



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Case 118 of 2006

CAROLINE KIBIWOTT 1ST PLAINTIFF

BRENDA A. ODUOR 2ND PLAINTIFF

AGNES AWUOR 3RD PLAINTIFF

TOM MARK OLANDO 4TH PLAINTIFF

GEORGE CHENGASIA MURUNGA 5TH PLAINTIFF

VERSUS

MOI UNIVERSITY 1ST DEFENDANT

VICE-CHANCELLOR MOI UNIVERSITY 2ND DEFENDANT

DEAN SCHOOL OF LAW

MOI UNIVERSITY 3RD DEFENDANT

REASONS FOR JUDGEMENT

This suit was filed on the 8th November, 2006 by the five (5) Plaintiffs herein who were at all material times students at Moi University School of Law.

The suit was filed against Moi University, Vice Chancellor, Moi University, Dean School of Law, Moi University.

In the Complaint, the Plaintiffs averred, inter alia, that:-

- On 20th September, 2004 the Defendant Senate unilaterally decided to increase the annual fees payable by 50% and agreed to forward to the Defendant's Council the revised fees for privately sponsored students for consideration.
- The Defendant's Council in its 60th meeting held on the 17th September, 2004 and 1st October, 2004 in Minutes number, 26/9/2004 approved the proposed fees increment.

- The Defendants without any justification effected a fee increment against them for the 2004/2005 academic year of Kshs. 50,000/= pursuant to the said Minutes in paragraph 6 and 7 above.

- The said increment was not only exorbitant but wrong and illegal because of the following reasons:-

(a) There was no such consultation on the part of the Defendants and the same was unilateral and in total breach of the rules of natural justice.

(b) The entire increment is exorbitant and did not take into consideration the prevailing economic conditions in the country.

- The Defendants subsequently consented to waive the said amount for the affected students and/or to refund the same to those who had paid and had filed a suit vide a consent Order in the High Court of Kenya, Miscellaneous Civil Application Number 31 of 2005.

- The Defendants have insisted that the Plaintiffs pay the additional fees contrary to the consent order dated 6th March, 2006 so that they can subsequently be refunded the same.

- The Defendants have since refunded the said additional fee to other students who had paid the same and had filed a suit for the waiver or refund.

The Plaintiffs in this suit, therefore, sought the following

orders:-

1. A declaratory order that the Plaintiffs should not be charged the additional fees pursuant to the consent dated 6th March, 2006 as being charged the same is discriminatory and in breach of the rules of natural justice.

2. A declaratory orders that the Defendants' actions are illegal and the Defendants should issue them with the 4th year transcript and forward their names to the school of law subject only to paying the old fee.

The Plaintiffs contended that the Defendants and in

particular the Vice Chancellor and the Dean of School of law have refused to forward their names to the Kenya School of Law for their admission in the 2007 academic year, have refused to issue them with the 4th year transcripts and have barred them from graduating from the university because of the additional illegal, unlawful and exorbitant fees.

The Defendants having been served with the Plaint and Summonses entered a Memorandum of Appearance on 6th December, 2006. On 30th April, 2007 at the instance of the Plaintiffs, the Deputy Registrar entered interlocutory Judgement against the Defendants having failed to file a Defence within the prescribed period.

This matter came before me for formal proof on 4th May, 2007. The Plaintiffs stated that they had served the hearing notice on the Defendants' Advocates who had entered appearance.

I perused the Affidavit of Service sworn by Process Server on 25th July, 2007 and was satisfied that the hearing notice had been served on 4th July, 2007 on the said law firm. I directed that the formal proof proceeds.

All the five (5) Plaintiffs testified. It was their case that they graduated from the Moi University School of Law in the year 2005/6. They completed their examinations in the academic year 2004/5. The

course took four years. In the last year, the Defendants increased the fees. Before then when the academic year started the fees was Shs. 100,000/= for each which was duly paid. The Defendants increased the fees to Shs. 150,000/=. The said decision was challenged by the Fourth year students through a Judicial Review case namely Miscellaneous Application number 30 of 2005. The suit was filed by three students, Victor Ayieko Odhiambo, Nicolas L. Otieno and Victor Wesonga on behalf of Moi University Privately Sponsored Students Programme (PSSP). The Plaintiffs produced the application for Leave under Order 53 Civil Procedure Rules as Ex. No. 1 and the Notice of Motion dated 6th April, 2005 was Ex. No. 2. It sought the following orders:-

1. The Honourable Court pleased to issue the orders of certiorari to remove into the High Court and quash forthwith the proceedings the decision of the Respondent's 60th Council meeting held on 17th September, 2004 and 1st October, 2004 specifically Minute 26/9/2004 which approved fees increase by 40% with effect from January, 2005.

2. Cost be provided for.

The Plaintiffs testified that at the hearing of the said Judicial Review application the parties recorded consent in this Court on 6th March, 2006. The Consent Order was produced as Ex. No. 4. It read as follows:-

(a) The Respondent be and is hereby restrained from effecting a fee increment against the Applicants for the 2004/2005 academic year.

(b) Where the Applicants had already paid a fee increment the same should be credited to their respective academic year.

(c) The Applicants who had paid the fee increment and have finalized their studies be refunded.

(d) Each party to bear its own costs.

The Respondent was the Moi University, the First Defendant herein which is really the principal Defendant.

It was the Plaintiff's case that the Applicants in the said case had obtained leave to file the said motion on their own behalf and on behalf of the members of the Moi University Privately Sponsored Students Programme of which they were part. The heading of the judicial application showed this and the Verifying Affidavit contained this fact.

This suit was not defended and there was interlocutory judgment entered against the Defendants for failure to file Defences. They had entered appearance but did not attend the Formal Proof despite being served with the Hearing Notice. The Defendants were entitled to cross-examine the Plaintiffs and any witnesses having entered appearance.

Having considered the testimonies of the five Plaintiffs given on oath, the documentary evidences and their submissions, and the suit not being defended, I found on a balance of probabilities as follows:-

1. That the Consent Order given in the judicial review proceedings referred to hereinabove prohibited the Defendants from effecting a fee increment against the University Privately Sponsored Students for the year 2004/2005 Academic Year.

2. Strictly, the effect of the said order was that the decision of the Respondent in its 60th Council meeting held on 17th September, 2004 specifically Minute No. 26.9.2004 which approved fees with effect from January, 2005 could not be enforced. The Consent Order was truly an order of prohibition since the court could strictly not give injunctive orders in judicial review proceedings.

3. Albeit the use of the term “**Injunction**” the order is a valid and regular order of the court and is and must be enforced.
4. Its binding effect is made even more absolute and solemn as it is an order of the Court obtained by mutual consent of both parties in the proceedings.
5. Effectively, the decision for the increment for 2004/5 academic year was quashed.
6. It is not permissible for the Defendants to depart from the terms and conditions of the mutually procured consent court order. This would be a breach, improper and against public policy, considering the Statute of the Defendant Institution.
7. To depart from the consent order and increase or demand increased fees from the Applicants would amount to differential treatment of the said class of students, discriminatory and oppressive.
8. This Court has inherent jurisdiction to right a wrong which has been committed.
9. The Defendants if aggrieved or had changed their mind were under an obligation to apply to set aside the consent order in the judicial review proceedings.
10. The Applicants could have applied for enforcement by contempt of Court proceedings but they elected to come to this Court for Declaratory orders.
11. There is no conflict in the existence of the said judicial review orders and the grant of Declaratory orders herein.
12. There has been no justification or Defences offered as to why the Defendants think that they increments should be applied discriminately and selectively for that year.
13. It would be in violation of Section 5 of the Moi University Act for the increment to be applied in such a manner. The said provision requires the University not to be discriminatory in the discharge of its duties.
14. The Defendants’ actions herein are illegal vis-à-vis the consent order in the judicial proceedings and against public policy.

Last but not least, the Court would like to observe that

ours is an adversarial system of law in terms of civil litigation. When a matter is not defended the standard of proof still remains that of ‘**on a balance of probabilities**’. A claimant in an undefended trial is most likely to have an advantage over the absent party particularly on issues of fact. However, a Court of law must still remain vigilant on matters of law that for instance touch on jurisdiction, capacity, locus standi, Limitation of Actions, etc in undefended cases as a matter of duty to the law. In such an event the court must not be derailed by issues of procedure, non-attendances etc and must come out and strike with the legendary sword held by **Themis**, the Blind Lady of Justice rather than the **Sword of Damocles** and ensure that the Rule of law in all its aspects carries the day.

Similarly, it is quite often that a cause of action that has merits and a high likelihood of success may be sadly dismissed as a result of a simple non-attendance. These are the vagaries of such an adversarial system of litigation. We have to live with it as for now as it is the best system of law available to us at this stage of the development of our jurisprudence. The Courts substantially apply and enforce the law of the land.

It is for the aforesaid **reasons** that this Court entered judgement in this matter on 3rd August, 2007. The justification for the judgement to be given and reasons reserved are on record.

As the reasons have been given today, the time within which any appeal may be lodged shall be deemed to run from the date of delivery of reasons.

DATED AND DELIVERED AT ELDORET ON THIS 9TH DAY OF MAY, 2008.

M. K. IBRAHIM

JUDGE

In the presence of:

Mr. Gicheru holding brief for Mr. Kibet for the Defendants

Mrs. Kibor holding brief for Mr. Nyachiro for the Plaintiffs

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