



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

PETITION NO. 53 OF 2015

IN THE MATTER OF: CONTRAVENTION OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF: ALLEGED BREACH/INFRINGEMENT OF RIGHTS AND
FUNDAMENTAL FREEDOMS**

AND

**IN THE MATTER OF: ARTICLES 3, 10, 19, 20, 21, 22, 23, 27, 46, 47, 165, 258 & 259 OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND
TECHNOLOGY ACT**

AND

IN THE MATTER OF: THE ENGINEERS ACT, 2011

AND

**IN THE MATTER OF: THE MOMBASA POLYTECHNIC UNIVERSITY COLLEGE ORDER
2007**

BETWEEN

JOHN OWINO OBUNDE (Suing for and on behalf of 82 others).....PETITIONERS

VERSUS

**1. TECHNICAL UNIVERSITY OF
MOMBASA**

**2. JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND
TECHNOLOGY.....RESPONDENTS**

RULING

1. This Ruling relates to two separate applications dated respectively, in June, 2016 and seeks orders for committal to civil jail at Shimo La Tewa Prison, of the Vice Chancellor, Professor Mabel Imbuga, and the Chief Legal Officer Vivian Waithaka of the Second Respondent for disobedience of the court orders issued on 23rd November, 2015 (not 2016), and the costs of the application be provided for.
2. The second application is dated 30th June, 2016, and was filed on 1st July, 2016, and seeks review of the orders issued herein on 23rd November, 2015.
3. These applications were argued on the same day by respective counsel for the respective parties. Ordinarily the application for contempt of court would take precedence over the application for review because it was filed first. However, without first considering the merits (if any) of the application for review, a court might condemn the Respondent to civil jail without considering whether its application for review has any merit. In the circumstances, I shall first consider the application for review.

The Notice of Motion of 30th June, 2016 by the Second Respondent

4. As already indicated this is an application by the Second Respondent Jomo Kenyatta University of Agriculture and Technology (JKUAT), for review of this court's Ruling of 23rd November, 2015 under which JKUAT was ordered to graduate the Petitioners whose particulars were stated in the said orders.
5. The law relating to review of the court's orders is set out in Order 45 of the Civil Procedure Rules 2010, and the relevant part is Order 45, rule 1, and is on the ground of discovery of new and important matter or evidence, which, after the exercise of due diligence was not within the knowledge or could not be produced by him (the Applicant) at the time when the decree was passed, or an account of some mistake or error apparent on the face of the record or any other sufficient cause.
6. There is no question of an error or mistake on the face of the record in this case. The Applicant (JKUAT) case is that it had not had time to package all information or data on the Petitioners at the time when the orders of 23rd November, 2015 were made. Its case now is that it will allow the Petitioners to graduate under its mandate, if the Petitioners would complete the courses prescribed by its Senate for the award of JKUAT, Engineering Degrees or qualifications.
7. It is a pity that this ping-pong and sea-saw game has been going on for too long between JKUAT and its erstwhile and child TUM. Like my sister Lady Justice Kasango observed in her Ruling on a similar application involving the two institutions, in Constitutional Petition No. 32 of 2014 **Daniel Muthoka Munyao & 9 others vs. Technical University of Mombasa & 3 others** [2014] eKLR that when –

 “elephants fight it is the grass which suffers ...”
8. The elephants the learned Judge was referring to are still the same, JKUAT and its now grown up baby “TUM”. The facts and issues were fully canvassed in the court's Ruling of 23rd November, 2015. The issue or question here is whether the orders made in that Ruling should be stayed, and reviewed.
9. I will deal with the question of stay first. Though this may be regarded as a technical point, it is necessary to deal with it because many counsel perpetually fall into that error. The prayer for stay is premised upon Order 22, rule 22 of the Civil Procedure Rules 2010. A reading of rule 22 envisages the transmission for a decree issued by one court (Court A) for execution by another court (Court B). The orders in this case were issued by this court. A party cannot therefore use its application for stay of execution of a decree on a rule which governs the powers of a court which receives a decree or order (Court B).
10. The proper Order for applications for stay of execution is Order 42 which is benignly entitled, **“appeals”** and the applicable rule is 6(1) and the conditions of granting such stay is rule 6(2). The

conditions are that –

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay;

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

11. The loss the Second Respondent is referring to is its academic reputation as a University, a centre of technological excellence of national, regional and international repute, holding among other distinctions of excellence, the ISO 9001:2008 Certification. The reputation of any institution of learning, more so, at the apex level, is determined by its products, its **alumni**, its graduates. Any such institution must be satisfied, by each student, through the courses offered, and passed by any such student as a condition for the award of its Certificates or Degrees.

12. The Applicant (JKUAT) is not satisfied that the Applicants have individually satisfied its **Senate** which is the ultimate body which approves the award of such Certificates and Degrees of JKUAT.

13. In this regard I am satisfied from the Affidavit of Dr. Esther Thaara Muoria that the Applicants did not satisfy the Senate of JKUAT, because of failure perhaps not by the Petitioners, but by their University College (TUM), (as it then was), to offer those courses for the award of Degrees of JKUAT in the various disciplines pursued by the Petitioners.

14. The courses and degrees studied and sought by the Petitioners are critical to the technological and therefore industrial development of our country, our region and continent of Africa. It is therefore paramount that the ultimate certificates and Degrees awarded by JKUAT, are earned, and not **court transmitted** or by court fiat. The loser in such a case is not JKUAT, but Kenya, the East African Community, COMESA, and indeed mother Africa.

15. Though the Application was filed more than six (6) months after the orders sought to be delayed were made, the question of stay of those orders is so fundamental that it was necessary to consider the reliefs sought both for the interests of the Applicant (JKUAT), and also the Petitioners themselves. The Petitioners would be eligible for registration by the Engineers Board of Kenya if they qualified from JKUAT rather than TUM, pending approval by the Engineers Registration Board of courses and degree qualifications offered by TUM.

16. In the circumstances therefore and subject to the conditions set out in the paragraphs following the orders made on 23rd May, 2015 are reviewed and stayed pending further orders of court.

17. The conditions of stay are that JKUAT and TUM will admit the sixty four (64) Petitioners who choose to satisfy the conditions for the award of degrees by JKUAT, and subject to supervision of JKUAT and/or TUM where applicable, to study and be examined in those courses which lead to award of engineering degrees by JKUAT.

18. The admission shall be free of tuition fees in respect of the subject or subjects required to be taken and shall be for the period to complete the course, hitherto not satisfied by respective Petitioners.

19. JKUAT and/or TUM shall act in good faith and enable the respective Petitioners to complete their courses, and be awarded **Degrees** upon satisfaction of the Senate of JKUAT, and **not pursuant to orders of court**.

20. That settles the application by the Second Respondent, the Jomo Kenyatta University of Agriculture and Technology. I now turn to the application by the Petitioners.

The Notice of Motion of 2nd June, 2016 by the Petitioners

21. In light of the orders made, and stay of execution orders granted to JKUAT, and the new conditions imposed, I do not propose to discuss the application for contempt at length.

22. I will however put on record that the Second Respondent (JKUAT) acted in bad faith by purporting to issue its degrees **“pursuant to orders of court...”**

23. It was ill-advised. There is no provision in any legislation, I know, which enables the JKUAT or TUM, or for that matter any other institutions of learning to issue **Degrees** pursuant to an order or orders of court. It is the standard the world over that universities issue Degrees subject to every and each student satisfying the conditions and examinations of the university and approved by the Senate or other governing body of the university. To say that a degree is issued **“pursuant to an order of court”** is elevating the court to the status of the “Senate” of the university, which it is not. The orders of 23rd November, 2015 were premised on the information and submissions that the Petitioners had satisfied the Senate of JKUAT in all the subjects for the award of an engineering degree of JKUAT. That was not the case as shown in the application for stay of execution and review of those orders.

24. Engineers of all types hold an important and special place in the technological and industrial development of our country, of the East African Community, of COMESA and mother continent of Africa. It is therefore of paramount importance that all students allowed to graduate from our technical schools, colleges and universities are properly certified that they have satisfied all the requirements for the award of the degrees and certificates to enable them apply their knowledge and practice, their skills.

25. Out of the eighty two (82) Petitioners, only eighteen (18) satisfied JKUAT’s conditions for award of the various Degrees in engineering. That left out sixty four (64) (Petitioners), and that is a large number of potential engineers and innovators and whose only fault was the failure by JKUAT and TUM to communicate their admissions and courses offered for the award of respective engineering degrees.

26. In the circumstances, I am unable to say that JKUAT or its personnel acted in contempt of the court’s order. I think, they were in a dilemma, and purported to carry out the court’s orders by issuing Degrees **“pursuant to the court orders of 23rd November, 2015”**. As I have already stated, such degrees are illegal. There is no statute or charter of any university or JKUAT in particular which enables any university to issue degrees pursuant to orders of court.

27. Any degree such as the one exhibited in the Supporting Affidavit of John Owino Ogunde in support of the Notice of Motion of 2nd June, 2016, is an illegality. It is of no use to any of the sixty four (64) Petitioners. It and all such degrees must be withdrawn and if kept can only be as an archive and museum piece in memory of the whims and idiosyncrasies of JKUAT’s Vice-Chancellor and Deputy Vice-Chancellor Academic.

28. I have already set out the consequences of such action in the conditions for the stay of execution of the orders to graduate the Petitioners with degrees of JKUAT until the Petitioners satisfy the Senate of JKUAT as to examination and award of the engineering degrees of JKUAT. To repeat by way of emphasis –

- (a) admit without pre-conditions, those of the Petitioners who opt to study those subjects they were not examined in for the award of JKUAT’s degrees;
- (b) exempt such Petitioners from payment of tuition fees for the subjects, and for the period of such study;
- (c) act in utmost good faith and facilitate the Petitioners satisfactory completion of their courses;
- (d) graduate the Petitioners upon their successful completion of their respective courses.

29. I have imposed these conditions on the clear understanding that if JKUAT and TUM (the two institutions) had adhered to all the conditions of admission, if there had been prior disclosure over the

period of study of the courses offered by the two institutions leading to the award of the requisite degrees, the litigation and intervention of the courts would have been totally unnecessary.

Determination in Summary

30. In summary -

(1) There shall be a stay of 23rd November, 2015. JKUAT/TUM shall give the Petitioners full credit in respect of the courses of which they have already been taught and examined.

(2) JKUAT/TUM shall graduate and award the said Petitioners with Engineering Degrees of JKUAT/TUM, upon satisfactory completion.

(3) JKUAT/TUM shall admit all the sixty four (64) Petitioners who opt to complete courses for the award of the Engineering Degrees of JKUAT/TUM.

(4) JKUAT/TUM shall exempt the said Petitioners from payment of tuition fees for such courses and for the designated period for completion of such courses.

(5) JKUAT/TUM shall act in good faith and facilitate the registration of the said Petitioners without undue technicalities.

31. In light of the convulsions in this matter, I direct that each party shall bear its own costs.

32. This matter be reviewed at the end of March, 2017, to ensure the implementation of the orders herein.

33. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 13th day of October, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Mr. Chamwada for Petitioners/Applicants

Miss Mwinzi holding brief Olunya for Respondents

Mr. Silas Kaunda Court Assistant