



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 439 OF 2019

REBECCA EBERE.....PETITIONER

VERSUS

DEPUTY VICE-CHANCELLOR ACADEMIC AFFAIRS

UNIVERSITY OF NAIROBI.....1ST RESPONDENT

THE UNIVERSITY OF NAIROBI.....2NDRESPONDENT

JUDGEMENT

1. The Petitioner, Rebecca Ebere is a student at the University of Nairobi, the 2nd Respondent herein, pursuing Doctor of Philosophy (PhD) studies in Public Health. The 1st Respondent is the Deputy Vice-Chancellor in Charge of Academic Affairs and the Secretary to the Senate of the 2nd Respondent.
2. The 1st Respondent is the person responsible for the preparation of syllabus and regulations; co-ordination of examinations; co-ordination of undergraduate and postgraduate studies; co-ordination of admissions; academic staff training; performance of any other functions pertaining to academic affairs; and the carrying out of such other duties and responsibilities as may be delegated by the Vice-Chancellor.
3. The 2nd Respondent is a public university established under Section 13 of the Universities Act, 2012 and Clause 3 of the University of Nairobi Charter. Its mission under Clause 4 of the University of Nairobi Charter is to provide quality university education and training and to embody the aspirations of the Kenyan people and the global community through creation, preservation, integration, transmission and utilization of knowledge.
4. The Petitioner's case is that in March, 2012, she enrolled for postgraduate studies at the University of Nairobi to pursue a Doctor of Philosophy (PhD) degree in Public Health on provisional basis and was accorded full PhD status in 2013. In October 2017, as part of the requirement for conferment of a PhD degree, the Petitioner submitted to the 2nd Respondent a thesis titled "*Glycemic indices in association with Diabetes among Rural Women of Kenya: Case of Amagoro in Busia County*". The thesis consisted of various articles touching on the subject title of the thesis, which the Petitioner had published in peer-reviewed journals.
5. The Petitioner's case is that there were several unexplained and unjustifiable delays on the part of the respondents. It is her case that the delays were caused by failure to constitute the Board of Examiners to consider her thesis or failure by the 2nd Respondent's School of Public Health to submit the thesis to the Graduate School for purposes of examination.
6. In April 2019, the Petitioner's thesis was, subjected to scrutiny by the internal examiner, external examiner and the Board of Examiners who all returned a verdict that the said thesis was satisfactory in both form and content and recommended conferment of a PhD degree on the Petitioner subject to minor corrections. The Petitioner averred that with the assistance of her immediate supervisor, she effected the minor changes that had been suggested by the Board of Examiners, submitted the final draft which was accepted by the respondents who directed her to publish the thesis at the 2nd Respondent's online repository.
7. The Petitioner averred that subsequent to the successful defence of her thesis and satisfaction of other requirements, she was issued with a certificate of clearance by the 2nd Respondent on 19th June, 2019 allowing her to graduate in a graduation ceremony that was scheduled for 6th September, 2019. However, in late August 2019 she learned that her name was missing from the list of graduands. It is her averment that on enquiring from the Director of the School of Public Health as to why her name was missing from the graduation list, she was informed

that she had published her articles in what the Director, termed as “predatory journals”. According to the Petitioner, the issue of the publication of her papers in predatory journals was never raised by the internal examiner, the external examiner or Board of Examiners who had certified the thesis as satisfactory in content and form and had recommended that she be awarded a PhD degree.

8. The Petitioner averred that her appeal against the respondents’ decision was not successful. She instead learned, that unbeknown to her, the 1st Respondent had constituted a committee to reconsider the journals in which she had published the articles which formed part of her thesis and the committee had ruled that her thesis did not meet the journal verification standards and had on that basis deferred her graduation pending her publication of two articles in a peer reviewed journal.

9. It is the Petitioner’s case that at all material time during the writing, defence and assessment of her thesis by the internal examiner, external examiner and the Board of Examiners, she was neither informed nor made aware of any criteria of review of journal publication that she needed to adhere to in the publication and submission of the papers that would form part of her thesis.

10. The Petitioner averred that she later learned through the 2nd Respondent’s Internal Memo of 9th September, 2019 that during the 212th and 213th Senate meetings held on 1st August, 2019 and 14th August, 2019 respectively, the 2nd Respondent had requested the Director of the Graduate School to formulate guidelines for verification of the journals where the PhD students had published their papers. Further, that acting on the Senate’s directive, the Director of the Graduate School formulated and communicated “Criteria for Verification of Peer Reviewed Journals” (Journal Verification Criteria) consisting of ten requirements that the Board of Examiners should look for in a PhD thesis and capture in their consolidated reports.

11. It is the Petitioner’s case that it is the 9th September, 2019 Journal Verification Criteria that was applied to her thesis resulting in the recommendation that the conferment of the PhD degree be deferred.

12. The Petitioner deposed that all the six articles she had submitted to form part of her thesis were all peer reviewed and published in internationally acclaimed journals whose publishers had copyrighted them. In her view, the 1st Respondent’s constitution of a committee to reconsider her thesis was *ultra vires* the 2nd Respondent’s Statute XXXIII which recognise assessments by the internal examiner, external examiner and the Board of Examiners as the only examination procedures a PhD student may be subjected to.

13. The Petitioner averred that the respondents’ decision to subject her thesis to further scrutiny and to defer her graduation was arrived at upon retrospective application of the Journal Verification Criteria which document was formulated after the Petitioner had defended and published her thesis, and after she had been cleared to graduate. According to the Petitioner, the application of the Journal Verification Criteria published by the 2nd Respondent on 9th September, 2019 to her thesis when the same standard was not applied to those who started the PhD programme with her, was discriminatory, and violated her right to be treated equally before the law and her legitimate expectation that she would be examined on the basis of the regulations that obtained at the time of her examination and which her colleagues were subjected to.

14. It is the Petitioner’s case therefore that the respondents’ actions violated various Articles of the Constitution. She therefore prayed for orders as follows:-

“(a) A declaration that the Respondent’s constitution of a committee to reconsider the Petitioner’s thesis after it was passed by the Board of Examiners and published by the 2nd Respondent was *ultra vires* to the Universities Act, the University of Nairobi Charter and the University of Nairobi Statutes XXXIII.

(b) A declaration that the Respondents’ deferral of the Petitioner’s graduation and conferment of PhD degree during the 61st and 62nd Graduation Ceremonies violated the Petitioner’s rights under Article 27, 29(d), 43 and 47 of the Constitution of Kenya.

(c) A declaration that the Respondents’ constitution of a Committee to reconsider the Petitioner’s thesis and deferral of the Petitioner’s graduation and conferment of PhD degree violated the Petitioner’s right to legitimate expectation.

(d) A declaration that by their acts of commission and omission, the Respondents have violated the Constitution of Kenya, and in particular Articles 10, 19, 20, 27, 29, 43, 47, 232 of the Constitution.

(e) A declaration that by their acts of commission and omission, the Respondents have violated Sections section 3 of the Fair Administrative Act, No. 4 of 2015, sections 3 and 34 of the Universities Act, 2012 and Clause 6 of the University of Nairobi Charter, 2013.

(f) A mandatory injunction be issued to compel the 2nd Respondent, its servants, agents and/or persons acting under the authority of the 2nd Respondent to confer the Petitioner with a Doctor of Philosophy (PhD) degree.

(g) An order of Mandamus be issued compelling the 2nd Respondent, its servants, their agents and/or persons acting under the authority of the 2nd Respondent to confer the Petitioner with a Doctor of Philosophy (PhD) degree.

(h) That an order for general damages for violations of the Petitioner’s fundamental rights.

(i) That Costs for this petition be provided borne by the Respondents.

(j) Any other relief that the court shall deem fit and just in the circumstances.”

15. The respondents opposed the petition through a replying affidavit sworn by the Prof. Lydia W. Njenga, the Director of the Graduate School of the 2nd Respondent. She averred that it is a requirement that before a PhD student is subjected to oral examinations, the student should table proof that he/she has published his/her thesis in an authentic peer reviewed journal before a Consolidated Report is generated on her thesis by the School's Board of Examination for consideration by the Graduate School and transmission to the University's Senate for approval.

16. It was Prof. Njenga's deposition that the Petitioner's name together with those of sixteen other PhD candidates were submitted to the Graduate School and thereafter tabled in the 212th University Senate Meeting held on 1st August, 2019 for approval for the award of the PhD degree. She conceded that the Petitioner's thesis was indeed assessed by internal and external examiners but stated that this did not dispense with the requirement to publish the thesis in a journal that met the standards stipulated under the Commission for University Education, Universities Standards and Guidelines, 2014 (the 2014 Guidelines), and which the Petitioner was well aware of during her studies and prior to submitting her thesis.

17. Prof. Njenga averred that the journals in which the PhD candidates had published their theses were thoroughly verified as recommended by the University Senate but some journals did not meet the requirements as stipulated under the 2014 Guidelines. Further, that the requirement for the publication of the thesis in a peer reviewed journal is mandatory and cannot be dispensed with since it is on the basis of such publication that the 2nd Respondent is assessed by the ranking authorities and the articles by candidates for an award of a PhD degree are reviewed by their peers and such is only done in accredited journals, a thing the Petitioner cannot claim to be ignorant of. It was the deposition of Prof. Njenga that the guidelines for publication have always been available to the Petitioner through the 2014 Guidelines and which guidelines are a mandatory read for all PhD candidates.

18. Prof. Njenga averred that for PhD candidates the final approval before graduation is done by the University Senate, which is the highest decision-making organ of the University and not by an individual. Further, that the Senate's decision is final.

19. According to Prof. Njenga, the communication dated 3rd August, 2019 from the Director of Library and Information Services was a periodic circulation to guide researchers on publishing in high impact journals and books. Her statement was that the circular was a guide to students on the criteria to use to determine predatory/questionable publishers of journals with a keen eye on four main aspects that is the credibility of the publisher, existence of an editorial board, the review process and adherence to submission format.

20. Prof. Njenga deposed that at the 213th University Senate Meeting held on 14th August, 2019 the Graduate School tabled a list of PhD candidates who had met the requirements as appertains to publishing in authentic peer reviewed journals for approval for the award of PhD degrees. She stated that at the meeting the Senate recommended that those candidates who had not met the requirements as regards the publishing of their thesis in refereed journals should have their work verified further by their deans or directors and the Graduate School.

21. It was Prof. Njenga's averment that the Petitioner's publications were verified by the Director of the School of Public Health and the Graduate School Board where the Graduate School in its meeting held on 20th August, 2019, which meeting was attended by the deans and directors of the affected candidates, resolved that the journals in which the Petitioner had published her articles did not meet the requirements set in the 2014 Guidelines. Further, that in its special meeting of 26th August, 2019 the University Senate recommended that the award of a PHD degree to the Petitioner and fourteen other candidates be deferred until they meet the publication requirement. This was communicated to the Petitioner through a letter dated 26th August, 2019 who made an appeal through her letter dated 29th August, 2019.

22. Prof. Njenga averred that upon receipt of the Petitioner's letter dated 29th August 2019, a committee on the Review of Journals in Respect of Publications for PhD 2019 candidates was constituted on 2nd September, 2019. The candidates who had not met the set criteria were requested to submit information to the committee for consideration but the Petitioner never complied. Prof. Njenga stated that the committee deliberated all the relevant aspects relating to the publication in journals by students and concurred with the University Senate's recommendations to defer the award of the PhD degrees to the identified candidates until all the set requirements were met.

23. It was deposed by Prof. Njenga that the deferment of the award of a PhD degree to the Petitioner was a result of her non-adherence to the set requirements on the publishing of papers in peer-reviewed journals. Further, that she was not the only candidate whose PhD approval was deferred until the requirement on publication of articles in peer-reviewed journals was met. She stressed that the University Senate is the only body mandated by the University Statutes to award degrees and that the examination process ends after the award.

24. According to Prof. Njenga, it was standard procedure for the University to go ahead and verify the journals in which the PhD candidates had published their theses and the Petitioner's case was therefore not an exception. She denied that the scrutiny was done retrospectively stating that the 2014 Guidelines were already in place and the Petitioner had knowledge of the same. Further, that it was the Petitioner's own conduct which forestalled the conferment of the degree and she cannot rely on legitimate expectation for misfortunes she authored for herself.

25. The Petitioner filed submissions dated 5th December, 2019 and the respondents filed submissions dated 4th December, 2019.

26. In brief, the Petitioner's claim is that once the internal and external examiners together with the Board of Examiners approved her for graduation, the University Senate had no business deferring her graduation. She also alleges that the decision to defer her graduation was based on the application of new rules to her thesis. The respondents deny that it applied new rules to the Petitioner's thesis and further asserts that the Senate has the final say in the award of any degree to any person by the 2nd Respondent.

27. In support of her case, the Petitioner submitted that the internal examiner, the external examiner, and the Board of Examiners are all

appointees of the 2nd Respondent. Further, that her two supervisors also worked for the 2nd Respondent. She stated that all of them approved her thesis without reservations and at no point during her supervision or examination was the question raised regarding the status and stature of the journals in which she had published her papers. Further, that in their Consolidated Report the Board of Examiners acknowledged and indicated that the Petitioner had published her articles in refereed journals.

28. The Petitioner submitted that her two supervisors, the internal and external examiners, and the Board of Examiners are all institutions created under the 2nd Respondent's Statutes, particularly Statute XXXIII, to conduct supervision and examination of PhD candidates. The Petitioner stated that they all represented to her that her thesis was correct, in both form and content.

29. The Petitioner contended that the respondents duly approved her thesis, cleared her to graduate and even went ahead to confirm that position through the letter of the Director of the Graduate School dated 20th June, 2019. It is the Petitioner's position that all these representations created a legitimate expectation on her part that she had satisfied all the requirements for the award of a PhD degree and that the degree would be awarded to her during the next graduation that was scheduled for September 2019. It is the Petitioner's case therefore that the re-opening of her thesis and the deferral of her graduation violated her right to legitimate expectation.

30. The Petitioner stressed that legitimate expectation is anchored on Section 7(2)(m) of the Fair Administrative Action Act, 2015 which grants this court jurisdiction to review an administrative decision which violates the legitimate expectation of the person to whom it relates. The decisions in the cases of **Jane Kigogo & 15 others v Laikipia University & 6 others [2019] eKLR** and **Communication Commission of Kenya & 5 others v Royal Media Service Ltd & 5 others (2014) eKLR** are cited as defining the principle of legitimate expectation and laying down the principles that govern a successful invocation of the doctrine.

31. According to the Petitioner, her supervisors and examiners were the persons authorised by the Statutes of the 2nd Respondent to supervise and examine her and their representations to her that her thesis complied with the form and was sufficient in content was therefore lawful, reasonable and competent. Further, that she had been cleared to graduate and her exclusion from the graduation list without any justifiable reason was therefore a breach of her legitimate expectation. She stated that the documents on record provide adequate evidence of the representations made and that the conduct of respondents created a legitimate expectation that she would graduate which expectation was violated by her exclusion from the final graduation list.

32. The Petitioner contended that although the respondents have asserted that their decision was made in accordance with the provisions of the 2014 Guidelines, this cannot be so as the letter communicating their decision makes reference to the Journal Verification Criteria formulated way after her thesis was approved and after her clearance to graduate. Further, that in any event, the provisions of the 3rd Schedule of the 2014 Guidelines do not provide for any criteria for verification of the journals save that it requires a candidate to show proof of publication of at least two articles in refereed journals, which the Petitioner had complied with and had received the Board of Examiners' confirmation. According to the Petitioner, the application of the Journal Verification Criteria to her thesis was therefore unlawful and against her rights.

33. It is the Petitioner's case that the respondents have confirmed that the reason why her thesis was reviewed and her graduation deferred was because she had published her articles in predatory journals. According to the Petitioner, although the respondents claim that the list of predatory journals was provided to all candidates beforehand, this is not correct since the "GUIDE FOR RESEARCHERS ON PUBLISHING IN HIGH IMPACT JOURNALS AND BOOKS: SCIMAGO AND OTHER PLATFORMS" which the respondents alleged was circulated to the PhD students to guide them on the criteria to determine predatory or questionable publishers was published by the 2nd Respondent's Director of Library and Information Services on 3rd August, 2019, way after she had successfully defended her thesis and had been cleared to graduate. It is therefore her view that the imposition of the contents of the "GUIDE FOR RESEARCHERS ON PUBLISHING IN HIGH IMPACT JOURNALS AND BOOKS: SCIMAGO AND OTHER PLATFORMS" to her thesis retrospectively was unlawful and also violated her right to fair administrative action under Article 47 of the Constitution.

34. The Petitioner referred to the procedure governing submission and examination of a PhD thesis under Statute XXXIII, paragraph 3.2.5 of the Statutes of the University of Nairobi and asserted that the 2nd Respondent's Senate had no legal authority to either re-open or cause re-evaluation of her thesis. It is her firm opinion that the process of examination ended when she submitted the final copies of her thesis and the same were published by the 2nd Respondent's Department of Library Services. Consequently, she declared that the actions of the respondents were *ultra vires* the provisions of paragraph 3.2.5 of Statute XXXIII of the University of Nairobi Statutes and therefore unlawful.

35. Turning to the alleged violation of her rights, the Petitioner submitted that she has demonstrated that her rights under the Constitution, particularly Articles 27, 28, 29(d), 43 and 47, were violated by the deferral of her graduation. Submitting on the alleged violation of the right to fair administrative action, the Petitioner stated that this right is meant to safeguard against arbitrary decisions of public and State officers. Further, that administrative actions that flow from Acts of Parliament must now meet the constitutional test of legality, reasonableness and procedural fairness. Cited in support of the submission are the decisions in **Judicial Service Commission v Mbalu Mutava & another [2014] eKLR** and **Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR**.

36. The Petitioner submitted that the retrospective application of the Journal Verification Criteria and the "GUIDE FOR RESEARCHERS ON PUBLISHING IN HIGH IMPACT JOURNALS AND BOOKS: SCIMAGO AND OTHER PLATFORMS" to a thesis which she had successfully defended and published was procedurally unfair, unreasonable and illegal and thus violated the provisions of Article 47 of the Constitution. She also contended that the decision by the respondents to subject her thesis to a further examination and to defer her graduation was undertaken without prior written notice or invitation to clarify the issues raised by the respondents hence violating her right to fair administrative action which is lawful, reasonable and procedurally fair under Article 47 of the Constitution.

37. On the alleged violation of her rights, the Petitioner submitted that the respondents discriminated against her and treated her unequally contrary to Article 27 of the Constitution by selectively applying the Journal Verification Criteria to her and not to those who started the PhD programme with her. Further, that the unjustifiable, unlawful and illegal deferral of her graduation and conferment of a PhD degree

unjustifiably impeded her intellectual development and progression in violation of her right to education under Article 43(1) (f) of the Constitution. The Petitioner also submitted that by subjecting a thesis she had successfully defended and published to reconsideration *ex post facto* in addition to several unexplained delays in examining her since 2017 resulted in psychological torture hence violated her right to freedom and security of person under Article 29(d) of the Constitution. The Petitioner stated that Article 29(d) extends the right of security of person to include freedom from psychological torture and urged that the deferment of her graduation amounts to psychological torture.

38. The Petitioner asserted that her constitutional rights have been violated and continues to face the threat of violation through her omission from the graduations of 2017, 2018, September 2019 and now December 2019. She contends that she has undergone and continues to undergo psychological torture, delayed professional and academic growth and violation of her right to fair administrative action. She stressed that as a professional teacher and academic she has lagged behind and had not been promoted beyond the position of an assistant lecturer. In her view, the danger of those violations being perpetuated to the unforeseen future by the respondents is real and not imagined or fictitious.

39. It is the Petitioner's further submission that her allegation that there were persistent delays in the appointment of the examiners in respect of her thesis from 2017 when she submitted the same to 2019 when the respondents first appointed the internal examiner has not been controverted by the respondents. Further, that the problem was not resolved even after she wrote to the respondents asking them to appoint examiners for her thesis. It is the Petitioner's case that the fact that she did not pursue her complaint in court is not a defence against the violation of her rights.

40. The Petitioner submitted that the respondents have not proffered any plausible explanation as to why they didn't move with speed to constitute a Board of Examiners to evaluate her after she had submitted her thesis. Further, that there is no responsibility placed on a student once he/she has met all the requirements for the conferment of a PhD degree and it is thus evident that the lapses in the constitution of a Board of Examiners to evaluate her are solely attributable to the respondents.

41. On their part, the respondents urged that their actions have not violated the Petitioner's constitutional rights. On the right to fair administrative action, the respondents submitted that an administrator is only required to ensure that the process is reasonable and everything is done in good faith. According to the respondents, they complied with the regulations and they cannot be accused of violating Article 47 of the Constitution. Reliance was placed on the case of **Republic v the Principal Secretary Ministry of Mining Ex-parte Airbus Helicopters Southern Africa (PTY) Ltd [2017] eKLR**.

42. The respondents' case was that they informed the Petitioner of what was required to be met before the conferment of a PhD degree. According to the respondents, the Petitioner obtained clearance before her name was put in the graduation list and proceeded thereafter to make enquiries why her name was not in the graduation list. It was their case, that she all along knew that something was amiss since she had published her thesis in predatory journals and could therefore not graduate.

43. On the Petitioner's claim that she was discriminated against, the respondents submitted that she was one of the many students who were subjected to deferral for publishing in predatory journals. The respondents submitted that the Petitioner did not tender any evidence in respect of the candidates she alleges were given different treatment from that extended to her. The respondents took the position that the fact that a committee had been set up to look at the issue is in itself evidence of fair administrative action. Further, that the Petitioner did not adduce any evidence to support her claim that her thesis was published internationally in recognized journals.

44. Still urging the court to find that the Petitioner was not discriminated against, the respondents contended that the Petitioner and the other candidates who did not meet the criteria for conferment of a PhD degree were all asked to meet the requirements before conferment of the degree. The decision in the case of **Nyarangi & 3 others v Attorney General [2008] KLR 688** was cited as defining the meaning of the term discrimination.

45. The respondents also accused the Petitioner of publishing her thesis before presenting the same to the Board of Examiners, contrary to Schedule 3 of the 2014 Guidelines 2014, which requires a candidate to show proof of acceptance of at least two papers in refereed journals. The respondents' position was that the Petitioner published her thesis in "predatory journals" and therefore failed to meet the standards set in the 2014 Guidelines. Further, that the thesis did not meet the standards set by Statute XXXIII of the Charter. The respondents stated that awarding the Petitioner a PhD degree as prayed would amount to overriding the established law on award of degrees by the 2nd Respondent.

46. On the Petitioner's claim that the decision to defer her graduation was unlawful, the respondents asserted that Section 16 (2)(d) & (f) of the University of Nairobi Act empowers the Senate of the University to decide on who can graduate upon being satisfied that all the requirements for conferment of a degree have been met. According to the respondents, the University Senate is not a passive player in the conferment of degrees and it cannot approve the graduation of candidates without considering the relevant reports. Further, that the University Senate can only approve the award of a degree once it is satisfied that a candidate has met all requirements for conferment of the same.

47. Upon perusal of the pleadings and the submissions of the parties I find that the question for the determination of this court is whether the decision by the respondents to defer the award of a PhD degree to the Petitioner violated her constitutional rights.

48. Apart from the replying affidavit already referred to in this judgement, the respondents also filed a notice of preliminary objection dated 29th November, 2019 through which they sought the striking out of the petition on the following grounds:-

“a) That the Petition and the Application by the Petitioner dated 4th November, 2019 is bad in law and offends the express provisions of the third schedule of the Commission for University Education Universities Standards and Guidelines 2014.

b) That the Honourable Court cannot grant the orders as sought for to do so will be to re-write guidelines by the Commission for University Education and usurp the powers of the University Senate.

c) That the Petition is fatally defective and filed in a vacuum since the two thesis the subject matter of this Petition are non-existent, do not belong to the Petitioner who, by admission, published the said thesis in an unauthorized predatory journals and sold her copyrights of the said thesis in 2017. (sic)”

49. In support of the preliminary objection, counsel for the respondents submitted that the court does not possess powers to formulate, review, interpret and determine the criteria for the award of a PhD degree as such power is vested in the Commission for University Education and the University Senate by the Universities Act, 2012; the 2014 Guidelines; the University of Nairobi Act; and the University of Nairobi Charter. Further, that the only entity capable of determining the eligibility of a PhD candidate is the University through the Senate and not the court. Further, that the substratum of the petition was no more considering that the Petitioner had published her thesis in unauthorized or predatory journals and sold her rights. Based on this argument, the respondents urged the court to strike out the petition.

50. On his part counsel for the Petitioner pointed out that the preliminary objection does not raise pure points of law fit for consideration on preliminary basis. Reliance was placed on the decisions in the cases of **Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Ltd [1969] EA 696** and **Oraro v Mbaja [2005] eKLR**.

51. The law is now well established that a preliminary objection raises a pure point of law which if argued successfully results in the disposal of the matter at hand. Examples of pure points of law are issues touching on the jurisdiction of the court, plea of limitation of time and a party's *locus standi* to institute the suit. The objection is argued on the assumption that all the facts pleaded by the parties are correct. Where there is any dispute about the facts of the case a preliminary objection cannot carry the day. As was stated in **Oraro** (supra), a preliminary objection **“must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”**

52. A perusal of the respondents' preliminary objection and the evidence laid before the court in support of the same clearly demonstrates that the objection is based on contested facts. The issue before this court is whether the respondents have failed to comply with the law and regulations governing PhD studies. Such an issue cannot be decided without interrogating the evidence placed before the court by the parties. In short, what the respondents have placed before the court is not a preliminary objection as known to the law. In the circumstances, I find that the preliminary objection dated 29th November, 2019 is without merit and the same is dismissed.

53. The evidence placed before the court by the parties shows that on 14th July, 2017 the Director of Graduate School acknowledged the Petitioner's intent to submit her thesis and instructed her, inter alia:-

“You will also be expected to show evidence of either two (2) publications or acceptance of two (2) publications from a peer reviewed journal from your PhD work during your oral defence.”

54. There are also reports from the internal examiner and external examiner, and a Consolidated Report from the Board of Examiners. All the reports recommended that the Petitioner be awarded the degree of Doctor of Philosophy in Public Health once she made the corrections identified in those reports. The Petitioner's averment that she made the corrections was not controverted.

55. It is, however, noted that the respondents are indeed correct that Section 16 (2) of the University of Nairobi Act, Cap. 210 empowers the Senate of the University as follows:-

“(2) Notwithstanding the provisions of the Universities Act (Cap. 210B), the Senate shall have the following powers and duties—

(a) to satisfy itself regarding the content and academic standard of any course of study in respect of any degree, diploma, certificate or other award of the University and to report its findings thereon to the Council;

(b) to propose regulations to be made by the Council regarding the eligibility of persons for admission to a course of study;

(c) to propose regulations to be made by the Council regarding the standard of proficiency to be gained in each examination for a degree, diploma, certificate or other award of the University;

(d) to decide which persons have attained such standard of proficiency and are otherwise fit to be granted a degree, diploma, certificate or other award of the University;

(e) to initiate proposals relating to the conduct of the University generally, and to discuss any matter relating to the University and to make representations thereon to the Council;

(f) to make regulations governing such other matters as are within its powers in accordance with this Act or the statutes.”

[Emphasis supplied]

56. The respondents are also correct that before the award of a PhD degree the candidate should publish two papers in two refereed journals. That requirement is found in the 2014 Guidelines. Statute XXXIII which provides the common regulations for the degree of Doctor of Philosophy at page 133 (Paragraph 3.2.5 (ix)) also provides that:-

“During the Oral Examination, a candidate shall show proof of acceptance for publication of at least two papers to a refereed journal jointly with the supervisors. Such proof shall be recorded in the consolidated report and the publication or

evidence of acceptance forwarded to GS.”

57. The Petitioner averred that she fulfilled this requirement and her evidence is indeed supported by the Consolidated Report of the Board of Examiners where at page 2 it is stated that:-

“Candidate is congratulated for having published 5 papers in refereed journals and presenting one unpublished one.”

That the Petitioner had therefore published two papers in refereed journals was noted by the Board of Examiners as required by Statute XXXIII.

58. Despite the process followed by the Petitioner, the Senate deferred the Petitioner’s graduation. In an Internal Memo dated 9th September, 2019, the Director of Graduate School addressed the deans and directors of faculties, schools and institutes and centres as follows:-

“SUBJECT: VERIFICATION OF PUBLICATIONS AND JOURNALS

The Senate in its 212th and 213th meeting held on 1st and 14th August 2019 respectively, requested verification of the journals where PhD students had published their papers. Upon further guidance, it has been agreed that this information should be captured in the consolidated report.

It is a requirement that details of the publications and journals are captured in the Consolidated Report. In addition, verification of the journals should be done by the Board of Examiners and the following captured in the consolidated report;

- 1) Duration of the review process; from submission to acceptance for publication**
- 2) Members of editorial board and if members are from different regions and possess academic expertise for the scope of the journal**
- 3) The scope of the Journal on a particular field**
- 4) Has a website where all links are active and contains no spelling or grammatical errors**
- 5) Has regular issues**
- 6) It is indexed by renown bodies**
- 7) Publication fee is paid after acceptance of the paper**
- 8) The publishers email address is professional or journal affiliated (not non-professional ones such as gmail, yahoo)**
- 9) The author(s) retain the copy right of the article and right of use**
- 10) The published article(s) and journal(s) are accessible.**

Kindly ensure this is discussed in the Board of Examiners meeting, and the deliberations guided by the above are captured in the consolidated reports.”

59. The Petitioner’s case is that the said Internal Memo is not applicable to her thesis as the guidelines were issued long after she submitted her thesis and was cleared to graduate. The respondents did not offer much resistance to the Petitioner’s contention. They instead pointed to the “GUIDE FOR RESEARCHERS ON PUBLISHING IN HIGH IMPACT JOURNALS AND BOOKS: SCIMAGO AND OTHER PLATFORMS” issued by the 2nd Respondent’s Acting Director of Library and Information Services on 3rd August, 2019. The guidelines gave the criteria for determining predatory/questionable publishers or journals. The Petitioner once again states that the guidelines are not applicable to her.

60. It must be stated at this stage that the Petitioner’s claim that her thesis was rejected as a result of the application of the guidelines in the Internal Memo dated 9th September, 2019(also known as Journal Verification Criteria) is incorrect. I say so because Prof. Njenga annexed to her replying affidavit a document titled “CANDIDATES PUBLICATION JOURNALS CONSIDERED IN THE GRADUATE SCHOOL BOARD HELD ON TUESDAY AUGUST 20, 2019 AT THE PRESS ROOM, 5TH FLOOR, UON TOWERS (LIST 1)” wherein the name of the Petitioner appears as No. 4. The recommendation of the Graduate School Board against her two papers is that they do not meet the requirements. That the Petitioner was aware that her graduation had been deferred and knew the reason for the deferment is clear from her appeal to the 1st Respondent through her letter dated 29th August, 2019. She was appealing against the decision conveyed by the Director of Graduate School through the letter dated 26th August, 2019. Her allegation that the Internal Memo dated 9th September, 2019 was retrospectively applied to her thesis is therefore without merit. The document was published after a decision had been made by the University Senate that the Petitioner should not graduate.

61. As for the “GUIDE FOR RESEARCHERS ON PUBLISHING IN HIGH IMPACT JOURNALS AND BOOKS: SCIMAGO AND OTHER PLATFORMS” dated 3rd August, 2019, I find that the Petitioner did not establish that the respondents used the guidelines in

determining that she should not graduate. Nowhere in the documents placed before the court is there any reference by the Senate to the said document.

62. As correctly submitted by the respondents, the Senate of the 2nd Respondent is empowered by the law to award degrees from the institution. The respondents have submitted evidence to the court showing that the Petitioner was not allowed to graduate because she did not publish her papers in refereed journals. She cannot allege discrimination as she was not the only PhD candidate whose papers were rejected for not being published in refereed journals. Legitimate expectation cannot come to her aid in the circumstances of this case. She could only have a legitimate expectation if she had fulfilled all the requirements for the award of the degree. The Senate, exercising its lawful authority found that she had not done so.

63. The right to education cannot be exercised in a vacuum. One can only successfully claim violation of the right by demonstrating that he/she complied with the requirements but was nevertheless denied an opportunity to graduate. In this case, no such evidence was adduced by the Petitioner.

64. The Petitioner alleged that the respondents delayed her graduation from 2017 when she indicated that she was ready to submit her thesis. She has herself explained in her pleadings why it took long before she was examined by the Board of Examiners. She appeared not to have complied with the procedure for submitting her thesis. She cannot now turn around and blame the respondents for the delay.

65. It is clear from the evidence placed before the court that the respondents deferred the Petitioner's graduation due to her failure to publish two papers in refereed journals as required by the rules and regulations of the 2nd Respondent. The Senate of the University of Nairobi is the only organ mandate by law to determine if a candidate has met the standard of proficiency befitting the award of a degree. In exercising its powers, the Senate can cross-check, as it did in this case, whether the journals in which papers were published by the PHD candidates were refereed journals. The Petitioner's claim of violation of constitutional rights in such circumstances cannot stand.

66. In view of what has been stated in this judgement, the only logical outcome is that the Petitioner's case has no merit. The petition is therefore dismissed with no order as to costs.

Dated, signed and delivered at Nairobi this 16th day of December, 2019.

W. Korir,

Judge of the High Court