



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. E270 OF 2021

BETWEEN

KEVIN KIMONDO KARIITHI.....PETITIONER

VERSUS

THE KENYATTA UNIVERSITY SENATE

THE VICE-CHANCELLOR, KENYATTA UNIVERSITY

KENYATTA UNIVERSITY.....RESPONDENTS

RULING NO. 1

1. The proceedings in this Petition were instituted under a certificate of urgency. The Petitioner herein, *Kevin Kimondo Kariithi*, filed a Petition and an application by way of a Notice of Motion dated 13th July, 2021.
2. The matter was considered by Court on 13th July, 2021 and the Petitioner was directed to serve the pleadings and the application within 3 days with a return date on 19th July, 2021.
3. When the matter came up on 19th July, 2021 for directions, the Petitioner sought for interim conservatory orders in terms of prayer 2 of the Notice of Motion pending the *inter partes* hearing thereof. As the Respondents were in the process of filing their responses, the matter was placed aside to the afternoon. Due to pressure of work, Counsel in this matter were heard at around 5:30pm.
4. This ruling is, therefore, on whether interim orders do issue prior to the *inter-partes* hearing of the Notice of Motion dated 13th July, 2021. The conservatory order sought, in the meantime, is to direct the Respondents to include the Petitioner's name in the graduation list of 23rd July, 2021. In the alternative, the Court is urged to issue an order staying the graduation ceremony scheduled for 23rd July, 2021.
5. The Petitioner is one of the students who studied an undergraduate course leading to the award of Bachelor of Laws (LL.B.) at Kenyatta University. He was admitted into the Respondents' Law faculty in the academic year 2015/2016. The Petitioner was to graduate on 23rd July, 2021, but his name did not appear in the Respondents' graduation list on account of having engaged in an examination malpractice in December 2019 and that the Petitioner is currently undergoing a disciplinary process.
6. All parties were represented by Counsel. The Petitioner was represented by *Mr. Gachoka* and *Mr. Mumia*, Counsel whereas the Respondents were represented by *Mr. Thuo*, Counsel.
7. With a view of not dealing with the substantive application at the interim stage, the Court directed the parties to tender brief submissions in support of their various positions. By the time the matter was considered aforesaid, the Respondents had filed a Replying Affidavit and a Further Affidavit both sworn by *Prof. Paul Okemo*, the Deputy Vice-Chancellor (Academic).
8. At this point in time, I will briefly recap the submissions made.
9. The Petitioner, while relying on the Petition and the application referred to the grounds in support of the application. Counsel highlighted on three main grounds. The *first* ground is that the subject examination malpractice took place in December 2019. It is submitted that

whereas the Respondents' Disciplinary Committee was immediately put in place, by January 2020 and rendered its Report by December, 2020, the Respondents did not deal with the matter further until June, 2021 around a month before the graduation ceremony. According to the Petitioner, the Respondents' action was deliberate and aimed at unfairly denying the Petitioner an opportunity to graduate on 23rd July, 2021. The Petitioner cites *mala-fides* on the part of the Respondents.

10. The Petitioner further contends that according to the Respondents, the Petitioner is not among the four students accused of being the main architects of the examination malpractice. The Petitioner, therefore, wonders why the cases against the four were conclusively dealt with and not his. He cites an infringement of Article 47(1) of the Constitution alleging that the disciplinary process is not expeditious.

11. The Petitioner did not find favour with the Respondents' contention that the disciplinary process was hampered by the Covid-19 pandemic since all the university programmes went on as scheduled.

12. The *second* ground is that the Petitioner passed all the required 52 units to enable him graduate and be conferred with a degree in law. The *third* ground is that in order to strike a balance between the two parties, the Petitioner be allowed to graduate and the Respondents to withhold the Degree Certificate pending the outcome of the disciplinary process.

13. The Respondents relied on the two Affidavits. It opposed the issuance of the orders sought on several grounds. The first ground is that the orders sought are final in nature. It is submitted that once the orders are granted then the application and the Petition will be spent and the entire Petition will be rendered moot. The second ground is that the Petitioner has delayed coming to Court. The Respondents contend that when the Petitioner was suspended in June, 2021, it was clear that his graduation was in jeopardy. However, the Petitioner did not approach the Court until days to the graduation with a view to create an imaginary crisis.

14. The third ground is that the Respondents stand to be highly prejudiced by the grant of the orders. To the Respondents, the issue at hand is an examination malpractice and that runs deep into the credibility of both the University and the Petitioner. Such a serious issue ought to be conclusively dealt with before it is determined whether the Petitioner will be eligible to graduate. The Respondents pointed out that in the event the Petitioner is cleared, then he is likely to graduate in the next graduation ceremony scheduled for December, 2021. The Respondents further pointed out that in fact the Petitioner was to graduate in 2019, but for reasons attributed to himself, his graduation was deferred.

15. Another ground is that any damage to the Petitioner can be reasonably compensated. The other ground is that the merit of the case or otherwise cannot be dealt with in the current proceedings, but before the disciplinary committee.

16. On the aspect of the delay, the Respondents explained that the delay in concluding the matter was largely attributed to by the Covid-19 pandemic which led to a total closure of the University in March 2020. It is submitted that the University was partially opened in October 2020 where some activities were conducted virtually. The Court was urged to note that the University was at one time destined as a Covid-19 Isolation Centre and that even one member of the disciplinary committee succumbed to the deadly virus. On resumption of activities, the committee expeditiously dealt with the several disciplinary matters regarding the entire University before it including the Petitioner's. It is submitted that committee should not be portrayed as having slept on the Petitioner's case given the number of such matters before it.

17. Lastly, the Respondents submitted that there are many other students implicated in the same examination malpractice as the Petitioner and that the other students are giving time to the disciplinary process to come to an end. It is argued that there is no harm in the Petitioner waiting for the process to be completed.

18. As I indicated earlier in this ruling, this decision is limited to whether interim orders ought to issue pending the *inter-partes* hearing of the application. In that case, therefore, this Court must exercise extra caution in dealing with the issues at hand as it risks making conclusive findings at a very early stage in the matter. (See the Court of Appeal in **Civil Application Nai. 31 of 2016 Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 Others [2016] eKLR** and the High Court in **Muslim for Human Rights (Milimani) & 2 Others vs Attorney General & 2 Others (2011) eKLR**).

19. Being accordingly guided, this Court will restrain itself from, in any way whatsoever, attempting to resolve any of the contentious issues. Such issues fall within the province of the *inter-partes* hearing of the application and the main Petition.

20. At this point in time, this Court will, on a *prima facie* basis, consider the matter as whole and weigh it against the competing parties' interests.

21. I have carefully perused the pleadings and documents on record. In the main, the Petition seeks *inter alia* declarations that the Petitioner's rights under Articles 27, 28, 29, 43 and 47 of the Constitution were variously infringed.

22. There is no doubt that the Petitioner is facing a disciplinary process. The process is on-going. Apart from the pleadings, there are numerous documents pointing out the manner in which the examination malpractice took place. One of such documents is a Report by the University's Committee which investigated the alleged examination irregularity at the School of Law. The Committee was headed by the Director of Accommodation Services. There is also another Report by the Director of Security Service. The reports give a synopsis of how the malpractice was planned and executed. The reports further captures part of the Petitioner's statement.

23. As a result of the examination malpractice, the University commenced investigations. On conclusion, those found culpable were charged. They include the Petitioner. The Petitioner was charged with the offence of '*Sourcing examination leakage from KU main campus*'. The particulars of the offence are that: -

He was implicated by Esther Wetende who formed the WhatsApp group and Brian Rono who is said to have sent a page of the leaked question paper to Esther Wetende on the morning of the exam....

24. One other student who was also charged is *Kent Walinya*. He was charged with the offence of ‘*Being a beneficiary of the leakage and was seen discussing PIL leakage with Kevin Kimondo*’. The particulars of the charge are that: -

He is implicated by Brian Rono who said that he saw Kimondo and Walinya discussing PIL. He is the one who promised Brian Rono and Esther Wetende the question paper....

25. *Esther Wetende* was charged with ‘*Being in possession of leaked exam materials and forming of WhatsApp group to distribute leaked exam materials*’. Part of the particulars of the offence were that: -

***..... It is her evidence that she had been told by Brian Rono that Kevin Kimondo had sourced exam paper from KU main campus
....***

26. *Brian Rono* was also charged. He faced the charge of ‘*Having prior knowledge of the leakage and shared it with Esther Wetende.*’ The particulars implicate the Petitioner herein as well.

27. The foregoing reveals an intricate web on how the alleged examination malpractice was hatched and executed. According to the record, the malpractice involved both students and some of the University staff.

28. Against such a background, on one hand, the Petitioner contends that his rights are variously infringed in the manner in which the disciplinary process is carried out. The Petitioner majorly decries the delay. On the other hand, the Respondents contend that the Petitioner is culpable and they are ready to demonstrate that at the disciplinary hearing.

29. This Court would have been accorded a wide latitude in the matter had the Notice of Motion been fully heard. The Court would have had an opportunity to interrogate the applicability of the principles guiding the granting of conservatory orders against the parties’ positions, submissions and decisions. However, that is yet to be.

30. As earlier said, the Court is now only called upon to have an overview of the matter and, on a preliminary analysis of the record, determine whether to grant the orders sought. That is an intricate balance.

31. By taking into account the above and given the contentious nature of the issues at hand further to having not had the benefit of interrogating the factual matters and legal issues raised by the parties, this Court finds that it can be only fair that the grant of the interim orders or otherwise awaits the determination of the Notice of Motion.

32. This Court further notes the need for expeditious determination of this matter and shall accordingly issue appropriate directions.

33. Having so found, the following orders and directions do hereby issue: -

(a) The Petitioner to file and serve any supplementary responses, if need be, together with written submissions on the Petition and the Notice of Motion dated 13th July, 2021 within 14 days;

(b) The Respondents to file and serve written submissions to the Petition and the Notice of Motion dated 13th July, 2021 within 14 days of service;

(c) The Petition and the Notice of Motion dated 13th July, 2021 shall be heard together and by way of reliance on affidavit evidence and written submissions;

(d) Highlighting of submissions on a date agreeable to parties.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF JULY, 2021.

A. C. MRIMA

JUDGE

Ruling No. 1 virtually delivered in the presence of:

Mr. Gachoka and Mr. Mumia, Learned Counsel for the Petitioner.

Mr. Thuo, Learned Counsel for the Respondents.

Elizabeth Wambui – Court Assistant.