



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.484 OF 2016

AND

IN THE MATTER OF ARTICLES 19, 20,21,22,23 AND 27(1) (2) (4) 33(c) 43(1) (f) 47(1) (2) THE CONSTITUTION OF KENYA

DUNCAN CHEGE MAINA.....APPLICANT

AND

VICE CHANCELLOR, KENYATTA UNIVERSITY.....RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioner through an amended petition dated 15th December 2016 seeks the following reliefs:-

- a) A Declaration that the Petitioner is entitled to sit for his examination under Article 33(c) of the Constitution of Kenya;
- b) An order directing the 1st Respondent to enroll & issue the examination card to the Petitioner to enable him sit for the examinations SMA 200, SCO 300, SCO 302, SCO 304, SCO 306, SCO 308 and SCO 310 papers scheduled for the 21st November 2016 onwards;
- c) An Order directing the 1st Respondent to forthwith desist from harassing, intimidating or in any other way frustrating the Petitioner from pursuing his academics.

2. The petitioner's case is that he is a student in the School of Engineering and Technology studying Computer Science at Kenyatta University. The Respondent having been admitted in the year 2016/2017 Admission No. 317/1452/2014 and currently into his third (3rd) year of study having successfully enrolled on 29th August 2016 when the first semester began.

3. The petitioner contend that he had all the times relied on his father for payment of fees which had been paid in instalments owing to financial challenges. The last instalment having been paid of the sum of Kshs.15,000/- on 19th October 2016 but the Respondent refused to enroll the petitioner to sit for examination. The petitioner's father wrote to the Respondent on 1/11/2016 to reconsider their decision and allow petitioner to register for examination but Respondent did not reply. The Respondent averred the examination were scheduled to take place from 21st November 2016 and where the petitioner was supposed to sit for **SMA 200, SCO 300, SCO 302 SCO 304, SCO 306, SCO 308 and 310** papers.

4. The petitioner argues his right to education has been violated and he stands to suffer irreparably since he invested time and money in his courses in particular and education generally with no guarantee. He avers the Respondent has an obligation under the Constitution of Kenya to ensure the petitioner's right to education and his freedom against any form of maltreatment or discretion is safeguarded.

The Respondent's Case

5. The Respondent contend that the purpose of the amended petition is to use the process of this court to subvert the Rules and Regulations of Kenyatta University which is not a party to this suit; as regards deadlines for the payment of fees and registration for units to be taken during a semester. The Respondent is opposed to the amended petition and in doing so relies on the Replying affidavit of Agnes Tanui filed on 30th January 2017.

6. The Respondent admit that the petitioner is a student at Kenyatta University which is not party to this petition, which has over 70,000/- students, over which administrative decisions concerning teaching and examination have to be taken and effected and the University operates on online registration system for units to be taken for the semester for which deadlines must be set for student to register for units so as to manage examination; that deadlines are also set for payment of fees; that the students intending to register for units must first pay fees by the set deadline to enable University plan budget for technicians, ensure classes meet the minimum sustainable number per class and plan for examination.

7. It is further Respondent contention that the first semester 2016/2017 Academic year, the semester started on 5th September 2016 and deadline for payment of fees for continuing students such as the petitioner was 7th October 2016 and deadline for online registration for examination was 14th October 2016 as per internal memo dated 23rd August 2016 (AT-1).

By this memo, all students were informed that those who had not completed their Registration would be required to call off the semester and that the deadline would not be extended; which policy is applicable to **ALL** students not just the petitioner. The Respondent states the allegations of discrimination as unfounded.

8. The Respondent further avers that the petitioner did not pay his fees in full by the payment deadline and thus he could not register for 13 units by registration deadline. It is further argued that nothing prevents the petitioner from continuing his studies in the next semester. It further asserted the only students who had their deadlines extended were those who received **HELB** funds later or whose registration was hampered due to online hitches, in which category the petitioner did not fall in, as per internal memo dated 2nd November 2016 (AT-2). The petitioner is alleged paid his fees on 19th October 2016 almost two weeks after payment deadline and a day after the registration deadline.

9. It is further urged by the Respondent for Kenyatta University, late payment of fees and late registration has a direct and severe effect on the arrangements required to properly plan for the teaching and assessment of students particularly where a large student population is concerned.

Analysis and Determination

10. I have very carefully considered the amended petition, affidavit in support, the Respondent Replying affidavit, parties rival submissions and from the aforesaid the issues arising for consideration can be summed up as follows:-

a) Whether the Respondent is the right party in this petition?

b) Whether the actions of the Respondent have violated the petitioner's constitutional right?

A) Whether the Respondent is the right party in this petition?

11. The Respondent contend that in the petitioner's amended petition, Kenyatta University in which the petitioner is a student has not been enjoined as a party to the Amended petition and that the Respondent herein is merely an officer of the University. The petitioner has not filed any supplementary affidavit to counter the contents of the Respondent's Replying affidavit on this issue nor has he given reasons as to why he instituted a petition against the Respondent rather than the University whose Rules and Regulations he is disgruntled with. It is common knowledge that Kenyatta University is a body corporate capable of instituting and defending legal suits in its own name as deponed in the Respondent's Replying affidavit. The petitioner has not submitted on this issue, but that notwithstanding, the law is clear that a claim against a body corporate capable of instituting and defending a legal suit should be sued in its name and not through a third party.

12. The petitioner in amending the petition had the opportunity to enjoin Kenyatta University, but did not do so. The petitioner is to blame himself for failing to rectify this fatal error which he had the opportunity to do so. The Amended plaint as it is, is brought against the wrong party. This court is alive to the fact, that no party should be condemned unheard. Kenyatta University having not been enjoined in this petition cannot be condemned unheard, consequently it would be against the rules of natural justice to issue any orders against Kenyatta University which has not been made a party in this suit; for issuing such orders would amount to violations of the right to a fair hearing under **Article 50 of the Constitution of Kenya 2010**.

B) Whether the actions of the Respondent have violated the petitioner's constitutional right?

13. The petitioner urges that the Respondents' actions violated his constitutional rights under Articles 27, 43 and 47 of the **Constitution of Kenya 2010**. The petitioner's allegation is that Kenyatta University's failure to allow him sit the examinations was discriminatory. The Kenyatta University has clearly laid down Rules and Regulations concerning payment of fees and Registration for units to be undertaken and which apply to **ALL** students as deponed under paragraph 5 of the Respondent's Replying affidavit. It is averred by Respondent that the only exemption that were made were due to online technical hitches or late disbursement of **HELP** as deposed under paragraph 7 of the Replying affidavit. The petitioner did not fall under any of the category but made his payment late and attempted registering contrary to the University Rules and Regulations. I therefore find he has not demonstrated that he was treated differently from all other students. He was therefore treated in the same way or manner like any other student; he was as such not discriminated.

14. The right to Education is not absolute; as unlike the rights and fundamental freedoms protected under **Article 25 of the Constitution**. The rights such as the right to education may be limited. Notably in a society in which there are inadequate resources, such rights must be limited, in order that all have reasonable access to those resources for the benefit of society as a whole. **Article 24 of the constitution** recognizes the need for such limitations and permits that. In respect of University education such limitations include imposition of conditions such as payment of fees and/or the times of registration for units a student wishes to pursue.

15. There is no doubt that reasonable limitations to the right to education exist the world-over and such limitation cannot be said to be

discriminatory; I find it may be argued that the development of an ability to comply with Rules and Regulations is an essential component of any useful education.

16. In the case of **John Mwai & 3 others vs Kenya National Examination Council & 2 others [2011] eKLR** where it was held:-

"It should be noted that discrimination which is forbidden by the Constitution is unfair or prejudicial treatment of a person or group of persons based on certain characteristics. The element of what is unfair or prejudicial treatment has to be determined in the light of the facts of each case."

17. In the instant petition, the petitioner has not shown that other self-sponsored students were treated differently by being allowed to pay fees late and register late. He has not demonstrated or shown that out of all the self-sponsored students he was singled out for discriminatory treatment. The groups which he has compared himself with had characteristics that he did not have; the first group was government sponsored and **HELP** funds were released late; the second group had paid but suffered online hitches. The allegation of discrimination therefore is unsubstantiated by the facts.

18. The petitioner in this petition willingly accepted and agreed to be bound by Kenyatta University Rules and Regulations when he first applied to join the University and was admitted to the University (see *KU/2 and KU/7 annexures to petitioner's supporting affidavit filed on 18/11/2016 as "DCM-1"*). In the case of **Oluoch Dan Owino vs Kenyatta University (2014) eKLR INSERT**

19. I find that any education institution has the right to set certain Rules and Regulations for those who wish to study in the institution to comply with; so long as they are studying in the institution. That once one voluntarily chooses to study at such an institution and voluntarily accepts and agrees to be bound by the Rules and Regulations when he joins the institution, he has to comply to the letter.

20. In the instant petition, the petitioner was aware of the Rules and Regulations concerning payment of fees and registration for units to be taken for the semester, and which had been communicated to him together with other students through an internal memo (**AT-1**) which clearly spelled the consequences for non-compliance. The petitioner failed to comply with the Rules and Regulations. In the petition there is no allegation that the Rules and Regulations were unreasonable or unconstitutional. I find that if students are allowed to disobey the Rules and Regulations which they signed binding themselves to obey, that would open the floodgates of disobedience and hamper the University ability to deliver quality education to its students. It would be unjustified for the court to issue an order that may cause chaos at the University. I find that any rate the Rules and Regulations and the Internal Memo (**AT-1**) do not bar any student who had not completed their registration from calling off the semester and resume their studies next semester. I find nothing stops the petitioner from resuming his studies next semester when he is able to comply with deadlines prescribed by the University.

21. The petitioner urges that **Article 47 of the Constitution** was violated as his request for late registration by a letter dated 19th October 2016 addressed to the Registrar Academics was rejected on spot without him being given an opportunity to be heard or any reason for the rejection being given. It is further argued the petitioner's father on 1/11/2016 wrote a letter of even date explaining reasons why he was notable to pay fees before deadline but the letter was not responded to. The petitioner urges therefore the act of compelling him to call off his semester and refusing to allow him to register amounts to double punishment.

22. From the petitioners petition dated 17/11/2016, it is supported by "*verifying affidavit*". The amended petition dated 15th December 2016 has no supporting affidavit. The alleged violation of Article 47 of the Constitution is not supported by the averments both in the petition and petitioner's supplementary affidavit. That notwithstanding, I find there is no dispute that the University had a written policy on the deadlines for the payment of fees and registration for units and all students at the University were informed, that there were to be no exceptions concerning it. The deadline affected all 70,000 students at Kenyatta University, and if a hearing were required for all students in the manner suggested by the petitioner, I find the University would cease doing its core business, such as teaching.

23. It is also noted the Respondent posted an internal memo (**TA-2**) to all students dated (2/11/2016); who had requested to be allowed to register late for examinations, giving reasons as to why their request could not be allowed. I find therefore the allegation that the petitioner was not given written reasons as to why he could not be allowed to sit the examinations to be not true. It is further noted from the Respondents Replying affidavit, that Kenyatta University runs an automated system for payment of fees and for registration of units. This online system automatically informs all registered students of the fees balances payable and the due date for the payments and the consequences of default. I therefore find that it would not be correct for the petitioner to allege that he did not know the consequences of failing to pay fees or registering for units on time.

24. From the pleadings and counsel rival submissions, I find that it has been established that the petitioner failed to meet the deadlines to pay his fees and register for the units he was to take in the semester; leading to failure to attend classes for those units and be examined. I find that it is clear, that these deadlines exist in order that Kenyatta University may organize the teaching of the students, administer classes and manage examinations for what is a large pool of students numbering around 70,000 as deposed by the Respondent. The petitioner could not be allowed to sit for units for which he had not paid for and attended classes. I find if the court would allow the petitioner to sit the examination having not paid for fees and attending classes, that would amount to interfering with internal organization and running of the affairs of the Kenyatta University. This court cannot allow to be used to micro-manage the offices of the Kenyatta University. The court similarly declines to have the court process to be used to lower the standards of tertiary education in the country as the petitioner prays it to do.

25. The upshot is that I find that the petitioners right under **Article 27 and Article 47 of the Constitution** has not been violated. The petitioner's petition is without merit and the same is accordingly dismissed.

26. I would have awarded costs in this matter to the Respondent but given that the petitioner is a student and was seeking to enforce his constitutional rights, I will direct that each party bears its costs.

Dated, signed and delivered at Nairobi this 6th day of February, 2020.

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J .A. MAKAU

JUDGE