REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HUMAN RIGHTS & CONSTITUTIONAL DIVISION

PETITION NO. 408 OF 2015

BETWEEN

ELIUD NYAUMA OMWOYO……...…….PETITIONER

AND

KENYATTA UNIVERSITY…….…...…1ST RESPONDENT

OLIVE MUGENDA…….…….…..2ND RESPONDENT

STEPHEN N. NYAGA…….…....….3RD RESPONDENT

LEGAL OFFICER, KENYATTA UNIVERSITY...4TH RESPONDENT

JUDGMENT

Background

[1] The Petitioner, in his quest to enforce orders given by the High Court on 12 September, 2014 in Petition No. 365 of 2012 as consolidated with Petitions No. 430 of 2012, 49 of 2012, 472 of 2012, 500 of 2012, 98 of 2013, 550 of 2012 and 474 of 2013 has now come before this Court *inter alia* seeking for orders that it be declared that the Respondents are in contempt of the court orders .

[2] The genesis of this Petition may be traced to Petition No. 365 of 2012 as consolidated Petitions No. 430 of 2012, 49 of 2012, 472 of 2012, 500 of 2012, 98 of 2013, 550 of 2012 and 474 of 2013. In that case, the Petitioner together with others (all " the Claimants") had been suspended and declassified from the graduation list of Kenyatta University, the 1st Respondent herein, on the allegation of tampering with online examination grades. The Claimants then moved the court to vacate the orders. It was alleged that the University's decision contravened the claimants' rights under Articles 26, 27, 28, 40, 47 and 50 of the Constitution. The court partly agreed with the Claimants. In its judgment, the Court held that:

> *(a) It be declared that the letters inviting the Petitioners to the disciplinary case and the disciplinary proceedings conducted against them on 21st June 2012 and 12th July 2012, as well as the decision to discontinue them from the University amount to a contravention of the petitioners' right under Article 47 of the Constitution to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair with regard to the respondent's allegations against them of alleged tampering with examination results.*

(b) That the Respondent is hereby ordered to conduct fresh disciplinary proceedings against all the Petitioners in accordance with the law and in any event within the next 45 days.

Petitioner's case

[3] The Petitioner's case is set out in the Petition dated 25 September 2015 and the affidavit in support dated 25 September 2015. There is also sworn a supplementary affidavit dated 27 October 2015. It may be summarized as follows.

[4] According to the Petitioner, pursuant to the court orders made on 12 September 2014 the Respondents invited him to a disciplinary hearing on 30 October 2014 vide a letter dated 16 October 2014. However, on the aforementioned date, the hearing did not take place. Subsequently, the Petitioner was invited for another hearing scheduled for 6 November 2014 vide a letter dated 31 October 2014. After the hearing, the Petitioner contends that he received the 1st Respondent's decision vide the letter dated 17 December 2014 discontinuing him upon finding him guilty of influencing or tampering with his on-line grades.

[5] It is the Petitioner's case that the letters inviting him for disciplinary proceedings dated 16 October 2014 and 31 October 2014 and the decision to discontinue him which was upheld after an appeal contravened the orders of the court made on 12 September 2014 in that, they were done out of the time stipulated in the court order and in contravention of the law as ordered.

[6] In the circumstances, the Petitioner seeks for orders that:

(i) It be declared that the disciplinary proceedings conducted by the 1st respondent on 6th November, 2014, against the petitioner were contrary to and in contravention of the order made by the court on 12th September, 2014 in Nairobi High Court Petition No. 365 of 2012 consolidated with petitions 430 of 2012, 49 of 2012, 472 of 2012, 500 of 2012, 98 of 2013, 550 of 2012 and 474 of 2013.

(ii) It be declared that the respondents are in contempt court order made on 12th September, 2014 in Nairobi High Court Petition No. 365 of 2012, consolidated with petitions 430 of 2012, 469 of 2012, 470 of 2012, 472 of 2012, 500 of 2012, 98 of 2013, 550 of 2012 and 474 of 2013.

(iii) An order that each of the respondents be committed to jail for a period of 2 years or for such other period of time or other sanction (s) as the court will deem appropriate in the circumstances.

(iv) It be declared that by virtue of being public officers, the 2nd and 3rd respondents have contravened the national value and principle of the rule of law under Article 10 of the constitution and are therefore unfit to hold public office including in the 1st respondent.

(v) It be declared that the letters inviting the petitioner to the disciplinary proceedings and the disciplinary proceedings conducted against him on 6th November, 2014, as well as the decision to discontinue him from the university amount to a contravention of the petitioners' right under Article 47 of the Constitution to a fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair with regard to the respondent's allegations against him of alleged tampering with examination results.

(vi) It be declared that the letters inviting the petitioner to the disciplinary proceedings and the disciplinary proceedings conducted against him on 6th November, 2014, as well as the decision to discontinue him from the University amount to a contravention of the petitioners' right under article 50 to a fair hearing with regard to the respondent's allegations against him of alleged tampering with examination results.

(vii) It be declared that the decision to discontinue the petitioner from the university amount to

a contravention of the petitioner's right under article 27 to equal protection of the law and freedom from discrimination to the extent that the petitioner was treated differently from other students with regard to the respondent's allegations him of alleged tampering with examination results.

(viii) That this Honourable Court be pleased to issue an order of certiorari to remove and bring to the High Court for the purposes of quashing and to quash the decision of the respondents to discontinue the petitioner from the University.

(ix) That this Honourable Court be pleased to issue an order/direction that the 1st respondent admit the petitioner back to the University forthwith and to award him the marks that are held by the university in the disputed unit.

(x) An order that the respondents do pay to the petitioner general damages.

(xi) That this Honourable court be pleased to make any other or further order/directions to secure enforcement of the petitioner's fundamental rights as it will deem fit.

(xii) An order that the respondent do pay to the petitioner costs of this petition.

Respondents' case

[7] The Respondents' case is set out in the replying affidavit of Prof. Paul K. Wainaina dated 16 October 2015.

[8] In opposing the petition, they contend that in fulfillment of the orders granted by the court, the 1st Respondent invited the Petitioner to a disciplinary hearing on 30 October 2014 vide a letter dated 16 October 2014. However, the disciplinary hearing before the Students Disciplinary Committee (SDC) did not go on as anticipated due to lack of quorum. The hearing was subsequently rescheduled for 6 November 2014 vide the letter dated 31 October 2014.

[9] The Petitioner was informed of the SDC's decision vide the letter dated 17 December 2014. The Respondents contend that they complied with the orders of the court within reasonable a time. They further contend that the Petitioner was afforded fair administrative action in accordance with the court orders granted in Petition No. 365 of 2012 and that the subsequent decision to discontinue the Petitioner was not in violation of his right to fair administrative action and fair hearing.

[10] Additionally, the Respondents contend that the Petition is an abuse of the court process and ought to be dismissed for being *res judicata*. According to the Respondents, aside from seeking enforcement of court orders granted in Petition No 365 of 2012 by way of a Petition, it is the Respondents' case that the Petitioner seeks to re-litigate issues that have already been determined.

Arguments in court

Petitioner's Submissions

[11] Ms. Muhoro urged the Petitioner's case.

[12] She submitted that there are violations of the Petitioner's rights. Particularly, it was submitted that the Respondents failed to give the Petitioner a fair hearing. According to the Petitioner, there were other persons who were involved, however, they were neither disclosed nor were they called as witnesses. It was also submitted that, whereas other students facing similar accusations were acquitted, the Petitioner was discontinued. This, it was submitted was discriminatory against the Petitioner.

[13] Secondly, counsel submitted that the disciplinary proceedings were not properly carried out. According to her, the Petitioner was to answer only to the charge, however, there were no witnesses. It

was thus submitted that the procedure was in contravention of Article 47 and 50 of the Constitution. Ms. Muhoro submitted that there were violations of these rights even at the appeal stage. Consequently, it was submitted that the Respondents are in violation of the Petitioner's right to education and human dignity.

Respondents' submissions

[14] The Respondents' case was argued by Mr. Mwangi.

[15] According to counsel, firstly, contempt cannot be sought in fresh proceedings. It was thus argued that, this matter should have been referred to the original court (read Judge) that (who) determined Petition No. 365 of 2012.

[16] Secondly, still on contempt, Counsel submitted that in an ordinary court petition, the standard is different from a contempt of court charges. The balance of probability is higher. It was argued that the 2nd, 3rd and 4th Respondents were not parties in the earlier proceedings.

[17] Thirdly, counsel submitted that there is an overlap on issues raised between Petition No. 365 of 2012 and the current suit. According to counsel, discrimination under Article 27 of the Constitution cannot be fetched on the basis of different punishments meted out. It was also submitted that these findings were also made on fair hearing under Article 50.With regard to violation of the right to fair hearing under Article 47, it was Mr. Mwangi's submission that the guidelines given by the court in petition No. 365 of 2012 were followed.

[18] With regard to the reliefs sought by the Petitioner, it was submitted that the award of damages was dismissed by the court in Petition No. 365 of 2012 ad as such, ought not to be granted by this court.

Discussion and determination

Issues

> *(1) Whether the Petition herein is res judicata and thus an abuse of the court process.*
>
> *(2) Whether this court can declare the Respondent to be in contempt of orders of the court in Petition No. 365 of 2012/ whether contempt of court proceedings are properly before this court.*

[19] As I see it, this petition has been presented on two fronts, first, the Petitioner claims that the Respondents are in contempt of the order of Court in Petition No. 365 of 2012. Secondly, the Petitioner asserts that the disciplinary process and the decision to subsequently discontinue him from the 1st Respondent institution amounts to a contravention of his constitutional rights, particularly, Articles 27,47 and 50 of the Constitution. Of import is that the Petitioner with others in consolidated Petition No. 365 of 2012 had sought to impugn the disciplinary process by the 1st Respondent. The court in Petition No. 365 of 2012 ordered that the disciplinary process be conducted afresh in accordance with the law and within 45 of the judgment therein.

[20] The Respondents on the other hand contend that the Petition should be dismissed for being *res judicata* as the Petitioner seeks to re-litigate issues that have already been determined in Petition No. 365 of 2012. Further, the Respondents aver that, contempt of court proceedings cannot be brought under a fresh suit with different parties to wit the orders they have alleged to be in contempt of were given.

[21] Before I visit the issue of contempt and whether this court is the right forum to deal with it, I will briefly discuss the issue of *res judicata.*

Res judicata

[22] *Kenya's law on res judicata is engrained in statute***. *Section 7*** of the Civil Procedure Act, Chapter 21, Laws of Kenya Provides that, '*No Court shall try any suit or issue in which the matter directly and*

substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court."

[23] The doctrine of *res judicata* is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation. See **Mulla, the Code of Civil Procedure, 16th Ed. Vol. 1 – pg 161; Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR Nicholas Njeru v. Attorney General & 8 Others [2013] eKLR**. Essentially, a final decree or judgment of a court of competent jurisdiction once it becomes absolute, puts to rest and entombs in eternal quiescence every adjudicated as well as justiciable issue between two parties to a dispute: see **Gordon *vs.* Gordon [1952] 59 So 2d 40** and **Crown Estate Commissioners *vs.* Dorset County Council [1990] 1 All E R 1923**.

[24] Caution must however always be taken in the application of the doctrine of res judicata as it has the potential locking out even deserved litigants from the doors of justice. In constitutional litigation the caution must be extra as there is the chance that a violation may occur severally. The doctrine however applies in constitutional cases with equal measure, the question as to whether the doctrine applies to constitutional petitions having been settled by the Supreme Court in the case of **Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR**, where it observed that:

> ***Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon. Norbert Mao v. Attorney-General, Constitutional Petition No. 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf of 21 persons from his constituency, for declarations under Article 137 of the Uganda Constitution, and for redress under Article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under Article 50, seeking similar relief; and Judgment had been given in Hon. Ronald Reagan Okumu v. Attorney- General, Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment.*** (emphasis)

[25] Is the Petitioner having a second bite at the cherry? The Petition, as I understand it, seeks to impugn the decision of the Respondents in the subsequent decision to discontinue the Petitioner. The Petitioner seeks a declaration that the disciplinary process and the subsequent decision to discontinue the Petitioner from the 1st Respondent was not done in accordance with the law and thus in contravention of the Petitioner's right to fair administrative action, fair hearing and equality and freedom from discrimination.

[26] As stated earlier, the essence of the doctrine of *res judicata* is that once the legal rights of parties have been judicially determined and settled, such edict stands as a conclusive statement as to those rights. A litigant is thus precluded from claiming under the same title for reliefs claimed in a previous suit.

[27] The Petition alleges discrimination just as the earlier cause did and the grounds for discrimination are the same. Petitioner claims that the disciplinary process was not undertaken ordered by the court in Petition No. 365 of 2012 and thus, the subsequent contraventions of the Constitution stem from the Respondents' contempt of those orders. This leads me to discuss the next issue of contempt from where I will be able to give my view on the issue of *res judicata*, in relation to this Petition.

Contempt of Court

[28] The Petitioner prays that it be declared that the Respondents are in contempt of the court order made

on 12 September 2012. Two sub- issues arise in these respects. First, whether contempt of court proceedings are properly before this court. Secondly, is whether this court can declare the Respondent to be in contempt of orders of the court in Petition No. 365 of 2012

[29] Black's Law Dictionary, 9th Ed., defines contempt of court as:-

> ***Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.***

[30] In the case of **Africa Management Communication International Ltd *vs.* Joseph Mathenge Mugo & anor [2013]eKLR,** it was held: -

> ***The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and order. As it was in the time of Chief Justice Mckean in 1778, so it is today that courts have a duty to ensure that citizens bend to the law and not vice versa. Indeed, if respect for law and order never existed, life in society would be short, brutish and nasty. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is because, a party who obtains an order from court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of court orders is fundamental to the administration of justice and rule of law.***

[31] The cardinal aim of contempt of court applications or offences is to basically arrest all conduct which are aimed or reasonably feared to be aimed at interfering with the proper administration or course of justice. Contempt proceedings also of ensure that there is compliance with court orders when the contemnor is forced to purge the contempt. There is no doubt that one of the essential conditions for the proper administration of justice is that there should prevail not only discipline in court but also subservience and obedience to the court process and court orders. This condition will certainly be undermined if any party to a case is allowed with impunity to defy court orders or simply ignore process. How then, should an application for contempt be instituted?

[32] Section 5 of the Judicature Act, provides for contempt of court. It states that, *'The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and such power shall extend to upholding the authority and dignity of subordinate courts. (2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.'*

[33] The High Court (Organization and Administration) Act, 2015 provides for power to punish contempt. However, both laws do not provide for the mode of instituting contempt of court proceedings. Since the Judicature Act states that the High Court shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, then the procedure by the High Court of England would in this instance apply. This was aptly discussed by the Court of Appeal in the case of **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 others [2014] e KLR,** where the court stated thus:

> ***Following the implementation of the famous Lord Woolf's "Access to Justice Report, 1996", The Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rule, 1999. Recently, on 1st October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and PART 81 thereof effectively replaced Order 52 RSC in its entirety. PART 81 (Applications and Proceedings in Relation to Contempt of Court) provides different procedures for four different forms of violations.***
>
> ***Rules 81.4 relates to committal for "breach of a judgment, order or undertaking to do or abstain from doing an act."***
>
> **…**

An application under Rule 81.4 (breach of judgment, order or undertaking) now referred to as "application notice" (as opposed to a notice of motion) is the relevant one for the application before us. <u>It is made in the proceedings in which the judgment or order was made or the undertaking given</u>. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit (s) containing all the evidence relied upon.

The application notice and the affidavit or affidavits must be served personally on the respondent unless the court dispenses with service if it considers it just to do so, or the court authorizes an alternative method or place of service. (emphasis mine)

[34] I fully adopt the sentiments of the Court of Appeal.

[35] In furtherance thereto, I wish to add that, by the better reason, the essence of filing contempt of court proceedings where the judgment or order is made is to avert filing multiple suits and dissuading litigants from litigating afresh. While it may be true that disobedience of court orders may raise constitutional issues like fidelity to the rule of law, it is important to note that it would not result in a new cause of action. Contempt proceedings have to be commenced to enforce the court orders and it has to be before the right forum.

[36] In the instant case, the right forum to file such a suit is the suit within which the orders emanated. This averts the question of *res judicata* and multiplicity of suits, essentially what the doctrine seeks to curb. Beside, when the Petitioner claims discrimination on the ground that other individuals accused of the same transgression as the Petitioner were let go by the 1st Respondent, one cannot help but notice the striking similarity between this Petition and the previously determined one.

[37] I would hasten to add that even if the Petitioner is of the view that the Respondents did not follow the law by affording the Petitioner the requisite fair administrative action then that too ought to form or constitute a ground for the contempt application. The court decreed on 12 September 2014 in Petition No 365 of 2012 that the Respondents must follow the law in the reconvened Disciplinary proceedings. In the process the court also set out clear directions in the judgment. Failure to follow the law or indeed the directions in the judgment would itself constitute a ground for contempt proceedings, subject only to proof.

Conclusion and disposal

[38] In my view, the Petitioner could not simply commence another suit. Substantially, the parties would have to go through a repeat of the same process and trial and if vindicated the Petitioner would end up with much the same orders, given that the Petitioner also lays a base on discrimination which had earlier been conclusively adjudicated..

[39] The Petitioner argues that Article 159 (2) (d) of the Constitution calls upon the court to dispense substantive justice without undue regard to procedural technicalities. However, I do view it that where the procedure has been glaringly flouted that to follow it would be unjust, then it cannot stand. An accusation of contempt of court goes to the tenets of the rule of law. This, in my opinion ought to be properly brought before the court and parties properly allowed to put in their defense. This requires following the proper procedure as set out by the Court of Appeal in ***Christine Wangari Gachege's*** case above.

[40] It is my view, and I so hold, that the Petition herein should fail in its entirety. The Petitioner, of course, has liberty to commence contempt proceedings as may be appropriate, if he feels aggrieved by the Respondents actions and believes they were made in disobedience of a court decree.

[41] The Petition is dismissed. Each party shall bear its own costs.

Dated, signed and delivered at Nairobi this 7th day of September, 2016

J.L.ONGUTO

JUDGE