



**Kimani v Kenyatta University & another (Petition E197 of 2023)
[2024] KEHC 253 (KLR) (Constitutional and Human Rights) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 253 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION E197 OF 2023
LN MUGAMBI, J
JANUARY 25, 2024**

BETWEEN

NYAMBURA KIMANI PETITIONER

AND

KENYATTA UNIVERSITY 1ST RESPONDENT

DR. LINDA KIMENCU 2ND RESPONDENT

RULING

Introduction

1. By a Notice of Motion application dated 9th June 2023, the petitioner seeks to have the 1st respondent compelled to release her CAT marks for the course Unit UCU104 and have her name included in the December 2023 graduation list. The application was supported by the petitioner's affidavit in support of even date and a further affidavit dated 19th October 2023. The petitioner seeks the following relief against the respondents':
 - i. The application be certified urgent and heard ex-parte in the first instance.
 - ii. Pending the hearing and determination of the application, an order be issued compelling the 1st and 2nd respondents to release the CAT marks for unit UCU104.
 - iii. Pending the hearing and determination of the application, an order be issued compelling the 1st and 2nd respondents to allow the applicant to be included in the graduation list in July 2023 and/or December 2023.
 - iv. Any other relief this Court may seem just and expedient to grant in the circumstances.
 - v. The costs of the application be provided for.



Petitioner's Case

2. The petitioner, a student at Kenyatta University, the 1st respondent herein, finished her coursework in December 2013. She however did not graduate due to missing marks in several units. She deposed that she has since completed these units save for the unit UCU 104 where the grades are yet to be recorded.
3. She registered for the said unit a second time in SEM 2020/2021 and attended the classes. She averred that she was unable to sit for the online CAT due to technical issues on the 2nd respondent's portal. As a result, the lecturer, the 2nd respondent herein, scheduled a physical CAT on 19th February 2021. She also sat and concluded the main examination in February 2022, after receiving a go ahead by the School Exam Co-Ordinator through the letter dated 14th September 2021.
4. She deposed that the dispute between the 1st respondent and the petitioner, commenced on 24th June 2022, when she was informed that that the record only reflected the main examination results but the unit's CAT results were missing. As a result, she stated that the 2nd respondent issued her a second CAT exam on the same day via email. She submitted the answers on 26th June 2022 and 29th June 2022. She asserts that despite submitting the CAT, the 2nd respondent failed to issue the results to the 1st respondent.
5. The petitioner further deposed that out of the minimum 49 credits required to complete the course and graduate, she had completed 51 credits including the mandatory courses. She is likewise aggrieved because the impugned unit UCU 104 is an elective unit which is no longer being offered in the Bachelor of Commerce (Marketing) course.
6. She deposed that in view of this, she wrote to the 1st respondent on 8th December 2022 requesting withdrawal of the said unit. Apparently, when she delivered the letter to the school she was chastised for her decision to sue the 1st respondent. As a consequence, the 1st respondent informed that it would withdraw the said unit.
7. According to the petitioner, the 1st respondent actions have caused her not to graduate in turn violating her right to legitimate expectation and right to a fair administrative action as envisaged under the Constitution. In addition, she asserted that the 1st respondent's decision had made her to suffer and caused mental trauma. On this premise, she is convinced that unless this court intervenes, the 1st respondent will not allow her to graduate.

The 1st Respondent's Case

8. Prof. Benard M. Kivunge, the 1st respondent's Registrar (Academic) in response filed a replying affidavit dated 20th July 2023 wherein with reference to the impugned unit, deposed that the petitioner had failed to satisfy the set threshold. This is because the petitioner had failed to attain the two - thirds class attendance requirement to make her eligible to sit for the examinations in the Unit. Moreover, that the petitioner had not participated in the group assignments, class participation and class discussions which account for 15% of her final grade. It is stated that she as well did not take part in a Quiz held on 8th December 2020.
9. He equally disparaged the petitioner's claim that she missed the online CAT due to technical issues. He asserted that there were no technical issues as evidenced by the other students' successful completion of the same online CAT. It was further asserted that the petitioner did not sit for the physical CAT offered on 19th February 2021 as alleged. Additionally, that the 1st respondent's records show that the petitioner did not sit for the main examination for the unit held on 17th March 2021.



10. Prof. Kivunge additionally deposed that sometime in June 2022 the petitioner misinformed the 2nd respondent, that the 1st respondent had approved she sits for a makeup CAT in the third semester of 2021/2022 which was conducted online on 26th June 2022. It is stated that when the 2nd respondent sought to submit the petitioner's full assessment and marks for the said unit to the 1st respondent, she realized that the petitioner had not met the threshold. Attempts by the 2nd respondent to engage the petitioner over the matter are said to have been futile.
11. It is as well deposed that on 2nd November 2022, in the meeting convened by the then Deputy Vice-chancellor (Academic) to discuss the matter with the himself, the 2nd respondent and the petitioner who was on the phone, the petitioner when questioned over these issues failed to give clear answers. Subsequently, it was agreed during the phone call that the petitioner ought to retrieve her assignments or at the very least, identify her group members to ascertain her claims. It is said that this was not done.
12. He went on to state that soon after on 28th November 2022, the petitioner served the respondents with a demand letter. In consideration of the petitioner's demand letter, the 1st respondent in its response dated 7th December 2022 recommended that the petitioner retake the impugned unit and denied advising the petitioner to withdraw the said unit.
13. Prof. Kivunge affirmed that the petitioner had completed 51 unit credits as such exceeding the minimum requirements for graduation which is 49 units. Nonetheless, he asserted that whereas the said unit is no longer an elective unit, the petitioner was required to complete the Unit so as to graduate. Moreover, he averred that the petitioner had not complied with the requirements provided under Clause 4.6.1, Clause 4.8.3 and Clause 4.8.4 of the 2022 - 2026 Handbook.
14. On a last note, he deposed that the 2nd respondent had been improperly joined in this suit. This is because the 2nd respondent is the 1st respondent's employee and thus her actions were done on behalf of the 1st respondent in execution of the duties and responsibilities assigned to her. Considering this, he stated that the 2nd respondent's name should be struck out.

Petitioner's Submissions

15. The petitioner through Hussein and Omar Advocates LLP filed written submissions and a list of authorities dated 3rd November 2023 and further supplementary submissions dated 11th November 2023.
16. Learned counsel commenced by submitting that the petitioner had completed 51 unit credits in excess of the minimum requirements of 49 units hence satisfying the threshold to graduate. He argued that despite this, the 1st respondent has failed to include her in the graduation list. It was asserted that the burden of proof that the petitioner did not sit for the examination in UCU 104 was on the respondents. Reliance was placed in *Violet Ombaka Otieno & 13 others v Moi University* (2019) eKLR where the Court held that:

“The petitioners had provided evidence of transcripts issued to them by the respondents indicating that they had passed their examinations. This was adequate evidence of representations made and conduct by the respondent as to the possibility of graduation by the petitioners, and it is my finding that this legitimate expectation on their part was violated by their non-inclusion in the final list of graduands for the respondent's 38th graduation ceremony.”



17. According to Counsel, the respondents' averment that the petitioner must complete unit UCU 104 to be eligible to graduate is unreasonable as the said unit is an elective unit. In like manner, Counsel observed that the petitioner had sat for the main examination and the CAT in the Unit yet her marks were missing and no reason had been supplied for this. This was stated to be contrary Article 47 (1) of the Constitution.
18. On whether the petitioner should be granted the mandatory injunctive orders, Counsel submitted that the petitioner is deserving of the orders because she has met the threshold for grant on the injunction as espoused by the Court of Appeal in Nation Media Group & 2 Others vs John Harun Mwau [2014] eKLR. The Court held that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances. Analogous dependence was placed in Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109, and Deoraj -v- State of Maharashtra & others, Civil Appeal No. 2084 of 2004.
19. Counsel in the further supplementary submissions stressed that issuance of the reliefs sought was anchored in Article 23 of the Constitution which grants this court the powers to issue appropriate reliefs in a bid to protect constitutional rights. In support reliance was placed in Law Society of Kenya & 7 others v Cabinet Secretary for Health & 8 others; China Southern Co. Airline Ltd (Interested Party) (2020)eKLR where it was held that:

“Article 23 of the Constitution of Kenya 2010 entitles the Court to grant any “appropriate relief” in any proceedings brought under Article 22 of the Constitution. The “appropriate relief” as stated herein above is a relief; required to protect and enforce the Constitution and includes a declaration of rights, an interdict, a mandamus or such relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced.”
20. Like dependence was placed in EWA and 2 others v. Director of Immigration and Registration of Persons & another (2018) eKLR.

The 1st Respondent's Submissions

21. The 1st respondent through its Counsel, Mohammed Muigai LLP filed written submissions and a list of authorities dated 9th November 2023 where Counsel was keen to discuss whether the prayers sought in the application are capable of being granted beyond the application and pending determination of the petition.
22. In Counsel's opinion, the prayers sought in the petition are substantive prayers not interim reliefs. As a consequence, Counsel argued that once the application is determined, no prayers will be capable of being granted. Equally, Counsel asserted that failure to seek an interim order is a material omission not capable of being cured under law.
23. To buttress this point reliance was placed in Foundation Ministry Church-Kitui & another v Mailu & 3 others (Civil Case E002 of 2022) r20221 KEHC 397 (KLR) (6 May 2022) (Ruling) where it was held that:

“The substantive prayers (4,5,6, 7 and 8) as sought in this application are not tenable because they are anchored on the pendency of this application which means that they cease immediately this application is determined. This is because the said prayers are couched or premised on the determination of the hearing and determination of this application and not either the application dated 20.04.2022 or the main suit. The omission by the applicants in my considered view renders the said prayers (4,5,6,7 & 8) defective and incompetent. The



omission is not a mere technicality because there is no prayer in this application seeking preservative orders or any other relief Pending the hearing and determination of either the application dated 20.04.2022 and/or the entire suit. The provisions of Order 2 Rule 1 & 6 of the Civil Procedure Rule provide that a party is bound by his pleadings and under Order 51 of Civil. Procedure Rule a party should clearly list the prayers sought and state in general terms the grounds upon which an application is premised. This is meant to accord the opposing party a fair chance to respond.”

24. Counsel pointed out that the petitioner had erroneously in her submissions purported that the prayers sought were pending the hearing and determination of the application and petition yet this had not been pleaded. On this premise, Counsel argued that the application ought to be dismissed.
25. Counsel nonetheless on whether the petitioner was entitled to the reliefs sought, submitted that prayers 2 and 3 cannot be granted for two reasons. First because both are framed as final orders which in effect will prematurely dispose of the petition denying the 1st respondent its right to be heard. Secondly, that the petitioner is not entitled to the orders sought on merit. This in because the petitioner failed to demonstrate that she sat for the CAT in the unit.
26. It was additionally contended that the application did not raise any special circumstances as alleged. Reliance was placed in *Kenya Power & Lighting Co. Ltd v Samwel Mandere Ogeto* (2017)eKLR where the Court of Appeal held that:

“ An applicant in a mandatory, injunction must in addition, establish the existence of special circumstances. Furthermore, an applicant for mandatory; injunction must prove his case on a standard higher than the standard in prohibitory injunctions.”

27. Equal reliance was placed in *Kenya Breweries LTD and another v Washington O.Okeya*(2002)eKLR and *Nation Media and 2 others v John Harun Mwangi*(2014)eKLR. Besides, Counsel noted that a mandatory injunction had not been sought in the application and its grant would also prematurely dispose of the petition.

2nd Respondent’s Submissions

28. Ruthia Advocates in the 2nd respondent’s written submissions dated 10th November 2023 begun by challenging the suitability of the 2nd respondent’s joinder in this suit. In Counsel’s assessment, a proper party is one whose presence is necessary for the determination of the real matter in dispute which the 2nd respondent is not as is the employee. As such counsel argued that the application did not disclose any clear cause of action against her and neither are the orders sought orders enforceable against the 2nd respondent. For this reason, Counsel urged the court to strike out the 2nd respondent’s name from the suit.
29. In support reliance was placed in *Nita Ganatra Suing as The Receiver Manager of Dawat Restaurant Ltd vs Shimmers Plaza Ltd & Another* (High Court Civil Case No. 1001 of 2001) where it was held that:

“The proper plaintiff would, therefore, be the company under receivership and the Receiver Manager is merely its agent. However, in order to do justice to the parties herein, this Court will decline to strike out the plaint and instead invoke its powers under Order VIA Rule 5 and direct that the plaint and the Chamber Summons application dated 20th June, 2001, be amended by the removal of “Nita Ganatra” and in her place be put the name of the Company



under Receivership, that is, Dawat Restaurant Limited. I believe that the non-joinder of the Company was a bona fide mistake deserving to be corrected under Order 1 Rule 10."

30. On the reliefs sought, Counsel pointed out that the prayers were limited to the determination of the application rendering them a nullity once the application is adjudged. It was submitted that a party is bound by its pleadings and that drafting of prayers is a material issue that cannot be cured by the dictates of Article 159 (2)(d) of the *Constitution*. Reliance was placed in *Foundation Ministry Church-Kitui & another*(supra). To this end, Counsel urged the Court dismiss the application with costs.

Determination

31. The only issue to determine is whether the orders sought in the application can be granted by this Court.
32. The petitioner seeks to have the 1st respondent compelled to issue her with her CAT marks in Unit UCU104 and to include her in the graduation list for December 2023.
33. The respondents contested the prayers being sought at an interlocutory stage stating that they are in the nature of final orders yet the matter has not been fully heard for such a substantive determination to be made.
34. It is apparent that the applicant is seeking interlocutory mandatory injunction that seeks to compel positive performance of the following specific acts by the Respondents, namely:

“an order compelling the 1st and 2nd respondents to release the CAT marks for unit UCU104 and an order compelling the 1st and 2nd respondents to allow the applicant to be included in the graduation list in July 2023 and/or December 2023.

35. In granting interlocutory mandatory injunctions, courts have been adopting a cautious approach due to the fact that a mandatory injunction may cause great injustice or irreparable harm to the person against whom it was granted should the applicant finally not succeed and this may also be so should the court refuse but the applicant eventually succeeds. Courts therefore have adopted a strict approach where interlocutory mandatory injunctions are only permitted in limited special circumstances which the court must weigh with great circumspection. In *Lucy Wangui Gachara v Minudi Okemba Lore* (2015) eKLR, the Court of Appeal held thus:

“It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the interlocutory stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage...Among the special circumstances that may justify the grant of a mandatory injunction at interlocutory stage is where the injunction involves a simple act that could be easily reversed or remedied should the court find otherwise after trial; the defendant has accelerated the development that the plaintiff seeks to retain, with the intention of defeating the plaintiff's claim or where the defendant is otherwise bent on stealing a match on the plaintiff...On the other hand, the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We



would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing...”

36. In the Indian case of *Samir Narrain Bhajwani v Aurora Properties Investment & Anor* (Civil Appeal no. 79 of 2018, Supreme Court of India) the Court held that an interim mandatory injunction is only granted in limited circumstances where prima facie material clearly justifies a finding that status quo has been altered by one of the parties to the litigation and interest of justice demands that the status quo ante be restored by way of interim mandatory injunction.
37. As already observed in the above judicial precedents, an interlocutory mandatory injunction is not granted lightly by the court. It is only issued where it is shown that there is a strong case for the trial and the interests of justice demand that the status affairs prior to the incident complained of be restored to prevent irreparable serious injury pending trial.
38. In the instant application, the issue at hand is non-graduation of the Petitioner allegedly due to missing marks in respect of one unit- UCU 104 which the Petitioner insists she sat for but the University has refused to reflect it in its records thus denying her an opportunity to graduate. The Respondent however countered this position on the ground that the Petitioner did not attend 2/3rds of the classes, there was no proof he participated in group discussions and assignments which account for 15% and also did not sit for the physical quiz on 8/12/20. All these factors combined made the Petitioner ineligible to graduate.
39. The position taken by the Petitioner and the Respondents present two diametrically opposed versions. These are diverse facts that cannot be dealt with summarily. They have to be thoroughly interrogated before granting the orders sought. If these orders are granted, the object of the petition will have been attained as they more or less final orders making the hearing of the main petition superfluous.
40. Finally, it is untenable for the Petitioner to present an application for interlocutory mandatory injunction seeking to compel the Respondent to be included in the graduation list which she was never part of prior to the filing of the Petition. An interlocutory mandatory injunction may be granted in special circumstances to restore to previous position annulling acts that the applicant complains were wrongfully undertaken with a view to reinstating her to the last non-contested position (status quo ante). Interlocutory mandatory injunction cannot be used to confer fresh status that did not exist prior to filing of the suit, it is meant to correct a wrong that has been orchestrated by compelling a return to the previous state of affairs before the actions complained of by the applicant were taken.
41. I find no merit in the instant application. It is hereby dismissed.
42. Costs in the cause.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 25TH DAY OF JANUARY, 2024.

L N MUGAMBI

JUDGE

