



**Nyagah & another v Egerton University & 3 others (Petition E072 of 2023)
[2024] KEHC 10024 (KLR) (Constitutional and Human Rights) (12 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 10024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E072 OF 2023

LN MUGAMBI, J

AUGUST 12, 2024

BETWEEN

**IAN NYAGAH 1ST PETITIONER
HENRY MULYUNGI 2ND PETITIONER**

AND

**EGERTON UNIVERSITY 1ST RESPONDENT
COMMISSION OF UNIVERSITY EDUCATION 2ND RESPONDENT
ENGINEERS BOARD OF KENYA 3RD RESPONDENT
CABINET SECRETARY, MINISTRY OF EDUCATION 4TH RESPONDENT**

JUDGMENT

Introduction

1. In a petition dated 8th March 2023, the two Petitioners allege that it is filed on their own behalf and on behalf of 55 other persons all former students of Egerton University, the 1st respondent herein. The petition is supported by the petitioners' affidavits in support sworn on even date and a further affidavit dated 23rd July 2023.
2. The gravamen of the petition is the allegation that the 1st respondent offered unaccredited engineering courses to its students who upon graduation, the Engineers Board of Kenya (3rd Respondent), refused to register as graduate engineers thereby denying them a chance of ever becoming engineers. The petitioners assert that the respondents' actions have violated their rights under Articles 21, 27, 28, 43 and 46 of *the Constitution* and seek the following reliefs:



- a. A declaration that the respondents have violated the petitioners' rights and fundamental freedoms under Articles 21, 27, 28, 43 and 46 of the Constitution.
- b. An injunction restraining the 1st respondent from offering, teaching, enrolling or advertising non-accredited engineering courses, including and not limited to Bachelor of Science-Water and Environmental Engineering, Instrumentation and Control Engineering and Manufacturing Engineering and Technology.
- c. An order of compensation to the petitioners in respect of:
 - i. Refund of full fees paid by the petitioners to the University at 150,000 per student.
 - ii. Refund of accommodation costs spent during the five-year period at 44,5000 per student.
- d. An order of compensation to the petitioners in respect of:
 - i. General damages for time spent in university.
 - ii. General damages for lost opportunities.
- e. An order for costs.
- f. Any other orders as it may deem just and expedient for the ends of justice.

The Petitioners' Case

3. The 1st petitioner swore that he graduated in November 2019 with a Bachelor of Science degree in water and environmental engineering just like the 2nd respondent who however, graduated in June 2022.
4. The petitioners depone that at the time of their enrollment, the 1st respondent offered engineering courses namely: Bachelor of Science – Water and Environmental Engineering; Instrumentation and Control Engineering and Manufacturing Engineering and Technology. The petitioners and the affected students took up these courses unaware that they were unaccredited. Upon graduating they were not registered as graduate engineers by the 3rd respondent reason being that they had trained for unaccredited engineering courses.
5. The petitioners' assert that the 2nd, 3rd and 4th respondents despite their mandate to maintain the highest standards of education, in this case, they failed for neglected to intervene by informing the 1st respondent that the engineering offered in the institution in the period between 2014 – 2019 were unaccredited. According to the petitioners these respondents neglected to take action against the 1st respondent hence aiding its illegal actions.
6. They assert that as a result of the respondents' actions, they have not been able to access professional jobs as they are not registered as graduate engineers. This in turn has caused them massive economic loss in their lives. That they cannot secure any form of professional employment or practice as engineers both in the private and public sector. Inevitably they are not able to join the engineering profession in Kenya. The petitioners aver that they have suffered mental pain and anguish due to this situation. They averred that their attempt to resolve the matter through the National Assembly was unsuccessful hence the reason for filing this petition. They blame the 1st respondent's for offering the unaccredited engineering courses as well as the 2nd, 3rd and 4th respondents' inaction to intervene and stop the 1st respondent and others institutions from illegally offering unaccredited courses.



The 1st Respondent's Case

7. In response, the 1st respondent filed a replying affidavit by the Vice Chancellor, Professor Isaac O. Kibwage sworn on 8th May 2023 and a further affidavit dated 10th July 2023. He deposed that the University was established under the Egerton University No. 11 of 1987.
8. He on a preliminary note contends that the application and petition is defective as the names and authority of the 55 on whose behalf the Petitioners allege to sue students have not been disclosed. Moreover, that the petition does not disclose any reasonable action against the 1st respondent because it fulfilled its role within the applicable law.
9. In answering the substantive issues raised in the Petition; he stated that all the 1st respondent's programmes and curricula including the alleged unaccredited courses were processed through the Senate in accordance with the relevant legal provisions and were subsequently approved by the Commission for University Education the 2nd respondent (then Commission of Higher Education) which has to date never raised any concerns on these specific programmes and courses and others that have been developed by the 1st respondent. Furthermore, the 1st respondent maintained that it is not subject to control by any other body in terms of educational programmes except the 2nd respondent.
10. He disclosed that the impugned courses were developed around 1999 pursuant to Section 14(2) Egerton University Act which was in operation at the time and were subsequently approved by the Senate. This Act was later on repealed by the *Universities Act*, No.42 of 2012. On the strength obtaining the requisite approvals, the 1st respondent admitted the 1st petitioner on 14th August 2014 and 2nd petitioner on 7th August 2015 as well as the rest of the qualified students to pursue those courses.
11. He thus maintained that the students were properly admitted to pursue lawfully approved courses that had been validly developed by the 1st respondent in accordance with the relevant course approval procedures. He further asserts that the 1st respondent trained, examined, evaluated and awarded degrees to the petitioners as conclusive evidence of their qualification and lawful fulfilment of 1st respondent's contractual obligations to the petitioners and the other students.
12. He stated that contrary to the petitioners' contention, the law does not require the 1st respondent through its Senate to obtain the approval from the Engineers Board of Kenya, (the 3rd respondent) prior to developing and offering engineering courses. Neither was that a requirement under the Engineers Registration Act which was repealed.
13. He deposed that previously, for a graduate to be registered as an engineer, Section 11(2) of the Engineers Registration Act only required one to have a degree, diploma or license from a recognized university. The Act did not specify any form of prior accreditation for the course.
14. This only changed with the current enactment of the *Engineers Act* which now mandates the 3rd respondent to accredit engineering programmes.
15. Essentially, he stated that at the time of development of the impugned courses, the 3rd respondent's mandate emanated from the repealed Engineers Registration Act. Contrarily, he deposed that the *Universities Act* mandates the 2nd respondent to accredit and regulate universities in Kenya and in so doing bring about a conflicting interpretation regarding the accreditation for engineering courses.
16. In light of the latest legal development, he stated that the 1st respondent will revise the curricula of the impugned engineering courses so as to conform to the guidelines of the 3rd respondent to enable



the students who graduate be registered as graduate engineers and eventually become professional engineers.

17. For the reasons set out, he stuck to the position that the 1st respondent did not violate the petitioners' constitutional rights as alleged. He drew this Court's attention to the letter dated 31st May 2023 in which the 2nd respondent informed the 1st respondent that Bachelor of Science, Instrumentation and Control Engineering had received formal accreditation. The other two impugned courses were under consideration by the 2nd respondent following the 3rd respondent's recommendations on the same.
18. He further divulged that the 1st respondent has undertaken to offer 8 remedial courses to the petitioners at no additional fee to make them compliant as recommended by the 3rd respondent so as to regularize their registration with the Engineers Board of Kenya (3rd Respondent).

2nd Respondent's Case

19. The 2nd respondent vide their Chief Executive Officer, Prof. Mike Kuria filed a replying affidavit sworn on 27th June 2023 opposing the petition. He avers that the Commission established under Section 4 of the Universities Act No.42 of 2012. He asserted that it duly performed its mandate under Section 5 of the Act in it's the execution of its responsibilities with the 1st respondent.
20. He swore that the Petitioners and other students were properly admitted by the 1st Respondent into lawful academic programmes that had been developed validly through the Senate as at the time of the development of the courses, there was no legal requirement that prior approval must be obtained from the Engineers Board of Kenya (3rd Respondent).
21. That that notwithstanding, the 1st Respondent welcomed the concerns raised by Engineers Board of Kenya (the 3rd Respondent) and sought to address them in conjunction with the Commission for University Education (2nd Respondent) and has succeeded in having one of the impugned courses, Bachelor of Science - Instrumentation and Control Engineering receive formal accreditation as at 31/5/2023 (in accordance with annexure P1OK 7) subject to changing the name to Bachelor of Science, Electrical and Electronics Engineering.
22. The 2nd Respondent asserted that registration of graduate engineers by the professional body (the 3rd respondent) is not within its jurisdiction hence the lack of registration of the petitioners as graduate engineers can or the economic loss or dimmed career prospects by the petitioners for non-registration cannot be blamed on the 2nd Respondent.

3rd Respondent's Case

23. In its answer to the petition, the 3rd respondent filed a replying affidavit sworn by Eng. Margaret N. Ogai, CE, the Chief Executive Officer sworn on 11th July 2023. She stated that the 3rd respondent's mandate is provided under Section 6 and 7 the Engineers Act. A key function of the 3rd respondent is to evaluate engineering programs in both local and foreign universities for recognition by the 3rd respondent in order to register the students pursuing these programs as graduate engineers.
24. Consequently, all engineering programs offered by various learning institutions must be recognized by the 3rd respondent to ensure conformity with the industry standards for purposes of registration. She acknowledges that the mandate to accredit university programs is vested with the 2nd respondent.
25. She asserts that by the time the petitioners were being enrolled by the 1st Respondent on 14th August 2014 and 7th August 2015 respectively, the 1st respondent was well aware of the legal requirement that



- it was required to seek accreditation from the 2nd respondent and also recognition of the course from the 3rd respondent before offering it. Despite this, the 1st respondent did not take any steps to comply.
26. The 3rd Respondent revealed that through a letter dated 27th March 2017, the 1st respondent consulted the 3rd respondent seeking to find out how the impugned courses can be made to conform. As a result, the 3rd respondent evaluated the impugned programs and found that they fell short of three industry requirements. Further that the 1st Respondent did not have the capacity, infrastructure and personnel to run these programs.
 27. The 3rd respondent advised the 1st respondent to offer remedial courses in order to make three impugned courses compliant. To her knowledge, the 1st respondent started offering these remedial courses as of October 2018 with a view to bridging the identified curriculum gap. The 3rd Respondent confirmed that the 1st respondent has since been consulting with the 3rd respondent for the continuous recognition of its engineering courses.
 28. She stated that the petitioners filed Petition No.035 of 2021 dated 5th July 2021 before the National Assembly. The 3rd respondent and 1st respondent were summoned to appear before the National Assembly's Departmental Committee on Education and Research on the issue.
 29. The Committee in its Report dated 8th June 2022 gave recommendations key among them being one that required the 1st respondent to offer remedial courses to all its engineering students who had not met the 3rd respondent's registration requirements at no extra cost. Additionally, that the 2nd respondent undertakes regular inspections to ensure compliance with the accreditation requirement under Section 5 of the *Universities Act*. The 3rd respondent thus asserted that it lawfully carried out its legal mandate in regard to the 1st respondent and thus to this end, the 3rd respondent has not violated the petitioner's rights as alleged.
 30. The 3rd Respondent stated that despite the petitioners being aware of the need to take the remedial courses before they graduated as recommended and as affirmed by the National Assembly's Departmental Committee on Education and Research, they did not undertake the courses to ensure regularization of their engineering degrees hence they are not entitled to the reliefs sought.

Parties' Submissions

Petitioner's Submissions

31. The petitioner through IC Law LLP filed submissions dated 8th September 2023. Counsel highlighted three issues, namely: whether the petition is a class suit; whether the petitioners' rights under Articles 21, 27, 28, 43 and 46 of *the Constitution* were violated and, if so; what are the appropriate reliefs.
32. On the first issue, the Petitioner emphasized that Article 22 (2) (b) of *the Constitution* empowers persons to institute a suit on behalf of a group or class of persons. Also, that Section 4 of the *Consumer Protection Act*, 2012 provides that a consumer may commence a proceeding on behalf of a class of persons or may become a member of such class of persons in a proceeding in respect of a dispute arising out of a consumer agreement.
33. It was noted that the 1st respondent in its response conceded that the number of students affected as a result of the unaccredited courses were offered between 2014 – 2015 were 85 in number. Counsel asserted that this number had increased overtime yet the 1st respondent has blatantly neglected to acquire the requisite accreditation and continues to offer the impugned courses.



34. Reliance was placed in the South African case of Children’s Resource Centre Trust vs Pioneer Food (50/2012) [2012] ZASCA 182 (29 November 2012) where the elements of a class action suit were stated to be:

“the existence of a class identifiable by objective criteria; a cause of action raising a triable issue; that the right to relief depends upon the determination of issues of fact, or law, or both, common to all members of the class; that the relief sought, or damages claimed, flow from the cause of action and are ascertainable and capable of determination; that where the claim is for damages there is an appropriate procedure for allocating the damages to the members of the class; that the proposed representative is suitable to be permitted to conduct the action and represent the class; and whether given the composition of the class and the nature of the proposed action a class action is the most appropriate means of determining the claims of class members.”

35. On the second issue, it was submitted on Petitioner’s behalf that the 1st respondent’s failure to seek approval from the 3rd respondent is an infringement on the petitioner’s right to quality education. Therefore, the 1st respondent by offering the impugned courses made a fraudulent representation to the petitioners and affected students on their accreditation status. Reliance was placed in *AB and Another vs Pridwin Preparatory School and Others* [2020] ZACC 12 where it was held that:

“All contractual agreements between private parties are governed by the principle of *pacta sunt servanda*, unless they offend public policy. Where it is alleged that constitutional values or rights are implicated, public policy must now be determined by reference to the values embedded in *the Constitution*, including notions of fairness, justice and reasonableness.”

36. Counsel for this reason stressed that the petitioners had a legitimate expectation that the 1st respondent who has a statutory obligation to seek accreditation and approval from the 3rd respondent of its engineering courses would do so. On the flip side, that they also had a legitimate expectation that the 3rd respondent would not allow the 1st respondent offer the impugned courses without its accreditation. In the end their legitimate expectation was violated by the two bodies to their detriment.

37. Reliance was placed in *Communications Commission of Kenya & 5 Others vs Royal Media Services & 5 Others* 10 SC Petition Nos. 14, 14A, 14B & 14C of 2014 where the Supreme Court held that:

“Legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. Therefore, for an expectation to be legitimate, it must be founded upon a promise or practice by public authority that is expected to fulfil the expectation.”

38. On the suitable remedies the Petitioners submitted that Article 23(3) of *the Constitution* grants this Court power to issue appropriate remedies. Further the Supreme Court in *Communications Commission of Kenya* (supra) held that:

“A close examination of these provisions (article 23(3) and 165(3)(d) of *the Constitution*) shows that *the Constitution* requires the court to go even further than the US Supreme Court did in the *Marbury*, and that article 23(3) grants the High Court powers to grant appropriate relief “including” meaning that this is not an exhaustive list.”



39. It was submitted that the petitioners are entitled to compensation which was held to be an appropriate and effective remedy for infringement of a fundamental right in *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] eKLR.
40. Like dependence was also placed in *Dendy vs University of Witwatersrand, Johannesburg & Others* - [2006] 1 LRC 291, *Kooba Kenya Limited v County Government of Mombasa* (2022) eKLR, *Smt. Nilabati Behera Alias Lalit .. vs State Of Orissa And Ors*, AIR 1993 SC 1960, *Peters v. Marksman & Another* (2001) 1 LRC, *Martin Wanderi & 106 others v Engineers Registration Board & 10 others* [2018] eKLR, *M W K v another v Attorney General & 3 others* [2017] eKLR and *Siewchand Ramanooop vs. The AG of T&T*, PC Appeal No 13 of 2004.
41. To this end, Counsel submitted that an award of Ksh.200,000/- as damages to each affected student would be an appropriate award for damages in addition to the award of costs.

1st Respondent's Submissions

42. Simiyu and Partners LLP for the 1st respondent filed submissions dated 4th October 2023. The 1st respondent submitted that its relationship with the petitioners was contractual as demonstrated in the 1st respondent's replying affidavit. It was stressed that the 1st respondent had fulfilled its obligations to the petitioners. Moreover, that the petition was defective as the matter cannot qualify as a class action.
43. The 1st Respondent urged the Court to be guided by the Supreme Court's holding in *Moi University vs Zaippeline & another (Petition 43 of 2018)* (2022) KESC 29 (KLR) (Civ) (17 June 2022) (Judgment) where it was stated that:

“The nature of the relationship between the respective parties is the foundation of the dispute in this matter. This relationship commenced between the appellant and the 1st respondent with the admission letter issued by the appellant to the 1st respondent. The admission letter was framed as an offer as it contained statements such as “I am pleased to offer you a place in the School of Science...” “This offer is on the basis of the statement of your qualifications,” “This offer is subject to the satisfactory verification of these qualifications” and “This offer is also subject to the following conditions.” The offer for admission was open for acceptance by the 1st respondent in the following words: “If you accept admission under these conditions, then you are requested to sign the enclosed form MUJI/1A.” The 1st respondent accepted the offer and was admitted to pursue the indicated course. At this juncture, we do not see any difficulty in construing a contractual relationship between the appellant and the 1st respondent.”

44. On whether the 1st respondent had lawfully exercised its power, Counsel relying on the averments in the 1st respondent's affidavit submitted that the impugned courses were developed and offered as mandated under its Act. In doing so it is stated that the 1st respondent was in compliance with the dictates of the law and so cannot be faulted.
45. Reliance was placed in Civil Appeal No.266 of 1996 - *Kenya National Examination Council vs. Republic, Ex Parte Geoffrey Gathenji Nioroge & Others* where the Court of Appeal noted as follows:
- “As a creature of statute, the council can only do that which it's creature (the Act) and the rules made thereunder permit it to do...”
46. Counsel further submitted that since the impugned courses were developed in 1999, the operative law with reference to registration of the petitioners as graduate engineers was the now repealed Engineers



Registration Act not the *Engineers Act* as deponed by the 3rd respondent. Accordingly, the provisions of the *Engineers Act* can only apply to programmes developed after 14th September 2012 when it came into force. Counsel argued thus that Section 11 (2) of the Engineers Registration Act provided that the only requirement needed so as to be registered as a graduate engineer was a degree, diploma or license from a recognized university and further that the Act did not provide for accreditation of the 1st respondent's programmes by the 3rd respondent.

47. The 1st Respondent further submitted that there is evidently a conflict of laws concerning the mandate of the 2nd and 3rd respondent as envisaged under the *Engineers Act* No. 43 of 2011 and the *Universities Act* of 2012. Counsel averred that there is a conflict of roles between the 3rd respondent's powers to accredit engineering programmes under Section 7 of the *Engineers Act* and the 2nd respondent pursuant to provisions of Section 5 (j) of the *Universities Act*. As a result, the 1st respondent posited that it cannot be held liable for accreditation challenges arising out of this conflict.
48. It is additionally stated that the 1st respondent's willingness to engage the stakeholders is in no way an admission of fault on its part. That in fact, the remedial courses are only meant to assist its students affected by the 3rd respondent's misapprehension of the law.
49. Counsel urged the Court to be guided by the case of Nairobi -High Court Misc. Appln. No. 1122 of 1994 - Rita Biwott vs. Council of Legal Education & Another where the Court dealing with a similar case observed as follows:

“...despite full qualifications of the applicant CLE rejects her and that too in the face of full evidence provided or in possession of CLE that she has all the necessary basic qualifications to be admitted to the Kenya School of Law. Coming back to the case law that I went into earlier, I am able to say that the decision of CLE was unfair and unjust and it does not have powers to so act. CLE cannot in all fairness ask the applicant to go back to Edinburgh as to complete a course which she has already completed.....That is unjust and unfair and that is where the court can interfere with the discretion of CLE.”
50. Taking these factors into consideration, the 1st respondent contended that it had not violated the petitioners' rights as alleged. It also pointed out that Article 21 and 27 of *the Constitution* apply to the State and not the 1st respondent. Equally, having fulfilled its obligation to admit and train the petitioners, it did not violate Article 43 of *the Constitution*. Concerning alleged violation of Article 46 of *the Constitution*, the 1st respondent submitted that its services and products are of reasonable quality and thus this claim was not substantiated.

2nd and 4th Respondents' Submissions

51. The Attorney General through Principal State Counsel, Edna Makori on behalf of these respondents filed submissions dated 5th October 2023 which highlighted the issues for discussion in the petition to be: whether the 2nd and 4th respondents violated the petitioners' fundamental rights and freedoms and; whether the petitioners discharged the burden of proof.
52. On the first issue, Counsel submitted that the 2nd and 4th respondents had not violated the petitioners' rights as alleged. This is because the 2nd respondent performed its mandate as pertains to the 1st respondent. It was stressed that registration of the graduate engineers is not within its mandate and so the 2nd respondent should not be faulted for the petitioners' lack of registration by the 3rd respondent.



53. Relying on *Kiambu County Tenants Welfare Association vs Attorney General & another* (2017) eKLR it was submitted on behalf of 2nd and 4th Respondent that a party must not only indicate the provisions alleged to be violated but also prove violation of those rights.
54. In light of this, it was submitted that the petitioners had proved with clarity and precision how their rights were violated by the 2nd and 4th respondents as required under Section 107 and 108 of the *Evidence Act*. Reliance was placed in *Rashid Odhiambo Allogoh & 245 Others vs Haco Industries Limited* (2015) eKLR where it was held that:
- “...that which is alleged must be proved and that any applicant who alleges that his/her rights have been infringed must not only make allegations but also state clearly with supporting facts and instances where the such rights have been infringed.”
55. Like dependence was placed in *Raila Odinga vs IEBC & 3 Others* Supreme Court of Kenya Election Petition No. 5 of 2013.

3rd Respondent’s Submissions

56. On 6th October 2023, Nyaanga and Mugisha Advocates for the 3rd respondent filed submissions. The key issues identified for discussion are whether there is a conflict of laws on the mandate to accredit and approve engineering programs in Kenya; whether the 2nd respondent acted ultra-vires in accrediting the three engineering Courses and whether the petitioners are entitled to the reliefs sought.
57. Referring to Section 7 (1) (l) of the *Engineers Act* and Section 5 of the *Universities Act*, the 3rd Respondent submitted that the respective mandates of the two bodies are distinct. While the 2nd respondent is mandated to generally accredit all the academic programs with respect to university courses in Kenya, the accreditation of engineering program is specifically assigned to the 3rd respondent. In Counsel’s view, the law governing specific matters overrides the law governing general matters as stated in the legal maxim *lex specialis derogate legi generali*.
58. Reliance was placed in *M J v N K & another* (2017) eKLR where the Court observed that:
- “It is well established that when a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. This principle finds its origins in the latin maxim of *generalia specialibus non derogant*, i.e., general law yields to special law.”
59. Additional reliance was placed in *County Government of Nyeri & Anor. vs. Cecilia Wangechi Ndungu* (2015) eKLR.
60. Counsel in view of its conclusion in the second issue argued that the 2nd respondent had acted ultra vires in accrediting the impugned courses as this mandate is specifically vested in the 3rd respondent by law. In support reliance was placed in *Okiya Omtotah Okoiti & 3 others vs Anne Waiguru, the Cabinet Secretary, Devolution and Planning & 6 others* (2021) eKLR where it was held that:
- “An act is ultra vires when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint



Acting without jurisdiction or ultra vires or contrary to the provisions of law or its principles renders the decision made laced with illegality.”

61. Consequently, Counsel contended that the 2nd respondent had a statutory duty to ascertain whether the subject courses had been accredited and approved by the 3rd respondent first before proceeding to accredit them.
62. On the last issue, it was submitted that the petitioner was not entitled to the reliefs sought as the 3rd respondent in receiving and rejecting the petitioners’ applications did so within the confines of its mandate. That upon evaluation of the impugned courses they were found to be lacking and unsatisfactory to meet the industry requirements and standards.
63. Counsel contended therefore that the 3rd respondent had not violated the petitioners’ rights and equally cannot be compelled to accredit courses which fall short of the industry standards. Counsel also took issue with the instant petition as the issues raised herein against the 3rd respondent are said to have already been determined by the National Assembly and so the prayers in that regard are untenable.

Analysis and Determination

64. Having regard to the pleadings and submissions, the issues that arise for determination in this matter are:
 - i. Whether the petitioners act of instituting a class action suit for the other 55 students is legally valid.
 - ii. Whether the petitioners’ rights under Articles 21, 27, 28, 43 and 46 of *the Constitution* were violated by the respondents.
 - iii. Who between the 2nd and the 3rd Respondent is responsible for accrediting engineering courses in the Universities?
 - iv. Whether the petitioners are entitled to the relief sought.

Whether the petitioners’ act of instituting a class action suit for the other 55 students is legally valid.

65. The law on legal standing to institute constitutional petitions is provided for under Article 22 and 258 of *the Constitution*. These Articles provide thus:
 1. Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
 2. In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - a. a person acting on behalf of another person who cannot act in their own name;
 - b. a person acting as a member of, or in the interest of, a group or class of persons;
 - c. a person acting in the public interest; or
 - d. an association acting in the interest of one or more of its members.
66. This provision is further elaborated by *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 under Rule 4 which states as follows:



1. Where any right or fundamental freedom provided for in *the Constitution* is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.
 2. In addition to a person acting in their own interest, court proceedings under sub rule (1) may be instituted by—
 - i. a person acting on behalf of another person who cannot act in their own name;
 - ii. a person acting as a member of, or in the interest of, a group or class of persons;
 - iii. a person acting in the public interest; or
 - iv. an association acting in the interest of one or more of its members.
67. In *Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR the court considered the above provision and eloquently stated as follows:
- “28. ...Today, by dint of Articles 22 and 258 of *the Constitution*, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22 (3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 – *The Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013—which, in view of its long title, we take the liberty to baptize, the “Mutunga Rules”, to inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under *the Constitution* is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Articles 22 (2) and 258 of *the Constitution*.”
68. Speaking of class actions suits, the court in *Andrew Muma and Charles Kanjama Trading as Muma & Kanjama Advocate & others v Deloitte & Touche East Africa & 5 others* (2020) eKLR opined as follows:
- “75. ...I note that, Article 22 (2) (b) of *the Constitution* of Kenya 2010, empowers any person to bring an action on behalf of a certain class or a group of persons. It is states that: -
- “In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by – (b) a person acting as a member of, or in the interest of, a group or class of persons.”
76. Similarly, Order 1 Rule 8 of the Civil Procedure Rules, 2010, provides that: -
- a. Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the court otherwise orders, continued, by or against any one or more



of them as of all in same representing all or as representing all except one or more of them;

- b. The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct;
- c. Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the court to be made a party to such suit.

77. In the case of; Trustees for the Time Being of Children’s Resource Centre Trust and others V Pioneer Food (Pty) Ltd and others (050/2012) [2012] Zasca 182 the court stated: -

“The class action serves to bring a number of separate claims together in one proceeding. In other words, it permits the aggregation of claims. However, that is not its only function. Of equal or greater importance, as Professor Silver points out, is the fact that the class action is ‘a representational device’. It is: “...a procedural device that expands a court’s jurisdiction, empowering it to enter a judgment that is binding upon everyone with covered claims. This includes claimants who, not being named as parties, would not ordinarily be bound. A class-wide judgment extinguishes the claims of all persons meeting the class definition rather than just those of named parties and persons in privity with them, as normally is the case”.

78. From all the legal provisions cited, it is evident that, for the court to allow a class action, the Applicants must prove inter alia that; there are numerous parties to the suit and they have significant or sufficient “same interest”, or “common interest” against the same person(s). There should be “community of interest”, whether it arises from the same transaction or not.”

69. In the present Petition, the Petitioners disclosed that they were bringing this Petition for themselves and 55 others whom they did not name or provide authority from. Nevertheless, I am not prepared to declare this Petition as incompetent simply because of lack of the authorization. It is apparent from the response given by the 1st respondent that generally the students admitted between 2014 and 2015 were all victims of non-registration as graduate engineers, not just the two Petitioners. The fact that they remained reticent and were not individually named in this petition does not take away the fact that they faced similar challenges as were the two petitioners who chose to come to Court for redress. In any case, even without enumerating the rest of the affected students, the nature of the orders sought are declaratory hence with or without naming the other affected students, should the Petition succeed, any aggrieved student can still claim reprieve. Given the circumstances, I do not think that failure to name those other students whose records can easily traced with the 1st respondent should be fatal to the Petition.



Whether the respondents' violated the petitioners' rights

70. It is not in dispute that the petitioners were the 1st respondent former students. What is in dispute however that is once the petitioners graduated from the impugned courses and were conferred with a degree, they were unable to get registered by the 3rd respondent as graduate engineers to enable them start a journey into the engineering profession.
71. The petitioners are aggrieved by the 1st respondent which they blame for not obtaining the requisite accreditation from the 3rd respondent to offer engineering courses and for the 2nd, 3rd and 4th respondents' for not strictly ensuring that the unaccredited courses were not offered by 1st respondent thereby violating their constitutional rights under Articles 21, 27, 28, 43 and 46 of *the Constitution*.
72. The test for a constitutional petition is premised on a satisfaction of the specificity and precision requirement by a petitioner so as to establish its case. This test was affirmed by the Supreme Court in Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others (2014) eKLR as follows:
- “(349) ... Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement...”
73. To begin with, the petitioners contended that respondents' actions were in violation of Article 21(1) of *the Constitution* which provides as follows:
- It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
74. In asserting it cannot be held liable to breach of Article 21(1); the 3rd Respondent stated as follows at paragraph 32 of the replying affidavit sworn on 11th July, 2023:
- ”That moreover, the 3rd Respondent is not a state organ as defined in Article 260 of *the Constitution* and therefore it cannot bear the obligations set out in Article 21 of *the Constitution* so as to infringe the Petitioners rights as alleged.”
75. Equally, the 1st Respondent deposed in its further affidavit at paragraph 36 as follows:
- ”The provisions of Article 21 and 27 only apply to State and not the 1st Respondent...”
76. This Petition is founded on an allegation of violation of rights and fundamental freedoms of the Petitioners that are guaranteed in the Bill of Rights. In that regard, it is not just the State is bound by *the Constitution* to uphold and respect the rights and fundamental freedoms under the Bill of Rights, that obligation applies to all, including private persons. This is by dint of Article 20(1) *the Constitution* which decrees that:” The Bill of Rights applies to all law and binds all State organs and all persons”. The contention by the respondents is thus untenable.



77. The petitioners complained that their right under Article 27 of *the Constitution* was also violated. The relevant sub-article referenced by the petitioners read as follows:

1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.

78. The Constitutional Court of South Africa in discussing this right in the case of *Prinsloo vs Van der Linde and Another* (CCT4/96) [1997] ZACC 5 opined as follows:

“32. In Dworkin’s words, the right to equality means the right to be treated as equals, which does not always mean the right to receive equal treatment. We find support for the approach we advocate in the following passage from the judgment of this Court in *The President of the Republic of South Africa and Another v Hugo*:

“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that is the goal of *the Constitution* and should not be forgotten or overlooked.”

79. In the same way, the Supreme Court in *Gichuru vs Package Insurance Brokers Ltd (Petition 36 of 2019)* [2021] KESC 12 (KLR) (Civ) (22 October 2021) (Judgment) guided 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.”

80. With due respect, the Petitioners have not proved how their right to equality and freedom from discrimination was violated. They have not proved the existence of other students who were in same circumstances as they that were registered by the 3rd Respondent and only they were left out. The 3rd Respondent explained categorically why it refused to register them. It evaluated the programme they had completed and found shortfalls which they communicated to the 1st Respondent to remedy by offering the students remedial courses. I do not find any basis for alleging that there was violation of Article 27 of *the Constitution* as against the petitioners.

81. Next, was allegation that the petitioners’ right to dignity as provided for under Article 28 of *the Constitution* was violated? It states as follows:

Every person has inherent dignity and the right to have that dignity respected and protected.

82. The Court in *M W K & another vs Attorney General & 3 others* (2017) eKLR discussed this right as follows:

“49. Article 28 provides no definition of dignity. However its role and importance as a foundational constitutional value has been emphasized in a number



of cases. In the South African case of *S v Makwanyane*,^[18] O'Regan J pointed out that "without dignity, human life is substantially diminished" and pronounced the prime value of dignity in the following terms:-

"The importance of dignity as a founding value of the ... Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in Chapter 3."

50. O'Regan J drew attention to the centrality of human dignity as a constitutional value when he stated:-

"Human dignity ... informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. ... dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour."

83. Other than citing this Article, I have also not found any evidence that the Petitioners provided to substantiate the allegation that their right to dignity was violated for not being registered as student engineers upon completion of their courses. If it is based on the ground that non-registration had denied them employment hence their suffering, there is no proof that registration guaranteed them automatic employment. I cannot certainly make a finding that if registration succeeded, they would all have been employed and working as professional engineers.

84. Turning to Article 43 (1) (f) of *the Constitution*, it is provided that every person has economic and social rights to education. Analyzing this right in *Joseph Njuguna & 28 others vs George Gitau T/A Emmaus School & another* (2016) eKLR the Court 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...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] eKLR, 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 43. However, there is no obligation placed on a private entity such as the respondent school to provide such right.”

85. Likewise, it was observed in *MMM vs Permanent Secretary, Ministry of Education & 2 others* (2013) eKLR 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.”

86. In my view, the State through Parliament had put in place the legislative mechanism that created the 1st, 2nd Respondent and also the 3rd Respondent to not only provide education but also to monitor



and evaluate the educational standards. In this particular case, there is tug of war on part of the 2nd and 3rd Respondent as to who between the two is responsible for setting engineering standards in the Universities. On one hand, the 2nd Respondent states that it had power to approve engineering courses offered to the Petitioners and they met all the requisite standards which position is disputed by the 3rd Respondent and which averred that in 2017 it conducted an evaluation and identified training gaps though 1st Respondent needed to remedy for students to be registered as graduate engineers.

87. The issue therefore is not that the right to education of the Petitioners was violated. Rather, my view is that the claim by the Petitioners pegged on the right to consumer protection. Article 46(1) states as follows:

Consumers have the right—

- a. to goods and services of reasonable quality;
- b. to the information necessary for them to gain full benefit from goods and services;
- c. to the protection of their health, safety, and economic interests; and
- d. to compensation for loss or injury arising from defects in goods or services.

88. The question thus becomes, were the educational services offered to the Petitioners of reasonable quality? and they also get the necessary information for them to get the full benefit of the courses they trained for?

89. If the 1st Respondent offered them educational courses that could not transist them into professional engineering skills because the body that is legally empowered to register professional engineers' finds the training insufficient or dubious, aren't petitioners entitled to protection as consumers?

90. In Leonard Otieno vs Airtel Kenya Limited (2018)eKLR, the Court made the following observation regarding consumer rights:

“46...Consumer rights litigation is not a game of win-or-lose in which winners must be identified for reward, and losers for punishment and rebuke. It is a process in which litigants and the courts assert the growing power of the expanded Bill of Rights in our transformative and progressive Constitution by establishing its meaning through contested cases.

47. The general principle governing the determination of cases is that the party who alleges or, as it is sometimes stated, the party who makes the positive allegation, must prove. Moreover, the onus on the Petitioner to establish violation of alleged consumer rights is not a mere formality; it is important. Differently put, the onus lies on the Petitioner to prove every element constituting his cause of action. This includes sufficient facts to justify a finding that his consumer rights were violated.

48. If, in contested proceedings, the consumer asserts that his rights have been violated, the court must make a finding whether, the consumer's allegations are true...”

91. Training for years in a course that does not equip you with the relevant skills to gain professional qualifications is a matter of I find that the petitioner's consumer protection rights were infringed for



made to undergo a training that did not offer them a chance in the profession they were purportedly being trained for.

92. However, I must state that although the general mandate of the 2nd respondent is to approve or accredit university academic programmes by dint of Section 5 (3) of the [Universities Act](#). The 3rd Respondent has now been given the statutory mandate to accredit engineering programmes in the Universities. The preamble states that it is an Act of Parliament to ‘to provide training, registration and licensing of engineers, regulation and practice of engineers and for connected purposes’ and Section 6 instructively cements the role of the 3rd respondent in the industry by providing that the ‘the Board shall be responsible for the registration of engineers and firms, regulation of engineering professional services, setting of standards, development and general practice of engineering.’

Specific to engineering programmes in Universities and Colleges Section 7 (1) (l) of the [Engineers Act](#) provides the Board ”approve and accredit engineering programs in public and private universities and other tertiary level educational institutions offering education in engineering.” Section 7 (2) states where any conflict arises between the provisions of this Section and the provisions of any other written law for the time being in force, the provisions of this section shall prevail. My view is that this provision has now upstaged the role of Commission of University Education in regard to accreditation of engineering programmes offered in universities. The [Universities Act](#) unlike the [Engineers Act](#) is a general regulatory statute for university education generally but the [Engineers Act](#) is specific on training of persons who desire to become profession engineers. The generality of scope given to the Commission for Higher Education is limited by the specific provisions in the [Engineers Act](#) giving the power to accredit engineering courses in the Universities to the Engineers Board.

93. The Legislature could not have intended that the Commission for University Education would have powers that could override specific mandate expressly conferred by statutory provisions in regard to the accreditation of training of training engineering courses in the universities. There is thus no conflict between the provisions of the [Universities Act](#) and the [Engineers Act](#). It is the responsibility of the Board to accredit the courses in the Universities and Tertiary Institutions for persons willing to enroll and train to become professional engineers. That mandate is now specifically vested on the Engineers Board of Kenya.
94. However, given the overarching role performed by the Commission for University Education in setting of university education standards in general; this role has to be performed by the two institutions collaboratively rather than exclusively. The Universities retain the academic freedom of developing academic programmes through their respective Senates as provided in their respective university charters working closely with the Commission for University Education but unlike before, deference must now be accorded to the 3rd Respondent whose concurrence must be obtained on accreditation of engineering courses owing to the specific legal mandate granted by the [Engineers Act](#) that confers the accrediting responsibility of engineering programmes in the universities and tertiary institutions to the 3rd Respondent to ensuring engineering standards are maintained.
95. The Supreme Court in *Martin Wanderi & 106 others vs Engineers Registration Board & 10 others* (2018) eKLR addressing a comparable dispute opined as follows:

”[109] Academic training in our view is an ongoing exercise subject to review from time to time based on the emerging needs and challenges and is something undertaken in a multifaceted approach amongst the various stakeholders ... We have also perused the Engineering Act, 2011. Its short title defines it as: [a]n Act of Parliament to provide for the training, registration and licensing of engineers, the regulation and development of the practice of engineers and for connected purposes. While this Act does not form the basis



for determination of this matter, we note that it has now ‘expounded’ and streamlined the scope of the Board perhaps to address some of the grey areas that had come out. The Board is established under section 3 and sections 6 and 7 provide for its object and purpose, and functions and powers. Particularly, section 7(1)(l) states:

“approve and accredit engineering programs in public and private universities and other tertiary level educational institutions offering education in engineering;

We agree with the petitioners that under the new Engineering Act, the Board now has an express mandate to accredit universities offering engineering programs. However, under Cap. 530, as it applied at the time of the dispute under our consideration, accreditation work was a preserve of the Commission for Higher Education.”

96. Consequently, the Court considers under the present Act, it was improper for the 1st Respondent to overlook the 3rd Respondent given the provisions of Section 7 (1) (l) of the *Engineers Act*. It was also misconceived for the 2nd Respondent to hold and mislead the 1st Respondent to believe that could it exclusively accredit the engineering courses offered by the 1st Respondent without the involvement of the 3rd Respondent. Consequently, I find that the fate of the petitioners was contributed to by the actions of the 1st and the 2nd Respondent lack of involvement of the 3rd Respondent despite being aware of the current legal dictates. As such, the 1st Respondent mounted engineering courses that were deficient as it could not give the Petitioners the full benefit of the training to enable them get registered as professional engineers at the end of their course. This was thus a violation of the Petitioners consumer rights protected under Article 46 (1) and (2) of *the Constitution*.
97. As it were, the 3rd Respondent cannot be compelled to register unqualified persons into the profession of engineering. The 3rd Respondent stated that it evaluated the course offered by the 1st Respondent in 2017 and identified the gaps in the training and suggested the remedial courses that the affected students were to be taken through to which the 1st Respondent agreed to cater fully to enable the Petitioners get registration. The 1st Respondent did not dispute this fact. I find this is the most workable option to get the Petitioners out of this quagmire.
98. I thus make the following orders:
- a. An order compelling the 1st Respondent to facilitate the Petitioners and all the affected students to undertake remedial courses recommended by the 3rd Respondent. The cost shall be fully covered by the 1st Respondent and the same should within the next three (3) months or where applicable over such a period as may be individually agreed between each of the affected students and the 1st Respondent.
 - b. A declaration is hereby issued that the 2nd Respondent shall immediately cease to approve or accredit engineering courses in the Universities unless it is with the concurrence and input of the 3rd Respondent.
 - c. The Court declines to issue a declaratory order stopping the University (1st Respondent) from offering on-going impugned courses (if any). Instead, the Court directs that the 1st, 2nd and the 3rd Respondent begin consultations to regularize the courses for purposes of meeting the registration requirement to avoid the recurrent of the present standoff.
 - d. The 1st and 2nd Respondent to bear the Costs of this Petition

DATED, SIGNED AND DELIVERED VIRTUALLY AT MILIMANI THIS 12TH DAY OF AUGUST, 2024.



.....

L N MUGAMBI

JUDGE

