



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 152 OF 2017**

*(An appeal arising from the judgment and decree of the Hon. W. Lopokoiyt,*

*Resident Magistrate (RM), in Kakamega CMCCC No. 384 of 2017, of 18<sup>th</sup> October 2018)*

**MASINDE MULIRO UNIVERSITY OF**

**SCIENCE AND TECHNOLOGY.....APPELLANT**

**VERSUS**

**MUTIMBA CM JOSEPH.....RESPONDENT**

**JUDGMENT**

1. The primary suit was for a declaration that the rights of the respondent had been violated, an injunction to restrain cancellation of a degree certificate and negative communication of academic credentials, an injunction to stop the employer of the respondent from acting on such information, general damages and costs. The principal complaint was that the appellant has written to the employer of the respondent alleging that the respondent had not been cleared to graduate, and the certificate he had used to secure employment had been obtained through unlawful means.

2. In the defence statement filed by the appellant, at the primary suit, it was conceded that the respondent had been a student of the appellant, and had been cleared to complete studies despite not completing payment of fees, but it was averred that he had not been cleared to graduate because of the fees arrears. A degree certificate was prepared, but was released to the respondent in unclear circumstances, hence the notice in the newspapers cancelling it. It was averred that the cancellation of the certificate had been effected before the suit was filed.

3. The matter was heard orally. The respondent, in his testimony, largely breathed life to his pleadings, that he had been cleared to graduate, was employed by the Teachers Service Commission but his salary was stopped after the appellant cancelled his degree certificate. He complained that the appellant had not notified him of the cancellation. He conceded to sitting examinations before he had paid fees in full. He claimed to have had collected the degree certificate and signed for it. He did not have documents to demonstrate that he had cleared with the appellant before he collected the certificate. He did not go back to the appellant thereafter. The appellant called its academic registrar, who testified that the respondent had not been cleared to graduate, had not been issued with a degree certificate, which was later found missing from the records and custody of the appellant. It was said that a duplicate certificate could be re-issued, if the respondent subsequently paid his fees in full and cleared with the appellant. It was stated that participating in the graduation ceremony did not amount to the respondent being cleared by the appellant. It was also stated that, after the certificates were stolen, the appellant was forced to cancel them. It was further said that a student goes home with a copy of his clearance certificate, and the respondent could not have collected the degree certificate while he still had fee balances.

4. In the end, the trial court found that it had no jurisdiction to grant the orders sought. On violation of the fundamental rights of the respondent, the court cited section 8(2) of the Magistrates Courts Act, No. 26 of 2015, to say that its jurisdiction was limited to application of Article 25(a)(b) of the Constitution 2010, relating to torture, cruel treatment, slavery and servitude. On the injunctions sought, the trial court found that the same had been overtaken by events, given that the certificate had already been cancelled. On the injunction against the employer of the respondent, it was found that the said employer had not been made a party to the suit. The suit was not dismissed instead the trial court granted leave to the respondent to bring Judicial Review proceedings at the High Court. The respondent was awarded costs.

5. The appellant was aggrieved, and filed this appeal, through the memorandum of appeal, dated 16<sup>th</sup> November 2018. It raises four grounds: failure to dismiss the suit after finding that the plaint was incurably defective, purporting to grant leave to bring Judicial Review proceedings, directing the appellant to contact the employer of the respondent to ask it to resume paying the respondent's salary when no such order had been sought in the plaint, and awarding costs to the respondent.

6. The appeal was canvassed by way of written submissions. Both sides submitted, and the written submissions are on record.

7. On the first ground, that the suit ought to have been dismissed on the finding that the plaint was defective, I have perused the trial record very closely. At page 3 of the judgment the trial court said “... it is unnecessary for me to go into the merits/demerits of the case as the plaint is incurably defective. If this court was to find the plaintiff has proved his case on a balance of probability, which orders would it grant?” The court then went on to demonstrate how there was no jurisdiction to declare violation of fundamental rights, and how and why the permanent injunctions sought were not available. At page 4 of the judgment, the trial court said, “In conclusion the plaintiff’s suit ought to be dismissed.”

8. I agree with the appellant, having come to the conclusion that the plaint was incurably defective, the suit should have been dismissed. “Incurably defective” means that the suit is so bad that it cannot be salvaged or cured or rescued, for it would be beyond repair. How then could it be that the trial court, having come to that conclusion, would not dismiss and instead, go on to make orders favourable to the respondent. Incurable defects can only attract dismissal or striking out of a suit. It cannot be that a suit is incurably defective, and is not dismissed, but favourable orders are, nevertheless, made to the party who presented the incurably defective suit.

9. On the second ground, grant of leave to bring Judicial Review proceedings at the High Court, the position is that the Judicial Review jurisdiction is an exclusive preserve of the High Court. The magistrate’s court has no jurisdiction whatsoever over such matters. The trial court exercised a jurisdiction it did not have, and the order it purported to make was null and void. In any case, the respondent had not even sought the order.

10. On the third ground, the orders directed at the appellant, to communicate with the employer of the respondent, to resume paying the salary of the respondent, I agree with the appellant, that the order was not sought in the plaint, it was not available for making, and there was, therefore, no basis for its making. Secondly, the trial court, having found that the suit was incurably defective, could not, in the same breath, go on to grant positive orders based on the incurably defective suit. There was, clearly, a contradiction in terms.

11. Finally, on costs, that the same ought not to have been awarded to the appellant, I totally agree. The suit was said to be incurably defective, and should have been dismissed or struck out. That being the case, there was no basis to award costs to the party who had filed the incurably defective suit. If anything, the costs ought to have been awarded to the appellant, for costs follow the event, and the event, in this case, was that the suit was incurably defective, and should have been dismissed.

12. Overall, there is merit in the appeal, and I, accordingly, allow the same, in the terms proposed. The appellant shall have the costs of the appeal.

**DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS .....12th.....DAY OF  
.....November.....2021**

**W. MUSYOKA**

**JUDGE**