



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO.115 OF 2016**

BETWEEN

ERIC MONG'ARE OGARO.....PETITIONER

AND

CATHOLIC UNIVERSITY OF EASTERN AFRICA (CUEA).....1<sup>ST</sup> RESPONDENT

REGINA PACIS UNIVERSITY COLLEGE.....2<sup>ND</sup> RESPONDENT

**REASONS FOR RULING**

**Introduction**

1. On 25<sup>th</sup> May 2016, I delivered a Ruling dismissing the Petitioner's Application dated 29<sup>th</sup> March 2016 but reserved the reasons thereof to a later date. This Ruling contains the reasons for the said dismissal.
2. In the Application aforesaid, the Petitioner had sought the following orders:

*"1) That this Honourable Court be pleased to certify this matter urgent and fit to be heard exparte in the first instance.*

*2) That the Honourable Court be pleased to grant interim injunctive orders restraining the Respondents herein jointly and severally, their agents, representatives or their functionaries by whatever name called from excluding or declining to include the Petitioner's name into the list of students scheduled to graduate in the month of May, 2016 at the Catholic University of East Africa (CUEA) pending hearing and determination of the instant application.*

*3) That Honourable Court be pleased to grant interim injunctive order restraining the Respondents herein jointly and severally, their agents, representatives or their functionaries by whatever name called from excluding or declining to include the Petitioner's name into the list of students scheduled to graduate in the month of May, 2016 at the Catholic University of East Africa (CUEA) pending hearing and determination of the Petition herein.*

*4) That cost of this application be provided for."*

**Factual Background**

3. The Petitioner was admitted as an undergraduate student at the 1<sup>st</sup> Respondent University where he was to study for a Bachelor of Science in Nursing degree. The studies were however to be undertaken at the

2<sup>nd</sup> Respondent College, a constituent college of the 1<sup>st</sup> Respondent. He was slated to graduate in May 2016 at the University's Convocation but in January 2016, the Assistant Registrar of the 2<sup>nd</sup> Respondent summoned him and told him that his examination results in three subjects; paediatrics nursing, community health III, education communication and technology (teaching methods) were missing and later, on another occasion, he was informed that the results of his research project were missing too. He was thereafter denied the opportunity to graduate hence the Petition.

### **Petitioner's Case**

4. According to the Petitioner, he had punctiliously adhered to the academic and training programme and passed all tests and examinations set by the Respondents and also successfully finalised his research project. His expectation was therefore that he would be in the graduation list for the May 2016 Convocation but all indications were that at the time of filing the Petition, that was not to be.

5. In his submissions therefore, relying on **Article 23(3)** of the **Constitution**, his advocate argued that the Court is granted wide powers to grant an appropriate remedy where a fundamental right has been breached. He relied on the decisions in **Fose v Ministry of Safety and Security 1997 (30 786 (CC))** and **Minister of Health and Others v Treatment Action Campaign & Others (2002) 5 LRC 216** in support of that proposition.

6. Counsel also submitted that **Article 47** of the **Constitution** entitled the Petitioner to a fair administrative process which he was denied by the Respondents. Further, that his right to education was curtailed and violated contrary to **Article 43** of the **Constitution** and is entitled to the orders elsewhere reproduced above.

### **Respondents' Case**

7. The Respondents case is that flowing from the contents of paragraphs 9 – 14 of Marcellus Otieno's Replying Affidavit sworn on 20<sup>th</sup> April 2016, there cannot be doubt that on the facts alone, the Petitioner has failed to show any *prima facie* case to warrant orders in his favour. For avoidance of doubt, the said Marcellus Otieno deponed as follows:

**“9. That it was during the review exercise that various discrepancies were noted namely:-**

***i) The courses register by the Petitioner during the September–December 2013 term did not match the results held by the student. Annexed herewith and marked MO-2 is a copy of the Petitioner's duly filed Course Registration Form dated 4<sup>th</sup> September 2013.***

***ii) The Petitioner purportedly undertook a course described as NUR 202 Pathophysiology in September–December 2012 semester which course was not being offered to his cohort at the time. Annexed herewith and marked MO-3 is a copy of the examination results form for the said course indicating that the Petitioner undertook the course alongside his cohort in January-April 2014. From the said annexure, it is evidence that the student did not sit for the main examination.***

***iii) The student purported to have registered for further courses namely NUR 307 Communicable Diseases, NUR 300 Medical Surgical Ethics and Forensics, EDU 300 Education Commination and Technology. The above courses were not being offered by the University in the September-December 2013 Semester.***

***iv) The Petitioner did not meet the minimum requirements for three (3) courses taken in September-December 2013 namely;***

***a) NUR 310 Paediatrics Nursing***

b) NUR 307 Community Health Nursing 111 (Epidemiology 111)

c) NUR 401 Teaching Methods and IT

Annexed herewith and marked MO-4 is a copy of the Petitioner's result slip for the said Semester.

v) The Petitioner did not also meet the minimum requirement in NUR 206 Medical Surgery II which he sat for and failed. The Petitioner attained a grade of F (45%) but has never re-sat the said paper. Annexed herewith and marked MO-5 is a copy of the result slip for the said unit.

10. That from documents available, the Petitioner never attempted the supplementary in NUR 401 Teaching Methods & IT. The only other student who had failed this Unit singly attempted the Supplementary and passed. Annexed herewith and marked MO-6 is a copy of the Examination results form submitted by the lecturer.

11. That I know of my own knowledge that the student sat for supplementary examination for units (a) and (b) above and passed.

12. That according to the records held by the 2<sup>nd</sup> Respondent the Petitioner obtained a C grade but the scores held by the student indicate that he obtained a B grade. The University policy is that a student who sits a Supplementary exam if successful can only score a pass (C Grade). The purported B grade presented by the Petitioner is not feasible.

13. That I further verily believe that the student never submitted for the research component in accordance with the requirements.

14. That these facts were brought to the Petitioner's attention on 20<sup>th</sup> November 2015.

*In a nutshell, the Petitioner's performance can be summarized as hereunder;*

Theory Work and Research

Date	Trimester	Required Units	Pass in 1 <sup>st</sup> attempt	Supp	Required Credits	Earned Credits	Hours	Mark	Grade
Sep-Dec '11	Yr 1, Tr 1	6	6	0	18	18	270	64	B
Jan-April '12	Yr 1, Tr2	6	4	2	31	31	470	50	C
Sep-Dec '12	Yr 2, Tr 1	6	5	1	24	24	355	52	C
Jan-April '13	Yr 2, Tr2	6	6	0	30	30	455	56	C
Sep-Dec '13	Yr 3, Tr 1	6	3	2	25	21	375	47.5	F

<b>Jan-April '14</b>	<b>Yr 3, Tr 2</b>	<b>5</b>	<b>4</b>	<b>0</b>	<b>24</b>	<b>20</b>	<b>360</b>	<b>64</b>	<b>C</b>
<b>Research</b>					<b>1</b>	<b>0</b>			
<b>Totals</b>		<b>35</b>	<b>28</b>	<b>5</b>	<b>153</b>	<b>144</b>	<b>2285</b>	<b>1</b>	<b>1</b>

**Non-Theory (Clinical Placements)**

<b>Date</b>	<b>Trimester</b>	<b>Number of Weeks</b>
<b>May-Aug 2012</b>	<b>Yr 1 Trim 3</b>	<b>14</b>
<b>May-Aug 2013</b>	<b>Yr 2 Trim 3</b>	<b>14</b>
<b>May-Aug 2014</b>	<b>Yr 3 Trim 3</b>	<b>16</b>
<b>Sep-Dec 2014</b>	<b>Yr 1 Trim 1</b>	<b>12</b>
<b>Jan-April 2015</b>	<b>Yr 2 Trim 3</b>	<b>12</b>
<b>May-Aug 2015</b>	<b>Yr 3 Trim 3</b>	<b>9</b>
<b>Total</b>		<b>77</b>

**The units with outstanding issues are highlighted in the table above and can be summarised as hereunder;**

- a. **Research Project**
- b. **NUR 301: Medical Surgical III**
- c. **NUR 401: Teaching Methods and IT.”**

8. Further, and on whether the Petitioner was given an opportunity to be heard, it was the Respondents' case that concerted efforts were made to assist him ameliorate the deficiencies in his course work and to enable him graduate and several meetings were held with him in that regard, to no avail.

9. On whether a mandatory injunction can issue as prayed, the Respondents urged the point that it can only be granted in the clearest of cases and relying on **Bullen and Leake on Judicial Precedents, Twelfth Edition** at pages 537 and 543 stated that the jurisdiction to grant such injunctions must be sparingly and cautiously exercised.

10. Further, relying on the decision of Nyarangi J. in **Nyongesa and 4 Others v Egerton University College [1990] KLR 692** and **Musinga J in R v Egerton University ex Parte Robert Kipkemoi Koskey [2006] e KLR**, the Respondents submitted that Courts should be loath to interfere with decisions of domestic bodies and tribunals including colleges unless it can be shown that their decisions were made without fairness and without hearing the person concerned. The decision of this Court in **Wamalwa v University of Nairobi and Anor [2015] e KLR** was also cited for the same proposition.

11. Arguing therefore that the Petitioner has failed to meet the above expectations of the law, the Respondents prayed for dismissal of the Application with costs.

## **Determination**

12. The facts in issue in the present Petition are largely uncontested save on one issue; whether, in the course of attempting to resolve the question of the Petitioner's eligibility, his right to an expeditious, efficient, lawful, reasonable and procedurally fair process was violated. That issue in any event will be resolved at the determination of the Petition but suffice it to say that *prima facie*, it would seem that the Respondents did not arbitrarily or capriciously act to deny the Petitioner his expectation that at the end of his study course, he would be entitled to graduate with a degree in his chosen area of specialisation.

13. Further, the present Application seeks only one substantive order; whether the Respondents should be restrained from "**declining to include the Petitioner's name**" in the 1<sup>st</sup> Respondent's graduation list for May 2016. Although inelegantly worded, I gather that what is sought is not a mandatory injunction as the Respondents seem to have argued, but a simple injunction to restrain the Respondent's in the above terms. What then are the principles for grant of an injunction under **Article 23(3)(b)** of the **Constitution**?

14. It must be remembered that an injunction is traditionally a private law equitable remedy but once elevated to the level of a constitutional remedy, then it takes a decidedly public law position. In the circumstances, any discussion of such a remedy, while borrowing from the criteria in private law, must necessarily be addressed in the context of constitutional principals such as was held with regard to conservatory orders in **Munya v Kithinji and 2 Others Supreme Court Application No.5 of 2014**.

15. In the above context therefore, one of the considerations, as I understand it, is that an injunction can only be granted where an applicant has shown that he has made out a *prima facie* case that his rights under the Bill of Rights have been violated.

16. In the present case, I have stated that *prima facie*, the Petitioner's issues were addressed by the Respondents and a decision was reached that he was ineligible to graduate. Further to that finding, it is generally the law that Courts must be slow to be micro-managers of educational institutions such as the Respondents unless it can be shown that their administrative and internal actions and decisions are unlawful or in breach of **Article 47** rights. I am unable to find reason at this stage of the proceedings and based on the evidence before me to ignore the edicts in **Nyongesa (supra)** and **R v Egerton University (supra)** that Courts should be slow to do so. I say so because as can be seen from the Affidavit evidence of Marcellus Otieno, there would seem to be problems with the Petitioner's academic records and the Respondents, it has not been denied, fully involved him in attempts at resolving them.

17. On whether damages can be an adequate remedy should the Application be denied it is indeed true that under **Article 23(3) (e)** of the **Constitution**, compensation, including by an award of damages, is a remedy available to any applicant alleging violation of constitutional rights. In the present case, such a remedy is indeed available to the Petitioner if he is minded to seek the same.

18. Lastly, on a balance of convenience, between allowing an allegedly unqualified student to graduate and be awarded a degree and the converse of such a situation, it is my view that the balance must tilt in favour of the Respondents. The Petitioner in any event has the opportunity to undo whatever issues have brought him this far by adhering to whatever demands the Respondents may make, including re-sitting any papers that he had failed.

## **Disposition**

19. From what I have stated above, it is obvious that I see no merit in the present Application and the same is dismissed.

20. As for costs, let the same abide the outcome of the Petition,

21. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY, 2016**

**ISAAC LENAOLA**

**JUDGE**

**In the presence of:**

Muriuki – Court clerk

Mr. Kibumbi for Respondent

No appearance for Petitioner

**Order**

Ruling duly read.

**ISAAC LENAOLA**

**JUDGE**

**Order**

Submissions to be filed for directions on 7/10/2016.

**ISAAC LENAOLA**

**JUDGE**