



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**PETITION NO. 28 OF 2019**

**IN THE MATTER OF AN ALLEGED CONTRAVENTION OF ARTICLES 1 (1), 2 (1), 2 (4), 3, 10, 19, 20, 21, 22, 23, 35(1) (A) AND (B), 47, 48, 258 V AND 259 OF THE CONSTITUTION 2010,**

**IN THE MATTER OF SECTION 4(1) (B) OF THE ACCESS TO THE INFORMATION ACT NO. 31 OF 2016**

**BETWEEN**

**KEPHA OMWENGA ORINA.....PETITIONER**

**AND**

**EGERTON UNIVERSITY.....1<sup>ST</sup> RESPONDENT**

**THE VICE –CHANCELLOR, EGERTON**

**UNIVERSITY.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**BACKGROUND**

1. The petitioner who is employed by the respondent as Assistant Registrar with the 1<sup>st</sup> respondent Egerton University filed this petition against the 1<sup>st</sup> respondent and the vice-chancellor of the 1<sup>st</sup> respondent the following orders:

**a. A declaration is issued that the respondents have violated the petitioner’s right under Article 35 (1) (a) and (b) of the constitution and section 4 (1) (b) of the Access to Information Act No. 31 of 2016.**

**b. An order be issued compelling the respondents to provide the Petitioner with the following documents:-**

**i. Complaint letter,**

**ii. Investigation’s report**

**iii. The Petitioners Admission letter**

**iv. All senate minutes that approved students results and graduation list for the 18<sup>th</sup> graduation,**

**v. Graduation booklet for the 18<sup>th</sup> Graduation,**

**vi. Minutes of the Faculty of Commerce Board of Examiners that discussed the student results and approved the graduation list of the 18<sup>th</sup> graduation.**

**vi. The Petitioner’s Transcript,**

**vii. Mark Sheets for MBAD 681 for the Relevant periods;**

**viii. Examination attendance sheet for MBAD 681 for the relevant periods,**

ix. **The university statutes for the relevant period relating to examinations and graduation,**

x. **Examination booklets for MBAD 681 for the relevant periods.**

c. **An order that the Respondents pays the Petitioner damages for violation of his rights to access information,**

d. **An order for costs of the petition,**

e. **Such other orders that the court may deem fit to grant.**

### **THE PETITIONER'S CASE**

2. The petitioner's averred that he was employed by the 1<sup>st</sup> respondent in the year 1995 as an Administrative Assistant; he thereafter enrolled in a Master of Business Administration program in the university between 2004 and 2007, and was promoted to the position of Assistant Registrar.

3. He averred that he received a letter on 24<sup>th</sup> June 2019, from the Chairman Integrity and Promotion Committee inviting him for an interview on 1<sup>st</sup> July 2019 in his capacity as a student. On enquiring the grounds for the interview, he received a letter alleging that he graduated for his MBA degree without satisfying the Board of Examiners and was requested to attend an interview on 2<sup>nd</sup> July 2019.

4. He averred that he was not supplied with any evidence supporting the allegation but despite registering his complaint with the 2<sup>nd</sup> respondent on 29<sup>th</sup> July 2019, no response was issued and he only received a verbal communication on 3<sup>rd</sup> October 2019 from the 2<sup>nd</sup> respondent indicating that he had received investigation report that required his name to be removed from the list of those who were to be interviewed for review and promotion to the grade of Senior Assistance Registrar.

5. He further averred that that by letter dated 4<sup>th</sup> October 2019, through his advocate he requested to be supplied with copies of letter raising a complaint, the report on the investigation, admission letter, all senate minutes of the faculty of the student results, and graduation list for the 18<sup>th</sup> graduation, minutes of the faculty of commerce board of examiners that discussed the student results and approved the graduation list of the 18<sup>th</sup> graduation, copies of the petitioners transcript, mark sheets for MBAD 681 for the relevant period, examination attendance sheets for MBAD 681 for the relevant period.

6. He averred that that the action of the 1<sup>st</sup> and 2<sup>nd</sup> respondent is unconstitutional as it violates **Article 35(1) (b) of the constitution** thus his resolve to file this petition to seek the documents listed above.

### **1<sup>ST</sup> RESPONDENTS CASE**

7. The 1<sup>st</sup> respondent opposed the petition by filing replying affidavit sworn by **Samuel Mwangi Kariuki** on 17<sup>th</sup> June 2020 and a preliminary objection on ground that the court lacks the jurisdiction to entertain the matter and thus the entire cause is an abuse of the court process.

8. 1<sup>st</sup> respondent averred that the petition is premature, total rush, based on mere allegations, incompetent, bad in law and ought to be struck out.

9. And further that, the petition herein relates to an employer-employee relationship and the same ought to be filed in the Employment and Labor Court; that there was no relationship between the petitioner and the 2<sup>nd</sup> respondent in terms of employment.

10. He further averred that the 1<sup>st</sup> respondent is a Chartered Public University and a creature of the **University Act, 2012** and thus enjoys protection under **section 37** in so far as the council is mandated to set up an appropriate committee to perform duties and responsibilities and the 1<sup>st</sup> respondent is in tandem with **Section 3 (1) (e), (f), (g), and (2) of the Act.**

11. He further averred that the petitioner was employed in the year 1995 by the 1<sup>st</sup> respondent as an Administrative Assistance and was promoted to the position of Assistant Registrar in the year 2007, after graduating with a master's degree in Business Administration Human resource.

12. He averred that they received an anonymous letter on/or before 9<sup>th</sup> May 2019, at the integrity and promotion office which alleged that the petitioner had graduated with the aforesaid MBA degree without satisfying the requirement of the university's senate and further that the alleged that the petitioner has failed MBAD 681 quantitative methods; and another anonymous letter was sent on or about the 5<sup>th</sup> August 2019, reiterating the contents of the first letter and that there are efforts being made from the offices concerned in an attempt to cover up the incidents.

13. He averred that the integrity Promotion Office presented the letter to the Corruption Prevention Committee of the university to undertake in-depth investigations and give recommendations and Sub-committee of the University Senate was formed to look into the matter, and a report is yet to be submitted.

14. He averred that the petitioner's rights have not been infringed as he is still working for gain and performing his daily duties at the

university and no information on all material evidence is being denied as the same will be availed to the petitioner upon conclusion of the matter. He added that the 1<sup>st</sup> respondent is apprehensive that the petitioner will sabotage the ongoing investigations as he has previously vandalized the evidence in the relevant registries.

15. He further averred that in response to the petitioner's concern, the 1<sup>st</sup> respondent through a letter dated 29<sup>th</sup> October 2019 informed him that the matter was still under investigation and as such no charge had been preferred and the petitioner has not been excluded from the interview as the committee is still conducting investigations; and the respondent's in their defense have attached documents to be relied on as evidence.

16. In response to the replying affidavit the petitioner filed his supplementary affidavit on 17<sup>th</sup> July 2020, in his response, he averred that the 1<sup>st</sup> respondent lacks a duly constituted council and thus could not have authorized **Samwel Mwangi Kariuki** to swear the affidavit and that he is not a member of the 1<sup>st</sup> respondent's senate.

17. He further averred that his petition is properly before the court of law and therefore not premature. He urged court to strike out the contents of **Samwel Mwangi Kariuki** in paragraphs 13-30 for being oppressive.

18. He averred that no senate meeting gave the 2<sup>nd</sup> respondent powers to constitute a committee to carry out investigations and the mark sheet produced as evidence shows that he had passed the resit for MBAD 681 and the graduation booklet and minutes have not been produced.

### **PETITIONER'S SUBMISSIONS**

19. The petitioner submitted that the cause does not arise out of an employer-employee relationship, that he only seeks information in the possession of the respondents and that the 1<sup>st</sup> respondent conferred the petitioner's degree in a capacity of a public university and not as an employer. And thus he is seeking to enforce his rights of access to information.

20. He submits that the court is vested with the jurisdiction to entertain the matter and quoted **Article 23 (1) of the Constitution of Kenya** where the courts have authority to uphold and enforce the bill of rights as read together with article 165.

21. He submitted that a contention that a suit is an abuse of the court process cannot be raised in a preliminary objection as was held in the case of **Omondi v National bank of Kenya Ltd & others (2001) KLR 579; (2001) 1 EA 177**.

22. That the preliminary objection is unmerited and the same to be dismissed.

23. He submitted that the 2<sup>nd</sup> respondent is enjoined to the suit by dint of being the chief executive officer of the 1<sup>st</sup> respondent, who in her capacity was to furnish the information to the petitioner but has not do so to date.

24. He further submitted that his rights of access to information have been violated and the reason he seeks the redress of the court; that a citizen who desires to access information needs only to request for the information and it should be given.

25. He further submitted that the respondents have not specifically traversed the petitioner's allegations in the petition and affidavits; that the petitioner's request for information is tied to his freedom of access to information of expression as guaranteed under **Article 33 of the constitution**, and the right to fair administrative action as enshrined under **Article 47 of the constitution**. The petitioner urges the court to allow the petition and award damages and costs of the suit.

### **RESPONDENT'S WRITTEN SUBMISSIONS.**

26. The respondent submitted that it provides equal opportunities for everyone and policies are in place to ensure that employment opportunities are availed to everyone and there is no deliberate failure to promote the petitioner.

27. The respondent submitted that this court has no jurisdiction to hear and entertain the matter as the matter is purely on employer - employee relationship and thus the same ought to be transferred to the employment court and cited the case of **United States International University (USIU) v Attorney General (2012) eKLR** where the court opined that the matter be transferred to the industrial court for hearing and determination since the High Court did not have jurisdiction to deal with the matter under **Article 162(2) and 165 (5)**.

28. The respondents further submitted that the rights of the petitioner have not been infringed and/or violated as alleged as the petitioner has not shown how the infringement has been occasioned; that the process of investigating the allegations leveled against the petitioner are still ongoing and unless the process is complete the applicant still enjoys the full benefit of a being an employee of the respondent.

29. Further that **Section 34** deals with the instruments of governance of the 1<sup>st</sup> respondent and the petitioner rushed to court whilst in full cognizance of the fact that the 1<sup>st</sup> respondent was still conducting investigations and that no adversarial decisions have been meted on the petitioner.

30. The respondent submitted that it formed a commission which was tasked with investigating the matter and table a report after the investigations and as such no procedural violations have been occasioned as the actions of the 1<sup>st</sup> respondent is within the purview of the law and procedure.

31. The respondent further submitted that the petitioner has not shown what fundamental rights or freedom he seeks to protect ones he is given the information he is seeking. The investigations are still ongoing and it is illogical to question the process during the pendency of the determination.

32. The respondent submitted that rights of the petitioner have not been infringed and thus seeking to enforce **article 35 (1) (b) of the Constitution of Kenya** is a rush and misuse of the court process in addressing that which is yet to be fully dispensed with.

**ANALYSIS AND DETERMINATION**

33. I have considered averments by the parties herein and submissions filed. There is no doubt that there is both employer and employee relations in between petitioner and respondent. It is not also disputed that the petitioner was 1<sup>st</sup> respondent’s student. What I consider to be in issue is **whether this court is seized with jurisdiction to entertain this matter and whether the petitioner deserve the prayers sought.**

34. **Article 47 of the Constitution** provides a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The **Fair Administrative Action Act** was enacted to illuminate and expand the values espoused under **Article 47 of the Constitution. Section 4(3)** of the Act provides the broad parameters which bodies undertaking administrative action have to adhere.

35. Whereas the petitioner has indicated that the subject matter relates to examination he sat in the institution in his capacity as a student of 1<sup>st</sup> respondent, the certificate issued is the basis of his promotion to his current position, it is his employment which is at stake in the event that after investigations, it turns out that he had not qualified for the certificate conferred. The two issues are intertwined.

36. From the averments the 1<sup>st</sup> respondent has appointed a committee to investigate and investigations are ongoing. No report has been submitted to 1<sup>st</sup> respondent. In my view the report will inform the documents relied on by the 1<sup>st</sup> respondent. Whereas the petitioner is entitled to the documents, the request has been made prematurely.

37. The 1<sup>st</sup> respondent has further indicated that the documents will be supplied to the petitioner upon completion of investigations. In my view, making orders for access at this stage will amount to interfering with the investigative role of the committee appointed. I see no merit in the petition herein.

38. **FINAL ORDERS**

**1. Petition is hereby dismissed.**

**2. Costs to the respondents.**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 10<sup>TH</sup> DAY OF JUNE, 2021**

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**RACHEL NGETICH**

**JUDGE**

**In the presence of:**

Lepikas - Court Assistant

Mr. Ekesa holding brief for Konosi Counsel for Petitioner

Mr. Kisila Counsel for Respondent