REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CONSTITUTIONAL PETITION NO. 4 OF 2017

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF APPLICATION FOR ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 19, 20, 21, 22(1)(2), (B) 23, 43(1)(F), 46, 47, 73, 258 AND 259 OF THE CONSTITUTION OF KENYA,2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 28, 43, 46, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE UNIVERSITIES ACT NO. 42 OF 2012

BETWEEN

MICHAEL NG'ALU MUTIE.....1ST PETITIONER

DOMINIC MUNYWOKI MAINGI.....2ND PETITIONER

ELVIS WILLIAM NDISYA.....3RD PETITIONER

FLORENCE NDUKU REUBEN.....4TH PETITIONER

PENINAH KILOKO MUTISO.....5TH PETITIONER

CHURCHILL M. KIMINZA*[Suing on their own behalf and on behalf of all other post graduate students of South Eastern Kenya University (SEKU) summarily deregistered on account of alleged failure to satisfy the entry criteria policy of the University]***.....6TH PETITIONER**

-VERSUS-

SOUTH EASTERN KENYA UNIVERSITY.....1ST RESPONDENT

PROF. CORNELIUS WANJALA.....2ND RESPONDENT

THE DIRECTOR, SEKU, MTITO ANDEI CAMPUS.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

JUDGEMNT

INTRODUCTION

1. The petitioners are Kenyan Citizens by birth and post-graduate students at the South Eastern Kenya University, Mtito Andei Campus undertaking a Doctor of Philosophy programme (PhD) in Educational Administration and planning.

2. The 1st respondent, South Eastern Kenya University (SEKU) is a body corporate established under the provisions of the Universities Act 2012 with a mandate to provide both under graduate and post graduate education in Kenya.

3. The 2nd respondent is the director, Board of graduate studies at SEKU.

4. The 3rd respondent is the director of SEKU, Mtito Andei campus.

5. The 4th respondent, the Hon. Attorney General is the principal legal advisor to the Government of Kenya and in that capacity is vested with legal authority to defend any suit against the Government.

DIRECTIONS

6. The petitioners were represented by learned Counsel Mr. Mung'ata and the 1st 2nd and 3rd Respondents were represented by learned Counsel Mr. Mutua. There was no appearance for the Hon. Attorney General. The Court gave directions on 5th October 2017 to the effect that the petition would be canvassed by way of written submissions and affidavits. Accordingly, the parties complied and the written submissions were highlighted on 16th May 2018.

THE PETITIONERS' CASE

7. The petitioners instituted this suit through a petition dated 25th April 2017 and supported by the affidavit of the 1st petitioner, Michael Ng'alu Mutie. The 1st petitioner obtained the relevant authorization from his co-petitioners to act on their behalf and sign such documents and swear such affidavits as would be necessary to support the petition.

8. The petition seeks the following reliefs;

a) A declaration be issued that the petitioners' right to fair administrative action which is lawful, reasonable and procedurally fair under Article 47 of the Constitution has been violated by the respondents.

b) A declaration that the respondents' actions have violated the petitioners' rights to education and gainful economic activities as protected by Article 43 of the Constitution.

c) A declaration be issued that the respondents' action in deregistering the petitioners from the Doctor of philosophy program without following the due process of the law is in violation of the petitioners' rights to participate in a transparent and accountable decision making process as enshrined in Article 10 of the Constitution.

d) An order of permanent injunction be issued to restrain the respondents through or by actions or omissions from deregistering the petitioners as Doctor of philosophy candidates or in any manner preventing them from continuing as candidates in the courses they have been admitted to.

e) An order of mandatory injunction be issued to compel the first respondent, SEKU, to withdraw the letter of deregistration served on the petitioners and to rescind any other communication or decision withdrawing the petitioner's admission to the Doctor of philosophy course at SEKU.

f) An order for compensation of the petitioners by way of damages for the violation of their rights and freedoms under Articles 27, 28, 43, 46, 47 and 50 of the Constitution.

9. The petitioners aver that on diverse dates between January 2013 and 2014, they were legitimately admitted as PhD students at SEKU, Mtito Andei campus and that since admission; they have complied with all the conditions of admission imposed by SEKU.

10. That they have covered all the course work and substantive portions of research work and that some of the petitioners have nearly completed the doctoral course and would have been eligible to graduate in March 2017.

11. That on 20th March 2017, they were issued with deregistration letters revoking their admission allegedly on grounds that they did not meet the minimum requirements as per the university's policy in force.

12. It is their contention that they were not afforded an opportunity to participate in the process through which the decision to deregister them was arrived at contrary to the rules of natural justice.

13. Further, they contend that the respondents have violated their fundamental right to fair administrative action in that the decision to

deregister them was not reached in an expeditious, efficient, lawful, reasonable and procedurally fair manner as provided for in Article 47 of the Constitution.

14. It is submitted that Article 47 of the Constitution codifies every person's right to fair administrative action. Thus, a person whose interests and rights are likely to be affected by an administrative action has a Constitutional right to be given a hearing before any adverse action is taken.

15. The Petitioners rely on the case of **Kenya Human Rights Commission v Non-Governmental Organisations Co-Ordination Board [2016] eKLR** where the Court stated as follows:-

> ***"…The right to fair hearing is evidently closely intertwined with fair administrative action .The often cited case of Ridge v Baldwin [1964] AC 40 restated the right to fair hearing as a rule of universal application in the case of administrative acts or decisions affecting rights. In his speech to the House of Lords in 1911, Lord Loreburn aptly put is as a 'duty lying upon everyone who decides anything' that may adversely affect legal rights."***

16. They have also cited the **Halsbury Laws of England, 5th Edition 2010 Vol. 61** at **para 639** where it is stated as follows:

> ***"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."***

17. It is further submitted that failure to give reasons for the de-registration to the petitioners is a violation of Article 47(2) of the Constitution.

18. It is submitted that the respondents have not controverted the petitioners' contentions and only appear to be shifting blame to the Commission for University Education (CUE). That there is no privity between the deregistration and the recommendations purportedly made by CUE in it's Quality and Audit Inspection Report made on SEKU.

19. It is submitted that SEKU's policy document which sets out the entry requirements for the Doctor of philosophy degree was developed in December 2016. It is therefore the petitioners' contention that having been admitted to the university way before the policy was developed or approved, the said policy does not have the force of law and even if it does, it cannot apply retrospectively to their detriment.

20. It is also submitted that the petitioners' right to legitimate expectation was violated in that upon being admitted to pursue the PhD programme, there was a promise by construction that SEKU would meet it's end of the bargain by awarding doctoral degrees to the petitioners.

21. They rely on the Supreme Court case Of **Communications Commission of Kenya & 5 others –vs- Royal Media Services Ltd & 5 others (2014) eKLR** where the Court at paragraph 263 stated as follows;

> ***"[263] Legitimate expectation is a doctrine well recognized within the realm of administrative law as is clear from the English case, in re Westminister City Council (1986)CA 668 at 692 (Lord Bridge)***
>
> ***"…the Courts have developed a relatively novel doctrine in pubic law that a duty of consultation may arise from a legitimate expectation of consultation aroused either by a promise or by an established practice of consultation"***
>
> ***"[264]…legitimate expectation applies the principle of fairness and reasonableness to the situation in which a person has an expectation or interest in a public body retaining a long standing practice or keeping a promise"***
>
> ***"[266] Wade and Forsyth in their work, Administrative Law, 10th ed [pages 446-448] discusses the relevant legal principles in legitimacy of an expectation….it must be founded upon a promise a practice by the public authority.***

22. On their part, the 1st 2nd and 3rd respondents *(herein after 'the respondents')* submit that at the time of admission, SEKU assessed the petitioners' qualifications on the basis of Executive Masters Degrees.

23. That in the course of the PhD programme, CUE conducted an audit of all the universities in Kenya and noted *inter alia* that contrary to it's regulations, some universities had admitted students for PhD programmes on the basis of Executive Masters Degrees. Consequently, CUE reiterated that such admissions were not recognized and that the students in those PhD programmes were not allowed to teach in any university in Kenya.

24. The respondents further submit that it is on the basis of the findings and recommendation by CUE that SEKU wrote to the petitioners revoking their admission to the PhD programme.

25. According to the respondents, they only communicated a decision that was made by a regulatory body i.e. CUE. It is their contention that the petitioners were aware that the decision to deregister them was made by SEKU in compliance with a regulatory requirement by CUE.

26. The respondents submit that even if the petitioners were to succeed in the suit and eventually get the PhD degree, such a degree will be of no use as it is not recognized by the regulator.

27. Further, the respondents submit that CUE is a creature of the Universities Act and has a statutory duty to regulate university education in order to ensure that such education is of good quality, equitable and relevant.

28. The respondents also submit that the letters of admission indicate that SEKU reserved the right to recall or revoke the admission if it established that the petitioners were not qualified for such admission. They however admitted that the original decision to admit the petitioners to the PhD programme was erroneous and that SEKU's senate had acted within it's mandate by recommending that the petitioners be discontinued from the programme. According to the respondents, this was a necessary action in order to correct the errors.

29. The respondents rely inter alia on the case of **Eunice Cecilia Mwikali Maema –vs- Council of Legal Education and 2 others (2013)eKLR** where the Court of Appeal determined the powers of a regulatory authority as follows;

> ***"We are also of the view that the learned Judge correctly applied the principle in the decision in Susan Mungai –vs- the Council of Legal Education petition No. 152 of 2011 to the effect that the council has the power to set standards to ensure that the highest professional standards are maintained in the profession and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the regulations."***

30. I have looked at the pleadings and all the annextures, the rival submissions together with all the cited authorities and it is my considered view that the issues for determination are;

a. Whether SEKU could legitimately admit the petitioners to pursue the PhD degree?

b. Whether the petitioners' right to fair administrative action was violated?

c. What is the order as to costs?

LEGITIMACY OF THE PETITIONERS' ADMISSION.

31. I note from the submissions that the respondents seem to be blowing hot and cold. On one hand, they admit that there were errors on their part; on the other hand, they tend to shift the blame to CUE.

32. I will start with the issue of accreditation. 'Programmes accreditation' is defined in the **Universities Act, No. 42 of 2012** as "the process by which the Commission formally recognizes an academic programme of a University, including a foreign university. In the **Universities Regulations 2014,** 'accreditation' means the procedure by which the Commission formally recognizes an institution or an academic programme of a university.

33. Regulation 48(1) provides that 'Universities shall submit all their academic programmes to the Commission for accreditation.' 48(5) 'A chartered university may develop and mount new academic programmes and shall submit the same for review within six months to the Commission in accordance with programmes standards.' SEKU is a chartered university as can be discerned from the CUE: Quality Audit Inspection Report of February 2017. *(herein after 'the SEKU audit report')* The charter was awarded on 1st March 2013.

34. According to the report, out of the 8 Doctoral programmes on offer at SEKU, only one *(PhD in Dryland Resource Management)* had been accredited by CUE. The other seven had been approved by senate and were in the process of being submitted to CUE. The SEKU audit report went on to recommend as follows; *"All the academic programmes should be submitted to CUE for accreditation before they are launched in conformity to the Universities Act 2012 amended 2016"*

35. As much as a chartered university has the leeway to mount and develop new academic programmes, the regulations make it mandatory for those programmes to be submitted to CUE for approval within 6 months. The petitioners were admitted to pursue one such programme in the years 2013/2014 and by the time the audit was being conducted in 2017, the programme had not yet been submitted. Some of the petitioners allege that they were due for graduation in March 2017. This raises the question as to whether SEKU had the capacity to award a Doctoral degree in a programme which had not been accredited by CUE. Certainly not.

36. SEKU, being a chartered institution of higher learning, the perception from students seeking to advance their studies, and rightly so, is that all the programmes being offered are compliant with the requirements of the relevant laws and regulations. I would place it in the same position with a professional Doctor who by virtue of his expertise is expected to discharge his duties with diligence.

37. He owes his patients a duty of care and is fully aware that a breach of that duty will make him liable in negligence. Rarely will you find patients ascertaining the qualifications of medical practitioners before submitting themselves to their care. Actually, some are usually in dire conditions and cannot afford such luxury. Similarly, you will hardly find students going the extra mile to ascertain whether the programmes being offered in universities have been accredited.

38. The long and short of the foregoing is that SEKU could not legitimately admit the petitioners to pursue the PhD degree.

39. With regard to the executive masters degree, which all the petitioners hold and which formed the basis of their admission to pursue the PhD programmes, the CUE audit report of all the universities in Kenya dated 16th February 2017 *(herein after 'the general report')* noted that there were reported cases of admission to PhD programmes for holders of Executive Masters Degree. It went on to recommend that all

such admissions and subsequent awards would not be recognized and the holders would not be allowed to teach in universities in Kenya.

40. The general report was of course reiterating the provisions of the **'Universities Standards and Guidelines 2014'. Regulation 5** thereof which provides that;

> ***Executive degrees shall;***
>
> ***a) Only be offered at masters level to applicants holding management positions in industry,***
>
> ***b) Be a terminal degree that does not qualify the holder to teach all the universities or gain entry into a doctoral programme.***
>
> ***c) Be open only to candidates who meet the minimum entry for a masters degree.***
>
> ***d) All the requirements for a masters degree shall apply save for thesis/dissertation which will be a project.***

41. It is common ground that the petitioners were admitted to pursue the PhD programme before the **'Universities Standards and Guidelines 2014'** came into force. The petitioners' argument is that, having come after the admission of the petitioners, the guidelines cannot have retrospective effect.

42. My view is that, having already opined that the petitioners' admission was flawed due to the fact that their PhD programme is yet to be accredited by CUE, I see no need of interrogating the issue further.

RIGHT TO FAIR ADMINISTRATIVE ACTION

43. Article 47 of the Constitution recognizes every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. An **'administrative action'** is defined by the **Fair Administrative Action Act, No. 4 of 2015** to include;

> ***a) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or***
>
> ***b) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.***

44. SEKU mounted an academic programme *to wit* Doctor of Philosophy *(Educational, Administration and Planning)* and even admitted students to pursue it for the 2013/2014 academic year. By the time the audit team from CUE went calling in 2017, that academic programme *inter alia* was yet to be submitted for accreditation. Despite the clarity in the regulations that submission of new academic programmes should be done within 6 months, SEKU continued to sit pretty and I say this because no explanation has been offered as to why accreditation was not sought within the timelines provided.

45. In my view, the act of 'mounting an academic programme' is a power conferred upon the SEKU senate and this squarely places it within the definition of an administrative action. Being in charge of all the academic affairs, the SEKU senate is duty bound to ensure that all the academic programmes are accredited within the shortest time possible after launching.

46. Failing to obtain the relevant accreditation for the programme that was being pursued by the petitioners is in my view, an omission which is detrimental to the petitioners and as such, and a violation of their right to fair administrative action. In fact, SEKU treated the issue so casually that some of the candidates were due for graduation in a programme which is yet to be accredited by CUE.

47. The deregistration letters issued to the petitioners in March 2017 are worded in part as follows;

> ***"…it has been confirmed that you do not meet the minimum admission requirements for the Doctor of Philosophy in Educational Administration and planning as per the University admission policy in force."***

48. The University admission policy was developed in December 2016 yet the guidelines which informed a substantial part of it's content were formulated in 2014. So, did SEKU suddenly wake up to the realization that the petitioners were no longer qualified because they were admitted on the basis of executive degrees? Actually, I think what happened is that SEKU got wind of an impending audit by CUE and it decided to quickly formulate a policy so that it would appear compliant, otherwise, it really does not add up that the policy was developed in December 2016 and the audit was conducted one month after.

49. Be that as it may, SEKU was duty bound to inform the petitioners about the status of their qualifications as soon as the guidelines were formulated. It waited for more than two years to bring it to the attention of the petitioners and all this while, the petitioners continued to invest time, money and other resources into the programme. In my view, it was too little too late for SEKU to argue that the admission letters contained a disclaimer to the effect that "the petitioners qualifications were subject to verification by university authorities".

50. Nothing in that disclaimer negated the duty imposed on SEKU to accord procedural fairness to the petitioners, inform them about the effect of the guidelines on their qualifications expeditiously and generally be reasonable in the way they handled the whole issue. The foregoing omissions in my view demonstrate that the petitioners' rights to fair administrative action were violated.

51. I have looked at the deregistration letters issued to the petitioners and it is evident that they do not have reasons as to why their

admissions were revoked. SEKU ought to have concisely communicated the minimum admission requirements which the petitioners did not meet regard being paid to the fact that a considerable amount of time had passed since their admission. Further, the petitioners had even done some pre-qualifying courses because their admissions were based on executive masters degrees.

52. SEKU's conduct must have led the petitioners to believe that they were compliant, otherwise, I do not think it would have been business as usual if they had the slightest idea that all their labour and effort was in vain. Failure to give reasons was a violation of the petitioners' right to fair administrative action.

53. Having opined that there was a violation of rights, what reliefs are the petitioners entitled to? In the case of **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012,** as was cited in **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR,** it was held by a majority as follows:

> ***"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her."***

54. The order of permanent injunction sought by the petitioners is in my view not practical. The regulator i.e. CUE recommended in no uncertain terms that it would not recognize any PhD degree issued on the basis of an executive degree. Of what use will such a degree be to the petitioners? There is a plethora of authorities to the effect that orders should not be granted in vain. The Court of Appeal in the case **ERIC V. J. MAKOKHA & OTHERS -VS- LAWRENCE SAGINI & OTHERS CIVIL APPLICATION NO. NAI. 20 OF 1994 (12/94 UR)** stated:-

> ***"There is one other reason on which the order of injunction granted in that case could be questioned. An application for injunction under Rule 5(2)(b) is an invocation of the equitable jurisdiction of the Court. So its grant must be made on principles established by equity. One of it is represented by the maxim that equity would not grant its remedy if such order will be in vain. As is said, "Equity, like nature, will do nothing in vain. On the basis of this maxim, courts have held again and again that it cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. If it will be impossible to comply with the injunction sought, the Court will decline to grant it."***

55. In the circumstances of this case, the remedy which seems most reasonable is an award of damages.

56. Having looked at the annextures, I am convinced that the petitioners have covered all the coursework and substantive portions of research work at great expense in time, effort, industry and finances. The petitioners claim to have spent an average of Kshs. three million each.

57. However, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See **National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR, Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur)**. In the latter case this Court was emphatic that;

> ***"… It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. …"***

58. The petitioners neither pleaded nor proved the amount spent in the course of pursuing their Ph.D course. They only stated that on average they spent about Kshs. 3milions each.

59. The claim of three million falls in the realm of special damages and it is trite that they must be specifically pleaded and strictly proved. In the absence of that, it is my view that the Court's discretion to award a global sum is unfettered.

60. In the case of **TITUS BARAZA MAKHANU –Vs- PC SIMON KINUTHIA GITAU and three others (2016) e KLR** ,the claimant was awarded kshs.250,000/= for violation of his right via assault inter alia while in custody. In **Const Pet No 3 of 2017 Makueni James Gichuki and another -Vs- Makueni County Sand Conservation And Utilization Authority** the petitioners were awarded Kshs. 250,000/= each for violation of their rights via assault and detention of their Lorries.

CONCLUSION

61. In sum the court makes a finding that, the petition has merit thus court makes the following orders;

a) Prayers a, b, and c are granted.

b) Prayers d and e denied.

c) Under prayer (f) damages for violation of rights are awarded @ Kshs. 250,000/= for each Petitioner.

d) Petitioners at liberty to pursue expenses incurred in pursuit of their Ph.D. course with SEKU.

e) Costs to the Petitioners.

SIGNED, DATED AND DELIVERED THIS 6TH DAY OF JULY 2018, IN OPEN COURT.

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C KARIUKI

JUDGE