



**Mbae & another v University of Nairobi & 2 others (Petition E132 of 2024)  
[2026] KEHC 548 (KLR) (Constitutional and Human Rights) (29 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 548 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E132 OF 2024  
CN MUGAMBI, J  
JANUARY 29, 2026**

**BETWEEN**

**MURITHI MBAE ..... 1<sup>ST</sup> PETITIONER**

**GITONGA MBAE ..... 2<sup>ND</sup> PETITIONER**

**AND**

**UNIVERSITY OF NAIROBI ..... 1<sup>ST</sup> RESPONDENT**

**COMMISSION FOR UNIVERSITY EDUCATION ..... 2<sup>ND</sup> RESPONDENT**

**MINISTRY OF HIGHER EDUCATION SCIENCE AND  
TECHNOLOGY ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petition dated 12<sup>th</sup> March 2024, is supported by the 1<sup>st</sup> Petitioner's affidavit in support of similar date.
2. The Petitioners' main grievance in the instant Petition is the alleged refusal by the 1<sup>st</sup> Respondent to release their examination results and allow them to graduate, despite having fulfilled all the academic requirements as students hence a violation of their constitutional rights and legitimate expectation.
3. Accordingly, the Petitioners seek the following reliefs against the Respondents:
  - a. A declaration be issued that the 1<sup>st</sup> Respondent's action of not clearing on time and including the Petitioners in the final list of graduands for the Respondent's Graduation Ceremonies in the intervening years was discriminatory, and violated the Petitioners' rights to non-



discrimination, dignity, freedom from psychological torture, and fair administrative action contrary to Articles 27, 28, 29(d) and 47 of *the Constitution*.

- b. A declaration be issued that the 1<sup>st</sup> Respondent's action of not clearing on time and including the Petitioners in the final list of graduands for the Respondent's Graduation Ceremonies in the intervening years, was a violation of *the Constitution* because they were done without due regard to the requirements of fair administrative action including expeditiousness.
- c. A declaration be issued that the 1<sup>st</sup> Respondent's action of not including the Petitioners in the final list of graduands for the Respondents Graduation Ceremonies in the intervening period, is a violation of the Petitioners legitimate expectations.
- d. A declaration be issued that the manner in which officials of the 1<sup>st</sup> Respondent conducted themselves resulting to the delay and total failure to include them in the graduation lists was done in violation of the rule of law and in direct contravention of provisions of *the Constitution* that guide the 1<sup>st</sup> Respondent and was therefore an abuse of office.
- e. An order be issued to compel the 1<sup>st</sup> Respondent to undertake all the necessary internal procedures required to retrieve the Petitioners missing/misplaced marks and to include the Petitioners in the next graduation list and graduation ceremony.
- f. An order be issued granting the Petitioners nominal damages for infringement of their rights under Articles 27, 28, 29(d) and 47 of *the Constitution*.
- g. An order be issued that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent pays the Petitioner general damages for violation of Petitioner's right.
- h. The costs of the Petition shall be borne by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent.
- i. This Court be pleased to grant such further Order or Orders as may be just and appropriate.

#### **Petitioners' Case**

4. The 1<sup>st</sup> Petitioner states that the 2<sup>nd</sup> Petitioner is his twin brother and swears this Affidavit on their behalf.
5. He depones that that they were admitted to the 1<sup>st</sup> Respondent to pursue a degree course in Bachelor of Science in Biology. Subsequently, they applied for inter-faculty transfer, to the School of Veterinary Medicine to pursue a degree in Biomedical Science and Technology.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents approved the transfer and thus the 1<sup>st</sup> Respondent admitted them to pursue the course in 2010 under admissions number J38/37059/2010 and J38/37060/2010 respectively.
7. They both had a legitimate expectation that they would complete their studies within the required timeframe prescribed by the 1<sup>st</sup> Respondent of 4 years.
8. Their education was financed using loan facility from the Higher Education Loans Board (HELB) as well as additional financial support by their mother.
9. He depones that currently, they are enrolled as the 1<sup>st</sup> Respondent's students undertaking a course in Medical Laboratory Science and Technology at the College of Health Sciences. He notes that at the time of filing this matter they had been in school for 13 years.



10. He avers that throughout their studies, they attended classes diligently, participated in class activities, sat for the Continuous Assessment Tests and undertook all their examinations for 3 years.
11. He depones that while undertaking Year 3 in 2014, they were informed that their Course, Biomedical Science and Technology had been declared defunct and further not recognized by the relevant professional bodies and deregistered by the 3<sup>rd</sup> Respondent.
12. . Considering this, an inter-faculty transfer was to be undertaken. The 1<sup>st</sup> Respondent initiated an inter-faculty transfer from the School of Veterinary Medicine to the College of Health Sciences to study Medical Laboratory Science and Technology. They were as a result issued new admission numbers being H38/37059/2010 and H38/37060/2010 respectively.
13. He asserts that this transfer was not undertaken officially hence the school records still reflected that they were in the defunct programme. He depones that although their course was transferred, their school fees was not and neither was it reimbursed. Equally, the grades that they had attained were also not transferred.
14. He depones that in the subsequent years they fulfilled their obligations as students while undertaking the Medical Laboratory Science and Technology programme. He informs however that despite this, they did not receive their examination results and were actually told to re-do their examinations severally. They were in addition informed that they had neither attended classes nor sat for the examinations. As a result, he asserts that they kept re-sitting examinations which they had done and excelled in.
15. He depones that, aggrieved by this situation, they reached out to the 1<sup>st</sup> Respondent's Registrar to address the situation and also regularize their transfer officially so that the records can reflect the same. He alleges that Mr. Lime who sits in the office demanded for money to assist them and further asked that their mother to visit the school.
16. He notes that their refusal to give out any money despite their mother presenting herself, caused Mr. Lime and Prof. Were, to direct that they do not attend any classes or sit for any examinations.
17. They approached the Vice Chancellor – Academic Affairs then, Prof. Mutoro who unfortunately referred them back to the two who maintained their stance. Prof. Mutoro in addition instructed, Mr. Orindi in Corporate Affairs to intervene in the matter.
18. He asserts that a further letter to the Vice Chancellor was not responded to. He states that as it had become the norm, they found themselves being forced to re-sit examinations and incurring similar challenges. In fact, he depones that at some point, he was asked to re-sit a Unit that does not exist dubbed HHP 212 and the 2<sup>nd</sup> Petitioner a Unit dubbed HHP 109.
19. He avers that soon thereafter, while in 4<sup>th</sup> Year in 2020, learning transitioned online. They as a result attended online classes and undertook online examinations. In like manner, they were later informed that they had not sat for these examinations.
20. He avers that their colleagues received their 4<sup>th</sup> year examination results but they did not. In addition, he states that he was informed that he had not sat for examinations in following Units: HHP308, HDR 316, HHP441, HHP405, HBC 412 and HHP 415 while the 2<sup>nd</sup> Petitioner HMM 309 and HDR 316, which are Year 3 Units. He depones that he went to school to follow up on the same and requested the school to retrieve their examination results after which some of the results were finally found.
21. He asserts that having fulfilled their requirements in the Course, they had a legitimate expectation that they would be cleared for graduation and awarded their degree. This however was not so due to the



- missing marks and misplaced marks. He maintains that their attempt to follow up on the matter has been frustrated and futile.
22. The Petitioners are aggrieved that the 1<sup>st</sup> Respondent has frustrated them throughout even when the ICT department affirmed that they sat for the said examinations. The Petitioners as such argue that the 1<sup>st</sup> Respondent's officers have breached their right to a fair administrative action in the manner they have handled them throughout.
  23. He further informs that some time in 2023, they raised their grievances with the Associate Dean, Faculty of Health Services, Prof. Fedrick C. F. Otieno who tried to assist them. He states however other 1<sup>st</sup> Respondent's officers frustrated their efforts and equally mislead him into believing that they had not met the academic requirements including their project proposal.
  24. The Petitioners aver that they have continued to experience similar hindrances. In fact, he asserts that their continued effort to follow up on the matter has caused them to receive threats of deregistration or discontinuation which is an act of impunity in violation of the law.
  25. The Petitioners contend that they continue to remain in the same predicament while their colleagues have already graduated and advancing their careers. In addition, they argue that they have lost both time and money in the process. They further contend that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents ought not to have allowed, the 1<sup>st</sup> Respondent to roll out and enroll students in the defunct subject course and further have the same deregistered without having a plan for the students.
  26. For these reasons, the Petitioners argue that the 1<sup>st</sup> Respondent violated their constitutional rights. Equally, the Petitioners argue that the 3<sup>rd</sup> Respondent ought to step in and ensure a lasting solution to their grievance. In view of the foregoing, the Petitioners assert that they filed this Petition as they have no other authority to turn to.

### **1<sup>st</sup> Respondent's Case**

27. In response, the 1<sup>st</sup> Respondent through the Academic Registrar, Humphrey Webuye filed a Replying Affidavit sworn on 11<sup>th</sup> November 2024.
28. He depones that the 1<sup>st</sup> Petitioner holds registration No.H38/370592010 while the 2<sup>nd</sup> Petitioner, registration No.H38/37060/2010, both pursuing the Bachelor of Science, Medical Laboratory Science and Technology Programme. He asserts that the records indicate that the two had incomplete marks in courses for Year 1 and 2 and no records for Year 3.
29. He avers that in 2014, the Petitioners alongside all other students in the same programme were transferred from the Bachelor of Science Biomedical Technology (BSC.BMT) programme to the BSC. Medical Laboratory Science and Technology (BSC.MLST). Following this transfer, the 1<sup>st</sup> Petitioner was issued with registration number H38/37060/2010 and the 2<sup>nd</sup> Petitioner H38/37059/2010.
30. He contends that the transfer followed a request by the students and stakeholder, as the BSC.MLST programme was recognized by the Kenya Medical Laboratory Technicians and Technologies Board and offers more opportunities. All the students were therefore transferred and programme archived. He clarifies that the programme did not become defunct as alleged by the Petitioners and the same is still recognized by the 2<sup>nd</sup> Respondent.
31. He depones that the Petitioners are currently in Year 4. He informs that the Petitioners have been performing poorly in the academic programme. This caused the 1<sup>st</sup> Respondent on 17<sup>th</sup> January 2018 to deregister the 2<sup>nd</sup> Petitioner and the 1<sup>st</sup> Petitioner on 16<sup>th</sup> October 2019.



32. He adds that the Petitioners have repeated every academic year and only progressed after undertaking supplementary examinations. Equally, it is alleged that despite personal exhortation by the Associate Dean, Undergraduate studies, the Petitioners have failed to present themselves for examinations, occasioning delay in their progression.
33. He states that the Petitioners failed a number of Year 4 courses as outlined in the affidavit. In addition, he states that the Petitioners were allowed to submit their research projects despite the pending Units. It is however noted that the 1<sup>st</sup> Petitioner failed in his research project. He was as such directed to make corrections and resubmit the work.
34. Furthermore, he states that the Petitioners have not made an official request to be issued with provisional transcripts. They were as well informed that they are required to undertake supplementary examinations however failed to show up to sit for the same.
35. In view of the foregoing, he informs that the 1<sup>st</sup> Respondent is currently reviewing student's academic status, in accordance with the University Statutes, 2013 and Examination Regulations. As such, he urges this Court to allow the 1<sup>st</sup> Respondent to handle the matter internally or in the alternative, issue orders to compel the Petitioners to sit for the supplementary examinations and complete their programme.

### **2<sup>nd</sup> Respondent's Case**

36. The 2<sup>nd</sup> Respondent through its Commission Secretary and Chief Executive Officer, Prof. Mike Kuria filed a Replying Affidavit sworn on 21<sup>st</sup> March 2025. He informs that following the 1<sup>st</sup> Respondent's application to be granted a charter, the same was awarded on 1<sup>st</sup> March 2013.
37. He asserts that the Petitioners have not set out any constitutional violation by the 2<sup>nd</sup> Respondent which indicates that the 2<sup>nd</sup> Respondent complied with the dictates of Articles 10, 19, 20, 23, 25, 27, 28, 29, 43(i)(f) and 47 of *the Constitution*.
38. In the circumstances of this case, he avers that in the event an academic programme is deregistered by a Board established by an Act of Parliament, the 1<sup>st</sup> Respondent's Council is responsible to make good of the matter. He asserts that the issues raised by the Petitioners are provided and covered for under Section 6 of the Charter. Moreover, he asserts that the 2<sup>nd</sup> Respondent does not work with any professional body to deregister an academic programme, thus the Petitioners allegations otherwise are not true.
39. He maintains that the 2<sup>nd</sup> Respondent as a regulator has not violated any of the Petitioners rights and further approved the 1<sup>st</sup> Respondent's Charter in line with the law. To this end, he argues that in the absence of violation of constitutional provisions the prayer for an order for general damages, costs of the Petition or any other order does not arise.

### **3<sup>rd</sup> Respondents' Case**

40. There was no response by the 3<sup>rd</sup> Respondent as none was found in the Court file or in the Court Online Platform (CTS).

### **Petitioners' Submissions**

41. In the submissions dated 13<sup>th</sup> May 2024, Wekesa and Simiyu Advocates, highlighted on a number of issues Counsel had identified, namely: whether the Respondents' have violated the Petitioners' rights to equality and freedom from discrimination, human dignity, freedom and security of the person, right to



education and fair administrative action, whether the Petitioners' legitimate expectations were violated and whether the Petitioners are entitled to the reliefs sought.

42. On the first issue, Counsel submitted that the Petitioners are required to show with precision that they have met the test set in the case of *Anarita Karimi Njeru Vs Republic* (1979) eKLR. Counsel submitted that in this matter the Petitioners' rights under Article 25, 27, 28, 29, 43(1)(f) and 47 of *the Constitution* were violated by the Respondents.
43. To expound on this, Counsel stated that the 1<sup>st</sup> Respondent through its Senate seeks approval of the 2<sup>nd</sup> Respondent who is charged with duty to accredit the programmes offered such as in this case. Counsel submitted that the programme undertaken by the Petitioners had been approved by the 2<sup>nd</sup> Respondent. As such, offering this programme and later on declaring it defunct is argued to be a gross abuse of power which in effect violated the Petitioners' rights.
44. To buttress this point reliance was placed in *Moi University V Zaippeline & Another* [2022] KESC 29 (KLR) (CIV) where the Supreme Court held that:

“In a country like ours where citizens place a premium on university education, it is not right to leave graduates in a suspended state where they do not know their fate especially where parents have made sacrifices to educate their children, students have taken out loans from the Higher Education Loan Board and are expected to re-pay these loans and the State has invested tax payers money... This is a situation that cries out for justice. ”The appellate court considered and was persuaded by these two cases. We think that they were correctly guided.”
45. Like dependence was placed in Civil Appeal No.266 of 1996 – *Kenya National Examination Council vs Republic, Ex parte Geoffrey Gathenji Njoroge and others*.
46. Moreover, Counsel submitted that the 1<sup>st</sup> Respondent in handling the Petitioners case, acted arbitrarily and unreasonably as captured in the Petitioners affidavit thus violated their rights. Reliance was placed in *Charles Kaindo Kuria & 20 Others V Technical University Of Kenya* (2019]eKLR where it was held that:

“The Respondent's failure to take any action for a period of 1 year and 6 months, I find, that is inefficient, unreasonable and procedurally unfair in light of Article 47 of *the Constitution* and section 63(3) of the *Universities Act*.”
47. Comparable dependence was placed in *Associated Provincial Picture Houses Limited Vs. Wednesbury Corporation* (1948] IKB 223 and *Padfield & Others Vs. Minister of Agriculture, Fisheries and Food* (1968] ALL ER 694.
48. Equally, Counsel argued that the 1<sup>st</sup> Respondent's actions in this matter amount to a misfeasance in public office which is in violation of the Fair Administrative Actions Act. Counsel added that the 1<sup>st</sup> Respondent had not only acted unlawfully but maliciously targeted the Petitioners by failing to render its decisions in a timely manner, granting them a proper hearing and arrogating itself the powers to accredit degrees for a programme that is not recognized.
49. Reliance was placed in *Violet Ombaka Otieno & 13 Others V Moi University* [2019] eKLR where it was held that:

“At the core of the duty to act fairly and the requirement of fairness is the need to ensure that a person affected by a decision has an effective opportunity to make representations before it is taken, so that he or she has the chance to influence it. This requirement: is what informs



the key procedural steps set down by the law of giving of notice of an administrative action, and provision of the evidence that will be relied upon during that administrative action. The question of whether failure to observe any of these steps renders the decision making by an administrator unfair.”

50. Equal dependence was placed in *Watkins Vs. Secretary of State For The Home Department And Others* (2004] 4 ALLER 1158 and *Martin Wanderi & 106 Others -V- Engineers Registration Board & 10 Others* [2018] eKLR.
51. Furthermore, Counsel submitted that the 1<sup>st</sup> Respondent’s refusal to release the Petitioners results and eventually to graduate them is illegal, irrational and full of procedural impropriety. Counsel argued that the Petitioners fulfilled their requirements as students however the 1<sup>st</sup> Respondent has continued to frustrate them. Counsel added that the 1<sup>st</sup> Respondent had not shown any clear basis why the Petitioners should not graduate.
52. Dependence was placed in *Muntu And Others Vs. Kyambogo University* [2008] EA236 where the High Court in Uganda noted as follows:
  - “i) Illegality is when the decision-making authority commits an error of law in the process of taking a decision. An exercise of power that is not vested in the decision-making authority is such an instance acting without jurisdiction or ultra vires are instances of illegality. A decision maker who incorrectly informs him/ herself as to the law or who acts contrary to the principles of the law is guilty of an illegality.
  - ii) Irrationality is when the decision-making authority acts so unreasonably that in the eyes of the court, no reasonable authority addressing itself to the facts and the law before it would have made such a decision. Such a decision must be so outrageous in its defiance of logic or acceptable moral standards that no sensible person applying his/ her mind to the question to be decided could have arrived at such a decision.
  - iii) Procedural impropriety is the violation of the cardinal rule of natural justice - audi alteram partem - the right of a party to a cause not to be condemned unheard. We are persuaded that in declining to register the Petitioners as graduate engineers, ERB is guilty of committing an illegality, has made an irrational decision and committed a procedural impropriety. We invite this Court to so hold.”
53. On the second issue, Counsel submitted that the Petitioners had a legitimate expectation that they would graduate after the 4-year period however, it had been 13 years at the time, since having fulfilled all their obligations yet had not graduated. Essentially, it was argued that this was a violation of their legitimate expectation. Reliance was placed in *Communication Commission of Kenya & 5 Others Vs Royal Media Services Ltd & 5 Others* (2014) eKLR where it was held that:
  - “(264) In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a longstanding practice, or keeping a promise.



(265) An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation."

54. Counsel added that the 1<sup>st</sup> Respondent's action was outrightly discriminatory as the Petitioners colleagues had already graduated and been working. Counsel stressed that this is in breach of Article 27 of *the Constitution*. Reliance was placed in Charles Kaindo Kuria (supra) where it was held that:

"The course intended to have taken 3 years, took 5 years to complete leading to the petitioners loosing lifetime opportunities, as they could not secure the job opportunities as their peers, who undertook other course within the same period. The petitioners could not be absorbed or employed without the academic certificate issued by the Respondent hence they had to wait for over 1 year. The petitioners were punished by the Respondent's commission or omission and through no fault of their own. This is an example of bad experience in life and how sometime life can be unfair and unjust to some people through a fault of others."

55. Comparable reliance was placed in Community Advocacy and Awareness Trust & 8 Others v. Attorney General and others (High Court Petition No.243 of 2011).

56. On this premise, Counsel submitted that the Petitioners are entitled to general damages and nominal damages for violation of their rights under Articles 25, 27, 28, 29, 43(1)(f) and 47 of *the Constitution*. Reliance was yet again placed in Charles Kaindo Kuria (supra) where it was held that:

"The Petitioners' classmates, friends and parents would see them as slow and not bright and equate them with failure. I find the Petitioners allegations having not controverted, that they have demonstrated, their inherent dignity and right to have their dignity respected and protected was abrasively violated. I find that this is a lifelong stigma which the petitioners have to live with since the damage already done cannot be undone. This kind of pain and suffering can only be compensated by award of damages."

57. Similar reliance was placed on Jesse Waweru Wahome and 42 others v Kenya Engineers and Registration Board, Petition No.149 and 207 of 2011.

### **1<sup>st</sup> Respondent's Submissions**

58. The 1<sup>st</sup> Respondent's Counsel, C.S Fredrick Collins Omondi filed submissions dated 16<sup>th</sup> May 2025.

59. He reiterated the averments in the 1<sup>st</sup> Respondent's affidavit and submitted that there was no abuse of power as alleged by the Petitioners, and in fact, contrary to the Petitioners allegations, Biomedical Technology Programme is not defunct and is still recognized by the 2<sup>nd</sup> Respondent though the 1<sup>st</sup> Respondent had transferred all the students from the Programme as deposed in the Affidavit.

60. Counsel stressed that the right to education is not absolute but is subject to the rules and regulations governing education in a given institution hence the Petitioners cannot be cleared for graduation before they attend classes, sit for examinations and pass all the Units with regard to the Bachelor of Science in Medical Laboratory Science and Technology programme.



61. In this respect, Counsel submitted that the 1<sup>st</sup> Respondent cannot be said to have acted unreasonably or abused its power in any manner. Reliance was placed in Maharashtra State Board -VsKurmarsheth & Others [1985] CLR 1083 where the Supreme Court of India held that:

“So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations.”

62. Furthermore, Counsel submitted that the Petitioners had not adduced any evidence to demonstrate that they satisfied the School Board of Examiners to warrant being cleared for graduation. Counsel noted that the Petitioners’ having stated that they sat for exams in every Unit, ought to have availed evidence to demonstrate that they indeed attended classes, sat for exams and passed the exams in respect of the Units they sat. It is stressed that they however failed to do so.

63. On the flipside, Counsel submitted that the 1<sup>st</sup> Respondent had demonstrated under Annexure marked ‘GM-7’ that they notified the Petitioners that they had failed some of their courses and were thus expected to sit for the same. This fact is also made manifest in the Petitioner’s own annexures in the Affidavit under pages 80 and 83, to the effect that the Petitioners failed to present themselves during the 2015/2016 Bachelor of Science in Medical Laboratory Science and Technology Year 2 examinations. Further, Counsel submitted that the Petitioners had not adduced any evidence that they sat for these examinations.

64. To buttress this point reliance was placed in Brian Cosmas Baraza -Vs- University of Nairobi, Petition No. E188 of 2022 where it was held that:

“A duty therefore fell on the Petitioner to prove his case. What has he presented before this Court to prove that he indeed attended classes and above all else sat the exam. The Evidence Act provides as follows; Section 107 Burden of Proof.

As the evidence now reveals it’s not proved that the Petitioner sat the CS0-308 Social Statics II exams in the year 2016/2017. He had also claimed violation of his rights under Article 27 through discrimination which he said was because exam results were released to others and not himself. Having found as above that he did not sit for the exam then the claim of discrimination cannot stand.

28. The "missing marks" being the basis of his claim for violation of his constitutional rights under Articles 26, 27, 28, 35, 43 & 47, I find that the violation has not been proved. The Court cannot therefore order/or release of missing marks which have not been proved to exist, in the first place."

65. Counsel contended thus that the Petitioners were the ones to blame for their failure to graduate owing to their inability to pass the examinations and fulfill set requirements. Counsel as such refuted the claims of discrimination, noting that the other students had graduated upon satisfying the School Board of Examiners.

66. Further to this, Counsel submitted that the Petitioner had failed to exhaust the internal mechanisms before the 1<sup>st</sup> Respondent prior to filing this suit. Counsel noted that the purported letter addressed to the Vice Chancellor did not contain any mark that it had actually been delivered to the Vice Chancellor. For this reason, it was argued that it cannot be said that the 1<sup>st</sup> Respondent’s management declined to



address the Petitioners complaints. To this end, Counsel maintained that no legal and factual basis had been laid by the Petitioners for grant of any of the orders sought in the Petition.

## 2<sup>nd</sup> Respondent's Submissions

67. This Respondent's submissions are not in the Court file or Court Online Platform (CTS).

## Analysis and Determination

68. Having carefully gone through the pleadings and submissions, I am of the view that the following are the key issues in this Petition, namely:

- i. Whether the 1<sup>st</sup> Respondent violated the Petitioners' rights under Articles 25, 27, 28, 29, 43(1)(f) and 47 of *the Constitution*.
- ii. Whether the 1<sup>st</sup> Respondent violated the Petitioners' right to a legitimate expectation.
- iii. Whether the Petitioners are entitled to the relief sought.

## Whether the 1<sup>st</sup> Respondent violated the Petitioners' rights under Articles 25, 27, 28, 29, 43(1)(f) and 47 of *the Constitution*.

69. Apart from pleading or alleging violation of rights, the burden of proof to establish the fact of violation by way of the evidence falls on the Petitioner. Pleading alone is not sufficient if it is not backed by evidence.

70. The Court in *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] KEHC 10211 (KLR) held as follows:

“73. Whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. This fact was succinctly put forth by Rajah JA in *Britestone Pte Ltd vs Smith & Associates Far East Ltd*[38] :-

“The court's decision in every case will depend on whether the party concerned has satisfied the particular burden and standard of proof imposed on him”

74. It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Court decisions cannot be made in a factual vacuum. To attempt to do so would trivialize *the Constitution* and inevitably result in improper use of judicial authority and discretion. It will be a recipe for ill-considered opinions. The presentation of clear evidence in support of such prejudice is a prerequisite to a favourable determination on the issue under consideration. Court decisions cannot be based upon the unsupported hypotheses.”

71. In the instant case, the Petitioners allege breach of Article 27 of *the Constitution* and the relevant sub-articles as referenced by the petitioner read as follows:

- (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.



- (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).
72. The Supreme Court in *Gichuru vs Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (Civ) (22 October 2021) (Judgment) expounded on this right by guiding as follows:
- “(47) This court had occasion to lay emphasis on the burden of proof in cases of discrimination in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR where the Supreme Court applied Section 108 of the *Evidence Act* in requiring the claimant to prove his claim in a matter involving discrimination. The court also grappled with the issue of direct and indirect discrimination. The court observed thus:
- “ [49] Section 108 of the *Evidence Act* provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
- [50] This court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & others*, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:
- “...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...”
- (51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the superior courts below, it is clear to us that, by no means, did the burden of proof shift to 1<sup>st</sup> respondent.”
- (48) Black’s Law Dictionary, 10<sup>th</sup> Edition defines discrimination as “failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” However, it must be appreciated that not all cases of distinction amount to discrimination.”

73. The Court went on further to observe that:

“ [50] In equal measure, we adopt the definition of discrimination in the High Court case of *Peter K Waweru v Republic* [2006] eKLR as follows:

“Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by race, tribe, place of origin or residence or other local conviction, political opinions, colour, creed, or sex, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.



Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex .... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

(51) From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification.”

74. In the present case, the question becomes, have the Petitioners demonstrated that they have been discriminated on any of the prohibited grounds under Article 27 (4) of *the Constitution* namely-race, sex, pregnancy, marital status, health, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language, birth or any other related ground? In my humble view, there is no specific evidence that shows that any of the constitutionally prohibited grounds has been unfairly applied against the Petitioners relative to any other person or persons under similar circumstance so as to fail them or frustrate them in their academic pursuit while favouring those in similar circumstances. The claim of unfair discrimination is thus not substantiated and fails in its entirety.

75. Concerning the right to education, it falls under the economic and social rights under Article 43(1) (f). The specific provision states as follows:

Every person has the right—

(f) to education.

76. Analyzing this right as envisaged under Article 43(1) (f) of *the Constitution*, the Court in Joseph Njuguna & 28 others vs George Gitau T/A Emmaus School & another [2016] KEHC 6612 (KLR) adopted the following view:

“ 39. It is key to observe that this right is placed on the State such that, where the State does not have resources to implement a right under Article 43, the State has to either show that it does not have the resources or it will give priority to ensuring the widest possible enjoyment of the right to prevailing circumstances, including the vulnerability of particular groups or individuals. The provision under the Bill of Rights applies to all law and binds all State organs and all persons. To ensure this right, the *Basic Education Act* (supra) enjoins the Cabinet Secretary to implement the right to basic education as enshrined under Article 53.

40. As stated above, public and private institutions are categorized as basic education institutions. However, what is the role of private institutions with regard to education? Are they enjoined to ensure the realization of the right to education and by extension, the right to free and compulsory basic education?

41. Mumbi Ngugi J., while addressing the right to education and the place of private schools in the case of *J.K (Suing on Behalf of CK) v Board of Directors of R School & another* [2014] e KLR, observed that:

“It is indeed correct that Article 43 guarantees to everyone the right to education. The constitutional responsibility is placed on the state to achieve the progressive realization of the rights set out in Article However, there is no



obligation placed on a private entity such as the respondent school to provide such right;”

42. I do agree with the above proposition as the correct legal position.
43. I further wish to state that, the services offered by a private entity are akin to a contract, where each of the parties has an obligation. The private school in fulfilling its obligation has to ensure that it provides proper and a conducive learning environment. The parents or guardians have to ensure that they pay the requisite fee so that the child is offered the services rendered in the private school. A private school cannot be equated to a public school, where free tuition is offered and charges can only be imposed with the approval of the Cabinet Secretary.”

77. Likewise, it was observed in *MMM vs Permanent Secretary, Ministry of Education & 2 others* [2013] KEHC 6002 (KLR) that:

“14. The application of the rights provided for in Article 43 of *the Constitution* is also articulated in Article 20(5) of *the Constitution* which provides that;

“In applying any right under Article 43, if the State claims that it does not have the resources to implement the right, a court, tribunal or other authority shall be guided by the following principles—

- a. it is the responsibility of the State to show that the resources are not available;
- b. in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals; and
- c. the court, tribunal or other authority may not interfere with a decision by a State organ concerning the allocation of available resources, solely on the basis that it would have reached a different conclusion.”

Article 21 (2) of *the Constitution* also provides that;

“(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43.”

15. Article 21 as illustrated above draws us to look at the following in view of the Government's efforts in achieving the progressive realization of these socio-economic rights: legislative steps, policy and other measures and the setting of standards. While socio-economic rights are therefore clearly justiciable, States are required to apply as much practicability as possible in the realization of these rights and within the available resources and allocation thereof.”



78. In my humble view, this Article addresses the broader question of ensuring education is accessible to all. The fact that the Petitioners, by their own admission concede that they have partly benefited in having their university education financed through the Higher Education Loan that is extended to them by the State shows that the State, has made a significant step, towards discharging this obligation of ensuring progressive realization of education to all persons under Article 43. The Petitioner’s inability to graduate is, considering the explanation by the 1<sup>st</sup> Respondent, which the petitioners were unable to displace by contrary proof, shows that their failure to pass and fulfil the academic requirements to facilitate their graduation is attributable to their own personal challenges, and not state induced obstacles, hence cannot claim their right under Article 43 was violated by the respondent in relation to them in the circumstances of this case.
79. As pertains the right to unfair administrative action, Article 47 of *the Constitution* provides as follows:
1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
80. The prominence of fair administrative action as a constitutional right was appreciated in the South African case of *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others* (CCT16/98) 2000 (1) SA 1 where it was held as follows:
- “Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades...”
81. Equally in *Mutimba Creser Masayi Joseph vs Masinde Muliro University of Science and Technology* [2020] KEHC 2465 (KLR) the Court citing a number of authorities with approval observed as follows:
- “ 31. The Court of Appeal, in *Judicial Service Commission vs. Mbalu Mutava & another* [2015] eKLR, stated as follows, with regard to Article 47:
- “Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires form which administrative law under the common law was



developed.... 34. The court in *Kenyan Human Rights Commission & another v. Non-Governmental Organization Co-ordination Board & another* (2018) eKLR, stated:

“40. Administrative actions that flow from statutes, must now meet the constitutional test of legality, reasonableness and procedural fairness. Accordingly a party, a hearing before taking action against him is no longer discretionary. It is firmly entrenched in our Constitution as an inviolable right. It is an important safeguard against capricious and whimsical actions that lead to abuse of authority by public bodies exercising administrative and quasi-judicial functions. These no longer have place in our constitutional dispensation.

41. This court can only emphasize that it is no longer even a mere legal requirement but a constitutional one that a person is entitled to be heard and that the action to be taken should meet the constitutional test. Those taking administrative actions are bound by this constitutional decree failure of which renders their actions unconstitutional, null and void.”

82. The Supreme Court of Canada in the case of *Baker vs. Canada* (Minister of Citizenship and Immigration) [1999] 2 SCR 817 expressed this fundamental principle in the following way:

“The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”

83. The burden of demonstrating unreasonableness or arbitrariness is on the Petitioners. Instead of demonstrating this fact through presentation of concrete evidence, the Petitioners made generalized unproved allegations regarding their academic achievements. For instance, they made claims that they had passed the examinations they had been sitting in all the courses but provided no evidence to back this claim. On the contrary, the 1<sup>st</sup> Respondent adduced proof of communication with the Petitioners on the examinations they had failed which the Petitioners could not counteract.

84. The Court thus finds that the claim of unreasonableness or arbitrariness thus cannot be established in the circumstances.

85. Further, there is no evidence to show that 1<sup>st</sup> Respondent had in any way, whether by conduct, representation or established practice induced the petitioners to believe that they can legitimately graduate without the fulfilment of the stringent academic standard required of them by the 1<sup>st</sup> Respondent. They cannot thus argue that there was abrupt turnaround by the 1<sup>st</sup> Respondent that disrupted their legitimate academic expectation. Moreover, they claim that the 1<sup>st</sup> Respondent unilaterally changed their course of study mid-way but there is no evidence that they protested or objected to this change at the time, and in fact, they have been at it for long without raising a finger, which raises the question why now? In my view, this is nothing but an opportunistic excuse, which has been influenced by their personal inability to satisfy the requisite academic requirements.



86. In Kenya Revenue Authority v Universal Corporation Ltd [2020] KECA 395 (KLR) guided as follows:

“a legitimate expectation arises where there is demonstration that: a decision maker led a party affected by the decision to believe that he would receive or retain a benefit or advantage including a benefit that he/ she/ it would be accorded a hearing before the decision was taken; a promise was made to a party by a public body that it would act or not act in a certain manner and which promise was made within the confines of the law; the public authority whether by practice or promise committed itself to the legitimate expectation; the representation was clear and unambiguous; the claimant fell within the class of person(s) who were entitled to rely upon the representation(s) made by the public authority; the representation was reasonable and that the claimant relied upon it to its detriment; there was no overriding interest arising from the decision maker’s action and representation; the representation was fair in the circumstances of the particular case and that the same arose from actual or ostensible authority of the affected public authority to make the same; the promise related either to a past or future benefit; its main purpose is to challenge the decision maker to demonstrate regularity, predictability and certainty in their dealings with persons likely to be affected by their action in the discharge of their public mandate.”

87. In addition, the Court in Republic v Kenya Revenue Authority Ex-parte KSC International Limited (In Receivership) [2016] KEHC 7369 (KLR) speaking to this expectation observed as follows:

“My view on this issue is informed by the need to achieve certainty in economic sphere. As was appreciated by Nyamu, J in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others HCMA No. 743 of 2006 [2007] KLR 240 at 295:

“...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Certainty of law is a major requirement to business and investment...certainty of law is an important pillar in the concept of the rule of law.”

88. The upshot of the foregoing is that this Court finds that the case lacks merit and is hereby dismissed.

89. I make no orders as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> JANUARY, 2026.**

.....

**L N MUGAMBI**

**JUDGE**

