



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CONSTITUTIONAL PETITION NO. 32 OF 2014**

**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: 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 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**

**DANIEL MUTHOKA MUNYAO**

**KIDERE MARYAM MOHAMMED**

**NYACHWAYA JOSEPH MARIGA**

**ZIRO SIMON BANDA**

**ATHMAN BWANAMKUU**

**JOSHUA ONYANGO OTIENO**

**KAMAU BENJAMIN**

**BRAMUEL MULIRO WANYONYI**

**FELIX KADZITU MUMBA**

**ERNEST KIPLANGAT (All suing for and on behalf**

**of themselves and on behalf of 119 others) ..... PETITIONERS**

**AND**

**1. TECHNICAL UNIVERSITY OF MOMBASA**

**2. JOMO KENYA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY**

**3. PROF. JOSPHAT KAZUNGU MWATELA ..... RESPONDENTS**

**AND**

**ENGINEERS BOARD OF KENYA ..... INTERESTED PARTY**

### **RULING**

1. This Ruling relates to a Notice of Motion filed by the 2nd Respondent and which is dated 11th June 2014. The application is brought under Order 45 of the Civil Procedure Rules, 2010. The 2nd Respondent by that Notice of Motion seeks two broad prayers. Firstly it seeks that there be a stay of execution of the Ruling of this Court dated 6th June 2014. Secondly that the Ruling of that date be reviewed and/or set aside.

### **Background**

2. As it can be seen from the prayers of that Notice of Motion this Court delivered the Ruling dated 6th June 2014. By that Ruling this Court ordered the first Respondent to submit to the second Respondent the names of the Petitioners who are due to graduate at the 2nd Respondent's 23rd Graduation Ceremony due on 27th June 2014. The 2nd Respondent was ordered to include the names forwarded by the 1st Respondent in that Graduation Ceremony and to afford the Petitioners all necessary assistance to ensure that they do graduate on that day. It is those prayers that are sought to be stayed/reviewed or set aside.
3. The Petitioners filed a Petition seeking the following declaratory orders-
  - **An Order compelling the First Respondent to forward to the Second Respondent a list of the Petitioners names for their inclusion in the Second Respondents list of grandaunts for the graduation ceremony scheduled on 27<sup>th</sup> June, 2014.**
  - **An Order compelling the Second Respondent to include the forwarded names of the Petitioners in its graduation list and graduate them.**
  - **A declaration that the Respondents have violated the Petitioners right to human dignity as protected by Article 28 of the Constitution, right to fair administrative action as protected by Article 49(1), right to a fair hearing as protected under Article 50 of the Constitution.**

- **An Order consequential to the above declaration that it is no longer possible for the Petitioners to graduate at the First Respondent's Institution because of the imminent risk of not being registered as Engineers.**
  - **A declaration that the Petitioners are entitled to compensation for breaches of their fundamental rights as particularized above.**
  - **The Respondents be condemned to pay the costs of this Petition.**
4. The Petitioners filed a Chamber Summons Application dated 23rd May 2014 which was the subject of the Ruling on 6th June 2014. The application sought interlocutory prayers in terms of the above prayers in the Petition. The application came before Court on 26th May 2014 when it was certified as urgent. The Court then set it down for hearing on 4th June 2014. When the matter came for hearing on that date the second Respondent as well as other Respondents were represented. The 2nd Respondent through its Learned Counsel was unsuccessful in applying for an adjournment. The Court was of the view that the matter was sufficiently urgent because of the Graduation Ceremony which was due on 27th June 2014 and declined the adjournment. The application was heard but the learned Counsel for the 2nd Respondent did not make any submissions on behalf of the 2nd Respondent even though she was present at the hearing.
  5. The grounds upon which the Petition is based gives background information of why the Petitioners have approached the Court in this manner. It is therefore useful to reproduce some of those grounds-
    - **The Petitioners, after passing their high school examinations, qualified for University admission. The Petitioners were admitted to undertake various Engineering Courses at the Jomo Kenyatta University of Agriculture and Technology.**
    - **The Petitioners, upon their admission were placed at the Mombasa Polytechnic University College in Mombasa where they were to undertake their studies.**
    - **During the pendency of the Petitioners' studies, Mombasa Polytechnic University College acquired a charter on 24<sup>th</sup> January 2013 and become a fully fledged University and was renamed 'Technical University of Mombasa'.**
    - **The Petitioners continued to undertake their Engineering studies as students of Jomo Kenyatta University even after the Mombasa Polytechnic University College became a fully fledged University on 24<sup>th</sup> of January 2013.**
    - **The Petitioners' courses before and after acquisition of the charter were taught, moderated and supervised by Lectures from Jomo Kenyatta University of Agriculture.**
    - **Notwithstanding the charter, the Petitioners continued being students of Jomo Kenyatta University of Agriculture and Technology, in that their codes were retained, the course content and syllabus was maintained and we continued paying their fees directly and indirectly to Jomo Kenyatta University of Agriculture and Technology.**
    - **All the named Petitioners have undergone and successfully completed their full five year degree course as mandated by the Jomo Kenyatta University of Agriculture and Technology Act and Legal Notice No. 160 of 2007. However, they are uncertain as where they will and when they will graduate.**
    - **The Technical University of Mombasa is not accredited by the (sic) to offer Engineering Courses and that the consequence of the Petitioners not graduating at Jomo Kenyatta University and Agriculture are that they will not be registered to practice as Engineers as currently The Technical University of Mombasa has not been accredited to offer**

## **Engineering Courses.**

- **Even upon the attainment of a charter by the Technical University of Mombasa, the previous group of Engineering students who were undertaking their studies at Mombasa Polytechnic University College (now Technical University of Mombasa) as a constituent college of Jomo Kenyatta University of Agriculture and Technology were allowed to graduate at Jomo Kenyatta University and Agriculture.**
  - **The Petitioners efforts and engagements to seek information regarding their pending graduation have been thwarted and currently they do not know and they are not certain where we will graduated at.**
6. The Court by its Ruling of 6th June 2014 formed the opinion that although the Orders sought by the Petitioners at the interlocutory stage were a kin to mandatory injunction orders, the case was sufficiently clear meriting summary orders. The Court found that the 2nd Respondent was unreasonable in refusing to include the Petitioners names in its Graduation.

### **The 2nd Respondent's arguments**

7. The 2nd Respondent relied on the affidavit sworn by Vivian Waithaka Chief Legal Officer of the 2nd Respondent. The said deponent confirmed that the 1st Respondent was its constituent college and that during their said relationship they undertook joint admission of students who undertook Engineering Courses at the 1st Respondent's institution each academic year. Each academic year those students' examination marks were submitted by the 1st Respondent to the 2nd Respondent. In respect of these Petitioners, the deponent stated that the 2nd Respondent was not engaged in their admission at the 1st Respondent's institution. Accordingly, she deponed that the 2nd Respondent could not satisfy itself that they had met the laid down degree requirements which was a parameter with the Engineers Regulatory Board. Further, she deponed that some of the Petitioners were progressive Diploma students.
8. Since this latter submission was of great importance in the decision I would reach in this Ruling, I did pose a question to the Learned Counsel for the 2nd Respondent, Mr. Oluoch-Olunya, whether he could inform the Court which of the Petitioners were progressively admitted through the Diploma Course and which were directly admitted by the 2nd Respondent. Learned Counsel stated that he could not tell the Court which of the Petitioners fell on either category. It should also be noted that the deponent of the affidavit in support of the application did not also clarify on that issue. This Petition has 129 Petitioners and it was necessary therefore for the 2nd Respondent to make this submission with clarity so as to assist the Court.
9. The deponent proceeded to state that it did not participate in the training or examination of the Petitioners. The deponent therefore concluded that the 2nd Respondent could not confirm whether the petitioners had met the required standards of education.
10. The deponent attached an internal memo written by the 2nd Respondent's Registrar addressed to the 2nd Respondent's Legal Officer. That internal memo addressed the issue of the admission of the Petitioners in the Graduation Ceremony. The memo gave 11 grounds upon which the 2nd Respondent was refusing the Graduation of the Petitioners at its 23rd Graduation Ceremony. It is important to note that the 1st Respondent by its affidavit sworn by the 3rd Respondent dated 3rd June 2014 attached various correspondences exchanged between itself and the 2nd Respondent. Amongst those correspondences was a letter dated 6th May 2014. It was a letter written by the Vice Chancellor of the 2nd Respondent. In that letter the Vice Chancellor gave three grounds upon which the 2nd Respondent was basing its refusal to graduate the Petitioners. The memo attached to the affidavit of Ms Waithaka is dated 5th June 2014. It is dated almost a month after the letter referred to in this paragraph.
11. Learned Counsel Mr. Oluoch in his submissions stated that it would be wrong to award the

Petitioners a Degree that may later be found to be substandard and which the 2nd Respondent senate may later find was a nullity. Mr. Oluoch in making that submission relied on **JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY STATUTES**. On relying on those statutes Mr. Oluoch submitted that there were certain qualifications of KCSE examinations which a student had to have in order to qualify to undertake an Engineering Course. In making that submission he did not tell the Court which of the Petitioners failed to qualify to be admitted for the Engineering Course. He further submitted that under Page 64 of that Statute there was a sealing committee which needed to confirm that the petitioners have qualified to be awarded the Degree. He wrapped up his submissions on this issue by saying that there are anomalies raised by the 2nd Respondent's application in respect of the Graduation of the Petitioners which are serious and which would lead this Court to set aside the Ruling of 6th June 2014.

### **1<sup>st</sup> and 3<sup>rd</sup> Respondents Arguments**

12. Learned Counsel Mr. Akenga for the 1st and 3<sup>rd</sup> Respondents began by considering the provisions of Order 45 and stated that the said Order only allowed the review of a Court Order to be undertaken where there is a mistake or error apparent on the face of the record, or for any other sufficient reason. Mr. Akenga submitted that if a review is sought on the basis of law rather than facts such an application should not be allowed because it would be tantamount to the Court sitting on its own appeal. He was of the view that the present application is such an application which seeks this Court to sit on its own appeal.

13. In respect of the factual issues raised by the 2nd Respondent, Mr. Akenga submitted that there is no likelihood of the Petitioners Degree not being recognized by the Engineering Board which is the Licensing body because the Engineering Board had by their letter dated 22nd May 2014 confirmed that the Petitioners' Degree will be recognized. I have looked at that letter and the Engineering Board of Kenya in part have stated as follows-

**“We also note that University Students who have completed their studies were admitted by the Jomo Kenyatta University of Agriculture and Technology (JKUAT) and went through the JKUAT programmes, already accredited by the Board, for a period of four (4) years.**

**With regard to the whether the students are eligible for registration by the Board upon graduating through JKUAT, we advise as follows:**

- i. **The Board recognizes the said engineering programmes from the Jomo Kenyatta University of Agriculture and Technology.**
- ii. **It is the responsibility of Jomo Kenyatta University of Agriculture and Technology to determine whether the final year studies undertaken by the students are in line with the requirements of the accredited programmes.”**

14. Mr. Akenga reiterated what had been submitted in support of the Petitioners' Notice of Motion dated 23rd May 2014 by stating that the Petitioners were admitted by the 2nd Respondent, lectured by Lecturers from 2nd Respondent and undertook a Course approved by the 2nd Respondent and that their examinations were approved by 2nd Respondent. This indeed was stated by the 3rd Respondent in his affidavit of 3rd June 2014.

15. Mr. Akenga also raised an issue with the Memorandum annexed to Ms Waithaka's affidavit which was raising issues that had not been raised when the 1st Respondent was communicating with the 2nd Respondent on the need to include the Petitioners' names in the 2<sup>nd</sup> Respondent's Graduation. He ended up by stating that the internal memo remained as such, that is it was no more than a memo.

16. Mr. Kenga submitted that the application must fail because the 2nd Respondent had failed to attach the Ruling which was being reviewed which he said was vital to the application.

## Petitioners Argument

17. Learned Counsel Mr. Chamwanda adopted the submissions made by Mr. Akenga. He also referred to the affidavit sworn in reply to the application by David Momanyi Ayangah. That affidavit is dated 18th June 2014. Ayangah was a former Engineering Student based at the 1st Respondent's institution where he undertook his studies as a constituent college of the 2nd Respondent. He was admitted on a five year Course in January 2010. He stated that he was taught, moderated and supervised by the Lecturers of the 2nd Respondent. That he is aware that the 1st Respondent obtained a charter on 30th January 2013. That notwithstanding, he continued to study as a student of the 2nd Respondent. He also continued to be taught and supervised by Lecturers of the 2nd Respondent. He undertook his practicals with the Kenya Ferry Services. After his five years Degree Course and notwithstanding that the 1st Respondent had obtained a Charter he graduated with a Degree at the 2nd Respondent's University on 28th June 2013.

18. Bearing in mind the positions of Ayangah the Petitioners herein also undertook the same Course. Their program similarly would have taken five years. It means that they were admitted at the institution of the 1st Respondent whilst it was a Constituent College of the 2nd Respondent and even before the 1st Respondent was awarded its Charter. That being so the submissions by the 2nd Respondent that it was not involved in the admission of the Petitioners cannot be true. Ayangah was graduated in June 2013. One would then be tempted to ask the question, what changed a year later that 2<sup>nd</sup> Respondent now would refuse to graduate these Petitioners?

19. Mr. Chamwanda sought the dismissal of the application stating that the Petitioners herein had invested not only their money but also their time in undertaking the Course which they had reasonable expectation of graduating with an Engineering Degree. On that basis he argued that there should be no stay nor should the order of 6th June 2014 be set aside.

## Analysis And Determination

20. I confirm that I have considered the totality of the parties submissions and their affidavit evidence.

21. I will begin by considering an issue raised by the 2nd Respondent that to grant the orders sought would be tantamount to granting the Petition since nothing would be left to be heard. That may largely be true because the main prayers of the Petition as reproduced above seek to compel the 2nd Respondent to graduate the Petitioners. But in my view there is more to the Petition than that prayer. The Petitioners do seek a determination whether their Constitution right has been violated and naturally if the court determines that there are some violations damages may very well flow from such determination. There is also the issue of costs of the Petition which shall need determination. But more importantly is that the orders which are sought as stated before being a kin to a mandatory injunction, can in my view be awarded where the case is clear. That I believe answers that argument by the 2nd Respondent.

22. The 2nd Respondent through its Learned Counsel stated that the application is premised on the last limb of Order 45 Rule 1(b). That is, the 2nd Respondent is seeking review of the Ruling of 6th June 2014 on the ground of “**any other sufficient reason**”. It is perhaps useful to reproduce that Rule for better understanding.

a. **(1) Any person considering himself aggrieved-**

a. **by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**

b. **by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree**

**was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”**

23. The Court of Appeal in considering that limb of that Rule in the case **OFFICIAL RECEIVER AND PROVISIONAL LIQUIDATOR NYAYO BUS SERVICE CORPORATION VS FIRESTONE E.A (1969)LIMITED (1998)eKLR** had this to say when quoting **WAKAHIHIA VS THIONGO (1992-88)1 KAR 1028** as follows-

**"I see no reason why any other sufficient reason need be analogous with the other grounds in the order because clearly s 80 of the Civil Procedure Act confers an unfettered right to apply for a review and so the words `for any sufficient reason' need not be analogous with the other grounds specified in the order: See Sadar Mohamed vs. Charan Singh [1959] E.A. 793."**

24. Bearing that in mind, does the 2nd Respondent show any sufficient reason why the orders of 6th June 2014 should be reviewed or set aside?

25. By Legal Notice No. 160 of 27th August 2007 the 1st Respondent was made a constituent college of 2nd Respondent. This is well set out in No. 3 of that Legal Notice-

**“There is hereby established a university college to be known as the Mombasa Polytechnic University College which shall be a constituent college of the Jomo Kenyatta University.”**

26. The objects of the 1st Respondent were set out in No. 4 of that Legal Notice as follows-

**“Provide directly, or in collaboration with other institutions of higher learning, facilities for technological, professional, scientific education.”**

27. The existence of that Legal Notice is a fact that is submitted by all parties. It has not been shown to this Court that the said Legal Notice has been revoked or that the said relationship has ceased. It is in view of that that I find it difficult to understand the submissions on behalf of the 2nd Respondent that to award the Petitioners the Degree that they seek may lead the Degree to be found to be substandard. My understanding is made even more difficult by the fact that the 2nd Respondent makes sweeping submissions regarding the status of the Petitioners at the 1st Respondent's College. This is when the 2nd Respondent submits that some of the Petitioners were directly admitted by it whilst others were admitted through the progressive admission from a Diploma Course. One would have expected that the 2nd Respondent who has approached this Court seeking to set aside this Court's orders would have submitted a clear list of those students directly admitted and those students admitted through Diploma Course. This they did not do but instead chose to lump all the Petitioners together. To allow the Respondent to get away with such a submission may very well be detrimental to some of the petitioners and would therefore lead to injustice. Even the submissions made with regard to procedures followed by the Senate was not convincing for it was not shown how it related directly to the 129 Petitioners before Court. Even the argument relating to the Sealing Committee was not relevant to the matters before Court.

28. As rightly submitted by the 1st and 3rd Respondents' Counsel as well as the Petitioner's Counsel, the 2nd Respondent in the month of May 2014 gave three reasons why the Petitioners would not graduate at its institution yet a month later they now seek to represent eleven reasons why the Petitioners cannot graduate. Second Respondent does seem to be a party which cannot be relied upon. It is important to state that 1<sup>st</sup> Respondent was able to respond to all the three grounds of refusal before this matter came to Court. Perhaps the more reason why the 2nd Respondent

refuses to graduate the Petitioners is to be found in the E-mail dated 24th April 2014 sent by the Vice-chancellor of the 2nd Respondent to the 3rd Respondent. This is in response to the exchanges that were taking place relating to Graduation of the Petitioners. This is what he said-

**“The ones we graduated last year was the final group. You better make arrangements with your senate for these students just like the others you have.”**

What in essence the Vice-chancellor of the 1st Respondent was saying was that the graduands from the 1st Respondent who graduated last year who presumably included Ayangah were the last lot that the 2nd Respondent was willing to graduate. The reason for refusing to further graduate students at the 1st Respondents institution may very well be because the 1st Respondent has now obtained its Charter. As much as that may be so it has sufficiently been shown by the evidence before Court that the 1st Respondent has not been cleared by the Engineering Board to undertake students in Engineering Course. As it is submitted before me the process of getting that accreditation is involving and has not yet been accomplished. If the 1<sup>st</sup> Respondent graduates the Petitioners before such accreditation Petitioners would never be licenced by that Board.

29.As I consider the application before me I am reminded of the popular saying that when elephants fight it is the grass that suffers. In this case the elephants are the 1st and 2nd Respondents. The grasses are the Petitioners. Each of those two Respondents are saying that the Petitioners do not belong to them. In my view justice of this case calls for the dismissal of the 2nd Respondent’s application. There is nothing that has been presented before me which can lead me to find that the orders of 6th June 2014 should be stayed or set aside. The upholding of the order that the petitioners do graduate is the lesser of the evil than altogether stopping the graduation as the Petitioners had sought. To stop the whole graduation due on 27th June 2014 would affect Graduands who had nothing to do with the present dispute.

30.It is for the above reasons that I do hereby dismiss the Notice of Motion dated 11<sup>th</sup> June 2014 with costs.

**DATED and DELIVERED at MOMBASA this 25<sup>TH</sup> day of JUNE, 2014.**

**MARY KASANGO**

**JUDGE**