



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL & HUMAN RIGHTS DIVISION**

**PETITION NO. 256 OF 2011**

**DENNIS KAHARA NYABURUGINI.....PETITIONER**

**AND**

**REGISTRAR OF ACADEMIC AFFAIRS,**

**TECHNICAL UNIVERSITY OF MOMBASA.....RESPONDENTS**

**RULING**

**The Application**

1. By the Notice of Motion dated 22<sup>nd</sup> October, 2018 which is premised on the petition herein also dated 22<sup>nd</sup> October, 2018 the Petitioner seeks an order of this court that the respondent admit the petitioner in Technical University of Mombasa immediately. The application is premised on the grounds that education is a constitutional right of the Petitioner and that the Petitioner has met all the requirements to be in class.
2. The Petitioner's case is that he was admitted to the Respondent University vide the University's letter dated 14<sup>th</sup> September, 2018 to undertake a degree course for Bachelor of Science in Civil Engineering.
3. The Petitioner subsequently planned and took all steps to register in time but due to a multiplicity of inconveniences, the Petitioner was not able to achieve the registration within the time stipulated by the letter of admission. That time was between 3<sup>rd</sup> September, 2018 to 7<sup>th</sup> September, 2018.
4. Among the factors which are alleged to have impeded the Petitioner from registering in time were the fact that he was attacked and lost all his valuables including the educational certificates while he travelled to the Respondent University. The Petitioner's registration was further delayed by the Kenya National Education Council (KNEC) who failed to confirm the Petitioner's grade on time.
5. The above limitations notwithstanding the Petitioner paid all the fees required and obtained all the requirements. However, at the point of registration the Respondent denied the Petitioner the registration on the basis that the classes had begun and it would not be easy for the Petitioner to catch up. The Petitioner was then asked to apply for registration for the next academic year.
6. The Petitioner's case is that the University has unlawfully denied him a chance to register despite meeting every hurdle and despite accepting his fees and other charges. It is on these grounds that the current application has come to court to vindicate the allegedly breached educational rights of the Petitioner.

**The Response**

7. The Respondent opposed the motion through Notice of Preliminary Objection filed on 25<sup>th</sup> October, 2018 on the grounds that the motion and the entire petition are incompetent, fatally defective and bad in law. The second ground is that the Respondent is not a legal entity in the eyes of the law and he lacks capacity to be sued in his own name.
8. The Respondent also filed a Replying Affidavit sworn by Dr. Paul Njihia Gichuhi on 25<sup>th</sup> October, 2018.

9. The Respondent's case is that they were not responsible for the delay in registration experienced by the Petitioner. On their part the University even extended the registration period to 24<sup>th</sup> October, 2018. However, the Petitioner was not able to make it. Subsequently, the Respondent advised the Petitioner to defer registration until the next academic year. This was so because the University could not register the Petitioner on 24<sup>th</sup> October, 2018 when he presented his Registration documents because:

- (a) The Petitioner was admitted for the Program of Bachelor of Science in Civil Engineering, the classes for which Program began on 13<sup>th</sup> September, 2018.
- (b) Currently, the academic semester for the program is in its eighth week.
- (c) The Total length of the current semester is fourteen weeks.
- (d) The Petitioner has already missed more than 50% of attendance.
- (e) Provision 6.3(xx) of the University Academic Manual provides that a student SHALL NOT be allowed to sit for exams without attending at least two-thirds of the lectures and all practicals.
- (f) Students who were enrolled for the program have already done their Continuous Assessment Tests (CATs) and practicals for the semester. The Petitioner has already missed all the Continuous Assessment Tests for this semester.
- (g) Provision 6.3(ix) of the University Academic Manual provides that students who fail to take a Continuous Assessment Test(s) and/or practical(s) shall be awarded a zero and shall be required to repeat the Course unit.
- (h) The Program which the Petitioner was admitted for is governed by the Engineers Board of Kenya Regulations which require that a student must have a minimum of 45 contact hours per unit. It is impossible for the Petitioner to meet that requirement if he is admitted at this point of the semester or academic year.
- (i) Consequently, the Petitioner has, at his own fault, missed more than half of the lectures for this Semester, missed Continuous Assessment Tests, missed the required threshold for minimum contact hours per unit and thus if he were to be Registered now, he would be ineligible to sit for exams or proceed to the next semester.

10. The Respondent further states that it is impossible to register the Petitioner at this present moment because the Petitioner is a Government funded student; the University has already submitted returns for all Government-sponsored students to the Universities Funding Board for the Board to release funds. The Respondent states that this exercise is only done once per semester at the close of registration and thus if the Petitioner was to be admitted now, way beyond the deadline, there would be no funds to cover his studies. It is further argued that it would be illogical and counter-productive for the University to admit a student who at the end of the day will not be able to meet the minimum thresholds set for class attendance since the student is already ineligible to sit for this semester's exams and he will not be eligible to move to the following semester; that it would be unfair for the University to be forced to register a student who is Government-sponsored yet the Universities Funding Board will not disburse the funds to cater for his studies during the current academic year due to the Petitioner's own fault of late registration; that due to the large number of students who have already missed the extended deadline for registration, an order directing the University to register the Petitioner out of the statutory time will open a Pandora's box for other students who equally failed to register on time to demand that the University registers them well beyond the statutory deadline. It was further argued that the Petitioner's circumstances of late registration are not unique as other students who were denied registration because of the deadline have already applied for and obtained deferment to the next academic year.

### **Submissions**

11. The Petitioner was unrepresented while the Respondent is represented by Mr. Ngoya. Parties made brief oral submissions on 16<sup>th</sup> October, 2018 in support of their position stated above. I have carefully considered those submissions and the motion.

### **Determination**

12. In my view the only issue for determination is whether or not ordering the admission of the Petitioner to the said University at this stage is in the interest of the Petitioner (Applicant). The Petitioner is a young scholar who is just about to engage in his educational career. He is also expected to be fairly emotional about the denial of admission at this stage. Having come all the way from Limuru, and having met the requirement for admission and even made requisite payments, the denial of admission must have come to him as a shock. The fact that he does not have parents in Mombasa further compounds the matter.

13. This court is alive to the emotional turmoil the Petitioner is going through. The decision to be made by this court will therefore have that in mind. This court must also consider the effects of allowing a scholar to commence classes when the rest of the class are at least six weeks ahead. This is a weighty matter and comes at two levels.

14. The first level is whether or not the Petitioner, if allowed to register, will be able to catch up with his class work. The Petitioner has assured this court that he will be able to catch up. This court has no doubt that the Petitioner is a bright student and could actually catch up in his studies in due course.

15. The second level is rather technical. This concerns the legal requirements on attendance of class, contact hours, and professional minimums for a student to be allowed into the profession. Mr. Ngoya drew the attention of the court to these requirements contained in

paragraphs 10-18 of the Replying Affidavit of Dr. Paul Njihia Gichuhi.

16. This court may have something to say about these technical legal requirements. They are provisions of the law which every student must comply with. The grim consequence they carry is that if they are ignored a student can go through the motion of study, only to be disqualified at the end of the year or at the end of the course for failure to meet them. Where a student is required to meet particular contact hours, it is not enough that the student is bright enough to catch up with other students in class. The failure to meet the requisite contact hours can lead to disqualification. More importantly, the student may be disqualified from entering the relevant professional body.

17. These are issues which the Petitioner cannot understand at this stage. He needs the cool mind of an adult with experience to internalize and understand them. The duty of the court is to be that cool, adult, reasonable mind. The decision to be made by this court must be the one which ultimately is in the interest and benefit of the Petitioner, even if at this time he can hardly appreciate it.

18. This court understands the pain that the Petitioner is undergoing. However, that pain will be eased only if the right decision is made to help the Petitioner. I cannot allow the Petitioner to start his academic career on a faulty note. If that is allowed, he will probably be faulted for not achieving the requisite contact hours with the professors. Even if he passes that, there will be a doubt as to whether he will meet the professional requirements to join the profession for which he would have studied.

19. It is better to err on the side of caution, than to proceed headlong to an abyss whose depth is uncertain on the basis of a "right". Choosing to err on the side of caution, I decline to order the University to admit the Petitioner. Instead, I direct the Respondent University to defer the admission for the next academic year.

20. In that regard I make the following orders:

(a) **The motion before the court is dismissed.**

(b) The Respondent shall avail to the Petitioner the deferment forms to apply for deferment to the next academic year.

(c) The Respondent shall pursuant to order 2 above provide the Petitioner with a letter of offer of a place within 90 days from today.

(d) This matter will be mentioned on 13<sup>th</sup> February, 2019 to confirm compliance above, and to close or record a settlement on the petition herein.

Orders accordingly.

**Dated, Signed and Delivered at Mombasa this 13<sup>th</sup> day of November, 2018.**

**E. K. OGOLA**

**JUDGE**

In the presence of:

Petitioner in person (Guardian)

Mr. Ngoya for Respondent

Mr. Kaunda Court Assistant