



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 192 OF 2019

IN THE MATTER OF ARTICLES 2(5), 10, 43, (1) (F), 22, 23, 56(6),

46(1)(6), 165(3), 258 OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

AND

IN THE MATTER OF PRACTICE AND PROCEDURE RULES, 2013 (MUTUNGA RULES)

AND

IN THE MATTER OF THE UNIVERSITIES ACT OF 2014

AND

IN THE MATTER OF THE COMMISSION FOR UNIVERSITY EDUCATION ACT

AND

IN THE MATTER OF THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) ACT OF 2014

AND

IN THE MATTER OF THE KENYA NATIONAL QUALIFICATIONS FRAMEWORK ACT 2014

AND

IN THE MATTER OF THE TECHNICAL AND VOCATIONAL TRAINING AUTHORITY ACT (TVETA)

AND

IN THE MATTER OF THE GOVERNMENT PROCEEDINGS ACT CAP 40 LAWS OF KENYA

BETWEEN

ROBINSON KIOKO.....APPLICANT/PETITIONER

VERSUS

CABINET SECRETARY OF EDUCATION.....1STRESPONDENT

COMMISSION FOR UNIVERSITY EDUCATION.....2ND RESPONDENT

JUDGEMENT

PETITION

1. The Petitioner through a Petition dated 20th May 2019 supported by a Supporting Affidavit sworn by the Petitioner of even date seek the following reliefs:-

- a) That this Honourable Court be pleased to declare that the Statute Law (Miscellaneous Amendment) Act 8 of 2014 is null and void and lacks any force of law for being a violation of the constitution and the law.*
- b) That this Honourable Court be pleased to issue Order stopping all Universities in Kenya from offering Bridging, Certificate and Diploma and Certificates courses for being a violation of the Constitution and the law.*
- c) That this Honourable Court be pleased to order the Technical and Vocational Training Authority compelling it to comply and enforce the full spirit and letter of the Technical and Vocational Education and Training Act (Act No.29 of 2013) and its attendant regulations.*
- d) That this Honourable Court be pleased to Order the KNQFA to comply and enforce the full spirit and letter of the KNQFA Act.*
- e) Any other Orders that this Honourable Court may deem fit and just.*
- f) That costs of this Petition be borne by the Respondents.*

PETITIONER'S CASE

2. The Petitioner's case as stated in the Petition is briefly as follows.

- i) That since independence, the Government has addressed challenges facing the education sector through commissions, committees and Taskforce. The first Commission after independence came up with the Report of the Kenya Education Commission (The Ominde Report, 1964) that sought to reform the education system inherited from the colonial government to make it more responsive to the needs of independent Kenya.
- ii) That the Commission proposed an education system that would foster national unity and the creation of sufficient human capital for national development. Sessional Paper No: 10 of 1965 on African Socialism and its Application to Planning in Kenya formally adopted the Ominde Report as a basis for post-independence education development.
- iii) That the report of the National Committee on Education Objectives and Policies (The Gachathi Report, 1976) focused on redefining Kenya's educational policies and objectives, giving consideration to national unity, economic, social and cultural aspirations of the people of Kenya.
- iv) That it resulted in Government support for Harambee schools and also led to establishment of the National Centre for Early Childhood Education (NACECE) at the Kenya Institute of Education (KIE).
- v) That the report of the Presidential Working Party on the Second University in Kenya (The Mackay Report, 1981) led to the removal of the advanced (A) level of secondary education, and the expansion of other post-secondary training institutions.
- vi) That in addition to the establishment of Moi University, it also recommended the establishment of the 8:4:4 system of education and the Commission for Higher Education (CHE), now Commission for University Education herein (CUE).
- vii) That the report of the ***Presidential Working Party on Education and Manpower Training for the Next Decade and Beyond (The Kamunge Report, 1988)*** focused on improving education financing, and quality relevance. This was at a time when the Government Scheme for the provision of instructional materials through the National Textbook Scheme was inefficient and therefore adversely affected the quality of teaching and learning.
- viii) That from the recommendations of the Working Party in 1988, the Government produced Sessional Paper No.6 on Education and Training for the next Decade and Beyond. This led to the policy of cost sharing between the Government, parents and communities.
- ix) That the commission of Inquiry into the Education System of Kenya (The Koech Report, 2000) was mandated to recommend ways and means of enabling the education system to facilitate national unity, mutual social responsibility, accelerated industrial and technological development, life-long learning and adaptation in response to changing circumstances.

x) That the Koech Report recommended Totally Integrated Quality Education and Training (TIQET). While the Government did not adopt the Report due to the cost implications some recommendations, such as curriculum rationalization have been adopted and implemented. Recent policy initiatives have focused on the attainment of EFA and, in particular, Universal Primary Education (UPE).

3. That the government is committed to the provision of quality education and training as a human right for all Kenyans in accordance with the Kenyan Law and the international conventions such as the EFA goal, and is developing strategies for moving the country towards the attainment of this goal.

4. That through **Sessional Paper No.1 of 2005** the government committed itself to the recommendations made by the delegates attending the National conference on Education and Training, held between 27th and 29th November 2004, to develop sector policies and implementation strategies that will ensure the provision of relevant and quality education and training to Kenyans.

5. That between 2012 - 2014 various laws were enacted to provide for a legal framework at all levels of education in the country. The Acts of Parliament enacted are **Technical Vocational Training (TVET) Act 2013, Basic Education and Early Learning Act 2013, Kenya National Examination Council Act, Kenya Institute of Curriculum Development Act, Universities Act No 12 of 2012 and Kenya national Qualifications Authority Framework No.22 of 2014.**

6. That following the enactment of the laws above, education and training is structured to include Basic Education, TVET and University Education. Basic Education covers two years of Pre-school, eight years of Primary education and four years of Secondary Education, then there is Tertiary education that comprises of TVET, Teacher Training Technical and Vocational Training and there is university education and higher Education.

THE 1ST RESPONDENT'S CASE

7. The 1st, 2nd, 3rd, 4th and 5th Respondents filed various Replying Affidavits.

8. The 5th Respondent further filed grounds of opposition dated 10th July, 2019 raising the following grounds:-

a) That the Petitioner has not demonstrated before the Honourable Court how the Respondents have violated his Constitutional Rights. It is well established in the case of Anarita Karimi Njeru vs. R (1976-1980) KLR 1272 that the Petitioner must state and identify the rights with precision and how the same have been or will be infringed in respect to him.

b) That there is a general presumption that every Act of Parliament is constitutional; every statute enacted by Parliament enjoys this presumption. It was held in Were Samwel & 14 others v. Attorney General & 2 others (2017) eKLR at paragraph 32 that Courts are invited to presume the statute or statutory provision to be constitutional unless the contrary is established, and that it is the duty of the person who alleges that a statute or statutory provision is unconstitutional to prove such unconstitutionality.

c) That the Petition herein is res judicata, the issues herein having been determined in Nairobi High Court Petition No. 93 of 2015 between Peter Ngatia Matu versus Speaker of the National Assembly and 3 others as consolidated with Petition NO. 132 of 2015 between The Kenya National Association of Private Colleges (KENAPCO) versus The Attorney General and 2 others.

d) That the law and the Regulations in question are designed at maintaining and ensuring high professional standards and competence and court should as far as possible, avoid any decision or interpretation of a statutory provision, rule or byelaw which would bring about the result of rendering the system unworkable in practice or create a situation that will go against clear provisions of the law governing the subject in issue. (See Rachel Adhiambo Ogola & another v Council of Legal Education & another (2017) eKLR.

e) That the Respondents have therefore acted in accordance with the power conferred upon them by law.

f) That the Petition is frivolous, vexatious, incompetent and improperly before court and an abuse of the court process.

ANALYSIS AND DETERMINATION

9. I have very carefully considered the Petitioner's Petition, affidavits in support and opposition and annexures thereto and counsel rival submissions; and from the above the issue for consideration can be summed up as follows:-

a) The Universities are mandated to offer Bridging Certificates?

b) Whether the Constitutionality of the statute miscellaneous law (Miscellaneous Amendments) Act of 2014?

A. WHETHER THE UNIVERSITIES ARE MANDATED TO OFFER BRIDGING CERTIFICATES?

10. The Respondent's through an affidavit sworn by Professor G. Magoha, Professor Mwenda Ntarangwi, Ephraim Munene and Dr. Kipkirui Langat all oppose the Petitioner's Petition on various grounds as stated thereto in their affidavits. The relevant acts of Parliament enacted and referred to in this Petition are **Technical Vocational Training (TVET) Act No. 29 of 2013; Basic Education and Early Learning Act No. 14 of 2013; Kenya National Examination Council Act, No.2013; Kenya Institute of Curricular Development Act, 2013, Kenya National Qualification Authority Framework Act No. 22 of 2014 and Universities Act No. 42 of 2012** that establishes the Commission for University

Education which Regulates University Education.

11. The enactment of the aforesaid Laws, Education and Training in Kenya is structured to include Basic Education and Early Learning; Technical and Vocational Education and Training and University Education. The Basic Education Course has Two (2) years of Pre-School, Eight (8) years of Primary Education and Four (4) years of Secondary Education. The structure provides for Tertiary education that comprises of Technical and Vocational Education and Training (TVET); Teacher Training below undergraduate level and university education.

12. The Legal framework facilitates and supports access to education and training, accordingly it follows institutions under the Ministry have mandates of implementing the Law's as required and ensure that each institution discharges only those functions, that fall within its mandate and is restrained from infringing on the mandate of other institutions in other level of education as it continues so as to ensure coherence and stability within the education sector.

13. It is noted that the **University Act No.42 of 2012** which regulates University Education was enacted and operationalized on 13th December 2012 and following this enactment, **Section 20(1) (e) of the Act** allowed Chartered Universities to award degrees including honorary degrees.

14. Following the **Statute Law (Miscellaneous Amendment) Act 2012** Universities were further allowed to award the following:-

(i) Degrees, including post graduate degree and honorary degrees

(ii) Diplomas, including postgraduate diplomas and

(iii) Other academic certificates.

15. It follows that following the provisions by the **Statute Law (Miscellaneous Amendments) Act of 2012** Universities are allowed to offer degrees, diplomas and certificates as per the provision of **Section 20(1)(e) of the Universities Act No. 42 of 2012**.

16. The Commission for University Education provides the minimum admission requirements for undergraduate, postgraduate diploma, masters and Doctorate programme in the University and all universities are expected to meet the minimum admission requirements when admitting students to whatever level of training. For instance, the minimum entry requirement for undergraduate is C+ at Kenya Certificate of Secondary Education (KCSE) or its equivalent determined by Kenya National Examination Council (KNEC) or KNEC, Diploma or its equivalent. **The Statute law (Miscellaneous Amendments) Act 2014** did not in any way allow universities to offer certificates that would enable students to be admitted in the University.

17. Considering academic Certificate envisaged under **Section 20(1)(iii) of the Universities Act**, these are in my view, academic certificates issued to a student upon meeting the minimum entry requirement to be admitted in the University and not otherwise. This is not intended for all purposes and intention to be used to allow Universities in Kenya to offer Bridging, or Certificate or Diploma and Certificates course contrary to clear provisions; of University Act on legibility of a student to be admitted for undergraduate, or post graduate diploma, masters and Directorate Programme.

18. The **University Act** is specific that in offering the academic certificates courses, Universities are also required to ensure those courses meet the required learning volumes. The certificates courses should take at least 1 calendar year of learning.

19. On the other hand the Kenya National Qualification Authority is established under the **Kenya National Qualifications Framework Act of 2014**. According to the **Kenya National Qualifications Framework (KNQF)**, the qualification for direct admission to the Universities is a minimum grade of C+ or having gone through a diploma programme for 2 years. Furthermore it is specifically stated under **Section 8 (j) of the KNQA Act**, that the Law mandates the Authority to define the various levels of qualification and competences. To operationalize that provision, **KNQA** gazetted the **Kenya National Qualifications Framework (KNQF) Regulations, 2018** which under **Regulations 18(5)** the volume of learning for each level are described.

20. **Regulation 18(5) (d) of KNQA Act** gives the volume of learning for craft certificates to 1200 notional hours which is equivalent to 1 calendar year and for diploma to 2400 notional hours which is equivalent to 2 calendar years.

21. The Petitioner has not demonstrated any contravention of Universities Act by any of the Respondents herein. The 4th Respondent has deponed that TIVET acknowledge tertiary institutions awarding diploma and certificates and that any institution accredited under the TIVET Act is deemed to offer lawful qualification. The 3rd Respondent further state KNQA will recognise the award of diploma and certificates from a University if the University is accredited by CUE and the programme for diploma and certificate comply with KNQA and that all qualifications to meet volume of learning and contact hours for every programme have been met as required.

22. In view of the above I find that the Universities have not been shown where contravened the **Universities Act No. 42 of 2012** to warrant granting the Petitioner the relief sought against them; under the sub-heading.

B. THE CONSTITUTIONALITY OF THE STATUTE MISCELLANEOUS LAW (MISCELLANEOUS AMENDMENTS) ACT OF 2014?

23. The Respondents through grounds of opposition by the 5th Respondent challenge the Petitioner's Petition and contend that the issues raised in this Petition is Res-judicata. It is contended the issue of the Constitutionality of the **Statute Law (Miscellaneous Amendments) Act**

2014 was determined in *Nairobi High Court Petition No. 93 of 2015* between *Peter Ngatia Matu versus Speaker of the National Assembly and 3 others* as consolidated with *Petition No. 132 of 2015 between the Kenya National Association of Private Colleges (KENAPCO) versus The Attorney General and 2 others*.

24. In *Petition No. 132 of 2015*, the Petitioner sought inter alia; the following:-

(i) That the Statute Law (Miscellaneous Amendments) Act No.18 of 2014 assented into Law on the 20th November 2014 be declared unconstitutional and in particular the amendment to Section 20(1)(e) of the Universities Act as it was enacted without proper public participation by the people of Kenya including the Petitioner as this violates Articles 10, 22 and 118 of the Constitution of Kenya 2010. Public participation in governance and conduct of public affairs is a golden rule in constitutional matters.

(ii) The Honourable Court do issue declaratory orders that the amendments to the Universities Act, 2012 in their entirety were not procedurally debated and passed by the National Assembly in accordance with Articles 118(1)(b) of the Constitution and therefore were null and void.

(iii) The Court do issue conservatory orders staying the suspending the implementation and operation of the Statute Law (Miscellaneous Amendments) Act No.18 of 2014.

25. *Section 7 of the Civil Procedure Act* bars Court from trying any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

26. In the instant Petition the petitioner avers that he has brought up this Petition in public interest. The *Petition No. 93 of 2015* was similarly brought by the Petitioner in public interest. *Explanation 6* under *Section 7 of the Civil Procedure Act* provides:-

“Explanation (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

“Further explanation 4 provides:—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

27. The prayers sought in the instant Petition are same as those sought in *Petition No. 93 of 2015*. In the instant Petition the Petitioner seeks the following reliefs:-

a) That this Honourable Court be pleased to declare that the Statute Law (Miscellaneous Amendment) Act 8 of 2014 is null and void and lacks any force of law for being a violation of the constitution and the law.

b) That this Honourable Court be pleased to issue Order stopping all Universities in Kenya from offering Bridging, Certificate and Diploma and Certificates courses for being a violation of the Constitution and the law.

c) That this Honourable Court be pleased to order the Technical and Vocational Training Authority compelling it to comply and enforce the full spirit and letter of the Technical and Vocational Education and Training Act (Act No.29 of 2013) and its attendant regulations.

d) That this Honourable Court be pleased to Order the KNQFA to comply and enforce the full spirit and letter of the KNQFA Act.

e) Any other Orders that this Honourable Court may deem fit and just.

f) That costs of this Petition be borne by the Respondents.

28. The Petitioner did not make submissions on the issue of this Petition being Res-judicata nevertheless I shall proceed to make a determination on whether the Respondent have established that this petition is Res-judicata by virtue of decision of this court in respect *No.93 of 2015 Peter Ngatia Moto vs. Speaker of the National Assembly and 3 others* consolidated with *Petition No. 132 of 2015* between the *Kenya National Association of Private Colleges (KENA PCO) Vs the Attorney General & 2 others*.

29. Upon perusal of the Judgment in the above-mentioned case and the Petition herein, I find that the suit or issue in this matter was directly and substantially in issue and has been directly and substantially been in issue in a former suit between the same parties or where a person litigated bona fide in respect of public right for themselves and others, and as such all persons interested in such right for the purposes of *Section 7 of Civil Procedure Act*, are deemed to claim under the persons so litigating; or between parties under whom they or any claim. The parties herein litigate under the same title, before a competent court to try the such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court. I find that the ingredients for a suit to be declared res-judicata have been established in this matter as the matter was heard by Hon. Justice Isaac Lenaola; as he then was, and final judgment delivered on his behalf by Hon. Justice E. C. Mwitia on 22nd March 2017 dismissing the Petition.

30. The upshot is that the Petitioner's Petition is without merits; it is vexatious and frivolous. I accordingly make the following orders:-

a) The Petition be and is hereby dismissed.

b) The Petition was nevertheless brought in public interest and in exercise of this Court's discretion as provided for under Rule 26 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and so as to ensure members of public have access to court to determine their rights and fundamental freedoms I direct each party to bear its own costs.

Dated, Signed and Delivered at Nairobi on this 25th day of February, 2021.

.....

J. A. MAKAU

JUDGE