REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 93 OF 2015 AS CONSOLIDATED WITH PETITION NO. 132 OF 2015

BETWEEN

PETER NGATIA MATU.....PETITIONER

AND

THE SPEAKER OF THE NATIONAL ASSEMBLY.....1ST RESPONDENT

THE CABINET SECRETARY MINISTRY OF EDUCATION ....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

COMMISSION FOR UNIVERSITY EDUCATION.....4TH RESPONDENT

PETITION NO. 132 OF 2015

BETWEEN

KENYA NATIONAL ASSOCIATION OF

PRIVATE COLLEGES (KENAPCO).....PETITIONER

AND

THE ATTORNEY GENERAL.....1ST RESPONDENT

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

THE CABINET SECRETARY MINISTRY OF EDUCATION..3RD RESPONDENT

NATIONAL ASSOCIATION OF PRIVATE

UNIVERSITIES OF KENYA (NAPUK).....4TH INTERESTED PARTY

JUDGMENT

Background

1. Petition No.93 of 2015, dated 11th March 2015 was filed in Court on 12th March 2015 by Peter Ngatia Matu and he sought the following reliefs:

(i) A declaration that the fourth schedule of the Constitution (Part 1, sections 14,15 and 16) and Articles 43, 46, 55 and 186 of the Constitution mandates the National Government to regulate university education.

(ii) A declaration that [the] amendment to sections 2, 5(1) (c), 5(1)(h)(i), (n), 13(3)(h), 15(2),20(1)(c), (d)(e), 20(2), 35(2), (3), 51(2)(b) and insertion of sections 13(3)(h), 20(3), 38(5) and 51A to the Universities Act 2014(the amendments) have the effect and or potential of diminishing and or significantly diluting government regulation of university education in Kenya.

(iii) A declaration that the amendments offend Article 186 and the Fourth schedule (Part 1 section 14,15 and 16) of the Constitution and are unconstitutional therefore.

(iv) A declaration that the fundamental rights of the Petitioner and the public under Articles 10, 11(2), 27, 28, 32,43,46,47 and 55 of the Constitution have been unjustifiably infringed or threatened and the amendments are unconstitutional therefore.

(v) A declaration that the amendments were effected without prior public participation by the Kenyan people and infringed on Articles 10 and 232(d) of the Constitution and are unconstitutional therefore.

(vi) A declaration that the National Assembly ought to have invited and allowed public participation before enacting the amendments.

(vii) In the alternative to (iv) and (v) hereof, a declaration that the National Assembly ought to have considered sessional paper no. 14 of 2012 titled 'A Policy Framework for Education and Training: Reforming the Education and Training in Kenya' as public input prior to enacting the amendments.

(viii) A declaration of invalidity and unconstitutionality of the amendments.

(ix) Such other orders as this Honourable Court shall deem just.

2. Petition No.132 of 2015 dated 9th April 2015 was filed in Court on the same day by Kenya National Association of Private Colleges (KENAPCO) which sought the following reliefs:

(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 and suspending the implementation and operation of the Statute Law (Miscellaneous Amendments) Act No.18 of 2014.

(iv) Orders be issued restraining the 2nd Respondents from licensing universities to offer Diploma, Certificates and Bridging Courses.

(v) Orders be issued compelling the 2nd Respondent to fully enforce the guidelines and regulations set out in the University Standards and Guidelines, 2014.

(vi) It be ordered that university education offered by universities to commence from degree levels.

(vii) There be an order restraining any further intake by the universities on Diplomas, Certificate, and Bridging Courses subsequent to filing of this Petition.

(viii) Orders of Mandamus do issue against the Technical and Vocational Training Authority the 4th respondent, compelling them to fully enforce the terms and regulations of their enabling Act the Technical and Vocational Education and Training Act, (Act No.29 of 2013).

(ix) It be ordered that universities be restrained from marketing, advertising promoting and/or offering Diplomas, Certificates and bridging courses.

(x) It be ordered to be condemned to pay the costs of this Petition. (sic)

(xi) Such further or other relief or orders be made as may be just.

3. On the 10th April 2015 the Court, upon hearing the application presented on the 9th April 2015 in Petition No.132 of 2015 by counsel for the Intended Interested Party, made an order enjoining the National Association of Private Universities of Kenya (NAPUK) as an Interested Party.

4. Subsequently, on the 5th June, 2015, by consent of the parties, the two matters were consolidated for hearing and determination with KENAPCO as the 1st Petitioner, Peter Ngatia as the 2nd Petitioner, the Speaker of the National Assembly as the 1st Respondent, the Attorney General and Cabinet Secretary for Education, Science and Technology as the 2nd and 3rd Respondents while the Commission for Higher Education is the 4th Respondent.

1st Petitioners case

5. The 1st Petitioner, the Kenya National Association of Private Colleges, (KENAPCO) is a registered association with about 200 member institutions all private colleges within the Republic of Kenya. It's members are licensed to offer Diplomas, Certificates and Bridging Courses and it's case is as contained in Petition No.132 of 2015 and supporting affidavit of Mathew Mureria sworn on 9th April 2015 as well as the submissions dated 6th October 2015.

6. The 1st Petitioners case is that the amendments to the **Universities Act 2012** by the **Statute Law (Miscellaneous Amendments) Act No.18** of 2014 were done in complete disregard to the provisions of the Constitution as they did not take into account any stakeholders input. It also alleges that the National Assembly never took into consideration Sessional Paper No.14 of 2012-*A Policy Framework for Education and Training; Reforming Education and Training in Kenya* that was developed after wide stakeholders engagement.

7. It is the 1st Petitioner's further argument that the said amendments are unconstitutional, unfair and discriminatory, meant to oppress the 1st Petitioner and its affiliate members as well as retrogress the education system in Kenya. That the gains of the enactment of the **Universities Act No.42 of 2012** and subsequent legislation have also been watered down by the amendment of the **Universities Act** vide the **Statute Law (Miscellaneous Amendments) Act No. 18 of 2014.**

8. The 1st Petitioner has in the above context, set out three issues for determination namely;

i. Whether there was public participation prior to the enactment of the **Statute Law (Miscellaneous Amendments) Act No. 18 of 2014.**

ii. Whether the amendments to the **Universities Act 2012** vide **Statute Law (Miscellaneous Amendments) Act No.18 of 2014** are unconstitutional thus rendering the amendments null and void.

iii. Whether the amendments to the **Universities Act 2012** vide **Statute Law (Miscellaneous Amendments) Act No. 18 of 2014** have infringed on the Petitioner's constitutional rights and whether they are against the public interest.

9. The 1st Petitioner further contends that in enacting the **Statute Law (Miscellaneous Amendments) Act No. 18 of 2014,** the National Assembly failed to take into account the provisions of **Article 10(2) (a) (b) (c)** of the **Constitution** on the principles of the rule of law, democracy and public participation. That the principle of public participation in any legislation is of core importance and the involvement of all stakeholders in such legislation is of utmost importance and consideration in upholding the principles of transparency and accountability.

10. It was also the 1st Petitioner's contention that the process leading to the enactment of the said legislation was nothing but a farce to which no public participation or interest was put into consideration. It made reference to **Article 118(1)** of the **Constitution** which requires the public and all relevant stakeholders to read and understand any proposed amendments before any changes to the law are effected.

11. In support of its propositions, the 1st Petitioner made reference to the case of ***Doctors for life International v Speaker of the National Assembly and others*** (CC12/050) and the ***Minister for Health and Another v New Cliks South Africa (Pty) Ltd & Others*** (2006) (2) SA 311; where the Constitutional Court of South Africa observed that on the requirement for public participation, what matters is that a reasonable opportunity has been given to members of the public and all Interested Parties to know about the issue and to have an adequate say in it.

12. The 1st Petitioner further submits that the principle of public participation is an essential constitutional obligation and prior to the enactment of any legislation, the concerns of different stakeholders ought to be considered even if they will not be taken into account in formulating the final regulations. It therefore emphasized that its members were not consulted and faulted the National Assembly for enacting the legislation in complete disregard to the principle of public participation.

13. The 1st Petitioner also analysed the objects and the preamble of the **Universities Act 2012** and submitted that the amendments to the **Universities Act** vide **Statute Law (Miscellaneous Amendments) Act No. 18 of 2014** are unconstitutional hence rendering the amendments null and void. In submitting so, the 1st Petitioner relied on the Canadian Supreme Court decision of ***Queen v Big M. Drug Mart Limited*** **(1985) 1 S.C.R. 295** wherein the Court held that *both the purpose and effect are relevant in determining constitutionality; that either an unconstitutional purpose or unconstitutional effect can invalidate legislation.*

14. It argues further that the amendments have created an unfair and discriminatory environment meant to oppress the 1st Petitioner and its affiliate members as the same was passed in a contentious and mischievous way and aimed at depriving its members of their right to offer Diploma, Certificate and Bridging Courses. Furthermore, that the amendments seek to discriminate between higher learning institutions and have altered the relationship between middle level colleges and universities and this has created conflicts and confusion between the **Universities Act** and the **Technical and Vocational Training Authority Act (Act No.29 of 2013.)**

15. The 1st Petitioner has also urged the Court to find that the amendment to the **Universities Act 2012** were unconstitutional, unfair, discriminatory and are meant to oppress the 1st Petitioner and its affiliate

members as the same was passed in a contentious way and meant to amend the **Universities Education Act** which was passed a few years ago with the sole aim of depriving the 1st Petitioner of the right of its members to offer diploma certificate and bridging courses. As a result this has made the 1st Petitioner's operations difficult and unattainable leading to closure of some businesses.

16. In addition, the 1st Petitioner submits that the amendment to **Section 20(1) (c)** of the **Universities Act** which deleted the words "*may develop and mount its new academic programs subject to review by the Commissioner in accordance with the Provisions of the Act"* and substituted it with "*may in accordance with its charter, develop and mount academic programs"* is discriminatory, unfair and extremely oppressive to the Petitioners. That it has divested the Petitioners of their proprietary rights acquired before the Act came into force and it infringes on the Petitioner's right to earn a living contrary to **Article 43** of the **Constitution,** as well as **Articles 6 and 11.1** of the **International Convention on Economic and Social Rights** to which Kenya is a party.

17. For the above reasons, the 1st Petitioner urges the court to allow the Petition and grant the prayers sought.

2nd Petitioners' case

18. The 2nd Petitioner Peter Natia Matu, is a Kenyan citizen and a parent who has stated that he believes in his children's dream of being admitted to a Kenyan University upon completion of their secondary school education. He filed Petition No.93 of 2015 allegedly as a patriotic Kenyan who is acting in the public interest and to protect the Constitution.

19. The 2nd Petitioner submits that the impugned amendments to the **Universities Act** goes against the wishes of the majority of stakeholders which are contained in sessional Paper No.14 of 2012 as they were proposed and effected without any public participation. He submits further that the effect of the various amendments was to weaken the power and responsibility of the 3rd Respondent as the regulator of university education.

20. It was the 2nd Petitioner's other submission that his rights and those of the public under **Articles 28, 32, 43(1)(f), 46,** and **55** of the **Constitution** have been violated and that the impugned amendments are discriminatory as foreign and private universities have been accorded special treatment by being exempted from various requirements under the **Universities Act** and this has led to the Commission for University Education (CUE) being unable to adhere to the provisions of **Article 47** to offer lawful, reasonable and procedural administrative action.

21. He alleges that the impugned amendments have further contravened **Articles 10, 11(2), 186** and the **Fourth Schedule (Part 1, Section 14, 15, and 16),** and **Article 232(1)(d)** of the **Constitution** by failing to prescribe and recognize these provisions. He therefore urges the Court to grant the prayers sought in the Petitions as consolidated.

The 1st Respondent's case

22. The 1st Respondent Speaker of the National Assembly did not take part in these proceedings at all.

The 4th Respondent's case

23. The 4th Respondent, the Commission for University Education, is a body corporate established under the **Universities Act** as a regulator in the university education sector. Its case is as contained in the Replying Affidavit sworn by Professor David K. sworn on 4th June, 2015 and submissions dated 18th April 2016.

24. The 4th Respondent submits that this Petition raises legitimate issues touching on a foundational

aspect of the Kenyan society and urges the Court to interpret the Constitution in a manner that promotes its purposes, values, and principles, advances the rule of law and having done so declare unconstitutional the amendments to the **Universities Act** enacted through the **Statute Law (Miscellaneous Amendments) Act No.18 of 2014** for lack of public participation.

25. Further, it submits that the substantive amendments in the **Statute Law (Miscellaneous Amendments) Act No. 18 of 2014** weakened its role as the regulator of university education making it unable to effectively continue carrying out its mandate. That the amendments were introduced on the floor of the National Assembly and immediately passed without any reference to the public as well as relevant stake holders and against the ruling of the Speaker to the contrary.

26. It is the 4th Respondent's other submission that even the Attorney General has had reservations regarding the impugned amendments and as a result has made proposals to further amend the **Universities Act** to take into account his reservations.

27. It was also its contention that the Bill which gave rise to the said amendments, was never subjected to the minimum standards required of public participation and in that regard, places reliance on the case of ***Robert N. Gakuru & Others v Governor Kiambu County and three Others*** **[2014] eKLR** where Odunga J quoted with approval the South Africa case **of *Doctors for life International v Speaker of the National Assembly and others* (CCT12/05)2006]ZACC11: 006(12)BCLR 1399 (CC); 2006 (6) SA 416(CC)** where it was stated that the general rule with regard to public participation is that the extent of it must be reasonable and would involve giving all Interested Parties notice of the proposed amendments and a chance to express their views. That at the very least, the 4th Respondent ought to have been accorded an opportunity to give its input and urges the point that, based on **Articles 2 (4)** and **165(3)(d)** of the **Constitution,** the Court ought to find that the process leading up to the enactment of the law is invalid and secondly, that the law so emanating from that process is unconstitutional.

28. The 4th Respondent also contends that the amendment to **Section 20(1)e** of the **Universities Act** amounted to discrimination against colleges and instead favoring the Universities in order to defeat the commercial viability of colleges by denying them the right to fair competition. Further, that the amendments have de-regularized the sub-sector by stripping off its oversight role.

29. The 4th Respondent therefore urges the Court to find that the amendments are invalid in so far as they ignore the well documented views of Kenyans on university education hence defeating the essence of public participation.

30. Its additional argument is that the amendments have resulted in a big conflict between the **Universities Act** and the **Technical and Vocational Training Authority Act** in that the said amendments have given the universities mandate to directly offer diplomas and certificate courses which are and ought to be a preserve of Technical and Vocational Training Colleges.

31. In conclusion, the 4th Respondent urges the Court to declare unconstitutional the amendments to the **Universities Act** enacted through the **Statute Law (Miscellaneous Amendments) Act**, specifically amendments to **Sections 2, 5(1)c, 5(1)h, 5(1)l 5(1)n, 13(3)h, 15(2), 20(1)c, 20(1)d, 20(1)e, 20(2), 35(2), 35(3), 51(2)b** and the insertions of **Section 13(3)h, 20(3), 38(5)** and **51A** to the **Universities Act.**

2nd and 3rd Respondents' Case

32. The 2nd and 4th Respondents are the Attorney General and the Cabinet Secretary Ministry of Education, Science and Technology, respectively. Their case is as set out in the replying affidavit of Dr. Richard Bellio Kipsang sworn on 23rd July 2015 as well as submissions dated 16th February 2016.

33. They set out the following issues for determination;

i. Whether there was public participation prior to the enactment of the **Statute Law (Miscellaneous**

Amendments) Act No. 18 of 2014.

ii. Whether lack of public participation, if any, rendered the **Statute Law (Miscellaneous Amendments) Act No. 18 of 2014** together with **Section 20(1) e** of the **Universities Act** a nullity.

iii. Whether the Petitioners are entitled to the remedies sought.

34. The 2nd and 4th Respondents submitted in the above context that it is ironical for the Petitioners to allege that there was no public participation prior to the enactment of the impugned Act when in fact there exists evidence showing that the Act passed through all the requisite stages in the National Assembly before it was passed into law. It is also their submission that this allegation is without support or evidence and therefore falls below the evidentiary threshold and is inadequate to prove lack of public participation.

35. The 2nd and 4th Respondent further argue that the Petitioners are driven by selfish and commercial interest to protect their turf by using the Court to lock out universities from offering diploma and certificate courses and that the Petitioners ought to have raised their grievances when the Bill was first introduced in the National Assembly if there was any genuine concerns regarding it. They relied upon the case of ***Commission for the Implementation of the Constitution v Parliament of Kenya & 2 Others [2015] eKLR*** where the Court stated that declaring a statute unconstitutional was a serious issue and ought not to be reverted to except in the clearest of cases.

36. The 2nd and 4th Respondent also submitted that the Petitioners have not shown that the Bill which gave rise to the amendments did not go through the relevant committee of the National Assembly and referred to the case of ***Nairobi metropolitan PSV Saccos Union Limited v County of Nairobi Government & 3 Others*** **[2013] eKLR** to argue that it does not matter how the public participation was effected and that what matters was that all affected parties had good notice of the impugned action.

37. It is furthermore their argument that suspending the operation of **Section 20(1)(e)** of the **Universities Act** will result in mass exodus of students to other universities in neighboring countries as the middle level colleges lack both the human and institutional capacity to offer certificate and diploma courses. That the decision to phase out diploma and certificates from universities should be informed by a comprehensive study and a clear policy framework but not through Court Petitions.

38. The 2nd and 4th Respondent in addition submitted that it would be against the spirit of the East African Community integration to stop Kenyan universities from offering diploma and certificate courses when plans are under way to harmonise the regional education system. Further, that the Ministry of Education Science and Technology has initiated the Universities Act Amendment Bill which seeks to overhaul university education in Kenya by addressing various contentious issues and to align it with the East Africa Community member states' education policy. That the Bill is currently at the consultative stage and will soon be tabled in the National Assembly and any concerns by the Petitioners can be addressed then.

39. The 2nd and 4th Respondents finally submitted that the **Statute Law (Miscellaneous Amendments) Act**, had sought to amend over **45 Acts of Parliament** and should the Court declare the Act unconstitutional, the effect would be that all the amendments which the Act sought to amend would become null and void thereby creating chaos in their implementation. They therefore urge the Court to dismiss the Petition with costs.

Interested Party's Submission

40. The Interested Party, the National Association of Private Universities (NAPUK) opposes this Petition. Its case is as set out in the affidavit sworn on 30th November 2015 by Vincent Gaitho, submissions dated 18th April 2016 and supplementary submissions dated 27th April 2016. It set out the following issues for determination:

(i) Whether there was public Participation in the enactment of the **Statute Law (Miscellaneous Amendments) Act No. 18 of 2014.**

(ii) Whether **Section 20(1)** of the **Universities Act No. 42 of 2012** as amended is discriminatory

(iii) Whether the **Statute Law (Miscellaneous Amendment) Act No. 18 of 2014** and **Section 20(1)** of the **Universities Act No. 42 of 2012** are unconstitutional.

41. NAPUK submits that the passing of the impugned Bill was responsive, accountable and transparent as there is overwhelming evidence that the public was duly involved through requests for submission of memoranda facilitated through invitations made by the relevant National Assembly Committees through the print media.

42. The Interested Party in that regard referred to a letter from the Speaker of the National Assembly dated 9th November 2015 which gave a detailed chronology of the events leading to the enactment of the amendments of the **Statute Law miscellaneous Amendment Bill**. In addition, NAPUK states that upon presenting the Bill to the President for assent, the President in exercise of his powers under **Article 115(1) b** of the **Constitution** returned it with reservations to the House. The National Assembly then considered his reservations and passed the Bill for a second time on the 13th November 2014, matters which were all in the public domain.

43. It states further that the Bill sought to amend 46 pieces of legislation and had to be referred to the respective departmental committees for deliberations. That the amendments to the **Universities Act 2012** were committed to the Departmental Committee on Education, Research and Technology and underwent the due process of public participation as is mandated by **Standing Order 127(3)** as read together with **Article 118** of the **Constitution**. It was also its submission that in the course of undertaking public participation, the said Committee received various submissions and memoranda from institutions, individuals and the general public.

44. To emphasize that indeed there was public participation, the Interested Party states that upon consideration of memoranda from various stakeholders, some amendments were dropped and it was its submission therefore that Parliament duly facilitated public participation contrary to the Petitioners' submission. That there is also evidence that public facilitation was facilitated by the national Assembly through the print media and that various interested groups were invited by the National Assembly to make representations on the amendments.

45. Furthermore, the Interested Party submitted that the proposed amendments to the **Universities Act 2012** introduced greater certainty to the role of universities in exercising their academic freedom as enshrined in **Section 29** of the **Universities Act**. They therefore urge the Court to take into account the purpose and effect of the impugned legislation and relied upon the case of ***Olum and Anor v Ag of Uganda (2001) 2 EA 508*** in that regard**.** They added that public participation is not the same as saying that particular public views must prevail at all times and referred to ***Nairobi Metropolitan PSV Saccos Union Ltd and 25 Others v County of Nairobi Government and 30 Others(2013)eKLR*** for that proposition.

46. The Interested Party also contends that the mere fact that the amendments to the legislation have caused some inconveniences to the Petitioners does not make them unconstitutional. He referred to the case **of *Mt. Kenya Bottlers Ltd & Others v the A.G and Others High Court Petition No. 72 of 2011*** in which the Court stated that it would not nullify legislation merely because it thought that a law was enacted in bad taste, is unconscionable or inconvenient. It also referred to the case of ***Coalition for reform and democracy (Cord and 2 Others v Republic of Kenya and 10 others (2015)eKLR*** where it was held that every Act of Parliament is presumed to be constitutional and that the burden of proof to the contrary lay on the person alleging the unconstitutionality. They contend in that context that the Petitioners have failed to show with particularity how the provisions of the **Universities Act 2012** have infringed on their rights as the preamble and objects of the **Technical Vocation Education and Training Act, 2013** and those of **Universities Act 2012** are very different. According to them therefore, the

allegations of discrimination are far-fetched and absurd.

47. The Interested Party therefore urges the Court to dismiss the Petition with costs as it does not disclose any reasonable cause of action.

Determination

48. The Petitioners in these Petitions are principally aggrieved by the enactment of amendments of the **Universities Act 2012** vide the Statute Law **(Miscellaneous Amendments) Act No 18 of 2014**. Consequently, they filed that Petitions to challenge the said amendments and more specifically **Section 20(1) e** in the interest of the public and for the protection of the Constitution.

49. After reading both Petitions, the supporting affidavits, replying affidavits and submissions herein, three issues arise for determination namely;

i) whether there was Public Participation in the enactment of the **Statute Law (Miscellaneous Amendments) Act No. 8 of 2014**.

ii) Whether the amendments to **Section 20(1) e** of the **Universities Act** vide **Statute Law (Miscellaneous Amendments) Act No. 18 of 2014** are unconstitutional for being discriminatory and unfair.

iii) whether the Petitioners are entitled to any remedies.

50. Before delving into the above issues, it is important to start by discussing the importance of public participation as enshrined in our Constitution. Chief Justice Dr. Willy Mutunga (as he then was) in the ***National Land Commission*** **Supreme Court Advisory Opinion No. 2 of 2014** at paragraph 320 stated thus;

> ***"In the entire history of constitution-making in Kenya, the participation of the people was a fundamental pillar. That is why it has been argued that the making of Kenya's Constitution of 2010 is a story of ordinary citizens striving to overthrow, and succeeding in overthrowing the existing social order, and then defining a new social, economic, political, and cultural order for themselves. It is, indeed, a story of the rejection of 200 Parliamentary amendments by the Kenyan elite that sought to subvert the sovereign will of the Kenyan population. Public participation is, therefore, a major pillar, and bedrock of our democracy and good governance. It is the basis for changing the content of the State, envisioned by the Constitution, so that the citizens have a major voice and impact on the equitable distribution of political power and resources. With devolution being implemented under the Constitution, the participation of the people in governance will make the State, its organs and institutions accountable, thus making the country more progressive and stable. The role of the Courts, whose judicial authority is derived from the people of Kenya, is the indestructible fidelity to the value and principle of public participation."***

51. Flowing from the above statements, it is indeed true that public participation as a principle enshrined in our Constitution is an essential constitutional obligation that has to be observed prior to the enactment of any legislation and we can therefore not negate its importance in the processes leading to the formulation and implementation of any legislation. This is a fact that has been alluded to by all the parties herein.

52. The question that I now need to address myself to is whether there was public participation in the process leading to the enacting of the impugned legislation. The Petitioners in that regard allege that the amendments introduced by the **Statute Law (Miscellaneous Amendments) Act No. 18 of 2014** did not take into account any of the stakeholders input and that the National Assembly in any event failed to inform them of ongoing discussions on the amendments and further, that the said amendments were introduced at the floor of the House leaving no opportunity for any participation by the public. The 2nd

Respondent also reiterated this position and emphasized that the amendments failed to take into account the findings of sessional paper No.14 of *2012* titled *A policy framework for Education and Training; Reforming Education and Training in Kenya* (the sessional paper) which was developed after consultations and taking into account various task force reports on the subject at hand.

53. In addition, the Petitioners relied upon the case of ***Robert N. Gakuru & Others v Governor Kiambu County and three Others*** **[2014]eKLR** Odunga J. quoted with approval the South Africa case **of *Doctors for life International v Speaker of the National Assembly and others* (CCT12/05)2006]ZACC11: 006(12)BCLR 1399 (CC); 2006 (6) SA 416(CC)** wherein it was stated that the general rule on public participation is that the extent of such participation must be reasonable.

54. In my understanding therefore, the Petitioners seem to be stating that because the National Assembly failed to contact them, and failed to take into account their views as well as the input of the stakeholders named in the sessional paper aforesaid then public participation prior to the impugned amendments did not take place.

55. Of interest also is the 3rd Respondent's (Commission of University Education) averment that it was aware that there was a Bill to be debated in the National Assembly but it was its understanding that only minor changes were in the offing, mainly to correct clerical and grammatical errors such as the substitution of the 'interim letter of Authority' with 'Letter of Interim Authority' and indeed I note that the amendment to **Section 15** of the **Universities Act** was for substitution of the terms 'interim letter of Authority' with 'Letter of Interim Authority.

56. In response, the 2nd and 4th Respondents submitted that it is ironical for the Petitioner to allege that there was no consultation when in fact there exists evidence showing that the impugned Act passed through all the requisite stages in the National Assembly before it was passed into law. Further, they submitted that this allegation is without any evidence in support thus falling below the evidentiary threshold and hence inadequate to prove lack of public participation.

57. On the other hand, the Interested Party gave a detailed submission on the process and sequence of events starting from the presentation of the Bill to the enactment of the amendment of the Statute Law (miscellaneous Amendment) showing that there was public participation. It went further to argue that there was overwhelming evidence that the public and stakeholders were duly involved and that public participation was therefore conducted.

58. On this issue, in the case of ***Law Society of Kenya v Attorney General Nairobi Petition No.318 of 2012,*** Majanja J. observed as follows;

> ***"[51] In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute. I am entitled to take judicial notice of the Parliamentary Standing Orders that require that before enactment, any legislation must be published as a bill and to go through the various stages in the National Assembly. I am entitled to take into account that these Standing Orders provide for a modicum of public participation, in the sense that a bill must be advertised and go through various Committees of the National Assembly which admit public hearings and submission of memoranda."***

59. I agree with the approach taken by the Learned Judge and in this instance, evidence has been adduced to show that the Bill was initially introduced to Parliament in 2013 as Bill No. 32 of 2013 following publication under Gazette Notice No. 146 of 2013. The 1st reading was on 13th November 2013. The 2nd reading was on various dates between 27th November 2013 and 11th March 2014. Further, the Bill was again republished and read for the first time on the 17th June 2014. The 2nd reading of the Bill was made between the 31st July 2014 and 13th August 2014 where additional amendments were proposed by members of Parliament in accordance with the standing orders and procedures before being passed.

In addition, the Interested Party has shown that upon presentation of the Bill to the President for assent, the President, in exercise of his powers under **Article 115(1) b** of the **Constitution,** returned it with reservations to the House. The National Assembly then considered the said reservations and passed the Bill for a second time on the 13th November 2014. Reference was also made to a letter from the Speaker of the National Assembly giving the details of the stakeholders involved in the public participation. This assertion has not been refuted or challenged by the Petitioners or the 3rd Respondent and are the above facts therefore sufficient evidence of public participation?

60. In answer thereto, I am aware of the decision in ***The North Rift Motor Bike Taxi Association v The Uasin Gishu County Government [2014] eKLR*** where the learned Judge stated thus:

> **I am also in agreement with the sentiments expressed by Chaskalson, Chief Justice of South Africa, in the Constitutional Court of South Africa case of *Minister of Health v New Clicks South Africa (PTY) Ltd (supra)* where he stated that;**
>
> > *"[155] It cannot be expected of the law maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. What is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law-maker and taken into account in formulating the regulations.*
> >
> > *[156] In parliament this is done through the publication of a Bill containing the provisions of the proposed legislation, hearings before Parliamentary Committees, and debates in Parliament where matters of principle raised by sectors of the public affected by the law can be contested.*
> >
> > *[157] Where laws are made through legislative administrative action, the procedure of publishing draft regulations for comment serves this purpose; It enables people who will be affected by the proposals to make representation to the lawmaker, so that those concerns can be taken into account in deciding whether changes need to be made to the draft.*
> >
> > *[158]This does not mean that the Minister who makes the regulations has to study thousands of pages received from the general public and respond to them. The analysis of these responses can be left to officials whose responsibility it is to consider the comments received and to report to the Minister on them."* (Emphasis added)
>
> I am attracted to the above expositions of the law and I agree with the 2nd and 4th Respondent, together with the Interested Party, that public participation in the manner expressed above and as contained in the Interested Party's replying Affidavit was conducted to a reasonable degree contrary to the Petitioner's assertions.

61. In addition, it is clear that the 4th Respondent the Commission for University Education was also aware that the Bill was being debated in Parliament but what did it do? The process of legislation is a lengthy one, and therefore the 4th Respondent ought to have been diligent, proactive and participated in the process no matter how minimal it appeared knowing clearly that matters touching on the **Universities Act** was core to its mandate. The 4th Respondents cannot now be heard to state that there was no public participation while all along it was aware of the process but chose or failed to participate in it.

62. It is also not enough for the Petitioners to state that the National Assembly did not undertake public participation simply because it may have failed to take into account the views of the majority as articulated in the sessional paper referred to earlier. In that regard in the case of **Association of Gaming Operators-Kenya & 41 Others v Attorney General & 4 Others [2014] eKLR** Majanja J stated that;

> ***"29 …As the authorities I have cited show, an oral hearing is not necessary in every situation and the legislature has wide latitude to determine how to receive submissions. Although public participation in the law making process is required, essentially all that is required of the***

legislature is to provide opportunity for some form of public participation. This may be by allowing the public to make written or oral submissions at some point in the legislative process.

30 …In my view the opportunity availed to the petitioners to forward their memorandum is ample demonstration that there was public participation. The fact that the outcome did not result in what the petitioners' wanted does not necessarily negate public participation.*"*

63. This was also the holding in the case of **The North Rift Motor Bike Taxi Association (Supra)** where the Court stated in passing that public participation is not the same as saying that particular public views must prevail. I therefore fully agree with the Interested Party's submissions that public participation is not the same as saying that one's views must always be taken into account or that a legislation that does not take into account the views of majority of any stakeholders is thereby rendered invalid.

64. I must also state that in order to show that there was no public participation, the Petitioners ought to have looked further and interrogated the entire process of legislation with the aim of showing whether or not the Bill was subjected to any stakeholders' forum. I therefore conclude by finding that the process leading up to the enactment of the amendments to the **Universities Act vide Statute Law (Miscellaneous Amendments) Act No**. **18 of 2014** followed all lawful processes in accordance with **Article 118(1)b** of the **Constitution** and cannot be invalid as claimed.

65. The second issue for determination is whether **Section 20(1) e** of the amendments to the **Universities Act** vide **Statute Law (Miscellaneous Amendments) Act No. 18 of 2014** is unconstitutional for being discriminatory and unfair.

66. For avoidance of doubt, the amendment to **Section 20(1) (e)** of the **University Act** provides thus:

"Delete paragraph (c) and substitute therefore the following new paragraph

c) may in accordance with its Charter develop and mount academic programmes

delete the word 'constituent' appearing in paragraph (d)

delete paragraph (e) and substitute therefore the following new paragraph

e) may award

(i) degrees including post graduate degree and honorary degrees;

(ii) diplomas, including postgraduate diploma and other academic certificate.

Section 20(2) delete the word 'constituent' insert the following new subsection immediately after subsection (2)

(3) the Cabinet Secretary may, in consultation with the Commission by order published in the Gazette, establish or declare an institution of learning or higher education or other training establishment to be a constituent college of a university."

67. In essence the above amendments empower accredited Universities to mount programmes leading to the award of diplomas, certificates and other qualifications lower than a University degree. This is in essence what the Petitioners are challenging and want declared unconstitutional for being discriminatory and unfair.

According to the Petitioners, this amendment was meant to oppress the 1st Petitioner and its affiliate members as well as retrogress the education system in Kenya. Further, that the amendment is discriminatory and unconstitutional for having deprived vocational and technical colleges of their right to offer diploma certificate and bridging courses and as a result, this has made the 1st Petitioner's operations

difficult and unattainable leading to closure of business.

68. In response, it was argued that the mere fact that the amendments to the legislation caused some inconveniences to the 1st Petitioner does not make the legislation discriminatory and therefore unconstitutional. The Interested Party added that the allegations of discrimination are in any event far-fetched as the Petitioners have failed to show with particularity how the provisions of the **Universities Act 2012** has infringed on their rights as the preamble and objects of the **Technical Vocation Education and Training Act, 2013** and those of the **Universities Act 2012** are very different. The 2nd and 4th Respondent have also argued that the 1st Petitioner's members are driven by selfish and commercial interests to protect their turf by using the Court to lock out universities from offering diploma and certificate courses.

69. In that context, what action may amount to discrimination? **Article 27** of the **Constitution** provides as follows:

> ***"(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.***
>
> ***(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***
>
> ***(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.***
>
> ***(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***
>
> ***(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).***
>
> ***(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.***
>
> ***(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.***
>
> ***(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."***

70. Discrimination has been explained as follows in the **UN General Comment 18** as implying ***"any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."***

71. The said Commentary however has a an exception to the extent that ***"not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate …".*** This exception was also well addressed in **Smidek v Czech Republic 1062/02** where the UN Human Rights Committee found that ***"the different treatment of people in like situations gives rise to discrimination. The different treatment of people in different situations does not."***

72. Applying the above definition to the present case, it is very difficult to see how the 1st Petitioner or its members were discriminated against merely because universities are now allowed to offer certificate and diploma courses. It is also not enough that the Petitioners are unhappy with the amendments to the law. No discrimination can be attributed to any of the Respondents in the present circumstances and I so find.

73. Having answered the two main issues set for resolution, what is the law on invalidation of any statute or part thereof?

74. In the case of **Coalition for Reform and Democracy (CORD) v Attorney General and Others [2015] eKLR** the Court stated thus:

> ***"We have been called upon to declare SLAA in its entirety, or at the very least certain provisions thereof, unconstitutional for being in breach of various Articles of the Constitution. In considering this question, we are further guided by the principle enunciated in the case of Ndyanabo vs Attorney General [2001] EA 495 to the effect that there is a general presumption that every Act of Parliament is constitutional. The burden of proof lies on any person who alleges that an Act of Parliament is unconstitutional.***
>
> ***However, we bear in mind that the Constitution itself qualifies this presumption with respect to statutes which limit or are intended to limit fundamental rights and freedoms. Under the provisions of Article 24 which we shall analyse in detail later in this judgment, there can be no presumption of constitutionality with respect to legislation that limits fundamental rights: it must meet the criteria set in the said Article."***

75. Further, in the case of ***Mt. Kenya Bottlers Ltd & Others v the A.G and Others High Court Petition No. 72 of 2011*** It was held that;

> ***[69] Declaring a statute as unconstitutional, needless to say is a serious issue with deep-seated ramifications and the court should not be overly enthusiastic in pronouncing so unless clear grounds known in law have been clearly established."***

76. I agree with the reasoning above and it is obvious to me that once I have not accepted the Petitioners' arguments on the two core questions for determination, it follows that the Petitioners are not entitled to any remedies.

Conclusion

77. Having held as above, I must state that whereas the 1st Petitioner's interest in the amendments are said to have been driven more by commercial purposes, the 2nd Petitioner stated that he was a public spirited citizen and parent and his drive was to secure and protect the Constitution. That may be so but the entreaty to this Court to wade into the morass of policy by invocation of the Sessional Paper is not welcome hence my refusal to allude to it at all. I have stayed to the legality of the impugned amendments and my views are now clear.

78. Lastly, I owe the Parties an apology for the delay in delivery of this Judgment caused partly by my elevation to the Supreme Court.

Disposition

79. From my findings above, my final orders are that:

> ***(i) Petition No.93 of 2015 dated 11th March, 2015 is hereby dismissed.***
>
> ***(ii) Petition No.132 of 2015 dated 9th April 2015 is hereby dismissed.***

(iii) Each Party shall bear its own costs because although the Petitioners may have been pursuing their own interests, the issues raised are of public importance.

80. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF MARCH, 2017

ISAAC LENAOLA

JUDGE

DELIVERED AND SIGNED AT NAIROBI THIS 22ND DAY OF MARCH, 2017

E. CHACHA MWITA

JUDGE