



**Orina v Egerton University & another (Petition E021 of 2021)
[2024] KEELRC 13331 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13331 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E021 OF 2021
DN NDERITU, J
DECEMBER 5, 2024**

BETWEEN

KEPHA OMWENGA ORINA PETITIONER

AND

EGERTON UNIVERSITY 1ST RESPONDENT

THE VICE CHANCELLOR, EGERTON UNIVERSITY 2ND RESPONDENT

JUDGMENT

I. Introduction

1. In an amended petition dated 14th November, 2022 the petitioner is seeking for the following orders –
 - a. A Declaration that the 1st Respondent’s Charter dated 1st March 2013 and statutes made thereunder are unlawful, illegal, null and void by reason of not having been gazetted as required by the mandatory provisions of sections 21 and 23 of the *Universities Act*, 2012 and section 22 of the *Statutory Instruments Act*, 2013.
 - b. A Declaration be issued that the existence and operation of the 1st Respondent is illegal and unlawful and all its actions taken from the year 2013 be declared unlawful, illegal, null and void by reason of operating under a Charter and Statutes which have not been gazetted as required by the mandatory provisions of sections 21 and 23 of the *Universities Act*, 2012 and section 22 of the *Statutory Instruments Act*, 2013.
 - c. A Declaration that the 2nd Respondent has no powers to appoint any Ad hoc Subcommittee of the 1st Respondent’s Senate without its express permission and authority.
 - d. A Declaration that the investigations and report of the Corruption Prevention Committee relating to the Petitioner are unlawful, illegal, irregular, ultra vires, null and void and against the rules of natural justice.



- e. A Declaration that the investigations and report of the Ad hoc Senate Subcommittee appointed by the 2nd Respondent on 27th November 2019 and the entire proceedings of the 1st Respondent's 509th special senate held on 10th March 2020 relating to the Petitioner are unlawful, illegal, irregular, ultra vires, null and void and against the rules of natural justice.
 - f. A Declaration that the Respondents have violated the Petitioner's rights under Articles 10, 28, 29(d), 41 (1) and 2(a)(b), 43(1), 47 and 50(1) of *the Constitution*.
 - g. An order of certiorari be issued to bring into this court for purposes of quashing and to quash the reports of the 1st Respondent's Corruption Prevention Committee and Ad hoc Senate Committee and the decision contained in minute 981/2020 of the 1st Respondent's 509th special senate held on 10th March 2020 to the effect that;
 - i. The Petitioner be given a chance to clear the "F" in MBAD 681
 - ii. The Petitioner plans to redo the unit on which he was given a credit transfer since there is no provision for Credit Transfer (CT) at the Master level for candidates under direct admission
 - iii. After the Petitioner satisfies i) and ii) above the determination of his case can be made.
 - iv. The Petitioner's Masters Degree certificate be withdrawn.
 - v. The committee investigates the whole 2004 cohort which the Petitioner and six (6) students belonged and present a report to the senate after three (3) months i.e. 12th June 2020, for further action.
 - vi. The committee to Co-opt Dr. Patricia Wambugu, the Director, Quality Assurance.
 - h. An order of prohibition, prohibiting the Respondents from withdrawing the Petitioner's Master of Business Administration (Human Resource Management) Degree or subjecting the Petitioner to any proceedings which may lead to the withdrawal of the said degree.
 - i. An order that the Respondents pay the Petitioner damages for violation of his rights under Articles 10, 28, 29(d), 43(1), 41 (1) and 2(a)(b), 47 and 50(1) of *the Constitution*.
 - j. Costs of the Petition.
 - k. Such orders as this Honourable Court may deem fit to grant.
2. The original petition dated 30th September, 2020 filed in the High Court was supported with an affidavit by the petitioner sworn on even date with several annexures thereto and the petitioner relied on the same during the hearing.
 3. The petitioner filed a further affidavit on 1st November, 2023 sworn by himself on 30th October, 2023.
 4. In response to the original petition the respondents filed a replying affidavit sworn by Prof. Seth F. O. Owido on 17th December, 2020 and after the amended petition was filed a further affidavit by Prof. Mwanarusi Said sworn on 23rd April, 2024 was filed.
 5. In a ruling delivered on 24th June, 2021 Matheka J found and held that the High Court did not have jurisdiction over the subject matter but instead of striking out the petition that court ordered that the petition be transferred to this court (ELRC) for the hearing and disposal.



6. On 13th December, 2023 it was by consent agreed that the petition be canvassed by way of written submissions. Counsel for the petitioner, Mr. Konosi, filed written submissions on 5th April, 2024 while Mr. Kisila for the respondent filed on 23rd April, 2024.

II. The Petitioner's Case

7. The petitioner's case is contained and expressed in the amended petition, the affidavits in support thereof, and the written submissions by his counsel, as summarized below.
8. It is pleaded that the petitioner is an employee of the 1st respondent working for gain as an assistant registrar. The 1st respondent (the university) is a public university initially established under the Egerton University Act which was repealed by the Universities Act 2012 while the 2nd respondent is the chief executive officer of the 1st respondent.
9. It is pleaded that the petitioner filed this petition for his interest under Articles 22 & 258 of the Constitution seeking reliefs under Articles 22 & 23 of the Constitution.
10. It is pleaded that the petitioner was engaged by the 1st respondent as an administrative assistant in January, 1995 and in the course of his employment he enrolled for a master of business administration (human resource management) and that he earned and graduated with the said degree during the 18th graduation ceremony held on 10th August, 2007. He was thereafter promoted to an assistant registrar.
11. It is pleaded that sometimes in 2019 the 1st respondent allegedly received a complaint to the effect that the petitioner had not earned the conferment of the above degree for having not passed all the requisite papers. The petitioner was thus invited for an interview with the 1st respondent over that matter vide a letter dated 24th June, 2019. The interview was to take place on 1st July, 2019 but the same was moved to 2nd July, 2019. The petitioner attended the meeting and was interviewed by two members of the 1st respondent's integrity promotion committee.
12. It is pleaded that the petitioner was not served with the complaint upon which the allegations against him and upon which the complaint and the entire process was founded notwithstanding that he had vehemently demanded to be supplied with the same. He protested to the 1st respondent vide a letter dated 29th July, 2019.
13. It is further pleaded that on or about 3rd October, 2019 the 2nd respondent informed the petitioner that his name had been removed from the list of those who were to be considered for promotion based on the allegations alluded to above.
14. It is pleaded that despite the petitioner requesting through his lawyers that he be supplied with his academic records vide a letter dated 4th October, 2019 the said records were not supplied. It is then that the petitioner filed Nakuru High Court Petition No. 28 of 2019 seeking that he be supplied with the said records.
15. It is pleaded that subsequently the 1st respondent withdrew the master degree conferred upon the petitioner as alluded to above without giving a hearing to the petitioner against the rules of natural justice and in violation of Article 47 of the Constitution. It is pleaded that besides the mental anguish caused by the alleged unfair and unlawful actions by the respondents, the petitioner has been denied promotion at work hence subjecting him to unfair labour practices.
16. It is pleaded that the withdrawal of the master degree, refusal to supply the academic records, and failure to promote or consider the petitioner for promotion amount to irrational, unreasonable, illegal, and unconstitutional actions by the respondents. It is pleaded that the respondents violated the petitioner's constitutional rights under Articles 10, 43(1), 47, & 50(1) of the Constitution.



17. In the supporting affidavit the petitioner reiterated the foregoing pleading in the petition and annexed thereto copies of the relevant university statutes and the charter, letter of appointment dated 9th January, 1995, copies of his master degree certificate and transcripts, letters by the respondents dated 24th June and 2nd July, 2019 inviting him for an interview, his letters to the respondents dated 2nd and 29th July, 2019, and a letter by his lawyers to the respondents dated 4th October, 2019, all mentioned in the petition.
18. It is deposed that the respondents denied the petitioner an opportunity to be heard on the allegations that he had not rightfully earned his master degree upon which he has been denied promotion to a senior assistant registrar.
19. Further, it is pleaded and deposed that the 1st respondent's charter and constitutive statutes have not been gazetted and as such the 1st respondent is operating illegally and all actions taken against the petitioner, including nullification and withdrawal of his master degree and denial of promotion, are mere nullities.
20. In the further affidavit the petitioner attached the career progression guidelines/scheme of service 2010 stating and alleging that he was entitled to promotion after every three years served but the respondents have denied him the same based on an alleged investigation into his academic qualifications as alluded to above. He stated that his terms of service have not been reviewed since 2014 subjecting him to unfair labour practices.
21. It is on the basis of the foregoing summary that the petitioner is seeking for the orders set out in the introductory part of this judgment.

III. The Respondents' Case

22. The respondents' case is stated in the replying affidavit of Prof. Mwanarusi Said and the written submissions by their counsel. Their position is summarized as hereunder.
23. It is deposed that the respondent is a duly chartered and gazetted public university in accordance with the law and that all its statutory instruments are valid. It is deposed that the gazettement and publication of the instruments lies with the relevant government ministry and a letter from the ministry of education acknowledging receipt of the said instruments for gazettement is attached to the affidavit alongside the charter.
24. It is further deposed that the information sought by the petitioner in Nakuru High Court Petition No. 28 of 2019 have since been supplied to him.
25. It is deposed that the above-mentioned petition alongside this one before this court are intended to defeat and stall investigations into unlawful and un-procedural acquisition of a master degree by the petitioner without meeting the required qualifications.
26. It is deposed that the respondents had a right to investigate the above serious issue upon receipt of a confidential complaint and the court should not be used to stop such lawful investigation. It is deposed that this court lacks jurisdiction to hear and determine the petition as the subject matter is outside the realm of the jurisdiction of the court as it relates to the academic qualifications of the petitioner and the validity of the master degree certificate. It is deposed that the respondents have a right to investigate the circumstances that led to the petitioner obtaining the decree without meeting the threshold which the respondents view as corruption under Sections 34, 35, & 37 of the Universities Act and Chapter 10 of the Constitution.



27. It is deposed that the petitioner ought to have complied with the recommendation that he first satisfies the qualifications of award of the master degree so as to earn his promotion instead of filing this matter in court wherein he is also challenging the legal status and legitimacy of his employer.
28. It is deposed that if the petitioner fails to remedy the anomaly as advised the university has the right to withdraw, rescind, and nullify the master degree certificate that was irregularly and or by error awarded to him. It is deposed that the petitioner is using this petition to forestall the investigations into his irregular award of the master degree instead of him doing the right thing as advised by retaking the course that he failed in.
29. It is disposed that this matter has nothing to do with the employment relationship between the petitioner and the respondent and the issues raised about the validity of his irregularly awarded master degree and the legal status of the respondent do not lie within the jurisdiction of this court.

IV. Submissions By Counsel

30. On the one hand, counsel for the petitioner enlisted the following issues for determination by the court – Whether the petition meets the threshold for constitutional petitions; Whether the petitioner is entitled to the reliefs sought; and, Who should pay the costs of this petition?
31. On the first issue, it is submitted that based on *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and the decision in Anarita Karimi Njeru V Republic (1979) KLR 154 the petition is properly before the court. Further, counsel cited Mumo Matemu V Trusted Society of Human Rights & 5 Others (2013) eKLR, Peter M. Kariuki V Attorney General (2014) eKLR, & Peter Michobo Muiro V Barclays Bank of Kenya Ltd & Another (2016) eKLR amongst many other decisions that have followed the reasoning in Anarita Karimi Njeru V Republic (supra) in delineating the boundaries of a constitutional petition.
32. It is submitted that the petitioner has pleaded and cited with precision the constitutional provisions applicable and pleaded and demonstrated how his rights thereunder have been violated.
33. On the second issue, it is submitted that the charter establishing the 1st respondent was not published and gazetted and as such it does not exist in law. Counsel cited Kenei V Egerton University & Another (2023) eKLR; Otieno & Another V Council for Legal Education (2021) eKLR; & Republic V Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Geteria (2010) eKLR in laying emphasis that the charter and regulations (statutes) for the university are legal instruments that must be published and gazetted before becoming operational.
34. It is submitted that the respondents failed to comply with Sections 21 & 23 of the *Universities Act*. It is submitted that while the respondents attached a letter submitting the charter to the Ministry no evidence was availed of publication and gazettement of the same. It is thus submitted that the 1st respondent is an illegal and unlawful entity under the above cited law as read with Section 22 of the *Statutory Instruments Act* and that the 2nd respondent has no legal authority to perform any of the roles or duties that he purports to execute.
35. It is thus submitted that the recommendations made by the respondents for the petitioner to re-sit the unit that he allegedly failed are illegal and unlawful.
36. It is therefore submitted and urged that the petitioner be relieved as prayed in the petition as set out in the introductory part of this petition. The court is urged to allow the petition with costs.
37. On the other hand, counsel for the respondents identified the following issues for adjudication and resolution by the court –



1. Whether the Petitioner's Petition is premature, vexatious and completely rush.
 2. Whether the Petition satisfies the particularity and precision threshold required of Constitutional Petitions.
 3. Without prejudice to (2) above, whether the Petition is meritorious.
 4. Whether the Petitioner is entitled to the orders sought.
 5. Who shall bear the costs of the suit.
38. On the first issue, it is submitted that the matters presented to court by the petitioner are not justiciable. It is submitted that the petitioner was properly advised on how to remedy the unit that he failed that rendered his award of a master degree untenable. It is submitted that the respondents are yet to cancel, rescind, or withdraw the degree certificate and as such the petition is premature and improperly before the court.
39. On the second issue, it is submitted that based on *Anarita Karimi Njeru V Republic (supra) & Mumo Matemu V Trusted Society of Human Rights Alliance & 5 Others (supra)* the petition as presented does not meet the constitutional threshold required for the threat, breach, or violation of constitutional rights. In illustrating this point counsel further cited *Communications Commission of Kenya & 5 Others V Royal Media Services Limited & 5 Others (2014) eKLR* arguing that other than citing numerous constitutional provisions the petitioner has not demonstrated or established a nexus between those provisions and the alleged violations.
40. On the third issue, and without prejudice to the submissions on issues one and two above, it is submitted that this court should desist from interfering with the internal administrative actions by the respondents unless it is demonstrated beyond peradventure that the actions were unfair, unreasonable, unjust, irrational, or tainted with illegality.
41. Further, it is submitted that the petitioner has not demonstrated that the respondents' action was irrational or unreasonable under Section 7(2) of the *Fair Administrative Action Act*. The court is urged to follow the reasoning in *Republic V Kenya Revenue Authority Ex parte Style Industries Limited (2019) eKLR* and find and hold that the action taken by the respondents in regard to the recommendations made for the petitioner to remedy the deficiency in the award of his master degree are rational, fair, just, reasonable, and lawful.
42. It is submitted that the petition lacks merits and the petitioner is thus not entitled to the reliefs sought. It is submitted that the petition is based on rhetorical citations of *the Constitution* with no concrete proof or relevance to the allegations made. It is submitted that while it has been established that the petitioner failed one unit and hence the award of a master degree to him was irregular and unlawful, the respondents advised him on the steps that he ought to take in remedying the situation. However, instead of complying as directed, the petitioner has decided to file this petition and the other mentioned above in the hope of resolving the rather straight-forward issue through the court. It is submitted that the subject matter is purely an internal disciplinary one. It is further submitted that there is nothing for this court to adjudicate on as the issues raised are not justiciable.
43. It is vehemently submitted that this petition has been filed with the sole purpose of circumventing and defeating the applicable and lawful internal administrative powers of an employer over an employee and the duty of the respondents to ensure that only those deserving are issued with degree certificates. The court is urged to dismiss the petition with costs.



V. Issues For Determination

44. Upon careful and thorough scrutiny of the petition, the supporting affidavit and the annexures thereto, the replying affidavit, and the submissions by counsel for both parties, the court identifies the following issues for determination –
- i. Is the petition properly before the court?
 - ii. Is the petitioner deserving of the reliefs sought?
 - iii. Costs.

VI. The Petition

45. Exactly what is this petition about? In the court’s understanding and appreciation of the facts and evidence as presented, the petitioner is complaining about several issues. Firstly, that the respondents have threatened to rescind, cancel, and or withdraw a master degree awarded to him on the basis that he failed a unit prior to the award and hence the certificate is irregular and unlawful. Secondly, the petitioner is complaining that he has been denied promotion by the respondents on the basis of the purported irregular award of the master degree. Thirdly, the petitioner is complaining that the 1st respondent is operating unlawfully for failing to gazette the charter and the statutes on which it is founded.
46. The basis of the above allegations has been discussed in the foregoing summary of the evidence by the parties in their respective affidavits and submissions by counsel and the court finds no value restating and or reproducing the same here.
47. In summary, when the respondents initiated the process of investing the petitioner’s alleged irregular acquisition of the master degree the petitioner filed Nakuru High Court Petition No. 28 of 2019 seeking that he be supplied with the details of his transcripts and other information pertaining to his journey towards attainment of the said master degree. Although this court was not informed of the status of the said petition, the respondents’ position, which has not been disputed or challenged by the petitioner, is that they have since supplied the information sought.
48. Upon investigation of the issue of the qualification of the petitioner for the award of the said certificate, the respondents found and concluded that the award was irregular and various recommendations were made for the petitioner to remedy the situation, including retaking of a unit that he had failed. It is clear from the arguments placed before the court that the petitioner is either not ready or unwilling to abide with those recommendations.
49. Instead, the petitioner has attacked the legality of the existence and operations of the respondents terming it illegal for alleged lack of gazettelement of the charter and the statutes upon which the university is founded and operating. The respondents’ position is that the charter and the statutes were duly forwarded to the concerned ministry, which is not party in this petition, for gazettelement and as such the matter is beyond the respondents.
50. In the circumstances, the petitioner argues that the respondents have no mandate and legitimacy in taking any action against him let alone withdrawing the master degree certificate.
51. It is germane to note that this petition was originally filed as Nakuru High Court Petition No. E003 of 2000 before the same was “transferred” to this court (ELRC) vide a ruling dated 24th June, 2021 (Matheka J). The “transfer” was based on the finding by that court that it lacked jurisdiction over the subject matter.



52. In my considered view, if the High Court, as the Judge found, lacked jurisdiction over the subject matter of the petition, that court lacked the capacity and jurisdiction in transferring the matter to this court. The holding in *Owners of Vessel "Lilian S" V Caltex Kenya Limited (1979) KLR* holds true to this day. To paraphrase Nyarangi J, a court without jurisdiction has no business making any orders in a matter as such orders or directions amount to nothing; they are mere nullities. This position has been cited and recited in countless decisions including *Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & Others (2012) eKLR* by the Supreme Court.
53. On the above ground alone, this petition is improperly before this court and the same ought to have been dismissed in *le mine*. The High Court ought to have struck out the petition as it cannot donate jurisdiction to this court that it did not enjoy in the first place. On this single issue the court finds and holds that this petition is improperly before this court and the same ought to be dismissed.
54. Further, the court has looked and examined the petition in its totality and established that what the petitioner is seeking is for this court to shield him from complying with the internal mechanisms set by the respondents for the award of academic certificates, in his case a master degree in business administration (human resources management). The petitioner has not established or demonstrated any illegal, irrational, unreasonable, unfair, or unjust conduct in the manner that the respondents have handled and made recommendations on what the petitioner needs to do for the certificate to stand. In any event, as shall be demonstrated below, that is not an issue within the province of this court.
55. In a rather bizarre twist in his story, the petitioner is challenging the legal existence, status, and legitimacy of the 1st respondent, his employer since 1995. This is the same employer that the petitioner accuses of not promoting him to a higher grade. This is rather curious because if the university is not properly and legally constituted it has no business in engaging any employees, the petitioner included.
56. The issue raised by the petitioner on the legal status of the respondents and the legitimacy of their actions is again not one of the matters that this court may adjudicate upon as discussed hereunder.
57. This court (ELRC) is established under Article 162(2) of *the Constitution* and operationalized through the *Employment and Labour Relations Court Act* (ELRC Act). The jurisdiction of the court is ringfenced in Section 12(1) of the ELRC as follows –

The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of *the Constitution* and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —

- a. disputes relating to or arising out of employment between an employer and an employee;
- b. disputes between an employer and a trade union;
- c. disputes between an employers' organisation and a trade union's organisation;
- d. disputes between trade unions;
- e. disputes between employer organizations;
- f. disputes between an employers' organisation and a trade union;
- g. disputes between a trade union and a member thereof;



- h. disputes between an employer's organisation or a federation and a member thereof;
- i. disputes concerning the registration and election of trade union officials; and
- j. disputes relating to the registration and enforcement of collective agreements.

58. The two main issues raised in the petition, firstly the validity of the master degree awarded to the petitioner and, secondly, the legal status and legitimacy of the respondents in taking any action against the petitioner, are not issues within the purview and realm of this court. Unless those two fundamental issues are adjudicated upon and determined, this court has no business in hearing and determining if and or whether the petitioner has been denied promotion or even the legality or otherwise of his employment.

59. For all the foregoing reasons, the court finds and holds that it has no jurisdiction over the subject matter of this petition and the same is hereby dismissed.

60. Having held as above, there is no gain in the court considering the reliefs sought.

VII. Costs

61. The court makes no order on costs.

VIII. Orders

a. This petition be and is hereby dismissed for being improperly before the court and for this court's lack of jurisdiction over the subject matter.

b. There is no order on costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 5TH DAY OF DECEMBER, 2024.

DAVID NDERITU

JUDGE

