REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

PETITION NO. 17 OF 2015

GEORGE KIBOR KIPYATICH.....1ST PETITIONER

ALEX KIPLAGAT KIBOR…….2ND PETITIONER

KANDA L. KIPLAGAT……...3RD PETITIONER

VERSUS

THE UNIVERSITY COUNCIL

MOI UNIVERSITY & 3 OTHERS……RESPONDENTS

RULING

1. The petitioners were students of Moi University between 2011 and 2015. They were enrolled at the School of Business and Economics for courses leading to the award of Bachelor of Business Management. The graduation was slated for the 3rd and 4th September 2015. They never graduated. They were removed from the final list of graduands for want of payment of tuition and other fees.
2. The petitioners are aggrieved by that decision. On 2nd September 2015 they presented a petition to the High Court. The petitioners claim that the respondents violated their rights enshrined under articles 10, 22, 23, 27, 30, 35 and 47 of the Constitution. Pending the hearing of the petition, the petitioners have filed a notice of motion dated 2nd September 2015 praying for three main reliefs: first, that they be allowed to graduate on 3rd and 4th September 2015; secondly, that they be issued with their degree certificates; and, thirdly, that the respondents be restrained from interfering with their education or qualifications *"as bona fide students and graduands [on] the graduation list annexed"*.
3. There are three fairly identical depositions sworn by each of the petitioners in support of the motion. They all claim they were admitted into the *Government Sponsored Student Programme*. They claim they had paid all their fees. They aver they were listed on a final graduation list dated 8th August 2015 (annexture *GKK4*). They have annexed their relevant academic transcripts. They claim that the respondents then placed them on another 2015 graduation list styled *Irregular Mature Entry* and classified them as such as shown in annexture GKK5. The university was now demanding Kshs 442,700 from the 1st petitioner as a privately sponsored student. The 2nd and 3rd petitioners claim there was an *overpayment* of Kshs 2,400 and 16,900 respectively. The overpayment would only arise if the 2nd and 3rd petitioners were *Government Sponsored Students*.
4. The petitioners were shocked because throughout their four years of study, they had always been classified as *regular* students. They claim they received no notice and were not heard on the matter. They aver that the actions of the respondents are *ultra vires*, amount to an abuse of office

and are unconstitutional.

5. The petition was lodged on the eve of the graduation. That was on 2nd September 2015. It was a wee bit late. The court declined to grant any relief *ex parte* and for considered reasons on the record. In the interests of justice, the court ordered that the motion and petition be served on the respondents for hearing *inter parties*. The respondents were served with the motion and petition. They did not enter an appearance or file a replying affidavit. The affidavit of service shows they were served on 7th September 2015, well after the graduation ceremonies.
6. On 9th September 2015, I heard learned counsel for the petitioners. She wondered why the university allowed the petitioners to sit for their examinations or put them on the initial graduation list if they had not paid their fees. She submitted that the action of reclassifying the students into private or mature entry students was an unfair administrative action.
7. I have considered the notice of motion, the depositions and submissions. By dint of articles 22 and 23 of the Constitution and *The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013,* the petitioners are entitled to bring this petition. The main petition remains unheard. It would thus be premature and prejudicial to make a final finding at this stage. That will be the true province of the trial court. The respondents have not filed a response to the action. The averments in the three depositions of the petitioners are thus uncontroverted. That is not the same as saying that they are proved or true. That will be determined further down the road at the hearing of the petition.
8. It is not contested that the university conducted graduation ceremonies on 3rd and 4th September 2015. Learned counsel for the petitioners conceded as much. The gravamen of the notice of motion was to compel the respondents to reinstate the petitioners on the list of graduands and to issue them with degree certificates. Granted those circumstances, the notice of motion has been completely *overtaken* by events. The main petition itself remains alive; but it may well call for amendments to seek more appropriate reliefs. The less I say about it the better to avoid embarrassing the trial court. What is now material is that the prayers in the notice of motion would be granted in *vain*. It would be anathema to the principles of adjudicating disputes. I decline the invitation to act in vain.
9. What I have said would be sufficient to dispose of the motion. But I am minded to comment on other aspects of the motion. I am satisfied that the removal of the petitioners from the final graduation list constituted an administrative action. The term *administrative action* is wider than the final decision. See *Orion East Africa Ltd v The PS Ministry of Agriculture & another*, Nairobi High Court 100 of 2012 [2012] eKLR. Accordingly, the university was enjoined by the Constitution to employ fair, efficient, lawful and expeditious procedures.
10. Article 47 is *elaborate* and provides as follows-

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

(3) ……"

11. To the extent that the petitioners are challenging an *administrative decision* the petition is an action in judicial review. As a general proposition judicial review proceedings are not concerned with the *merits* but with the decision making process. In order to succeed in an application for judicial review, the applicant has to show that the impugned decision is tainted with *illegality, irrationality or procedural impropriety.* Those terms were explained well by Odunga J recently in *Republic v Inspector General of Police Ex-parte Patrick Nderitu* Nairobi, High Court Judicial Review 130 of 2013 [2015] eKLR-

"Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable

authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision."

12. There are a plethora of precedents on that subject. See generally *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300, (A persuasive but non-binding Ugandan decision), *Council of Civil Unions v Minister for the Civil Service* [1985] AC 2, *An Application by Bukoba Gymkhana Club* [1963] EA 478 at 479 and *The Commissioner of Lands v Kunste Hotel Limited*, Nairobi, Court of Appeal, Civil Appeal 234 of 1995 [1997] eKLR.
13. This dispute is between a public educational institution and its students. They are not disciplinary proceedings: they hinge on a dispute over accounts or classification of student payments. The court has to trend with caution to avoid interfering with internal accounting or administrative matters of a university. But if the actions are capricious or unreasonable or the rights of the students guaranteed by the Constitution have been infringed, the court will be entitled to grant a remedy. In *Nyongesa & 4 others v Egerton University College* [1990] KLR 692, the Court of Appeal had this to say-

"Courts are loathed to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that a decision has been made without fairly and justly hearing the person concerned or the other side, it is the duty of the courts to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people. Whatever the status and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings or inquiry are of an internal disciplinary character".

14. The petitioners state that they learnt of their removal from the list after browsing the university's website. They then learnt of the other list excluding them. Upon inquiry, they were faced with the claims for fees arrears. A key question is whether the petitioners got a *fair* hearing. That will be a matter to be determined finally at the hearing of the main *petition*. Article 35 of the constitution also entitles the petitioners to the information on their fees held by the public university. Again I say that very carefully because the petition remains unheard.
15. From the annexture marked GKK5 that the petitioners' names appeared on the initial graduation list as numbers 17, 41 and 43. The document is undated. there is however an internal memo of 8th August 2015 showing that the 1st petitioner was to graduate (accounting option, number 93 on the list), the 2nd and 3rd petitioners under the purchasing and supplies option (numbers 22 and 23 on the memo respectively). Doubt of their qualification is removed by a letter dated 22nd June 2015 from the university addressed to the public confirming the petitioners had completed their degree courses. I am also satisfied that the university advertised in the *Daily Nation* newspaper (annexture GKK8) the convocation ceremonies slated for the 3rd and 4th September 2015.
16. It is material that the internal memo warned that students with fees arrears would have their names *expunged* from the list. This petition does not wholly turn on the petitioners' academic record; it revolves around the question whether the university reclassified their fees structure. Paraphrased, whether the petitioners were *Irregular Mature Entry (Privately Sponsored Students)* or whether they owed the university the arrears I particularized earlier. If they owe fees, it might justify their removal from the final graduation list. If they don't, the action by the university would be arbitrary or unreasonable. From the admission letter I refereed to earlier, the 1st petitioner was admitted as a *mature* student. None of the petitioners has annexed their fees structure or a document showing they were in the *Government Sponsored Student Programme.* The petitioners have annexed bank deposit slips and materials showing they paid their fees. But they have also annexed statements of accounts from the university for August 2015 showing they owe the university some monies. The

onus to prove they were in the *Government Sponsored Student Programme* lay exclusively on their shoulders.

17. I have also studied annexture GKK7. It is a list from the university showing that the petitioners had fees arrears that I enumerated earlier. I have then looked at the letter of admission of the 1st petitioner dated 7th September 2010 (annexture GKK9). It is titled: *mature entry admission into the university 2010*. I *cannot* then say with confidence at this stage that the petitioners did *not* owe any fees to the university.
18. It follows as a corollary that the petitioners have not made out a *prima facie* case for grant of the interlocutory or conservatory reliefs in the notice of motion. See *Flemish Investments Limited v Town Council of Mariakani*, Mombasa High Court Case 459 of 2010 (unreported), *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589, *Giella v Cassman Brown and Company Limited* [1973] E.A 358.
19. I also stated at the beginning that the university conducted graduation ceremonies on 3rd and 4th September 2015. The gravamen of the notice of motion was to compel the respondents to reinstate the petitioners onto the list of graduands and to issue them with degree certificates. Granted those circumstances, the notice of motion has been completely *overtaken* by events. The main petition itself remains *alive*; but it may well call for amendments to seek more appropriate reliefs.
20. The upshot is that the notice of motion dated 2nd September 2015 is dismissed. In the interests of justice; and, considering the plight of the petitioners, I order that costs shall be in the cause.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 27th day of October 2015.

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open Court in the presence of:-

Ms. Adhiambo for the petitioners instructed by Angu Kitigin & Company Advocates.

No appearance for the respondents.

Mr. J. Kemboi, Court Clerk.