



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

PETITION NO. 1 OF 2017

BETWEEN

INGANGA ALFRED ARUNGA.....PETITIONER

AND

UNIVERSITY OF NAIROBIRESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner is a former student of the University of Nairobi (“the University”). In his petition dated 31st January 2017 he states that he completed the four-year Bachelor of Laws (LLB) degree course and graduated on 2nd December 2016. After graduation, he applied to be admitted to the Advocates Training Programme at the Kenya School of Law which required him to submit his degree certificate and original transcripts. While the degree certificate was given to him on 16th January 2017, he was informed that the original transcripts would be ready for collection on 23rd January 2017. When he went to collect the transcripts on the appointed day, his original degree certificate was confiscated and he was verbally informed that he would not be given the original transcripts as the University had received some information that he had graduated through deceit and fraud.

2. The petitioner's case is that the University violated his constitutional rights particularly the right to fair administrative action guaranteed under **Article 47(1)** of the Constitution by confiscating his degree certificate and withholding his transcripts. He seeks several reliefs including the release of his official documents and consequential relief including damages.

Respondent's Case

3. The University opposed the petition through the replying affidavit of Professor Henry W. Mutoro, the Deputy Vice-Chancellor in charge of Academic Affairs, sworn on 14th June 2017. He admitted that the petitioner was a student at the University and that he graduated on 2nd December 2016. He further deposed that on 5th December 2016, the University received confidential information from a whistleblower stating that the petitioner had forged the University's transcript software, rubber stamp and signature of the Dean of the Law School. According to the email, the petitioner had made copies of transcripts for his father in the course of studies. Following the allegations, the University, through the Dean of the School of Law, wrote to the petitioner a letter dated 7th December 2016 suspending the issuance of the certificate and transcripts to the petitioner until the matter was investigation were concluded.

4. The University contended that the degree certificate was confiscated on the allegation that he obtained it fraudulently and the University, in terms of the provisions of the **Universities Act (Chapter 210B of the Laws of Kenya)** has powers, through its Senate, to decide which persons have attained such standard of proficiency and are otherwise fit to be granted a degree, diploma, certificate or other award. Consequently, the petitioner was requested to surrender the transcripts and degree certificate issued to him pending the outcome of disciplinary proceedings against him.

5. The University also challenged this court's jurisdiction to adjudicate an administrative matter through a constitutional petition without exhausting the normal channels of appeal within the University. It contended that the petition does not establish any factual or legal basis for granting the reliefs sought and that the petitioner had not proved the violation of any fundamental rights and freedoms.

Jurisdiction to grant relief

6. Since the University raised the issue of jurisdiction, I will deal with it first. The petitioner had invoked the jurisdiction of the High Court under **Article 165(3)(b)** of the Constitution to enforce fundamental rights and freedoms. **Article 22** of the Constitution provides that every person who claims that his fundamental rights and freedoms are threatened or have been violated has a right to move the High Court for relief. The right to apply to the High Court for relief is unconditional, unhindered and without prejudice to any other relief, cause of action or alternative remedy the petitioner may have (see **Samura Engineering Ltd & 10 Others v Kenya Revenue Authority NRB Petition No. 54 of 2011[2012]eKLR at para 53** and **Kenafic Industries Ltd v Commissioner of Domestic Taxes & 4 Others NRB Petition No. 99 of 2011 [2012]eKLR at para. 37**).

7. It follows that the objection taken by the respondent that the petitioner ought to have followed the followed internal university procedures to resolve his issue or that he could not invoke the provisions of **Article 22** of the Constitution is not well founded.

8. It is also well established that a party who seeks relief under the Constitution must state with specificity the right which he alleges had been violated and how it has been violated in respect to him (see **Anarita Karimi Njeru v Republic (No.1) [1978] KLR 154** as affirmed by the Court of Appeal in **Mumo Matemu v Trusted Society for Human Rights Alliance & 5 Others NRB CA Civil Appeal 290 of 2012 [2013]eKLR**). The petitioner is clear that his right to fair administrative action under **Article 47(1)** of the Constitution which provides that, "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair," has been violated.

9. Thus, contrary to the respondent's assertion, the right to fair administrative action is a fundamental right under the Constitution and it is a right that may be enforced by an application made under **Article 22** of the Constitution. I now turn to consider the issue whether the petitioner has made out a case for relief.

Whether the petitioner's right has been violated

10. The purpose of **Article 47** is to uplift the standards of administrative action by providing a constitutional standard for determination and subject administrative action to constitutional discipline (see **Dry Associates Limited v Capital Markets Authority and Another Nairobi Petition No. 328 of 2011 [2012]eKLR**). In **Judicial Service Commission v Mbalu Mutava & Another NRB CA Civil Appeal No. 52 of 2014 [2015]eKLR**, the Court of Appeal remarked that:

[23] Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was

developed.

11. The import of **Article 47** of the Constitution is that rules of natural justice including the requirement of notice are no longer left within the realm of common law principles, they are now anchored in the Constitution whose intent is to promote the rule of law as a national value under **Article 10(2)** of the Constitution and to cure the culture of arbitrariness inherent in our administrative processes.

12. The petitioner's case is that he was not notified of the case against him and that his certificate was withdrawn without notice or information. In ***Geothermal Development Company Limited v Attorney General & 3 others***, NRB Petition 352 of 2012 [2013] eKLR, the court noted that a key component of due process is notice of any adverse action. The court observed that;

*[28] As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well.... Hilary Delany in his book, **Judicial Review of Administrative Action**, Thomson Reuters 2nd edition, at page 272, notes that, "Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision."*

13. The University avers that by a letter dated 7th December 2016 it notified the petitioner that issuance of the degree certificate and transcripts had been suspended pending disciplinary proceedings. Although the Prof. Mutoro referred to the letter his replying affidavit, he did not attach or produce it. Despite the University advert to the fact that disciplinary had been commenced, the petitioner was issued with the degree certificate on 16th January 2017. After the petitioner was informed that his transcripts had been withheld, the petitioner's father, George Arunga Sino wrote a letter dated 24th January 2017 to the Vice Chancellor through the Center Director of the University's Kisumu Campus. In that letter, he explained what had transpired and stated as follows;

We are saddened as a family to note, when the student came to collect his original transcripts, his degree certificate was confiscated without any written reason over the counter and told to go to School of Law Parklands to see the Dean My efforts to get comments from the Associate Dean School of Law Kisumu indicated that he is not aware of any such impropriety on the part of the said student in his school and had only referred me to the Vice Chancellor who is the architect of this matter. His officer has no information nor knowledge of such misnomer.

14. Following the letter, the petitioner's father spoke to the University Legal Officer and informed him of the situation. This conversation was confirmed by an email dated 30th January 2017. The Legal Officer wrote back and confirmed that the petitioner could collect his academic papers from the University. Nothing was of the impending disciplinary process alluded to in the letter of 7th December 2016.

15. Together with the petition, petitioner filed a Notice of Motion dated 31st January 2017 seeking an order that, "*The Honourable court do issue summons to the VICE-CHANCELLOR-UNIVERSITY OF NAIROBI, Professor Peter Mbithi to attend the Honourable court and show cause why the institution is detaining the petitioner's degree certificates and original transcripts.*" Since the application was not opposed, I issued an order that, "*The VICE-CHANCELLOR-UNIVERSITY OF NAIROBI, Professor Peter Mbithi be and is hereby summoned to attend this Court on 25th April 2017 to show cause why the institution is detaining the petitioner's degree certificates and original transcripts.*" Following summons issued to the court, the Legal Officer, informed that court that the petitioner's degree certificate and academic transcripts had been released to the petitioner on 3rd February 2017.

16. Since the University did not produce the letter dated 7th December 2016, I am entitled to draw an

adverse inference that in fact, no such letter was sent to the petitioner. Further and despite receiving the petitioner's father's letter, the University did not allude to disciplinary proceedings of any sort or deny the petitioner's allegations. The totality of the evidence before the court is that although the University knew of the allegations against the petitioner, it never informed the petitioner and proceeded to take adverse and arbitrary action against him.

17. I therefore find and hold that the petitioner's right to fair administrative action under **Article 47(1)** of the Constitution was violated when he was not informed of the purported disciplinary action against him and when his degree certificate was confiscated and original transcripts withheld without informing him in writing. In short, the University's action was arbitrary and it is this kind of this conduct that **Article 47(1)** of the Constitution is aimed at.

Reliefs

18. Since I have found a violation of the petitioner's right, I turn to consider the reliefs available for the petitioner. **Article 23(3)** of the Constitution mandates this court to grant appropriate relief including a declaration of rights, an injunction, a conservatory order, an order for compensation and an order of judicial review in order to vindicate the rights protected under the Bill of Rights. What amounts to an appropriate relief depends on the nature and circumstances of each particular case (see *Nancy Makokha Baraza v Judicial Service Commission and 9 Others Nairobi Petition No. 23 of 2012 [2012]eKLR* and *Bidco Oil Refineries Ltd v Attorney General and 3 Others Nairobi Petition No. 177 of 2012 [2012]eKLR*).

19. The petitioner has prayed for declarations, damages and incidental relief. I have already found the respondent liable for violating the petitioners' rights. A declaration to that effect will articulate the fact of infringement but this alone will not mollify the petitioner whose rights have been violated. The petitioner has now been given his certificate and transcripts hence the order compelling release of these documents has been spent. In my view, an award of compensation would go some way to giving full and tangible effect and meaning to the Bill of Rights.

20. Doing the best I can, I award the petitioner Kshs. 500,000/- as general damages for violation of his right to fair administrative action. It is also clear that the petitioner had to move the court to obtain his documents and since he has succeeded in this claim he is entitled to costs which I award him. I assess the costs of the case at Kshs. 50,000/- all inclusive.

Disposition

21. I now make the following orders:

(a) A declaration be and is hereby granted to the petitioner that his right to fair administrative action under **Article 47(1)** of the Constitution was violated when the respondent when the respondent arbitrarily and without due process confiscated the petitioner's degree certificate and refused to release his original transcripts.

(b) I award the petitioner Kshs. 500,000/- as general damages with interest thereon at court rates from the date of this judgment until payment in full.

(c) I award Kshs. 50,000/- as all-inclusive costs.

DATED and DELIVERED at KISUMU this 31st day of October 2017.

D.S. MAJANJA

JUDGE

Mr Abande instructed by Omondi, Abande and Company Advocates for the petitioner.

KTK Advocates for the respondent.