*

[3] {2017} eKLR

[4] {2013}EKLR

[5] Civil Appeal No. 314 of 2009

[6] MANU/SC/0047/1967

[7] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats Versus University of Delhi & Anr.* (Citing Lord Denning).

[8] *Ibid*

[9] Bryan A. Garner, Ed. In Chief, *Black's Law Dictionary*, Seventh Edition (St. Paul, Minnesota: West Group, 1999)

[10] Henry Campbell Black, *Black's Law Dictionary*, Sixth Edition (St. Paul, Minnesota: West Publishing Co., 1990).

[11] *Supra* note 8

[12] *Ibid*

[13] *American Jurisprudence*, vol. 28 (Escrow to Estoppel and Waiver), Second Edition, 1966; *Estoppel and Waiver* 27, pp. 627-628.

[14] *J. F. Johnson Lumber Co. vs. Magruder*, 218 Md 440, 147 A2d 208

[15] ***Hughes vs. Metropolitan Railway Co.* 1877 2 AC 439**

[16] {1947} KB 130

[17] **{1985} CLR 1083**

[18] A.I.R. 1965 S.C. 1932.

[19] (1980) 4 S.C.C. 480.

[20] {2007} eKLR

[21] {2013} eKLR

[22] {2015}eKLR

[23] {2015}eKLR

[24] *Ibid*

[25]{2012}eKLR

[26] Article 47(1) of the Constitution of Kenya, 2010

[27] Article 47(2) of the Constitution of Kenya, 2010

[28] Act No. 4 of 2015

[29] *Ibid*

[\[30\]](#) Ibid

[\[31\]](#) Section 6(1)

[\[32\]](#) Section 6(2)

[\[33\]](#) Section 6(4)

[\[34\]](#) Section 6(4)

[\[35\]](#) Ibid

[\[36\]](#) Supra

[\[37\]](#) Eguasa David Odiase vs. Auchu Polytechnic, Auchu (1998) 4 N.W.L.R. (Pt. 546) 477 at 492