



**Kibuthu v Engineers Board of Kenya & another (Petition E111 of 2022)
[2023] KEHC 3979 (KLR) (Constitutional and Human Rights) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3979 (KLR)

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

PETITION E111 OF 2022

M THANDE, J

APRIL 28, 2023

BETWEEN

GEORGE WACHIRA KIBUTHU PETITIONER

AND

ENGINEERS BOARD OF KENYA 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. The Petitioner has moved to this Court by a Petition dated March 17, 2022. His claim is that he was awarded a Bachelor's degree in Electrical and Electronic Engineering on December 23, 2020 by the Technical University of Kenya (TUK), having satisfied the requirements set out in Section 18 of the Engineers Act (the Act). On June 21, 2021, the Petitioner lodged an application for registration as a graduate engineer with the 1st Respondent (the Board), which application was acknowledged vide a letter dated October 26, 2021. No further communication was received from the Board until its letter dated February 23, 2022, informing the Petitioner that registration was not automatic. The Petitioner contends that the Board continues to sit on his application without any regard to time and expediency as per law required.
2. The Petitioner went on to state that without registration under the Act, he is barred from using the term 'engineer' under Section 47 and from employment to offer professional engineering services under Section 49(1) of the Act. It is thus the Petitioner's case that due to the Board's failure to register him, his constitutional right to employment and to earn a living has and continues to be violated, infringed and threatened. He further contends that the Board's failure to make a decision on his application for registration as a graduate engineer, more than 8 months later is a violation of Article 47 of the Constitution. This dereliction of duty has infringed upon the Petitioner's right to freedom



from discrimination under Article 27(4) as well as his right as a youth to access employment under Article 55(c) of the Constitution. The Board's failure to register the Petitioner as a graduate engineer will further affect his prospects of employment with the Rural Electrification and Renewable Energy Corporation (REREC) for which he has applied and has been invited for interview.

3. The Petitioner further avers that the Board is required, under Section 25 of the Act, to consider any application for registration on its first meeting upon receipt. The Board's failure to consider his application is thus contrary to fair administrative action and the doctrine of legitimate expectation. The Petitioner further averred that on March 10, 2022, the Registrar of the Board appeared before the National Assembly's committee on education to answer to a petition from engineering students who had not been registered. The Registrar informed the committee that the reason for not registering the students was that the subjected engineering courses had not been accredited by the Board. It is the Petitioner's contention that accreditation of courses is not a function of the Board but of the Commission for University Education (CUE), and that this has been held by the High Court in the case of Kenya Medical Laboratory Technicians and Technologists Board & 6 Others v Attorney General and 4 others and by the Supreme Court in the case of Martin Wanderi & 106 other v Engineers Registration Board and 10 others. The import of the decisions is that the function of the Board is purely procedural registration, upon confirmation of citizenship and validity of degree certificates. As such, the failure by the Board to register the Petitioner amounts to contempt of court and is a blatant disregard of the law. He added that the issue of registration of engineers is a matter of great public interest.
4. The Petitioner thus seeks the following reliefs:
 - a. A Declaration hereby do issue that in failing to render its decision expeditiously on the Petitioner's application for registration as a graduate engineer, the Board violated the Petitioner's right to fair administrative action under Article 47(1) of the Constitution; to access employment after successful academic training under article 55(c) of the Constitution; to equal treatment before the law and non-discrimination under article 27(4) of the Constitution to the extent that the Petitioner being a successful engineering graduate remains discriminatorily unregistered.
 - a. A mandatory order do issue directing the Engineers Registration Board to register the Petitioner within twenty one (21) days and in default the Petitioner be at liberty to apply to this Court for any appropriate enforcement orders.
 - b. A declaration that the 1st respondent's members of the board have violated Article 10 of the Constitution by failing to adhere to the rule of law and as a consequence therefore unfit to hold any public office in Kenya.
 - c. Damages for violation of the clear Constitutional rights by the 1st Respondent.
 - d. Costs be borne by members of the 1st respondent's board personally.
 - e. Such other order(s) as this Honourable Court shall deem just.
5. The Petition is opposed by the Board vide a replying affidavit sworn on November 17, 2022, by Eng Margaret N Ogai, the Registrar/CEO of the Board (the Registrar). It is the Board's case that the Petition is premature as the Board is yet to communicate its conclusive decision on the registration application by the Petitioner. The Registrar deponed that the Board has not declined to register the Petitioner as a graduate engineer but has pended the decision to allow it time to review the engineering courses offered by TUK. This was communicated to the Petitioner vide a letter dated February 28, 2022, a material fact concealed by the Petitioner. To facilitate the review process, the Board held a



meeting with the vice chancellor of TUK on October 4, 2021. It was agreed that TUK would write to the Board requesting the review and also make a formal proposal to the Board for consideration. In 2019, TUK requested the Board to audit its training environment pertaining to its Bachelor programmes in Civil and Mechanical Engineering, a request that was considered by the Board in its 173rd Ordinary Board Meeting on February 14, 2019. After visiting the institution, the Board granted TUK interim accreditation for the 2 programmes pending submission to the Board of inter alia, a staff recruitment and development plan.

6. The Registrar further averred that the issues raised by the Petitioner are not unique to TUK but also affect other universities such as Muranga, Multi-media, South Eastern, Machakos and Kenyatta Universities. Additionally, that the Petitioner is not alone in this predicament and that the Board's intention is to come up with a way to solve the present registration issues even for future graduates. The Board under the guidance of the Attorney General intends to enter into a memorandum of understanding with the CUE for cooperation in the accreditation process to ensure that engineering academic programmes accredited by CUE meet the standards set by the Board. On the appearance before the National Assembly committee on education, the Board stated that it maintained its position that unaccredited universities do not have same education standards and policies as the accredited ones. As such the quality of education cannot be guaranteed. Accordingly, to be required to register engineering graduates based merely on the degree certificate would deny the Board its mandate as regulatory body for ensuring quality engineering education and degree programmes offered by universities. This is aimed at safeguarding public interest. The Board urged that the Petition be dismissed and that the Court allows it to carry out a review of engineering courses offered by TUK as a whole.
7. The 2nd Respondent filed an application dated April 27, 2022, seeking to be struck out from the proceedings. On December 8, 2022, the Court allowed the application and discharged the 2nd Respondent from the proceedings.
8. Parties filed their written submissions which I have duly considered. The issues for determination are:
 - i. Whether the Respondent has violated the Petitioner's constitutional rights as alleged.
 - ii. Whether the Board is empowered by law to review engineering courses
 - iii. Whether the Board should be compelled to register the Petitioner as a graduate engineer.
 - iv. Whether the Petitioner is entitled to damages.
 - v. Who should bear the costs of this Petition.

Whether the Board has violated the Petitioner's constitutional rights as alleged

9. The Petitioner's complaint is that upon completing his studies in electrical and electronic engineering at TUK, he on June 21, 2021, applied to the Board for registration as a graduate engineer. The Board has however failed to act on his application to date. In its defence, the Board stated that it had not declined to register the Petitioner but that it was reviewing the engineering courses offered by TUK. This was communicated to the Petitioner vide a letter dated February 28, 2022. The delay in making a decision on the Petitioner's application for registration is what provoked this Petition.
10. The right to fair administrative action is anchored in the Constitution. Article 47 of the Constitution guarantees to every person fair administrative action as follows:
 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.



2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - a. Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - b. Promote efficient administration.
11. In compliance with Article 47(3) Parliament did enact the *Fair Administrative Action Act* (FAAA) to give effect to the rights stipulated in Article 47(1). Section 4 of the Act mirrors Article 47(1) and (2) and provides:
1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. Every person has the right to be given written reasons for any administrative action that is taken against him.
 3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—
 - a. Prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. An opportunity to be heard and to make representations in that regard;
 - c. Notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d. A statement of reasons pursuant to section 6;
 - e. Notice of the right to legal representation, where applicable;
 - f. Notice of the right to cross-examine or where applicable; or
 - g. Information, materials and evidence to be relied upon in making the decision or taking the administrative action.
 4. The administrator shall accord the person against whom administrative action is taken an opportunity to—
 - a. Attend proceedings, in person or in the company of an expert of his choice;
 - b. Be heard;
 - c. Cross-examine persons who give adverse evidence against him; and
 - d. Request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
12. Section 2 of the FAAA defines 'administrative action' as:
- i. The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or



- ii. Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;
13. A person who takes an administrative action or who makes an administrative decision, is an administrator under Section 2 of the Act. An administrative action by definition may be an act, omission or decision made by an administrator. The right to fair administrative action cannot be gainsaid. This right encompasses action that is expeditious, efficient, lawful, reasonable and procedurally fair. Where a person's right or fundamental freedom has been, or is likely to be adversely affected by administrative action, such person must be given reason in writing, for such action. This requirement ensures that administrative bodies discharge their mandate within constitutional and statutory confines.
14. In the case of *Judicial Service Commission v Mbalu Mutava & another [2015] eKLR*, the Court of Appeal had this to say about the right to fair administrative action:

'Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.'

15. A similar position was adopted in the case of *Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another [2018] eKLR*, where Mwita, J stated:

33.

'Article 47(1) of the *Constitution* is in mandatory terms that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Sub Article 2 makes it even more forceful that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for that action.'

16. The learned Judge went on to state:

37. The fact that the right to Fair Administrative Action is a constitutional right was stated by the Constitutional Court of South Africa in the case of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1*, that;

'Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and,



in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades.'

38. The importance of this right to fair administrative action as a constitutional right in our Article 47 cannot be over emphasized. The Court of Appeal stated in the case of *Judicial Service Commission v Mbalu Mutava & another* [2014] eKLR; that;

'Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.'

17. In the present case, the Applicant made his application for registration on June 21, 2021. The Board has to date, a year and 10 months later, not communicated its decision the application, one way or the other. The Board did vide a letter February 28, 2022 communicate its decision to the Petitioner. In that letter, the Board stated in part:

'Sections 18 and 19 of the *Engineers Act* 2011 and Rule 4 of The Engineers Rules, 2019 provides for the requirements for registration as a Graduate Engineer.'

During its 184th ordinary meeting that was held on October 22, 2021, the Board considered you're application for registration as a Graduate Engineer. It was noted that Bachelor of Engineering in Electrical and Electronic Engineering program of the Technical University of Kenya is not recognized by the Board.

The Board will therefore pend your application for registration until there is a way forward on recognition of this course.

This is therefore to communicate the decision of the Board.

18. As can be seen from the contents of the letter, the Board made no decision on the Petitioner's application for registration. The letter was not a decision. It neither approved or rejected the Petitioner's application for registration as a graduate engineer. The Board did not also tell the Petitioner for how long it would 'pend' his application. The Petitioner has thus been kept in limbo not knowing the fate of his application.
19. The omission by the Board in this regard is an administrative action within the meaning of Section 2 of the Act. The delay of close to 2 years to communicate its decision to the Petitioner flies in the face of the requirement in Article 47(1) and Section 4(1) of the FAAA that administrative action shall be expeditious, efficient, lawful, reasonable and procedurally fair. The omission by the Board to make a decision one way or another on the Petitioner's application 1 year and 10 months after the application was made, the Respondent took administrative action that has adversely affected the constitutional rights of the Petitioner.



20. The *Constitution* guarantees to every youth the right to access employment. Article 55 provides that the State shall take measures, including affirmative action programmes, to ensure that the youth access employment. It is the Petitioner's contention that the Board's failure to register him as a graduate engineer has violated his right to access employment.
21. Section 49 of the *Engineers Act* Prohibits the employment of unregistered persons as follows:
1. A person shall not employ or continue to employ any person to offer professional engineering services or works if that person is not registered under this Act.
 2. A person shall not take up or continue in any employment as a professional engineer or consulting engineer unless that person is registered as a professional engineer or consulting engineer.
 3. An employer shall not employ or engage a graduate engineer in any work or professional engineering services or works unless that graduate engineer is under the supervision of a professional or consulting engineer.
 4. A person who contravenes any provision of this section commits an offence.
22. The Petitioner was on December 23, 2020 awarded a Bachelor's degree in Electrical and Electronic Engineering, having satisfied the requirements for the award of that degree. Without registration as a graduate engineer by the Board, the Petitioner is unable, by dint of Section 49(1) of the *Engineers Act*, to offer professional engineering services. This is because the Act prohibits anyone from employing an unregistered person to offer professional engineering services or works. By failing to make a decision on the Petitioner's application for registration, the Board has threatened the Petitioner's to access employment as a youth as guaranteed under Article 55 of the *Constitution*. His application for employment with REREC may be in jeopardy due to the omission by the Board to make that crucial decision.
23. In defense of its position, the Board's argued that the issues raised by the Petitioner are not unique to TUK but also affect other universities. Further that the Petitioner is not alone in this predicament and that the Board's intention is to come up with a way to solve the present registration issues even for future graduates. To my mind, this can only mean that there are many engineering graduates who are also in limbo awaiting decision by the Board on their application for registration. This in my view, this speaks to the urgency of the matter. It is not enough for the Board to plead that several universities and students are affected. From the material placed before the Court, there is no demonstration of any sense of urgency on the part of the Board to resolve a matter that is widespread across universities and affecting engineering students. This depicts a laissez faire attitude on the part of the Board. It is unacceptable and cannot be allowed to continue unchecked. The Board must make every effort to ensure that this matter is expeditiously resolved once and for all, for the sake of all engineering graduates who are yet to be registered and for students now pursuing engineering programmes in the various universities.
24. Having considered the foregoing, I find that the omission by the Board has violated the Petitioner's rights under Article 47(1) and 55 of the *Constitution*.

Whether the Board is empowered by law to review engineering courses

25. The Board is established under Section 3 of the *Engineers Act*. Section 6 provides that 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. Under Section 7(1), it is the



function of the Board to inter alia receive, consider, make decisions on applications for registration and register approved applications. The Board is also mandated under Section 7(1)(l) to approve and accredit engineering programs in public and private universities and other tertiary level educational institutions offering education in engineering.

26. In the case of *Martin Wanderi & 106 others v Engineers Registration Board & 10 others [2018] eKLR*, relied on by the Petitioner to argue that the Board has no role in reviewing engineering courses, the Supreme Court made orders inter alia that:
- (b) The decision of the High Court issued on October 15, 2012 is hereby affirmed in the following specific terms:
1. A declaration hereby do issue that the power of the Engineers Registration Board under the provisions of section 11(1)(b) of the Engineers Registration Act (now repealed) to register graduate engineers did not include the power to accredit and approve engineering courses offered by public universities incorporated under the Laws of Kenya.
27. One of the orders given by the High Court in its decision giving rise to the matter in the Supreme Court in that case, was:
- (f) The Engineers Registration Board shall pay general damages assessed at Kshs 200,000.00 to each petitioner and every Engineering graduate from Egerton University, Masinde Muliro University of Science and Technology and any other Kenyan public university graduating at least three years prior to the commencement of the *Engineers Act*, 2011. The said sum shall carry interest at a rate of 12% per annum from the date of judgment. (emphasis)
28. When the Martin Wanderi case was first filed in the High Court, the *Engineers Act* had not come into force. The concept of accreditation was only provided for in the new *Engineers Act* of 2011 the commencement date of which was September 14, 2012. This then explains why the High Court and the Supreme Court found that the Board's powers under the provisions of section 11(1)(b) of the repealed Engineers Registration Act to register graduate engineers did not include the power to accredit and approve engineering courses offered by public universities. In the current dispensation, however, that is not the position. My finding therefore is that by dint of Section 7(1)(l) of the Act, it is the Board that has the mandate to approve and accredit engineering programs in public and private universities and other tertiary level educational institutions offering education in engineering.

Whether the Board should be compelled to register the Petitioner as a graduate engineer

29. The Petitioner seeks an order compelling the Board to register him as a graduate engineer. The Board contends that its mandate as regulatory body is to ensure quality engineering education and degree programmes offered by universities. It should therefore not be required to register engineering graduates merely on production of a degree certificate.
30. I concur with the Board, the statutory responsibility placed upon it to ensure quality engineering education in this country is heavy. The Board must therefore be given the requisite space to approve and accredit engineering courses to satisfy itself that they meet the required standards. For the Board to register graduate engineer, it must be satisfied that an applicant has met the requirements. It must be noted that this Court has no capacity to tell whether the degree conferred upon the Petitioner meets the requirements. It is therefore not for this Court to direct the Board to register the Petitioner as a graduate engineer.



Whether the Petitioner is entitled to damages

31. The Petitioner seeks general damages for clear violation of his rights by the Board. The Constitution has made provision for the award of appropriate relief which includes an order of compensation. Article 23 (3) of the Constitution provides as follows:

In any proceedings brought under Article 22, a court may grant appropriate relief, including

- a. A declaration of rights;
- b. An injunction;
- c. A conservatory order;
- d. A declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- e. An order for compensation; and
- (f) An order of judicial review.

32. The Petitioner's complaint against the Board is that it has delayed and/or failed to register him as a graduate engineer long after he made his application. Section 25(1) of the Act provides that the Registrar shall, so far as is practicable, bring by the every application before the Board for consideration at its first meeting after receiving the application. Subsection (3) goes on to provide that the decision of the Board on an application for registration shall be communicated to the applicant by the Registrar by letter sent to the address stated in the application within twenty one working days from the date of the decision of the Board. In enacting this provision, Parliament clearly considered the constitutional imperative that administrative action must be expeditious, efficient, lawful, reasonable and procedurally fair. Although the Act does not stipulate the period within which a decision must be made, Section 58 of the Interpretation and General Provisions Act provides that:

'Where no time is prescribed or allowed within which anything shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises.'

33. The Board is yet to communicate to the Petitioner, its decision on his application for registration as a graduate engineer close to 2 years after he made the application. This cannot be said to be reasonable and smacks of dereliction of duty. It is a fact of lime is a resource that once lost, cannot be recovered. American author Aiden Wilson Tozer stated thus about time:

'Time is a resource that is non-renewable and non-transferable. You cannot store it, slow it up, hold it up, divide it up or give it up. You can't hoard it up or save it for a rainy day—when it's lost it is unrecoverable. When you kill time, remember that it has no resurrection.'

34. As a result of this delay by the Board, the Petitioner has lost 2 years of his productive life. Years he will never be able to recover. Having found, as I have that the Board has violated the Petitioners' rights, it is necessary that the Petitioner be awarded compensation. In the Martin Wanderi case (supra), the petitioners were awarded Kshs 200,000/= each for failure by the Board to register them, in circumstances similar to the case herein. That was about 11 years ago. I am of the view that an award of Kshs 500,000/= in general damages will be reasonable compensation, as an appropriate relief.



Who should bear the costs of this Petition

- 35. Costs follow the event. Rule 26(1) of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, provides that the award of the costs is at the discretion of the Court. The Board has by its omission compelled the Petitioner to move to this Court for a determination of his rights and fundamental freedoms. Had the Board done the right thing, this Petition would not have been necessary. Accordingly, the Court in exercise of its discretion finds that the Petitioner ought to be compensated for prosecuting this Petition.
- 36. In the end and in view of the foregoing I find that the Petition is merited and partially succeeds and I make the following orders:
 - i. A declaration do hereby issue that by delaying its decision on the Petitioner’s application for registration as a graduate engineer, the 1st Respondent has violated his rights under Article 47 and 55.
 - ii. The 1st Respondent shall pay to the Petitioner general damages assessed at Kshs 500,000/= which shall carry interest at a rate of 12% per annum from the date of this judgment.
 - iii. The 1st Respondent shall conclude the review of the engineering programme offered by the Technical University of Kenya expeditiously and in any event not later than July 31, 2023.
 - iv. The 1st Respondent shall make and communicate its decision on the Petitioner’s application for registration as a graduate student by August 14, 2023.
 - v. Mention for compliance on September 18, 2023.
 - vi. The Petitioner shall have costs of this Petition.

DATED AND DELIVERED IN NAIROBI THIS 28TH DAY OF APRIL 2023

M. THANDE

JUDGE

In the presence of: -

..... for the Petitioner
 for the Respondent
 Court Assistant

