



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO.79 OF 2018

IN THE MATTER OF: ORDER 53 RULE 5 OF THE CIVIL PROCEDURE RULES

2010

AND

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

LAZURUS AWALA ASEWE.....EX PARTE APPLICANT

VERSUS

TECHNICAL UNIVERSITY OF MOMBASA.....RESPONDENT

RULING

The Applicant

1. The Notice of Motion application dated 7. 12. 18 was filed pursuant to leave granted on 6. 12. 18 to the Ex parte applicant to commence Judicial Review proceedings. The motion prays for the following orders:

(a) An Order of Prohibition do issue, prohibiting the Technical University of Mombasa from purporting to proceed with the graduation ceremony scheduled for 19. 12. 2018, without the including of the applicant's name to the list of grandaunts

(b) An Order of Mandamus do issue compelling the Technical University of Mombasa to include the name of the applicant herein in the list of grandaunts scheduled to graduate on 19. 12. 2018

(c) A Direction that the hearing of this application for judicial review be expedited.

(d) THAT this Honourable Court do stay **of the conduct by the** respondent herein of the graduation ceremony scheduled to take place on 19. 12. 2018 pending hearing and determination of this application

(e) An order for costs

2. The Motion is premised on the grounds set out therein and is supported by verifying affidavit of the applicant sworn on 07. 12. 18.

3. In brief the Ex-Partes Applicant's case is that he joined the Technical University of Mombasa, the Respondent herein, in the year 2010 as a BSC. Civil engineering student when the same was a polytechnic college operating under the name and style of Mombasa Polytechnic University College. Following an enquiry to the Respondent as to why he failed to graduate, the Respondent replied through an email dated 11. 04. 2016 with a letter from the Chairman of the Building and Civil engineering Department dated 01. 04. 2016 attached to the said email. In the said letter dated 01. 04. 2016, the Respondent stated failure in some of the academic units in year 3 and 4 of the course, that is Calculus IV (**SMA 2370**) and Theory of Structures VI (ECE 2416) as the reason as to why the applicant did not graduate

4. In an email from respondent through the Deputy Vice-Chancellor, academic Research and Extension, dated 01. 05. 2016, the applicant was advised to retake the two Units, that is, Calculus IV (**SMA 2370**) and Theory of Structures VI (**ECE 24616**) a precondition to the award of

his degree. The applicant states that he has since retaken and passed the said two Units. (He attached copy of the email dated 01. 05. 2016 as well as year 3 and 4 results dated 16. 02. 2018 and marked as "LAA-2")

5. The applicant has also since cleared pending school fees balance of amount of Kenya Shillings Thirty Seven Thousand only. He attached a copy of a bank receipt dated 10. 09. 2018 and marked as "LAA – 3"

6. Despite the above the Applicant has learnt that the Respondent has misplaced part of his year 5 results. Several attempts to have the same addressed have been fruitless. He has since followed up the matter to

have his name enlisted as a graduand on 19. 12. 2018 to no avail

7. The Applicant's current employer has since offered to fund the Applicant's MSC Civil Engineering on a precondition that the Applicant graduates this year. As such the Applicant states that he stands to lose the said opportunity should he not be in a position to graduate by the end of this year. This fact is known to the Respondent.

The Response

8. The Application is opposed by the Respondent vide a Replying affidavit sworn on by John Chege on 11. 12. 2018.

9. The Respondent's case is that the Ex-Parte Applicant is not eligible to graduate in the forthcoming graduation ceremony of the Respondent University scheduled for 19th December 2018 because he did not undertake and finish his studies in accordance with the University Rules. That according to the University Rules, a student can only proceed to his final year of study after passing all units taken in the preceding year(s) of study. This is a fact all students are aware of and the same is contained in the Student's Handbook. The Respondent states that the Ex-parte Applicant was admitted to the Respondent University in 2010 when the institution was then known as the Mombasa Polytechnic University College. The applicable Students' Handbook is therefore the one issued by the Mombasa Polytechnic University College. At Clause 4.1 (e) at page 17 of the said Students' Handbook, it is clearly provided that in order to proceed to the final year of study, a candidate must have passed all units taken in the preceding year(s) of study. The Respondent's case is that the Ex-parte Applicant had supplementary in Calculus IV (SMA 2370 in his 3rd year of study and another supplementary in Theory of Structures **VI (ECE 2416)** in his 4th year of study. The Ex-parte Applicant could not therefore proceed to the 5th year which was his final year of study before passing the said two units of 3rd year and 4th year of study respectively. It was not until September 2017 that the Exparte Applicant sat for and passed the two supplementary examinations. This was after he had purported to proceed to his 5th and final year of study in 2015 without passing **ALL** the units. The Respondent avers that contrary to the University Regulations, the Ex-parte applicant irregularly and unprocedurally proceeded to his 5th and final year of study without passing all the units taken in his 3rd and 4th years of study. This was unacceptable and is an irregularity known in the University parlance as "**illegal progression.**"

10. It is for the reason of illegal progression that Ex-parte Applicant has not satisfied the requirement of the Senate of the award of his degree and he therefore is not qualified to graduate and his name cannot be included in the 2018 list of graduands. Further, the Ex-parte Applicant's results for the 5th year were not approved by the Senate in its sitting held on 10th September 2015 for the reason of illegal progression. Thus, the results were returned from the Senate with the remarks "**WITHHOLD**" which implied that the same were not available to be released to the Ex-parte because he was not qualified to proceed to 5th year or sit for the said examinations.

11. The Respondent's case is that in accordance to the Ex-parte Applicant's transcript produced by himself in court, he was only cleared to "proceed to year five semester one" after he passed all the units for his 4th year of study. It is claimed that the Ex-Parte Applicant was made aware that he could not proceed to 5th year without first clearing the units for his preceding years of study in 2016 by the Registrar of Academic Affairs together with the Dean of the Faculty of Engineering and Technology. He was warned that this studies would be discontinued if he did not comply by clearing the pending units. However, instead of complying, the Ex-parte Applicant kept on pleading with the University to bend the rules and exempt him from the units in which he had the supplementary on the basis that he did not have the academic acumen to pass those units.

12. The Respondent claims that despite knowing the right communication channels through which to direct his grievances the Ex-Parte applicant chose to communicate with unqualified officers, who evidently misdirected him by failure to communicate to him the official policy of the University on the issue. These officers included **ESTHER NJOKI AND EZRA WEKESA** who only serve the University in the capacities of a Technologist and Teaching Assistant respectively, but from whom the Ex-parte applicant purported to get official communication displayed in proceedings herein. The fact that **ESTHER NJOKI EZRA WEKESA** were not authorized to make any official communication to the Ex-parte Applicant is clearly demonstrated by the fact that the duo used their "**gmail**" email addresses instead of the official University emails. Their emails were authored in their individual capacities and cannot be used in court as the official communication from the University.

The Respondent states that Senate is the University organ mandated to approve students for the award of degrees and if the requirements of the academic programme are not met by the students such students cannot graduate

Submission

13. Parties made oral submissions on 11. 12. 18. Due to the urgency of the matter I reserved a ruling for 14. 12. 18. In my view the issues for determination are:

- 1) Whether the issues complained of can be determined through judicial Review proceedings.

2) Whether the court can compel the Respondent to admit the applicant to the graduation roll.

14. Due to constraint of time I will be brief in determining the said issues.

As for the first issue, I have considered the application and the response. The finding of whether the applicant has duly qualified to be on the grandaunt Roll on 19. 12. 2018 is in my view a seriously contested issue. Whether or not the applicant has qualified in accordance with the University Rules and regulations, and whether or not he is entitled to graduate are issue of serious evidence which cannot be determined in Judicial Review Proceedings. Whether the applicant unprocedurally proceeded to his 5th year and final year of study, and whether he suffers what is called "**illegal progression**" are matters of evidence. It is trite law that where a court has to resort to evidence, then Judicial Review process would not be the appropriate forum. Indeed without evidence I do not see how I can reach a decision herein on the basis of the pleadings and the affidavit.

15. On the second issue, it is also trite that even where a meritorious submission is made for Judicial Review remedies, a court of law may still not grant the same if the court is of the view that the said remedy would not be the proper remedy to make. I could be satisfied with the applicant's case, but I may not feel that the Court should issue a mandamus order to compel the Respondent to admit the applicant to its Roll of grandaunts for 2018. The court should not unduly interfere with the internal running of the learning institutions unless there are valid reasons. At the end of the day the Respondent University is self-responsible for the quality of its degrees and awards, and a court cannot purport to force it to qualify a candidate who has not qualified pursuant to the laid down procedure. I hasten to add that qualification for graduation, in cases where there are doubts, would still be determined under a court process which admits evidence for that determination. Under the circumstances I cannot compel the Respondent to admit the applicant to the Respondent's graduation Roll for 2018 until I am myself satisfied that there are good reasons to do so. In the current application, I am not satisfied, and even if I were satisfied, I still would not grant Judicial Review orders because they would not be suitable in this instance. Such orders at this stage may embarrass the Respondent University, and would question the Senate's decision unnecessarily.

16. For the foregoing reasons the application dated 7. 12. 18 is not allowed. Parties to bear own costs.

Orders accordingly.

Dated, Signed and Delivered at Mombasa this 14th day of

December, 2018

E. K. OGOLA

JUDGE

In the presence of: