



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CONSTITUTIONAL PETITION NO. 32 OF 2014**

**IN THE MATTER OF: CONTRAVENTION OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED BREACH/INFRINGEMENT OF RIGHTS AND  
FUNDAMENTAL FREEDOMS**

**AND**

**IN THE MATTER OF: ARTICLE 3, 10, 19, 20, 21, 22, 23, 27, 46, 47, 165, 258 & 259 OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND  
TECHNOLOGY ACT**

**AND**

**IN THE MATTER OF: THE ENGINEERS ACT, 2011**

**AND**

**IN THE MATTER OF: THE MOMBASA POLYTECHNIC UNIVERSITY COLLEGE ORDER,  
2007**

**BETWEEN**

**DANIEL MUTHOKA MUNYAO**

**KIDERE MARYAM MOHAMMED**

**NYACHWAYA JOSEPH MARIGA**

**ZIRO SIMON BANDA**

**ATHMAN BWANAMKUU**

**JOSHUA ONYANGO OTIENO**

**KAMAU BENJAMIN**

**BRAMUEL MULIRO WANYONYI**

**FELIX KADZITU MUMBA**

**ERNEST KIPLANGAT (All suing for and on behalf of themselves and  
on behalf of 119 others) .....PETITIONERS**

**AND**

**1. TECHNICAL UNIVERSITY OF MOMBASA**

**2. JOMO KENYA UNIVERSITY OF AGRICULTURE AND TECHNOLOGY**

**3. PROF. JOSPHAT KAZUNGU MWATELA.....RESPONDENTS**

**AND**

**ENGINEERS BOARD OF KENYA..... INTERESTED PARTY**

**RULING**

1. The Petitioners seek by their Petition order to compel the 1<sup>st</sup> Respondent to forward to the 2<sup>nd</sup> Respondent list of their names for their inclusion in the 2<sup>nd</sup> Respondent's list of granduants for graduation ceremony of 27<sup>th</sup> June 2014; an order to compel 2<sup>nd</sup> Respondent to include the forwarded names of the Petitioners in its graduation list and graduate them; an order that the Respondents have violated Petitioners rights to human dignity as protected under Article 28 of the Constitution, right to fair administrative action as protected by Article 49(1) and right to fair hearing as protected under Article 50 of the Constitution.

2. What provoked this Petition is the 2<sup>nd</sup> Respondents refusal to graduate the Petitioners.

3. By their interlocutory application by way of Notice of Motion dated 23<sup>rd</sup> May 2014, Petitioners seek similar relief as per the Petition. That application was on 26<sup>th</sup> May 2014 certified as urgent and fixed for inter partes hearing on 4<sup>th</sup> June 2014. When the application came up for hearing the 2<sup>nd</sup> Respondent had not filed its response and in view of the urgency of the matter and because no good reason was given for not filing the response an adjournment was denied. The 2<sup>nd</sup> Respondent simply failed to fully instruct its Counsel. It is more the pity that the application is being determined without the input of the 2<sup>nd</sup> Respondent.

4. The 1<sup>st</sup> and 3<sup>rd</sup> Respondent had filed their response and in considering the present application I have found their response most helpful. 3<sup>rd</sup> Respondent is the Vice Chancellor of 1<sup>st</sup> Respondent. I should state that the 1<sup>st</sup> and 3<sup>rd</sup> Respondent did not oppose the application save that it was submitted that the 1<sup>st</sup> Respondent had forwarded Petitioners names to the 2<sup>nd</sup> Respondent on 9<sup>th</sup> April 2014 to facilitate the Petitioners graduating on 27<sup>th</sup> June 2014.

5. 1<sup>st</sup> Respondent by the replying affidavit sworn by the 3<sup>rd</sup> Respondent confirmed that the Petitioners were students of the 2<sup>nd</sup> Respondent studying in 1<sup>st</sup> Respondent's Institution in Mombasa from 2009 to date where they undertook Bachelor of Science in Electrical Engineering, Bachelor of Science in Mechanical Engineering and Bachelor of Science in Civil Engineering. 1<sup>st</sup> Respondent for that purpose was a constituent college of the 2<sup>nd</sup> Respondent from 2007 by virtue of Legal Notice No. 160 of 2007.

As a constituent college of 2<sup>nd</sup> Respondent 1<sup>st</sup> Respondent admitted Petitioners to undertake those various Engineering Courses which were prepared, taught and examined by Lecturers from the 2<sup>nd</sup> Respondent. 2<sup>nd</sup> Respondent indeed prepared and approved the Syllabus which Petitioners were taught by its very own Lecturers.

6. According to the 3<sup>rd</sup> Respondent, 1<sup>st</sup> Respondent was granted a Charter and therefore became fully fledged University in January 2013. That although 1<sup>st</sup> Respondent obtained that Charter it has not been accredited by the Engineering Registration Board to offer Engineering Courses. That if the 1<sup>st</sup> Respondent does indeed graduate the Petitioners they then will not be registered to practice as Engineers. Petitioners had deponed and it is confirmed by 1<sup>st</sup> and 3<sup>rd</sup> Respondents that there were students who previously studied at 1<sup>st</sup> Respondents institution as a Constituent College of 2<sup>nd</sup> Respondent and had graduated at 2<sup>nd</sup> Respondents institution.

7. Petitioners complained of not having received information regarding that graduation from either of the Respondents.

8. The 2<sup>nd</sup> Respondent is stated to have refused by their letter dated 6<sup>th</sup> May 2014 to allow Petitioners graduate at its institution. The reasons given for such refusal in that letter are as follows-

- **That JKUAT was not involved in the admission of the said students and is not in a position to ascertain performance of the students to the Engineering Board of Kenya requirements.**
- **That the results for the students had not been presented to the relevant JKUAT Schools and Senate.**
- **That the Engineering Board of Kenya (EBK) may have issues with JKUAT to graduate TUM (1<sup>st</sup> Respondent) students when TUM is full-fledged university.**

9. The 3<sup>rd</sup> Respondent by his replying affidavit of 3<sup>rd</sup> June 2014 responded to those issues as follows-

**a. On issue number (i)**

**The evidence so far tendered or made available to Court does support the fact that the Petitioners/Applicants have been and are still students of the Mother University, the 2<sup>nd</sup> Respondent herein.**

**b. On the Issue number (ii)**

**The syllabus(es) and/or courses were prepared and/or introduced and/or taught and/or examined by the 2<sup>nd</sup> Respondent, studying at the 1<sup>st</sup> Respondent and its Lecturers for the five years the Petitioners/Applicants have been students of the 2<sup>nd</sup> Respondent's institution (Hosting Institution) and for all those years the results of the Petitioners/Applicants were presented to the 2<sup>nd</sup> Respondent as required.**

**(c) On issue Number (iii)**

**Though the 1<sup>st</sup> Respondent was granted a Charter and became a fully-fledged University in January, 2013, its Engineering Courses are yet to be approved and/or accredited by the Interested Party as required under the Engineers Act of 2012.**

**If the Petitioners/Applicants are graduated by the 1<sup>st</sup> Respondent before accreditation status is given to the 1<sup>st</sup> Respondent, the Petitioners/Applicants risk being barred from practicing their profession by the Interested Party, who would not recognize their degrees.**

10. Education is power. Nelson Mandela said-

**“Education is the most powerful weapon which you can use to change the World.”**

The quest by the Petitioners to graduate and enter the job market will be impeded if the decision of the 2<sup>nd</sup> Respondent is allowed to stand. The 2<sup>nd</sup> Respondent’s decision will deny Petitioners the power referred to by Mandela. 2<sup>nd</sup> Respondent having made such a decision which would indeed adversely affect Petitioners’ future, treated the application before Court in a very flimsy manner by failing to file its response.

11. Having considered the documents presented by the Petitioners, 1<sup>st</sup> and 3<sup>rd</sup> Respondent I am satisfied that a prima facie case has been made out to justify the interlocutory orders sought. The word prima facie has variously been defined but for now I will consider the definition in the Blacks Law Dictionary 8<sup>th</sup> Edition as follows-

**“Prima facie: At first sight; on first appearance but subject to further evidence or information.”**

That is my finding, that the Petitioners at first sight, first appearance have shown they have a valid claim deserving interlocutory orders sought.

11. The Petitioners seek what is essentially mandatory orders. Such orders are only granted in the clearest of cases. In Vol. 24 Halbury’s Laws of England the learned author stated-

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the Act done is a simple and a summary one which can be easily remedied, or if the Defendant attempted to steal a match of the Plaintiff .... A mandatory injunction would be granted on an interlocutory application.”**

Also in the case LOCABALL INTERNATIONAL FINANCE LTD –Vs- AGRO EXPORT AND OTHERS [1986] I ALL ER 901 at page 901 it was stated-

**“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a match on the Plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”**

12. Having considered the evidence adduced by the Petitioners, 1<sup>st</sup> and 3<sup>rd</sup> Respondent on prima facie basis I find Petitioners were admitted as Students of 2<sup>nd</sup> Respondent albeit at the Institution of 1<sup>st</sup> Respondent. 2<sup>nd</sup> Respondent regulated their Syllabus and lectured them. And finally 2<sup>nd</sup> Respondent examined them. To deny them the all important opportunity to graduate cannot be condoned by this Court. The Petitioners have met the high standard required for a mandatory injunction.

13. Although the 1<sup>st</sup> Respondent argued that since it had forwarded Petitioners names to 2<sup>nd</sup> Respondent it cannot be said to have done any wrong, it has been shown that 1<sup>st</sup> Respondent did not however communicate to the Petitioner of having so forwarded their names. Having that in mind the Petitioners could not proceed with the fulfillment of various stages required of potential graduants of 2<sup>nd</sup> Respondent. 1<sup>st</sup> Respondent did fail to communicate its action of forwarding the names. It is therefore not without blame. I have seen from exhibit marked ‘B’ the Newspaper advertisement relating to the 23<sup>rd</sup> Graduation Ceremony; it shows Petitioners had a deadline of 3<sup>rd</sup> June 2014 to confirm their names were included in the Graduation list and that they were correctly spelt. How could these Petitioners have

confirmed that if they did not know their names had been forwarded by 1<sup>st</sup> Respondent.

14. In view of the above I grant the following orders-

**a. 1<sup>st</sup> Respondent shall submit within one (1) day from this date hereof to 2<sup>nd</sup> Respondent names of the Petitioners for their inclusion into the 2<sup>nd</sup> Respondents 23<sup>rd</sup> Graduation Ceremony of 27<sup>th</sup> June 2014, and 1<sup>st</sup> Respondent shall give to the Petitioners information of such submission.**

**b. The 2<sup>nd</sup> Respondent is hereby ordered to include the forwarded names of the Petitioners in its 23<sup>rd</sup> Graduation Ceremony of 27<sup>th</sup> June 2014 and in that regard shall afford Petitioners all necessary assistance to ensure their Graduation on the said date.**

**c. Liberty is granted to any party to seek further orders.**

**d. The 2<sup>nd</sup> Respondent shall pay the costs of Notice of Motion of 23<sup>rd</sup> May 2014 to the Petitioners and 1<sup>st</sup> and 3<sup>rd</sup> Respondents.**

**DATED and DELIVERED at MOMBASA this 6<sup>TH</sup> day of JUNE, 2014.**

**MARY KASANGO**

**JUDGE**