



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 37 OF 2015

IN THE MATTER OF: CONTRAVENTION OF THE CONSTITUTION OF KENYA

AND

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

AND

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

AND

IN THE MATTER OF: THE TECHNICAL UNIVERSITY OF MOMBASA ACT

AND

IN THE MATTER OF: THE 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

KENNETH NJUE NGURU & OTHERS.....
PETITIONER

AND

TECHNICAL UNIVERSITY OF MOMBASA..... 1ST

RESPONDENT

JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY..... 2ND
RESPONDENT

RULING

INTRODUCTION

0. By a Notice of Motion dated 18th June 2015, the petitioners who allege to be students of the 2nd respondent who were enrolled for an engineering degree at the 1st respondent, then a constituent college of the 2nd Respondent, which unlike the 1st Respondent was accredited under the Engineers Act to offer engineering courses, and therein trained and examined by lecturers of the 2nd respondent and who claim to have been successful in their examinations therefor, seek specific orders as follows:

1. ***The application be certified as extremely urgent and service be dispensed with at the first instance.***
2. ***To grant an order compelling the First Respondent to forward to the Second Respondent a list of the Petitioners' names for graduation in the forth coming graduation ceremony scheduled on the 31st of July 2015.***
3. ***To grant an order compelling the Second Respondent to include the forwarded names of the petitioner in its graduation list and graduate the Petitioners in a manner consistent with the other graduands.***
4. ***To grant an order compelling the Second Respondent to issue degree certificates to the Petitioners alongside other graduands.***
5. ***The costs of these proceedings be borne by the Second Respondent.”***

0. The application was based on the grounds set out in the application as follows:

1. *The First and Second Respondents' failure to properly and timeously notify the Petitioner where they are supposed to graduate at upon the successful completion of their Engineering courses constitutes an abrogation of the First and Second Respondent's duty to conduct a fair hearing. The Petitioners have not only been denied access to any documents in possession of the First and Second Respondent relating to their graduation but also the continued delay is prejudicial to the Petitioners considering that the Second Respondent graduation is scheduled on 31ST OF JULY 2015. This violates the Petitioners right under Article 35 and 50 of the Constitution that guarantees the right to information and a fair hearing.*
2. *The Petitioners as Engineering students had a legitimate expectation that upon completion of their studies they would graduate at the Jomo Kenyatta University of Agriculture and Technology and an expectation that they will be informed of this information within a reasonable time by the First and Second Respondent. This, for whatever reason, has not happened in this instance. This conduct violated the Petitioners right to a fair administrative action.*
3. *The conduct of the First and Second Respondents and its legal advisors in failing to disclose material facts and documents (timeously) as far as the status of Petitioners with regard to the pending graduation violates their right to a fair hearing.*
4. *In light of the fact that the courses of the First Respondent have not been accredited and have been impugned by the First interested party to the extent that the First Respondent has been authorized to offer any Engineering courses, there is no basis upon which the First Respondent can possibly seek to graduate the Petitioner at its institute. The continued persistence by the First Respondent to proceed with the graduation of the Petitioners at its institution is against public policy and violates the Petitioners' rights to a quality education.*
5. *This delay is not forwarding the names of the Petitioners to the Second Respondent is not only*

- prejudicial to the Petitioners but also violates the Petitioners' constitutional right to a fair hearing and their right to have their names included in the Second Respondent's graduation list within a reasonable time.*
6. *The conduct of the Respondents and the decision of the First Respondent not to forward the list of the names of the Petitioner to the Second Respondent for graduation constitutes a violation of a wide spectrum of administrative action guaranteed under Article 47(1) of the Constitution – in particular (but not necessarily limited to) the right to an expeditious, efficient, lawful, reasonable and procedurally fair administrative action, the Petitioners' legitimate expectation to graduate upon successful completion of their studies and the Petitioners' right to be furnished with all material facts relating to their pending graduation.*
 7. *The Respondent has totally breached Article 27 of the Constitution which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law.*
0. The 1st Respondent filed a replying affidavit in which its Vice Chancellor, Prof. Josphat K.Z. Mwatelah, has deponed at paragraphs 3-6 that the petitioners were the students of the 2nd respondent studying at the 1st Respondent as a constituent college of the 2nd respondent from the year 2010 and that it had it forwarded the names of the applicants to the 2nd respondent for graduation purposes, as follows:
3. ***THAT*** *as regards paragraphs 1 to 15 of the Petitioners'/Applicants' supporting affidavit, its true that the Petitioners/Applicants were and/or are students of the 2nd Respondent studying at the 1st Respondent's institution in Mombasa, being a constituent college of the 2nd Respondent from the year 2010, undertaking engineering courses whose syllabus(es) and/or studies were prepared and/or approved and/or taught and/or examined by Lecturers from the Mother University, 2nd Respondent herein.*
 4. ***THAT*** *even the 1st Respondent became a fully-fledged University on 30th January, 2013, the Petitioners/Applicants continued being students of the 2nd Respondent herein.*
 5. ***THAT*** *as regards paragraphs 16 to 18 of the Petitioners'/Applicants' supporting affidavits, it seems that the Petitioners'/Applicants' sole purpose or reason for commencing this suit against the 1st Respondent herein is the wrong perception that their names were never forwarded to the 2nd Respondent for graduation purpose....*
 6. ***THAT*** *from the foregoing, it is evident that the orders sought as against the 1st Respondent cannot issue because the sought for exercise or duty was already undertaken or performed in January, 2015 and thus if any orders should be made in favour of the Petitioners/Applicants, they should be made as against the 2nd Respondent.*
0. For the 2nd respondent an affidavit by its Chief Legal Officer, Vivian Nyambura Waithaka, sets out the 2nd Respondent's case that the petitioners were registered as students of the 1st Respondent as a constituent college of the 2nd Respondent but that upon verification exercise conducted by the 2nd Respondent, 8 of the 11 had been found not to have met the requirements for admission to the engineering degree course at the 2nd respondent university and that the files on the three remaining petitioners had not been forwarded by the 1st respondent.
3. ***THAT the Petitioners are engineering students of Technical University of Mombasa (TUM) which was a constituent college of the 2nd Respondent and were admitted to undertake the course of Bachelor of Science in Electrical and Electronic Engineering.***
 4. ***THAT with the transition of TUM to a fully-fledged University and having its own charter which guided its operation the said constituent relationship was extinguished and thus became a distinct and separate entity to the 2nd Respondent.***
 5. ***THAT pursuant to a ruling of the courts issued on the 29th November 2014 in Constitutional Petition 68 of 2014 on a similar application, a report of a sub-committee consisting of the Engineering Faculties and Senate of the 1st and 2nd Respondent appointed by the Ministry of Education Science & Technology, directions were given on the award of degrees by the 2nd***

- Respondents of students admitted to TUM before December 2012 when the University was awarded a charter.*
6. *THAT it was agreed that the 2nd Respondents would graduate the 1st Respondents students upon the verification and scrutiny of the complete student files and academic transcripts so as to satisfy itself as of the students' eligibility of a degree award by the 2nd Respondent. (Annexed hereto and marked as exhibit "VNW 1" is the report/findings following the verification process of the University Senate dated 18th February 2015).*
 7. *THAT during the verification of the sub-committee of Senate, it was found that out of the Sixty one (61) students presented by Technical University of Mombasa (TUM), only thirty nine (39) were eligible for the award of degrees by the 2nd Respondent.*
 8. *THAT the application before this court is of Eleven (11) students who the 1st Respondent submitted to the 2nd Respondent for the award of degrees by the 2nd Respondent. Out of the Eleven (11), only Eight (8) student's files were submitted for verification by the sub-committee of senate and it was found that the 8 students were not eligible for an award of degree by the 2nd Respondent. (Annexed hereto and marked as exhibit "VNM 2" is the recommendations submitted to TUM following the said meeting – highlighted are the Eight (8) students in this application).*
 9. *THAT it was the recommendation of the sub-committee of the Senate that the Eight (8) students highlighted in the report and who are part of the Eleven (11) Petitioners herein be awarded a degree by TUM for the reasons indicated in the report.*
 10. At paragraph 13 of the replying affidavit filed on its behalf the 2nd Respondent agrees to award the degree, in these terms:

“That the 2nd respondents have no objection in awarding the degree upon verification of all requisite documents having been submitted by the 1st respondent.”

11. By a consent recorded in court on the 3rd July 2015, in the presence of Mr. Chamwada for the petitioners, Mr. Mutiso for Mr. Kenga for the 1st respondent and Mr. Oluoch for the 2nd respondent, the court made the following consent order:

“1. There be an order compelling the First respondent to forward to the Second respondent a list of the Petitioners names for graduation in the graduation ceremony scheduled on the 31st of July 2015;

2. The matter be mentioned on the 13th July 2015 for further orders/directions.”

12. It would appear from the terms of the said consent order therefore that prayer NO. 2 of the Notice of Motion has already been granted by consent of the parties and all that remains is the substantive prayers for the graduation and certification of the petitioners in terms of Prayers Nos. 3 and 4 of the Notice of Motion.
13. Counsel for the parties – Mr. Chamwada for the petitioners, Mr. Kenga for the 1st respondent and Mr. Rambo for the 2nd respondent - made oral submissions on the 23rd July 2015 and ruling was reserved.

ISSUE FOR DETERMINATION

14. The central issue for determination in the petition is whether the petitioners constitutional rights and legitimate expectation have been violated or threatened with violation by the refusal by the 2nd Respondent to graduate and award the petitioners its degree of engineering. At the interlocutory stage, before the hearing of the petition, the court's power to make mandatory orders as sought by the petitioners is circumscribed by a requirement in accordance with the authorities that the applicant demonstrates a clear case for the making of the order sought. It is trite that as held in *Shepherd Homes Ltd. v. Sandham* [1970] 3 All E.R. 402 (Ch. Div.), *Kamau Mucuha v. Ripples Ltd* (1990-94) EA 388, *Gusii Mwalimu Investments Co. Ltd v. Gusii Mwalimu Hotel* (1995-98) 2 EA 100 and *Locabail International Finance Ltd v. Agro Export and Others* (1986) 1

ALL E.R. 901, mandatory injunctions may exceptionally be granted at the interlocutory stage in strong and clear cases.

15. The issue before the court at this interlocutory stage is whether the applicant has established special circumstances or a clear case for the grant of the interlocutory mandatory injunction to compel the 2nd respondent to graduate and award degree certificate to the petitioners. In determining the issue, the court must consider the following questions:
- Whether the petitioners are students of the 2nd respondent;
 - Whether as such students the petitioners have a legitimate expectation that they will be graduate and certified to the degree of engineering following successful completion of their training;
 - Whether in fact, the petitioners have satisfied the examiners for the award of the degree of engineering by the 2nd Respondent; and
 - Consequently, whether the petitioner's constitutional rights have been violated.

DETERMINATION

Whether the petitioners are students of the 2nd respondent

16. The background of the matter is that the 1st respondent had by its predecessor Mombasa Polytechnic University college established under Legal Notice No. 160 of 2007. In a report of verification exercise by a senate Committee of the 2nd respondent dated 18th February 2015, the 2nd Respondent has found 8 of the 11 petitioners herein to be unsuitable for the award of the degree of the 2nd respondent on the grounds variously that the given petitioner did not meet the 2nd respondent's criteria for admission to the degree course or that he/she should have been admitted to first year rather than the second year of study in view of their low grade at Diploma (Pass) level. The report however, recommends the award of degree by the 1st Respondent.
17. The Transition provisions of Clause 32 (2) (d) of the 1st respondent's Charter dated 24th January 2013 establishing the 1st Respondent as a full-fledged University from its earlier status as Mombasa Polytechnic University College, a constituent college of the 2nd respondent provides as follows:

“[All the students of Mombasa Polytechnic University College who were pursuing Degree, diploma and certificate programmes as at the commencement date of the Charter, shall be allowed to complete their courses and shall be awarded degrees, diplomas and certificates of the University.”

18. With respect, question whether the petitioners were students of the Mombasa Polytechnic University College must be contextualized. The 2nd respondent is accredited by the Engineer's Board to offer engineering courses. The Mombasa Polytechnic University College was not accredited. By the invitation notice, the students were offered to undertake engineering courses at the 1st respondent's predecessor as a constituent college of the 2nd respondent by virtue of L.N. No. 160 of 2007. The 1st respondent or its predecessor could have no capacity to register students for engineering courses as they were not accredited by the Engineers' Board in accordance with the Engineers Act. The petitioners were, therefore, registered for the electrical and electronics engineering course of the 2nd respondent as students of the 2nd respondent which was accredited by the Engineer's Board to offer engineering courses. They were never students of the 1st respondent. Kasango, J. in ***Daniel Muthoka Munyao & 9 Ors. v. Technical University of Mombasa & 3 Ors.*** [2014] eKLR adverted to the want of accreditation by the Engineers Board of the 1st Respondent and its dire consequences if the students were graduated by the 1st respondent.
19. Indeed, the Chief Legal Officer of the 2nd Respondent impliedly conceded this position when she deponed at paragraph three of her replying affidavit that –

“3. THAT the Petitioners are engineering students of Technical University of Mombasa

(TUM) which was a constituent college of the 2nd Respondent and were admitted to undertake the course of Bachelor of Science in Electrical and Electronic Engineering.”

20. In these circumstances, the provisions of Clause 32 (2) (d) have no application to students at the Mombasa Polytechnic University College who were students undertaking courses offered by the 2nd respondent and which the Mombasa Polytechnic University College had no capacity to offer having not been accredited by the Engineers Board in accordance with the Engineers Act.

Whether as such students the petitioners have a legitimate expectation.

21. The Court of Appeal (Visram, Koome & Otieno-Odek, JJ.A) in ***Oindi Zaippeline & 39 Ors., v. Karatina University*** (2015) EKLR found legitimate expectation to exist in similar circumstances—

“In the instant case, the appellant has undertaken study and education as a student of the 2nd respondent since 2009, he has invested time, energy and resources; two months to completion of his study the 2nd respondent disowns him as its student and asserts that he is a student of the 1st respondent who was neither in existence in 2009 nor taught and examined the appellant. This situation invites the court to intervene and injunct the 2nd respondent from renegeing on its contractual obligations and the legitimate expectation of the appellant.”

22. I find that the petitioners having registered for engineering course with the 1st respondent as a constituent college of the 2nd respondent since 2010 and having undertaken the training conducted by the 1st respondent’s predecessor as the 2nd respondent constituent college and having passed the relevant examinations have a legitimate expectation to be graduated and awarded degree certificates by the 2nd respondent whose students they were since admission to the 1st respondent when it was a constituent college without interruption even after the 1st respondent obtained its own Charter as a full-fledged University. I agree with the Court of Appeal in ***Oindi*** that by virtue of section 23 of the Interpretation and General Provisions Act the promulgation of charters as a repealing law cannot retrospectively affect rights that have already accrued or obligations that have been incurred and that as in this case petitioners had acquired a legitimate expectation following their registration for engineering courses of the 2nd respondent University at its constituent college, the MPUC that they would be allowed to graduate and be awarded a degree of the 2nd Respondent and that therefore the latter had incurred a liability so to award the petitioners its degrees. See also a decision of this court section 23 of cap. 2 in ***The Registered Trustees of Kiembeni Baptist Church v. Ministry of Education and Ors.***, Mombasa H.C.Pet. No. 3 of 2006.

23. As shown above, the attempt by the 2nd Respondent to disown the petitioners as its students long after they have completed their studies awaiting only graduation and certification has no proper basis in law or fact. Indeed, the consent order of 3rd July 2015 for the 1st respondent to forward to the 2nd respondent a list of the petitioners’ names for graduation in the Graduation Ceremony of the 31st July 2015 could only have been made on the understanding that the petitioners were the students of the 2nd respondent.

Whether in fact, the petitioners have satisfied the examiners for the award of the degree of engineering by the 2nd Respondent.

24. The Petitioners are part of 61 candidates who under an award document approved by the Board of examiners and the senate of the 1st respondent and signed by the Dean of the Faculty of engineering and Technology and chairman of the Senate certified as having satisfied the faculty of engineering and Technology Board of Examiners during the 2013/2014 academic year for the degree of Bachelor of Science in Electrical and Electronic Engineering.

25. Save for the one of the petitioners (9th Petitioner) who was shown by the 1st Respondent to be to be undertaking supplementary examinations, the petitioners whose documents were verified by the

- 2nd Respondent's Senate Committee of 18th February 2015 were recommended for award of degree by the 1st respondent and not the 2nd respondent on the ground taken by the 2nd respondent that they were not eligible for the 2nd respondent's degree for having not met its admission criteria. Having found that the petitioners had been properly admitted by the 1st respondent as a constituent college of the 2nd respondent in accordance with the Legal Notice No. 160 of 2007, the petitioners who have been shown to have passed their examinations administered by the 1st respondent must be taken to have satisfied the examiners for the purpose of the award of the degree of the 2nd respondent for which they were enrolled in accordance with the relationship existing before the 1st respondent's grant of Charter.
26. The questions raised by the 2nd respondent as to the qualifications of the petitioners does not appear to be the successful completion of the training and passing the relevant examinations. The 2nd respondent indeed recommends award of degree by the 1st Respondent. Its contention is with the admission criteria contending that it had a higher grade criteria than that used by the 1st respondent's predecessor in admitting the petitioners. But the petitioners were admitted by the 1st respondent as a constituent college of the 2nd respondent upon criteria set out in the advertisement for admission. In respect of Bachelor of Science in Electrical and Electronic Engineering, the requirements were shown as KNEC Diploma in Electrical Power, Electronics, Instrumentation, Telecommunication and Medical Engineering or Equivalent or HDip in Electrical Engineering or equivalent recognized by MPUC.
27. MPUC (Mombasa Polytechnic University College) was established under the Jomo Kenyatta University of Agriculture and Technology Act 1994 by Legal Notice NO. 160 of 2007. In terms of the legal Notice, the Chancellor and Vice-Chancellor of the 2nd respondent were chair and vice-chair of the Council of the MPUC, the 1st Respondent's predecessor, and the Council under clause 12 of the Legal Notice was the governing body of the University Council. By Clause 5(j) of the Legal Notice, the only degrees that the university college could confer were the degrees of the University. The 2nd Respondent's chancellor and vice-chancellor having been top officials of the 1st respondent's predecessor, the 2nd respondent must be stopped from denying the validity of the admissions based on the criteria used by its constituent college at the time.

Whether the petitioner's rights have been violated.

28. The petitioners have demonstrated the frustration by the 2nd Respondent of their legitimate expectation to be graduated by the 2nd respondent, which is an aspect of fair administrative action under Article 47 of the Constitution. The court considers that the petitioners have an arguable case on the issue whether their constitutional rights have been violated by reason of non graduation when other students who were similarly placed have been graduated and await the award of their degree certificate. The final determination of the breach of the petitioners' constitutional rights will be made upon the full hearing of the petition.

CONCLUSION

29. The court finds that petitioners have established a strong and clear case for the reliefs sought in the petition by way of a legitimate expectation as students of the 2nd respondent who upon being admitted into the 1st respondent's predecessor, the Mombasa Polytechnic University College (MPUC) as a constituent college of the 2nd Respondent; have undertaken the relevant training for the engineering degree courses for which the 2nd respondent was, and the 1st respondent and its predecessor were not, accredited by the Engineers' Board; and upon being certified by the Board of Examiners by the 1st respondent, which despite the grant of Charter on the 24th January 2013, did not take over the petitioners as they were not its students, being students of the 2nd respondent for whose engineering degree course they had enrolled with the 1st respondent's predecessor then a constituent college of the 2nd respondent as students; and they are accordingly entitled to the relief sought in the nature of an interlocutory mandatory injunction as prayed in Prayer No. 3 of

- the Notice of Motion. For the reasons, I have set out above, in the words of Megarry, J. in **Shepherd Homes Ltd. v. Sandham** [1970] 3 All E.R. 402 (Ch. Div.), I consider that there is ‘a high degree of assurance that at the trial it will appear that the injunction was rightly granted.’
30. However, the order sought in prayer No. 4 of the Notice of Motion ‘*compelling the Second Respondent to issue degree certificates to the Petitioners alongside other graduands*’ is in the nature of a final act and order as sought in the main Petition apart from the prayers for declarations and compensation for alleged breaches of their constitutional rights and costs of the petition. Once granted there shall be nothing left to be heard at the Petition. Graduation as a ceremony, which this Court orders by an interlocutory mandatory injunction under prayer No. 3 of the Notice of Motion, is the first act in the process of conferment of degrees after satisfying the Board of Examiners and has a lesser risk of prejudice against the defendant at this interlocutory stage than certification. Certification by the award of the degree certificate is the final act of recognition by a university of a student as having duly met all the requirements for the award of the relevant degree of the University. I consider that this aspect of the matter should await full hearing of the petition to conclusively determine the rights of the parties upon hearing of the dispute by affidavits, written submissions or oral hearing as the trial court may direct in accordance with Rule 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.
31. In **Hudson Okello Oganga & Ors.**, (2014) eKLR, with a graduation ceremony, as here, shortly impending, this court dealt with the first batch of 42 petitioners part of the 61 students of the 2013/2014 academic year finalist class who undertook engineering course at the 1st respondent as a constituent college of the 2nd respondent since 2010, and, taking note of the 2nd respondent’s authority under Statute XXXII clause 6 (vii) to correct any error in the award of a degree, made a order for graduation of the students in that case as follows:

“On the balance, therefore, I consider that a case is made out for the graduation ceremony to proceed subject to the inclusion of the petitioners in the ceremony and for the 2nd respondents to proceed with the verification exercise within the period of two weeks intimated by the 2nd Respondent, with the result that if any of the allegations of impropriety on the part of the petitioners is established the award of degree for the affected petitioner will be withdrawn in accordance with the statutes of the University. The degree certificates for the petitioners may await the conclusion of the verification exercise aforesaid with liberty to apply for any affected party.”

32. The verification exercise of the 62 students including the petitioners herein is said to have resulted in approval of only 39 of the students. The petitioners in this case are said not to have become eligible for the award of the 2nd Respondent’s degree. The reasons given for their ineligibility concern the admission process which was undertaken by the 1st Respondent as a constituent college of the 2nd Respondent. Having found that the students herein were the students of 2nd respondent, they have a legitimate expectation that upon their successful completion of the engineering course, they would be awarded the relevant degree by the 2nd Respondent.
33. For the reasons set out herein above and those given in the *Hudson Okello Oganda* case and which are applicable herein as the petitioners herein are in the same category of the students enrolled for engineering course at the 1st respondent as a constituent college of the 2nd respondent, the Court is minded to repeat the order for graduation of the students pending the hearing of this petition. The prayer for award of certificate set out in prayer No. 4 of the Petition shall await the final determination of the Petition.

ORDERS

34. Accordingly, the court makes an order for interlocutory mandatory injunction in terms of Prayer NO. 3 of the Notice of Motion dated 18th June 2015 to the effect that the Second Respondent shall include the names of the petitioners, save those who are scheduled to take supplementary examinations, in its graduation list for the Graduation Ceremony of 31st July 2015 and graduate

the Petitioners in like manner as with the other graduands of the University. The prayer for certification by award of degree certificate and declarations and compensation for breach of the petitioners' rights shall await full hearing of the Petition.

35.Costs in the Cause.

DATED AND DELIVERED THIS 28TH DAY OF JULY 2015.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

..... for the Petitioners

..... for the 1st Respondent

.....for the 2nd Respondent

..... Court Assistant.