



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL 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, 165, 258 AND 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 &**

**TECHNOLOGY.....RESPONDENTS**

**RULING**

1. This Ruling relates to the Notice of Motion dated and filed on 16<sup>th</sup> September, 2015 in which the Petitioners seek the following orders:-

(1) An order compelling the First Respondent to forward to the Second Respondent a List of the Petitioners' names and their academic files for graduation in the upcoming graduation ceremony scheduled for November, 2015;

(2) An order compelling the Second Respondent to include the forwarded names of the Petitioners in its Graduation List and graduate the Petitioners in a manner consistent with other graduands;

(3) An order compelling the Second Respondent to issue Degree Certificates to the Petitioners upon their graduation;

(4) An order compelling the First and Second Respondents to render an account of how the Petitioners' school fees were utilized and shared between the Respondents;

(5) Costs of this Application be provided for;

(6) Any other relief which the court deems fit and just to grant.

2. The Notice of Motion (the Application) was supported by the Affidavit of John Owino Obunde (the First Petitioner) (suing for himself and on behalf of 82 others), sworn on 16<sup>th</sup> September, 2015, and the grounds on the face of the Application.

3. The Petitioners/Applicants was argued by Mr. Chamwada before court on 23<sup>rd</sup> November, 2015, while Mr. Kenga argued the case for First Respondent (Technical University of Mombasa), while the Jomo Kenyatta University of Agriculture and Technology was argued by Mr. Rambo.

4. The Applicants are all students of the Technical University of Mombasa (TUM), formerly, a Constituent University College of the Jomo Kenyatta University of Agriculture and Technology (JKUAT). The Applicants say, (and there is no dispute) that they were admitted to JKUAT under the Universities Joint Admissions Board, and were sent to study engineering courses at TUM the Constituent College of JKUAT, and that by virtue thereof they are entitled to graduate and be awarded Bachelor of Science Engineering Degrees from JKUAT the University to which they were admitted and studied at TUM before and after it became a full-fledged University with its own Charter.

5. Indeed Mr. Chamwada argued strongly that having successfully completed their respective courses at TUM under the auspices of JKUAT, the Applicants are entitled to graduate at JKUAT and be awarded degrees of JKUAT.

6. Mr. Kenga supported Mr. Chamwada's submissions. Mr. Rambo however opposed the submissions by both Mr. Chamwada and Mr. Kenga. He submitted that the Applicants' respective cases be considered on a case by case basis, to facilitate graduation on merit in accord with the standards of JKUAT.

7. In a Replying Affidavit sworn on 22<sup>nd</sup> October, 2015, Professor Josphat K. Z. Mwatelah, the Vice-Chancellor of the First Respondent confirms in paragraph 6 of his Affidavit **inter alia** –

(a) that by Legal Notice Number 160 of 2007, the First Respondent became a constituent college of the Second Respondent, on 27<sup>th</sup> August, 2007;

(b) that being a consultant college of the Second Respondent, the Second Respondent admitted the Petitioners/Applicants to undertake various engineering courses, which were prepared and/or introduced and/or regulated and/or taught and/or examined by lecturers from the Second Respondent, a fact very well known to the Petitioners/Applicants.

8. The Vice-Chancellor of the First Respondent also depones in the same paragraph 6 that though the First Respondent was granted its own Charter on 30<sup>th</sup> January, 2013, and thus it became a full-fledged university from June, 2013, it cannot graduate the Petitioners/Applicants because, the First Respondent is yet to obtain accreditation of its engineering courses from the Engineers Board of Kenya in line with section 7 as read with section 18 of the Engineers Act 2012.

9. The Vice-Chancellor also depones at paragraph 6(d)-(f) though he immediately initiated and took steps including applying to the Engineers Board of Kenya for independent accreditation of its engineering courses, and degrees. The Engineers Board of Kenya has yet to conduct accreditation visits to approve all the programs including –

(i) Bachelor of Science in Civil Engineering

(ii) Bachelor of Science in Mechanical Engineering and

(iii) Bachelor of Science in Electrical and Electronic Engineering

10. He (the Vice-Chancellor) while awaiting for the Engineers Board of Kenya accreditation prepared and forwarded to the Second Respondent a list of the Petitioners/Applicants names on 10<sup>th</sup> September, 2015 and 16<sup>th</sup> September, 2015 respectively for purposes of graduation.

11. Although the said Vice-Chancellor deponed that he had yet to receive a formal response to his list, Mr. Rambo, learned counsel for the Second Respondent did however hand over to the court an “**Analysis of the Technical University of Mombasa (TUM) 83 STUDENTS IN SUIT (PETITION) NO. 53 OF 2015, JOHN OWINO OBUNDE & 82 OTHERS VS. TUM & JKUAT**” with remarks on each of the Petitioners, and the JKUAT Senate found that only eighteen (18) of the List of Graduands forwarded by the Vice-Chancellor were suitable for award of JKUAT Degrees. Thirty (30) were found to have obtained irregular admissions (into TUM/JKUAT), two of the Petitioners (Nos. 10 and 66) were found to have incomplete attachment(s), twenty three (23) students (Nos. 47, 48, 49, 50, 51, 52, 53, 54, 56, 57, 58, 59, 62, 65, 66, 67, 68, 71, 73, 78, 79, 80 and 82) were found not eligible for award of JKUAT Degrees. The grounds for disqualification of these Applicants is **either** that they had lower marks at KSCE, or had been admitted to Degree Courses with **PASS** marks in **Diploma** Courses, or that they were granted a credit of one year after successful completion of the Diploma Courses.

12. One candidate (No. 61), was withdrawn from the list at the request of the First Respondent because his Second year marks could not be found. **Four** Petitioners No. 54 (who had not sat for supplementary examinations, Petitioner No. 63 (who had a disciplinary case), Petitioners Nos. 69, 70 and 80 who had not sat for their supplementary examinations, and are therefore unable to graduate.

### **DETERMINATION**

13. The Applicants have all undertaken professional courses where their skills in civil, mechanical, electrical and electronic engineering fields are sorely needed. Apart from those who have not satisfied the First Respondent’s requirements as to passing of the necessary supplementary examinations or are facing disciplinary cases, the majority of the Petitioners/Applicants are denied an opportunity to graduate on the ground that they were admitted for the respective courses on ineligible criteria namely poor passes in KSCE and/or Diploma course in these fields.

14. It was the submission of counsel for the Petitioners/Applicants and indeed no less a person than the Vice-Chancellor of the First Respondent, that the Petitioner, except those stated to be ineligible, had satisfied the First Respondent’s criteria for the award of those degrees. There is a doctrine in law called “estoppel”.

15. The doctrine of estoppels postulates that a person is barred or prevented from asserting a claim, or a right which contradicts what one has said or done before. Of course there are many colours or varieties of estoppel. There is equitable and legal estoppel. In equitable estoppel a party is prevented from taking

unfair advantage of another, when through false language or conduct, he has induced another person to act in a certain way, usually to his detriment. Legal estoppel arises from a recital or other statement in a deed or official record and precludes any denial or assertion concerning a fact.

16. In this case, the Petitioners/Applicants were admitted to study their respective engineering courses at the First Respondent's campus, then a constituent college of the Second Respondent. The courses taught were its courses, the examinations set and passed were taught and examined by its lecturers and professors. It is now late in the day for the Second Respondent's Senate to wake up, as if it had been in a slumber when it admitted the Petitioners/Applicants to its campus that because the First Respondent. The Second Respondent is estopped, barred and prevented from asserting such a defence that the Petitioners/Applicants were admitted with lower criteria than usual, for those Degree Courses. It seems to me therefore that having successfully completed those courses and having been examined and passed their final examinations, it would not only be unjust but entirely unreasonable to deny these Petitioners/Applicants an opportunity to graduate solely on the ground of "alleged irregular admission". That is a matter that ought to have been brought to Petitioners' attention in the first semester of their university course.

17. Being therefore of that mind, I make the following orders –

(1) that apart from Petitioners Nos. 54, 61, 63, 69, 70 and 80, and for the reasons given, and who shall not therefore be eligible for graduation, the other candidates for graduation, be allowed to graduate in November, 2015 as per the Graduation List forwarded by the Vice-Chancellor of the First Respondent to the Vice-Chancellor of the Second Respondent.

(2) that following such graduation, the Second Respondent shall issue to those Applicants graduating, with Degree Certificates, in accordance with its usual procedures following such graduation.

18. I decline to grant prayer 5 of the Notice of Motion as it is irrelevant for the purposes of both the Petition and the Notice of Motion.

19. Each party shall bear its own costs.

20. There shall be orders accordingly.

**Dated, Signed and Delivered in Mombasa this 23<sup>rd</sup> day of November, 2015.**

**M. J. ANYARA EMUKULE**

**JUDGE**

In the presence of:

Mr. Chamwada for Petitioners

Mr. Kenga for First Respondent

Miss Mwanzi holding brief Oluoch Olunya for 2<sup>nd</sup> Respondent

Mr. Silas Kaunda Court Assistant