



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

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

PETITION NO. E271 OF 2021

BETWEEN

MURUNGA VERAH ODILIA.....PETITIONER

VERSUS

KENYATTA UNIVERSITY.....RESPONDENT

RULING NO. 1

1.The proceedings in this Petition were instituted under a certificate of urgency. The Petitioner herein, *Murunga Verah Odilia*, filed a Petition and an application by way of a Notice of Motion dated 9th 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 prayers 2 and 3 of the Notice of Motion pending the *inter partes* hearing thereof. The prayers sought are as follows: -

2. A conservatory order issue restraining the Respondent, its agents, servants and/or representatives from preparing and advertising a final graduation list or in any other way publishing a final graduation list pending the hearing and determination of this application inter partes.

3. That pending the hearing and determination of this application inter partes this Honorable Court be pleased to issue a temporary injunction restraining the respondent, its agents, servants and/or representatives from conducting the graduation ceremony scheduled for the 23rd of July 2021.

4.This ruling is, therefore, on whether interim orders do issue prior to the *inter-partes* hearing of the Notice of Motion dated 9th 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. She was admitted into the Respondents' Law faculty in the academic year 2015/2016. The Petitioner was to graduate on 23rd July, 2021, but her name did not appear in the Respondent's 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. Amukhale*, Counsel whereas the Respondent is 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). The Petitioner had also filed a Supplementary Affidavit.

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. It was pointed out that

the facts in the matter were fairly similar to those in Petition No. E270 of 2021 save that the Petitioner herein was not suspended as required of by the University regulations. Instead, the Petitioner was summoned to appear before the disciplinary committee thinking that she was a witness as she had raised a red flag on the examination leakage. On attending the committee sitting, the Petitioner was charged.

10.The Petitioner further contends that the remedial decision that the whole law class resits the examination which had leaked was arrived at by the students and the Dean and not by the disciplinary committee.

11.The Petitioner further contends that she was involuntarily added into a WhatsApp group and upon realizing that there was a call to raise funds for the leaked examination, she left the group and informed the University.

12.It is submitted that the Petitioner passed all the examination units and is eligible to graduate and that her name appeared in the first provisional list of those eligible to graduate as Number 65. Surprisingly, her name was omitted in the subsequent list which was uploaded in to the University website. The Petitioner followed up the matter with the University in vain.

13.The Petitioner alleges that the Respondent has not given her a reason as to why she is not graduating this 23rd July, 2021. She submits that, the *status quo* is an infringement of her rights and as such calls upon the Court to stop the violation.

14.The Respondent 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.

15.The Respondent contend that the Petitioner was not suspended based on a recommendation arrived at after investigations were undertaken and the fact that the Petitioner had just lost one of her parents. However, the Petitioner was timeously informed to collect her letter to appear before the disciplinary committee, but thereafter, did not approach the Court until days to the graduation with a view to create an imaginary crisis.

16.The third ground is that the Respondent stand to be highly prejudiced by the grant of the orders. To the Respondent, 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 Respondent pointed out that in the event the Petitioner is cleared, then she is likely to graduate in the next graduation ceremony scheduled for December, 2021. The Respondent further pointed out that infact the Petitioner was to graduate in 2019, but for reasons attributed to himself, his graduation was deferred.

17.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.

18.On the aspect of the delay, the Respondent 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.

19.Lastly, the Respondent 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.

20.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*.)

21.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.

22.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.

23.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, 35, 43 and 47 of the Constitution were variously infringed.

24.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.

25.As a result of the examination malpractice, the University commenced investigations. On conclusion, those found culpable were charged. They include the Petitioner. The Petitioner is accused of adding one *Damaris Mwendu* into the WhatsApp group that shared the leaked

examination. She is also accused of authoring a letter to the Vice-Chancellor.

26.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.

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

28.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.

29.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.

30.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.

31.Further, the twin orders sought have adverse effects on the other students and graduates who have no share in the Petitioner's tribulations. An order stopping the entire graduation ceremony at this stage is improper. Such a prayer cannot be issued at this stage.

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 9th July, 2021 within 14 days;

(b)The Respondents to file and serve written submissions to the Petition and the Notice of Motion dated 9th July, 2021 within 14 days of service;

(c)The Petition and the Notice of Motion dated 9th 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. Amukhale, Learned Counsel for the Petitioner.

Mr. Thuo, Learned Counsel for the Respondents.

Elizabeth Wambui – Court Assistant.