



REPUBLIC OF KENYA



KENYA LAW
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**Cherogony v Egerton University (Petition E018 of 2023)
[2025] KEHC 9186 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 9186 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
PETITION E018 OF 2023**

JM NANG'EA, J

JUNE 30, 2025

**IN THE MATTER OF THE CONTRAVENTION OF THE RIGHTS UNDER
ARTICLES 27, 28, 29, 35, 47 & 55 OF THE CONSTITUTION OF KENYA**

BETWEEN

JOEL TUITOEK CHEROGONY PETITIONER

AND

EGERTON UNIVERSITY RESPONDENT

JUDGMENT

1. By this Petition dated 23rd August 2023 the Petitioner prays for compensation for violation of his right to education and the costs of the Petition. He avers that in the year 2012 the Respondent University admitted him to pursue a Bachelor of Science in Clinical Medicine and Surgery Course. The Petitioner laments that he was unable to graduate for the following reasons;
 - i. Frustrations in the hands of the Respondent.
 - ii. Poor training and evaluation on units of a programme other than that for which he was admitted.
 - iii. Despite passing in Critical Thinking Paper, the Petitioner complains that he was unfairly failed by the Respondent.
 - iv. Late lecture sessions resulting in delay to complete the course.
 - v. Failure to facilitate clinical/ward mentorship at the Nakuru Teaching and Referral Hospital.
 - vi. Subjection to end of course examination in 2014 despite lack of training, causing him to resit a unit in 2015.and;



- vii. Discrimination and unfair discontinuation of his studies.
2. The Petition is not supported by affidavit evidence.
3. The Respondent filed a reply to the Petition through an affidavit of its Registrar Academic Affairs (Prof. Mwanarusi Said) stating that the Petitioner was admitted to pursue a Bachelor of Science in Clinical Medicine Programme. He attacks the Petition as incompetent, vexatious, misconceived and otherwise an abuse of the court process. It is averred that as per the Rules of the University a student who fails resit examinations in respect of the medical programme shall be discontinued from the programme. The Petitioner allegedly failed his third year repeat examination, whereupon he was lawfully discontinued. His appeal to the Respondent's Council Committee on Appeals and Grievances Handling was rejected.
4. According to the Respondent, the Petitioner then complained to the Commission for Higher Education which directed re-admission of the Petition. The Respondent thought that the order was unfair and unjustified and maintained its stance that the Petitioner had been lawfully discontinued. The court is told that the Petitioner had failed to meet his contractual and academic obligations owed to the Respondent and the general public he would serve as a Clinician if he was allowed to graduate. It is therefore the position of the Respondent that no constitutional right of the Petitioner was violated.
5. The Petitioner sought and obtained leave to put in an affidavit to answer the averments in the Respondent's affidavit. He reiterates the averments in the Petition and contends that contrary to the contention in the Respondent's reply he was enrolled to study a Bachelor of Science in Clinical Medicine and Surgery and not Clinical Medicine only. He complains that the Respondent unilaterally changed the title of the course and mode of study midway to his detriment. The Petitioner therefore maintains that he is aggrieved by the Respondent's acts and/or omissions that led to discontinuation of his studies.
6. The Petition was disposed of by written submissions. In brief written submissions, learned Counsel for the Petitioner underscore the averments in the Petition and further affidavit of the Petitioner. In support of the submissions the court is referred to this court's determination in Petition No. 574 of 2017 (Douglas Moturi Nyairo vs The University of Nairobi (2018) eKLR. This decision relates to an application for stay of execution of a Judgement/Decree pending appeal.
7. The Respondent's Advocates on the other hand argue by written submissions that the Petition lacks attributes or characteristics of a Constitutional Petition and is meant to circumvent proper legal channels. It is observed that while the Petition is expressed to be brought under the provisions of Articles 27, 28, 29, 35, 47 and 55 of *the Constitution*, it is not shown how those provisions were infringed by the Respondent.
8. Reference is made to this court's judicial precedent in Anarita Karimi Njeru vs The Republic (1976 - 1980) KLR 1272 where it was held that if a person seeks a constitutional remedy or redress it is important to;

“set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

This position was reiterated in recent Superior Court's decision including Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others (2013) eKLR and Communications Commission of Kenya & 5 Others vs Royal Media Services Limited & 5 Others (Petition 14, 14A, 14B and 14C of 2014 (Consolidated) KESC 53 (KLR) (29 September 2014) (Judgement) also relied upon by Counsel.



9. The Respondent further submits that by dint of the doctrine of constitutional avoidance, claims that are not necessarily constitutional ought to be ventilated in other appropriate fora and not through a constitutional petition. According to the Respondent this Petition therefore fails to meet the constitutional threshold for specificity and evidence in support of the contentions therein.
10. The Respondent's Counsel continue to submit that, in any event, the Petition is bereft of merit. It is argued that the court cannot be invited to interfere with internal workings of the Respondent as a statutory body without showing that its decision complained of is illegal, irrational and/or unreasonable. Inter alia, the decision in Sebastian Sinya & 5 Others vs Busia County Public Service Board and Another (Bungoma ELRC Petition Number E005 of 2022) is cited by the Respondent and emphasizes the non-interference principle especially in respect to universities which are opined to be better equipped to deal with academic matters.
11. The court is told that no evidence is offered to prove that the Respondent's administrative decision in question infringes the Petitioner's constitutional and legal right to fair administrative action.
12. According to the Respondent, the parties hereto had entered into both a contractual and administrative relationship, and the court has no jurisdiction to intervene where there is no evidence of breach thereof [see the Court of Appeal case of John Mburu vs Consolidated Bank of Kenya (2018) eKLR and Pius KImayo Lang'at vs Co-operative Bank of Kenya Ltd. 2017 eKLR cited the proposition that courts are not allowed to re-write contracts between parties unless coercion, fraud or undue influence are pleaded and proved].
13. For the stated reasons inter alia the court is urged to dismiss the Petition with costs.
14. As gleaned from the material placed before the court in relation to the Petition, the substratum of the Petitioner's grievance appears to be the Respondent's administrative decision to discontinue his studies owing to failure in a critical unit. The Respondent retorts that no evidence has been provided in proof of the contention that the Petitioner's constitutional right to education was infringed as to entitle him to compensation as prayed. Indeed the Petition is not supported by affidavit evidence at the time of lodging thereof. The Petitioner, however, later put in affidavit evidence in answer to the Respondent's reply.
15. The following issues arise for determination;-
 - a. Whether the Petition satisfies the established threshold of a Constitutional Petition.
 - b. Whether the Petition is sustainable on the merits.
 - c. The orders commending themselves to the court, including as to the costs of the Petition.
16. The Anarita Case supra among many others superior courts decisions have settled the elements of a proper constitutional petition. The Petition should not only set out with reasonable precision the right allegedly infringed but also the Constitutional Provisions violated and the manner of violation.
17. Articles 27, 28, 29, 35, 47 and 55 of *the Constitution* on which this Petition is anchored generally allude to rights and fundamental freedoms including fair treatment that every person is entitled to. No specific evidence has been offered proving that these rights have been denied to the Petitioner. The particular rights allegedly infringed are not also identified.
18. The Case Law cited by the Petitioner refers to principles guiding determination of an application for stay of execution pending appeal. The decision is thus clearly inapplicable herein.



19. This is not therefore a strictly Constitutional Petition and this finding disposes of issue (a) as framed. Rather, the Petitioner's complaint appears to belong to the realm of judicial review of decisions of administrative bodies pursuant to the Law Reform Act and Order 53 of the Civil Procedure Rules 2010. The Petitioner seems to contend that the Respondent's impugned decision is unfair, even irrational.
20. Section 7 of the Fair Administrative Action Act enacted on the authority of Article 47 of the Constitution provides for judicial review of administrative actions or decisions on grounds of irrationality or unreasonableness.
21. The test of rationality has been discussed extensively in many cases including Republic vs Public Procurement Administrative Review Board & Another Ex-parte Interteck Testing Services (EA) PTY Limited & Authentic Inc; Trippex Construction Company Limited & Edmar Enterprises Limited, Ex-parte Rongo University (2018) KEHC 9643 (KLR) and the South African Case of Pharmaceutical Manufacturers Association of South Africa & Another. Re Ex-parte President of the Republic of South Africa & Others.
22. As determination of this Petition is now clear, I will not analyse the stated decisions in relation to this matter which is not a judicial review application. The doctrine of Constitutional avoidance in my view accordingly applies as is also the position of the Respondent.
23. In light of this finding, the court will not determine the Petition on merits. Instead, the Petition is struck out. Considering the relationship that existed between the parties, they shall bear their own costs.
24. Judgement accordingly.

RULING DELIVERED VIRTUALLY THIS 30TH DAY OF JUNE, 2025 IN THE PRESENCE OF:

J. M. NANG'EA, JUDGE.

Petitioner's Advocate, Mr. Simiyu

Respondent's Advocate, Ms Mwangi for Mr. Kisilah

The Court Assistant (Mr. Ng'eno)

