



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 68 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 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

BETWEEN

1. HUDSON OKELLO OGANGA

2. CHARLES MAINA GITHINJI

3. ROSE KIPLAGAT JEPCHIRIR *(All suing for and on behalf*

of themselves and on behalf of 50 othersPETITIONERS

AND

1. TECHNICAL UNIVERSITY OF MOMBASA

2. JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY

3. PROF. JOSPHAT KAZUNGU MWATELA

4. PROF. MABEL IMBUGARESPONDENTS

AND

1. ENGINEERS REGISTRATION BOARD

2. COMMISSION FOR UNIVERSITY EDUCATION..... INTERESTED PARTIES

RULING

0. The petitioners who are some 42 students of the 1st respondent who enrolled for the engineering course of the 2nd respondent when the former was a constituent college of the 2nd Respondent have upon completion of their studies complained of delay in the processing of their documentation necessary for their graduation by the 2nd respondent university. The petitioners have consequently sued the two universities and their executive heads the Vice-Chancellors seeking primarily that they be graduated by the 2nd University during its scheduled graduation ceremony and the suspension of the graduation in the alternative pending the processing of their documentation by the two universities.
0. The 1st and 3rd respondents have conceded the delay and blamed it on a change of graduation dates of the 2nd respondent from the 28th to the 24th November 2014 as deponed in paragraph 5 (g) of the affidavit of the 3rd respondent of 11th November 2014 as follows:
 - g. ***THAT*** I was aware that the Petitioners/Applicants would be graduating on 28th November, 2014 and that a List of the Gradaunds was being prepared for onward transmission to the 2nd Respondent but due to the change of graduation date from 28th November, 2014 to 24th November, 2014, a meeting has been organized for tomorrow, the 12th day of November, 2014 between myself and the 4th Respondent which shall also involve the Senate(s) of both Universities, where the List of Gradaunds shall be submitted to the 2nd respondent and thus the Petitioners/Applicants fear is misplaced.
0. The 2nd and 4th respondent's case is that while conceding that the petitioners were students of the 1st respondent undertaking engineering course of the 2nd respondent, there were some anomalies in the admission of some students to the degree course and in the grading of the students, as set out in paragraphs 23 - 26 of the Affidavit of the Vivian Nyambura, the Legal Officer of the 2nd Respondent of 17th November as follows:
 23. ***THAT*** this report was presented to the University Senate special sitting which included the Vice Chancellor of the 1st Respondent who was invited to present the results of the Petitioners herein;
 24. ***THAT*** the said body met on the morning of the 17th of November 2014 and I am informed by the Registrar Academic affairs that results of the Petitioners herein were found to have several anomalies and in particular the grading of the results was found not to be uniform across the board;
 25. ***THAT*** for this reason it was agreed between the Respondents that a subcommittee would be

- constituted to address these anomalies and report to senate within a period of 2 weeks;
26. **THAT** from the forgoing it would not be right and proper and against the 2nd respondent Statutes for the Senate to award the said degrees to the said Petitioners as they have failed to comply with the mandatory requirements of the 2nd Respondent statutes and a candidate can only be awarded a Bachelors degree once he has undertaken approved courses and satisfied all the requirements in the 2nd Respondents Statutes which has clearly not been done in these cases.
0. On the basis of its urgency of the matter, the action sought to be affected by the orders of the court being the scheduled university graduation of the 2nd Respondent's students set for the 24th November 2014, the matter proceeded to the hearing of the main petition dated the 7th November 2014. The interlocutory Notice of Motion filed therein for relief pending the hearing of the application and for further orders in terms similar to the prayers of the petition was subsumed in the hearing of the main petition on the 17th and 18th November 2014.
 0. Upon hearing counsel for the parties – Mr. Mogaka for the petitioners, Mr. Kenga for the 1st and 3rd respondents and Mr. Oluoch for the 2nd and 4th respondents and a witness for the 2nd respondent, Ms Vivian Nyambura advocate, in cross-examination on her affidavit of 17th November 2014 filed in court in support of the 2nd Respondent's case, the Court set the date of delivery of Judgment for the 4th December 2014, and in the meantime scheduled a ruling on the conservatory orders for the 19th November 2014.
 0. The Notice of Motion sought principally orders suspending the graduation ceremonies of the two respondent universities scheduled for the 28th November 2014 and 4th December 2014 or alternatively the inclusion of the petitioners on the graduation list and the graduation of the petitioners along and in the same manner as other graduands.
 0. As I observed in ***Gerishon Nyongesa v. Chumani Secondary School Board of Management***, Mombasa HC Civil Suit No. 95 of 2014,

“It is trite law that interlocutory mandatory injunction may be given in clear cases where the plaintiff/applicant demonstrates his right to the relief sought. See ***Kamau Mucuha v. The Ripples Limited***, Court of Appeal Civil Application No. NAI. 186 of 1992 (NAI.77/92 UR).”

0. In considering the conservatory orders herein, this court is guided by the principle of non-interference with decisions of the university bodies as held by the Court of Appeal in ***Nyongesa & 4 Ors. v. Egerton University College*** [1990] KLR 692 that –

‘Courts are loath to interfere with decisions of domestic bodies and tribunals including college bodies. However, the courts will interfere to quash decisions of any bodies when moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side.’

0. The duty to give fair hearing to the persons concerned is now buttressed by the requirements of fair administrative action under Article 47 of the Constitution of Kenya, 2010, which provides –

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

0. In balancing the tripartite rights of the petitioners, the 1st and 3rd Respondents, and the 2nd and 4th respondents, against each other and against the background of the public interest in promotion of high standards in education and ensuring that only qualified students are so certified by award of degree and other educational awards as well as in universal enjoyment of relevant fundamental rights and freedoms, I have considered the following matters as determinant:
 - a. The respondents are guilty of unfair administrative action as against the petitioners in not earlier processing the petitioners' documentation in good time before the graduation ceremony scheduled for the 24th November 2014 when the petitioners were students of the

1st respondent undertaking a degree course of the 2nd respondent for five years since the 2009/2010 academic year.

- b. The 2nd and 4th respondents cannot be heard to deny knowledge of admission of the petitioners to undertake the engineering course of the 2nd respondent university. The 4th respondent was the Vice-chancellor of the 2nd respondent and therefore member of the Council of the 1st Respondent during the period of 2009 -2013 when the latter was a constituent college of the 2nd Respondent by virtue of Legal Notice No. 160 of 2007, and must be deemed to have been so aware.
- c. The 4th Respondent as Vice-chancellor of the 2nd respondent and member of the Council of the 1st respondent upto January 2013, and therefore being aware of the petitioners undertaking of engineering course of the 2nd respondent should have called for the results of the petitioners and other documentation in good time for inclusion of those qualified in the graduation ceremony of the 2nd University.
- d. The 1st respondent is guilty of delaying in the submission of the results of the petitioners to the 2nd respondent having done it only after the filing by the petitioners of a suit for that purpose.
- e. It has not been shown that the petitioners have failed any of the examination requirements for the degree course and the alleged analysis showing non-qualification of four students was not backed by the primary documentation from which the analysis was made.
- f. For breach of the constitutional right to fair administrative action, the petitioners would be entitled to an order for the stoppage of the graduation ceremony in which they are not listed as participants. However, such stoppage would affect many other students outside the engineering class of the 1st respondent estimated at 3,300 students and as well as disrupting the elaborate planning that a graduation ceremony no doubt entails.
- g. Should there be need for correction of degree award, after the examination of the petitioners documents as proposed by the 2nd Respondent, its Statute XXXII clause 6 (vii) provides for correction of any error in award of any degree by making a stipulation for the withdrawal of a degree as follows:

“The Council in consultation with the Senate may withdraw any degree, diploma, certificate or other academic qualification conferred or granted where the conferment or grant was contrary to any requirements contrary to the University regulations or where the qualifications obtained was through fraudulent or other improper means”

- h. 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.
0. For the reason set out above, I make the following conservatory orders pending the final determination of the petition herein –
 1. **That the 2nd and 4th respondents do include the petitioners in the list of graduands and to graduate the petitioners in the same manner as other graduands of the 2nd respondent university on the 24th November 2014 or on any other date appointed for the graduation of all of its graduates for the year 2014.**
 2. **The degree certificates for the petitioners shall, however, be given upon the conclusion of verification exercise to be carried on within 14 days as sought by the 2nd Respondent.**
 3. **There shall be liberty to apply.**
 4. **Costs to abide the order in the final determination of the Petition.**

Dated, Signed and Delivered on the 19th November 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Chamwada and Mr. Mogaka for the Petitioners

Mr. Kenga for the 1st and 3rd Respondents

Mr. Mola for Mr. Oluoch for the 2nd and 4th Respondents

No appearance for the 1st Interested Party

No appearance for the 2nd Interested Party

Mr. Murimi – Court Assistant