



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 354 OF 2015**

**BETWEEN**

**KELVIN MBWAYA**

**ZACHARIAH MWANIKI KANJOGU**

**SUSAN WAMBUI CHEGE**

**STELLA NASIMIYU SITATI.....PETITIONERS**

**(SUING ON THEIR BEHALF AND ON BEHALF OF FIFTY FIVE (55) OTHERS)**

**VERSUS**

**THE ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE TECHNICAL UNIVERSITY OF KENYA.....2<sup>ND</sup> RESPONDENT**

**THE UNIVERSITY OF NAIROBI.....3<sup>RD</sup> RESPONDENT**

**THE COMMISSION FOR UNIVERSITY EDUCATION.....4<sup>TH</sup> RESPONDENT**

**THE ENGINEERS BOARD OF KENYA.....5<sup>TH</sup> RESPONDENT**

**THE MINISTRY OF EDUCATION SCIENCE AND TECHNOLOGY.....6<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. Universities in Kenya are not built from scratch. Most, if not all, transit from university colleges as constituent colleges to full university status upon receiving their own charter. University colleges offer degree programmes and award various degrees conferred by parent universities in accordance with prior arrangements with those universities. In most cases, all is well in such arrangements until a constituent college attains full university status when, uncharacteristically, disputes begin to emerge over duties and obligations owed to students who were taking their studies in the constituent college.

2. The most common dispute that seems to afflict our university colleges transiting from constituent college to full university status, is the position of students admitted and taking their degree courses in the constituent college when, mid-stream their studies, the constituent college attains full university status, raising the question which institution the students belong to and whose degree certificates they should be awarded. It is even more startling when neither the constituent college nor the university is willing to take responsibility for mistakes that may have occurred along the way and which in one way or another affect students' academic programmes.

**The Petition**

3. Kevin Mbwaya, Zachariah Mwaniki Kanjogu, Susan Wambui Chege and Stella Nasimiyu Sitati, petitioners, filed a petition dated

25<sup>th</sup> August 2015 on their own behalf and that of 55 others, against the **Attorney General, The Technical University of Kenya, University of Nairobi, Commission of University Education, the Engineers Board of Kenya** and **The Ministry of Education Science and Technology**, 1<sup>st</sup> to 6<sup>th</sup> respondents respectively, seeking various declarations as follows;

*1. A declaration that the petitioners herein were valid students of the University of Nairobi having been enrolled at Kenya Polytechnic University college which was a Constituent College of University of Nairobi.*

*2. A declaration that the action by the 2<sup>nd</sup> respondent to absorb the petitioners into the Technical University of Kenya knowing very well that it was not approved to offer courses by Engineering Board of Kenya is unconstitutional contrary to Article 47(1) of the Constitution.*

*3. That the Honorable Court do issue an order compelling the 2<sup>nd</sup> respondent to forward the names of the petitioners to the 3<sup>rd</sup> respondent for inclusion in the 3<sup>rd</sup> list of graduands (sic) for the graduation to be held on 4<sup>th</sup> September 2015.*

*4. That this Honorable Court be pleased to grant orders that the 5<sup>th</sup> respondent be compelled to admit and or register the petitioners herein to the profession as graduate Engineers and their degree certificates be deemed to have been acquired properly, procedurally and in conformity with the law and with the requirements of the Engineering Board of Kenya.*

4. The petitioners sought alternative reliefs in the nature of;

*i. An order nullifying degree certificates issued by the 1<sup>st</sup> respondent to the petitioners, that the court do compel the 3<sup>rd</sup> respondent to graduate (sic) the petitioners and issue them with fresh degree certificates for Bachelor of Science Electrical and Electronic Engineers.*

*ii. That the Honorable Court do grant orders that upon successful compliance of orders 2 and 3 above, the 5<sup>th</sup> respondent be compelled to consider petitioners' applications as graduate Engineers valid.*

5. They also sought any order the court would deem fit to grant as well as costs.

6. The petition is supported by affidavits sworn by **Kelvin Ombwaya Sial'langa, Zachariah Mwaniki Njogu, Andisi Jumba Brenda and Stella Nasimiyu Sitati** all sworn on the same day 25<sup>th</sup> August 2015. From the facts averred in the petition and depositions in the affidavits, the petitioners received admission letters from the Kenya Polytechnic College ( university college) a constituent college of the 3<sup>rd</sup> respondent, in 2009 to pursue a course leading to a degree in Bachelor of Science in Electrical and Electronics engineering, where they studied for 4 years.

7. According to the petitioners, on 15<sup>th</sup> January 2013, the university college received its own Charter and attained full university status assuming the name, "**The Technical University of Kenya**", the 2<sup>nd</sup> respondent herein. The 2<sup>nd</sup> respondent absorbed students who were in the university college including the petitioners who studied at the 2<sup>nd</sup> respondent for the remaining years and on completion, were awarded the 2<sup>nd</sup> respondent's degrees on 18<sup>th</sup> December 2013.

8. According to the petitioners, after graduation they presented their degree certificates to the 5<sup>th</sup> respondent for registration as a graduate Engineer, but were turned away on grounds that the 2<sup>nd</sup> respondent was not accredited and was not recognized by the 5<sup>th</sup> respondent as one of the institutions allowed to offer engineering courses in Kenya.

9. The petitioners stated that according to their admission letters, they were to take a different course but ended up taking Bachelor of Engineering in Electrical and Electronic Engineering; (BEng EEE) equivalent to Bachelor of Science which was being offered by the 3<sup>rd</sup> respondent.

10. The petitioners stated that they enjoyed facilities of the 3<sup>rd</sup> respondent including lecturers, library and bookshop services, and pursued a syllabus approved by the 3<sup>rd</sup> respondent including examinations. They averred that graduations between 2009 and 2013 were of those of the 3<sup>rd</sup> respondent and were presided over by the 3<sup>rd</sup> respondent's Chancellor. The petitioners are aggrieved for being absorbed by the 2<sup>nd</sup> respondent and awarded the 2<sup>nd</sup> respondent's degrees yet the 2<sup>nd</sup> respondent was not accredited to offer engineering courses. They are therefore, unable to be registered as graduate engineers and cannot earn a living.

## **2<sup>nd</sup> Respondent's Response**

11. The 2<sup>nd</sup> respondent filed a replying affidavit by **Ruth Kirwa** sworn on 1<sup>st</sup> October 2015, and filed in Court on 17<sup>th</sup> November 2015. Ms Kirwa deposed that **the University College**, established under **Legal Order No 159**, of 2007 had a distinct mandate and managed its affairs independently, except that the syllabus and examinations were to be approved by the 3<sup>rd</sup> respondent. She deposed that the 3<sup>rd</sup> respondent's role was to oversee, mentor and act as caretaker to ensure quality of education in the University College and assist in the administrative and management issues whenever they arose. Graduations between 2009 and 2013 were presided over by the 3<sup>rd</sup> respondent.

12. According to Ms. Kirwa, no prejudice was caused to the petitioners when they were absorbed by the 2<sup>nd</sup> respondent since they had been admitted to the university college, and once legal status changed, they had to continue in the 2<sup>nd</sup> respondent. It was deposed that the University College submitted engineering degree courses in Bachelor of Engineering in Electrical and Electronic engineering to the 5<sup>th</sup>

respondent in 2009 for consideration and there had been amicable communication since then.

13. Ms. Kirwa further deposed that the 5<sup>th</sup> respondent, the successor to Engineers Registration Board made recommendations in its letter dated 13<sup>th</sup> July 2015 on what the 2<sup>nd</sup> respondent should do with regard to Engineering programmes it offered. However, in the same month, the 5<sup>th</sup> respondent issued communication indicating that the 2<sup>nd</sup> respondent was not accredited to offer Engineering courses.

14. Ms. Kirwa deposed that the Universities Act, 2012 established the 4<sup>th</sup> respondent whose functions and mandate include, accrediting and inspecting university programmes in the country, while the Engineering Act, 2011 had granted powers to the 5<sup>th</sup> respondent to accredit engineering programmes in Universities. In that regard, it was deposed, Universities are not answerable to other professional bodies and, therefore, the 5<sup>th</sup> respondent ought not to have acted retrospectively as it did by declining to register the petitioners.

### **3<sup>rd</sup> Respondent's Response**

15. The 3<sup>rd</sup> respondent filed grounds of opposition dated 15<sup>th</sup> January 2016 and a replying affidavit by **Henry Mutono Wangutusi, Deputy Vice Chancellor academic affairs** sworn on 15<sup>th</sup> January 2016, both filed on the same day. The grounds of opposition were to the effect that the petitioners not being students of the 3<sup>rd</sup> respondent could not be conferred with degrees of the 3<sup>rd</sup> respondent, that the mandate of conferring degrees to the petitioners was that of the 2<sup>nd</sup> respondent which had been granted a charter to full University with its own duties and obligations. It was contended that the 3<sup>rd</sup> respondent was wrongly enjoined into these proceedings, that the 3<sup>rd</sup> respondent has not violated or infringed the petitioners' rights generally under Article 27(1) and 47(1) of the Constitution or violated their legitimate expectation; and that the 2<sup>nd</sup> respondent is responsible for non- accreditation of engineering degrees by the 5<sup>th</sup> respondent and is responsible to the petitioners' as its graduates.

16. In the replying affidavit, **Mr Wangutusi** denied that the petitioners were students of the 3<sup>rd</sup> respondent. He deposed that the petitioners were admitted by the University College as shown by their admission letters hence were students of the university college. He admitted **Andisi Jumba Brenda** had received admission letter from the 3<sup>rd</sup> respondent dated 20<sup>th</sup> September 2007, but did not join the 3<sup>rd</sup> respondent given that she again received a letter from the University College dated 5<sup>th</sup> January 2009, two years after she was supposed to have joined the 3<sup>rd</sup> respondent. He deposed that the petitioners having been admitted and commenced studies in the university college they were students of the university college and later the 2<sup>nd</sup> respondent.

17. On the contention that the petitioners enjoyed services of the 3<sup>rd</sup> respondent including lecturers, library and bookshop, Mr. Wangutusi deposed that it is not uncommon for lecturers to teach in more than one university, and that library and bookshop services are open to members of the public and are not restricted to students of the 3<sup>rd</sup> respondent only. He deposed that enjoyment of such services did not make petitioners students of the 3<sup>rd</sup> respondent.

18. Mr. Wangutusi further deposed that the 3<sup>rd</sup> respondent's role was that of a mentor, approving the syllabus and examinations but the role of examining and award of degrees was that of the university college. On receiving a charter, he deposed, the university college became a full university and its duties and obligations were automatically taken over by and vested in the 2<sup>nd</sup> respondent. Examinations and conferring degrees became one of the 2<sup>nd</sup> respondents' mandates and the petitioners were properly absorbed by the 2<sup>nd</sup> respondent.

### **5<sup>th</sup> Respondent's Response**

19. The 5<sup>th</sup> respondent filed an affidavit by **Engineer Nicholas M. Musuni**, the Registrar of Engineers Board of Kenya, sworn on 15<sup>th</sup> September 2015 and filed in Court on 17<sup>th</sup> September 2015. He deposed that the 5<sup>th</sup> respondent's mandated is to regulate the engineering profession and has developed criteria for accreditation of undergraduate engineering programmes for universities. He deposed that no university should embark on teaching engineering degree courses without its approval. In that regard, it was deposed, the 5<sup>th</sup> respondent informs the public through newspapers and Kenya Gazette the list of universities accredited to offer specific programmes in Engineering courses.

20. **Eng. Musuni** further deposed that although the 2<sup>nd</sup> respondent was informed of the requirements it did not fulfill them. He deposed that the 2<sup>nd</sup> respondent's predecessor had also been informed that as a constituent college of the 3<sup>rd</sup> respondent, the programmes it was offering differed from those approved for the 3<sup>rd</sup> respondent and was asked to comply with the requirements set by the 5<sup>th</sup> respondent. It was deposed that it had been made clear that only graduates who had undertaken recognized engineering courses would be registered by the 5<sup>th</sup> respondent.

21. Eng. Musuni concluded that the 2<sup>nd</sup> respondent was aware and had been informed through its predecessor that its engineering programmes had not been accredited, and the decision not to recognize its engineering degree programmes was taken long before the petitioners graduated from the 2<sup>nd</sup> respondent. He deposed that the fact or choice of University notwithstanding, only students who studied accredited engineering programmes are registered.

### **Petitioners' Submissions**

22. Counsel for the petitioners submitted that at the time the petitioners were admitted to university in 2009, the 2<sup>nd</sup> respondent was a constituent college of the 3<sup>rd</sup> respondent and did not have capacity to admit them given that a charter was granted on 15<sup>th</sup> January 2013. It was submitted that the petitioners were admitted by the 3<sup>rd</sup> respondent to undertake various engineering courses at the University College.

Counsel contended that there was no privity of contract between the petitioners and the 2<sup>nd</sup> respondent but had a contractual relationship with the 3<sup>rd</sup> respondent which issued them with admission letters.

23. Counsel submitted, citing section 3 of Legal Notice No. 159 of 2007, that the degrees to be awarded to the petitioners were those of the 3<sup>rd</sup> respondent. Counsel maintained that the curriculum of engineering programmes the petitioners undertook was that of the 3<sup>rd</sup> respondent and they sat and passed examinations under that curriculum.

24. On the enactment of the Universities Act, 2012 and repeal of the University of Nairobi Act, it was submitted, did not change the legal status of the petitioners as students of the 3<sup>rd</sup> respondent. Counsel referred to **Section 23(3)** of the Interpretation and General Provisions Act (Cap 2) to support their submission that the repeal did not affect the petitioners' rights, privileges obligations or liability acquired, accrued or incurred under any written law. Counsel contended, therefore, that rights and privileges of the petitioners as students were not affected by that repeal. It was contended that by virtue of Legal Notice no 159 of 2007, petitioners had acquired rights and had a legitimate expectation to be awarded degrees of the 3<sup>rd</sup> respondent.

25. Learned counsel submitted that there was no legal relationship between the petitioners and the 2<sup>nd</sup> respondent. He submitted that the 2<sup>nd</sup> respondent became a full university in 2013 with no express mandate to absorb students who had been admitted by the 3<sup>rd</sup> respondent. Counsel argued that the Charter did not operate to convert students of the 3<sup>rd</sup> respondent into those of the 2<sup>nd</sup> respondent and that the charter could not operate retrospectively.

26. It was further contended that the 2<sup>nd</sup> respondent awarded its degrees to the petitioners contrary to section 46 of the Engineers Act 2011 which bars institutions from admitting students and offering courses in engineering when they are not accredited by the 5<sup>th</sup> respondent. According to counsel, the 2<sup>nd</sup> respondent was aware of this shortcoming yet proceeded to award the petitioners degrees in disregard of **section 5(1) of legal Notice No 159 of 2007** and section 46 of the Engineers Act.

27. Counsel's next submission was that the petitioners' right to fair administrative action was violated and referred to **Article 47(1)** of the **Constitution** to buttress this submission. He contended that both the 2<sup>nd</sup> and 3<sup>rd</sup> respondents knew that their actions would affect the petitioners' rights but never accorded them reasons. These actions, counsel submitted, have violated the petitioners' fundamental rights and freedom. He referred to **HWR Wade CF Forsyth's Work Administrative Law**; 10<sup>th</sup> edition, and the decision of **Lord Denning in Abbott v Sullivan [1952] 1KB 189**, and **Kioa v West[1985] HCA 81(1985) 159 CLR55**, for the proposition that there is a duty to act fairly in the sense of according procedural fairness.

28. Finally, counsel submitted that the petitioners had been discriminated against contrary to **Article 28** of the **Constitution** that their right to property under **Article 40(3)** and right to affirmative action and empowerment of the youth under **Article 55** of the **Constitution** breached and their dignity undermined.

#### **1<sup>st</sup> and 6<sup>th</sup> Respondents' Submission.**

29. For the 1<sup>st</sup> and 6<sup>th</sup> respondents submitted that the ministry draws its mandate from various instruments including the Constitution various Education Acts and education Order no 2 of 2013. It was also submitted that Article 55 of the Constitution requires the state to take measures to ensure that the youth access relevant education, training and employment. For that reason, it was submitted, the Ministry's mandate is limited to policy issues and supervision.

30. It was contended that according to section 5(1) of Legal Notice No 159 of 2007 the degrees to be awarded by the college were those of the 3<sup>rd</sup> respondent. Under section 2 of the Universities Act, a constituent college is a constituent college of a university established under that Act. According to the 1<sup>st</sup> and 6<sup>th</sup> respondents, the petitioners were admitted to the university college on the understanding that they would be awarded the 3<sup>rd</sup> respondent's degrees. But with the award of the charter, award of degrees was left to the 2<sup>nd</sup> respondent.

31. Regarding registration of the petitioners as graduate Engineers, it was submitted that the Court can only intervene where a public body has acted irregularly or contrary to statute, and referred to the case of **Republic v Council of Legal Education Exparte James Njuguna & 14 Other** [2007] eKLR in support of that submission. It was contended that the issue of registration of Engineers under the Engineers Act 2011 was determined in the case of **Engineers Board of Kenya v Jesse Waweru Wahome & Others** Civil appeal No 240 of 2013 that **recognition** includes **accreditation**. It was concluded that the 5<sup>th</sup> respondent cannot be blamed for discharging its legal mandate and therefore, cannot be compelled to register the petitioners.

#### **2<sup>nd</sup> Respondent's Submissions**

32. Counsel for the 2<sup>nd</sup> respondent submitted that the petitioners' case lay on the interpretation of paragraph 5 of Legal Notice no 159 of 2007 and the transition clause in the Charter constituting the 2<sup>nd</sup> respondent as a full University. Counsel contended that the petitioners were admitted as students of the University College, a body corporate under paragraph 3(2) of legal Notice no 159 of 2007, and became the 2<sup>nd</sup> respondent's students on attaining full university status. Reliance was placed on the case of **Oindi Zaippeline & 39 others v Karatina University & another [2015] eKLR** to support this submission.

33. On the issue of legitimate expectation, counsel submitted that the petitioners were admitted, then taught and examined by the 2<sup>nd</sup> respondent which was under obligation to award its degrees on completion of studies. Counsel cited paragraph 5 of Legal Notice No. 159 of 2007 to support this submission. He relied on the case of **South Africa Veterinary Council V Szymanska 2003(4) SA 42 (SCA)**, on the submission that the law does not protect every expectation but only those which are legitimate. He also relied on the case of re **West Minister City Council [1986] AC 168** on the doctrine of legitimate expectation.

34. It was further submitted that legitimate expectation does not override statutory provisions. Counsel relied on the case of **R V DPP Exparte P. Kebitene** for the submission that legitimate expectation is founded on the principle of fairness. In counsel's view, the petitioners having being admitted taught, examined by the 2<sup>nd</sup> respondent and awarded its degrees, they could not turn around and contend that they were not its students.

35. Counsel went on to submit that the 2<sup>nd</sup> respondent did not violate the petitioners' right to education and had nothing to gain by violating its students' right to education. It was submitted that the 3<sup>rd</sup> respondent was not responsible for teaching and examining the petitioners. It was also contended that the degree courses having been approved by the 4<sup>th</sup> respondent, the 5<sup>th</sup> respondent has no reason to claim that courses taught at the 2<sup>nd</sup> respondent were not accredited.

36. Counsel went on to contend that the University Education Act being a later legislation took precedent over The Engineers of Kenya Act, and therefore, the 5<sup>th</sup> respondent could not rely on the former Act to perform accreditation of University programmes for Engineering courses. Reliance was placed on the case of **Martin Wanderi & 19 others V Engineers Registration Board of Kenya & 5 others [2014]eKLR** for the proposition that a later Act is deemed to have repealed the former.

37. Counsel held on the firm position that the power to accredit academic programmes in universities is now with the 4<sup>th</sup> respondent and not the 5<sup>th</sup> respondent. Counsel concluded that the 2<sup>nd</sup> respondent did not violate the petitioners' right to education placing the blame on the 5<sup>th</sup> respondent's door step.

### **3<sup>rd</sup> Respondent's Submissions**

38. **Miss Kilonzo**, learned counsel for the 3<sup>rd</sup> respondent submitted that the petition does not meet the constitutional standard of pleading. According to counsel, petitioners cited omnibus provisions of the Constitution without the petition does not give particulars of the alleged violation, the manner of breach or infringement or the jurisdictional basis for it. Counsel relied on the case of **Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others [2013]eKLR**, and **Anarita karimi Njeru V Republic (No2) (1976- 1980) 1 KLR 1272** to support this proposition.

39. It was submitted that on the evidential threshold, no proof was presented to Court that the 3<sup>rd</sup> respondent violated the petitioners' rights to fair administrative action, given that the petitioners were not students of the 3<sup>rd</sup> respondent. **Miss Kilonzo** contended that there was no relationship between the petitioners and the 3<sup>rd</sup> respondent. According to counsel, the University College was a constituent college of the 3<sup>rd</sup> respondent pursuant to Legal Order, 20007, but the 3<sup>rd</sup> respondent's role was limited to reviewing syllabus, overseeing, mentoring and assisting the university College develop capacity, while the role of administering examination and awarding degrees was the mandate of the college under section 4(1) (a) of the Order.

40. In counsel's view, upon receiving the charter as a full University, the 2<sup>nd</sup> respondent assumed duties and obligations of the College under section 3(4) of the charter. Counsel relied on section 2 of the universities Act, 2012 which defines who a student is and submitted that the letters relied on by the petitioners show that they were students of the College and later became students of the 2<sup>nd</sup> respondent. Counsel contended that the petitioners had not proved their case as required by sections 107 and 109 of the Evidence Act. She relied on the case of **Rhesa Shipping Co SA V Edmunds [1985] 2 ALLER 712** on the burden of proof.

41. Regarding legitimate expectation, Miss Kilonzo submitted that the petitioners never established that they had any expectation from the 3<sup>rd</sup> respondent. According to counsel, there was no express, clear and unambiguous promise given to the petitioners by the 3<sup>rd</sup> respondent. Reference was made to the case of **Communication Commission of Kenya & 5 others V Royal Media Services Limited & 5 others** Petition No 14 of 2014 on that point. Counsel argued that the petitioners graduated as the 2<sup>nd</sup> respondent's students and were awarded its degrees without any complaint.

### **4<sup>th</sup> Respondent's Submissions**

42. **Miss Olao**, learned counsel for the 4<sup>th</sup> respondent, submitted that the Commission established under the Universities Act is the body with mandate to accredit Universities and set academic standards in universities hence professional bodies cannot perform functions of the Commission. Counsel referred to **Section 5A** of the Act to show that the Act overrides other statutes in case of a conflict. The section provides that in case of conflict between the Act and any other law on the approval or accreditation of academic programme, the Universities Act shall prevail. Counsel however contended that the petitioners' grievance and the conflict arose before that amendment hence section 5A is not applicable.

43. Counsel went on to submitted that the 4<sup>th</sup> respondent issued guidelines to manage transition and according to these guidelines, students who were admitted to a constituent college but midstream their studies, the College becomes an independent university, students have a choice; either to graduate as students of the new university, or those of the parent university. Where that was not done, counsel submitted, reference was to be made to transitional provisions in the charter.

44. It was submitted that section 32 (4) of the charter only referred to students pursuing diploma and certificates courses at the University College as those who would be awarded certificates and diploma of the new university. In counsel's view, the omission of students pursuing degree courses in the transition clause meant those students would be awarded degree of the 3<sup>rd</sup> respondent. Counsel relied on the case of **Oindi Zaippeline & 39 others v Karatina University & another (Supra)** to support her position.

45. Counsel also relied on paragraph 5 of Legal Notice 159 of 2007 to contend that the degrees to be awarded by the university college were degrees of the University. According to counsel, the University referred to in paragraph 5 (1), was the 3<sup>rd</sup> respondent and for that reason, the

petitioners were students of the 3<sup>rd</sup> respondents and were to be awarded degrees of the 3<sup>rd</sup> respondent.

### 5<sup>th</sup> Respondent's Submissions

46. **Mr Kerongo**, learned counsel for the 5<sup>th</sup> respondent on his part submitted that the 2<sup>nd</sup> respondents' application for accreditation was not approved but it defiantly continued to offer Engineering degrees. According to counsel, the 5<sup>th</sup> respondent's role in accrediting professional Engineering Programmes is not in doubt. He blamed the 2<sup>nd</sup> and 3<sup>rd</sup> respondents for failure to agree on how the petitioners ended up taking unapproved engineering programmes.

47. Counsel submitted that several Engineering programmes in the 3<sup>rd</sup> respondent's university have been approved by the 5<sup>th</sup> respondent, but are different in content and structure from those offered by the 2<sup>nd</sup> respondent. For that reason, counsel submitted, even if the petitioners were to be awarded degrees of the 3<sup>rd</sup> respondent the programmes they studied were not approved and accredited by the 5<sup>th</sup> respondent. It was submitted therefore, that the 5<sup>th</sup> respondent was performing its legal obligations hence there was no evidence that the petitioners' right to fair administrative action had been violated. Counsel relied on the case of **Engineer Board of Kenya V Jesse Waweru Wahome & others Civil appeal No 240 of 2013** to support his position.

### Analysis and Determination:

48. I have considered the pleadings herein, submissions by counsel and the authorities cited. From these I have identified the following two issues for determination, namely; whether the petitioners were students of the 2<sup>nd</sup> or 3<sup>rd</sup> respondents; and whether the 5<sup>th</sup> respondent should be ordered to register the petitioners as graduate Engineers.

49. The petitioners were admitted to the University College in 2009 to pursue a degree in Bachelor of Engineering in Electrical and Electronic Engineering. The university college was at the time a constituent college of the 3<sup>rd</sup> respondent. When the university college received a charter the petitioners continued with studies in the 2<sup>nd</sup> respondent up to completion.

50. The common denominator in the petitioners' case is that their letters of admission were from the university college to pursue one degree course but ended up taking a different course. They graduated from the 2<sup>nd</sup> respondent, and were awarded its degrees. According to the admission letters, the University College was a constituent college of the 3<sup>rd</sup> respondent.

51. Upon graduating, the petitioners applied to the 5<sup>th</sup> respondent for registration as graduate Engineers, but their applications were declined on grounds that the 2<sup>nd</sup> respondent had not been accredited to offer Engineering courses, and for that reason, the 5<sup>th</sup> respondent did not recognize engineering courses offered by the 2<sup>nd</sup> respondent.

52. It is undisputed that the University College was a constituent college of the 3<sup>rd</sup> respondent. Both the 2<sup>nd</sup> and 3<sup>rd</sup> respondents have maintained that upon receiving a Charter as a full university the 2<sup>nd</sup> respondent legitimately took over duties and obligations of the University College and students enrolled at the university college became students of the 2<sup>nd</sup> respondent and, therefore, the award of degree certificates by the 2<sup>nd</sup> respondent to the petitioners was in order. The petitioners have on their part argued that they were not students of the 2<sup>nd</sup> respondent and were not supposed to be awarded its degrees raising the issue of which degrees were the petitioners entitled to.

53. In order to resolve this issue, it is important to examine the constituting instruments namely; the University of Nairobi Act, 210 B, Legal Notice No. 159 of 2007, the charter and the transition clause therein to discern the legislative intent. This requires a proper interpretation of these statutes, looking at not only the text, but also the context of the statutes.

54. The importance of considering both text and context in interpreting statutes was emphasized by the **Supreme Court of India in Reserve Bank of India v. Peerless General Finance and Investment Co. Ltd., 1987 SCR (2) 1 thus;**

*“Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place.”*

55. The same Court pointed out in **Commercial Tax Officer, Rajasthan v M/s Binan Cement Ltd** [2014] SCR that **the Court should be mindful of the principle that it should examine every word of a statute in its context and must use context in its widest sense.**

56. It is also imperative that when interpreting a statute, the Court takes a holistic approach to that interpretation. This was stated by the Court of Appeal in the case of **The Engineers Board of Kenya v Jesse Waweru Wahome & others** Civil Appeal No 240 of 2013 thus;

*“One of the canons of statutory interpretation is a holistic approach. As stated in Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 44 paragraph 1484, no provision of any legislation should be treated as ‘stand-alone’. An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in*

*the Act.”*

57. The 3<sup>rd</sup> respondent is established under section 3(1) of its statute, University of Nairobi Act, 210 B. Section 2(1) of the Act has several definitions which are relevant to this petition. For instance, the word “**university**” is defined to mean the University of Nairobi. “**Constituent college**” is defined to mean any institution declared to be or established as a constituent college of the University under section 5. The word “**student**” is defined as a person registered by the University for the purposes of obtaining a qualification of the University or any other person who is determined by the Senate to be a student. **Section 5** provides that The President may, on the advice of the Council, by order published in the Gazette establish or declare an education institution of higher learning or any training establishment to be a **constituent college** of the University.

58. **Section 3(1)** of Legal Notice No 1159 of 2007, on the other hand, established the university college as a constituent college of the 3<sup>rd</sup> respondent, and a body corporate pursuant to section 3(2) of the Order. Section 4 of the Order provided for functions of the university college one of which was to examine and make proposals for new degree courses and subjects of study. Section 5 on conferment of degrees and other academic certificates was material and provided;

*“(1) The degrees to be awarded by the University College shall be the degrees conferred by the University.*

*(2) Notwithstanding subparagraph (1), the University College shall have powers to grant diplomas, certificates or other academic qualifications which may, for the time being, be authorized by the statutes of the University College.” (emphasis)*

59. The above provision was clear that degrees to be awarded by the University College were degrees conferred by the 3<sup>rd</sup> respondent. The university college’s power was to award diplomas and certificates. In this regard. **Section 2** of the Order defined the word “**University**” to mean the 3<sup>rd</sup> respondent. This meant that graduates from the University College would be awarded degrees of the 3<sup>rd</sup> respondent. A reading of **Section 5(2)** of the Order is clear that the university college would only award diplomas and certificates or other academic qualifications but not degrees.

60. The university college received its charter on 15<sup>th</sup> January, 2013, assuming the 2<sup>nd</sup> respondent name. Both the university college Order 2007 and the charter did not define the word “**student**”. but section 2 of the University of Nairobi Act as showed above, defined “**student**” as **a person registered by the University for the purposes of obtaining a qualification of the University or any other person who is determined by the Senate to be a student.** That would imply the 3<sup>rd</sup> respondent could only award its academic qualifications to its students.

61. Section 3 of the charter established the 2<sup>nd</sup> respondent as a full university and corporate entity and assumed assets, liabilities and obligations of the university college. The charter contains a transition clause in section 32(4) which is in the following words;

*“The students of the Kenya polytechnic University College pursuing diploma and certificate programmes as at the commencement of the charter shall compete their course and shall be awarded diplomas and certificates of the university. (emphasis)*

62. When the petitioners commenced their studies in the university college they were by law entitled, upon completion of studies to degrees of the 3<sup>rd</sup> respondent. The Legal Order did not make it a condition that this would be the case only if the petitioners completed their studies while the university college was still a constituent college. On 15<sup>th</sup> January 2013 while the petitioners were still pursuing their studies, the university college attained full University status but the petitioners continued with their studies in the 2<sup>nd</sup> respondent which had taken over assets, obligations and liabilities of the university college. Upon completing studies, they were awarded the 2<sup>nd</sup> respondent’s degrees which they say was wrong

63. The pertinent question in the petition is; were the petitioners students of the university college and on attaining university status did they become students of the 2<sup>nd</sup>; and whose degrees were they entitled to?

64. I have examined the relevant statutes for the three institutions involved and more so Legal Notice 159 of 2007 and the 2<sup>nd</sup> respondent’s charter. The transition clause in charter is clear that only students of the University College pursuing diploma and certificate programmes at the commencement of the charter, (15<sup>th</sup> January 2013), would complete their courses and be awarded diplomas and certificates of the 2<sup>nd</sup> respondent. There is no similar provision regarding students who were pursuing degree courses in the university college. The Legal Notice establishing the university college, on the other hand provided that its students pursuing degree courses would be awarded degrees of the 3<sup>rd</sup> respondent.

65. Although the petitioners received admission letters from the university college which would ordinarily make them students of the college, Legal Notice No 159 of 2007 was unequivocal that they would be awarded degrees of the 3<sup>rd</sup> respondent. This can also be implied from the transitional clause in the charter which left out students who were pursuing degrees at the university college among those who would be awarded academic certificates of the 2<sup>nd</sup> respondent at commencement of the charter on 15<sup>th</sup> January 2013.

66. Furthermore, Legal Notice 159 of 2007 which was a subsidiary legislation to the 3<sup>rd</sup> respondent Act, defined “**university**” as the 3<sup>rd</sup> respondent. The Act itself defined “**student**” as one registered for purposes of obtaining academic qualification of the 3<sup>rd</sup> respondent, which was the case with the petitioners.

67. From a factual and practical point of view therefore, and giving the three statutes a holistic examination both textually and contextually, the university college had no legal power to award its own degrees. The Legal Notice was clear on this, and the same fact could also be

implied from the charter. It was the responsibility of the 3<sup>rd</sup> respondent to confer degrees to the petitioners and the fact that the charter left out the petitioners among students who would be awarded the 2<sup>nd</sup> respondent's academic certificates, spoke it all. The only logical conclusion one can draw from the examination of the statutes is that the petitioners were students of the 3<sup>rd</sup> respondent, and this fact was acknowledged by paragraph 5 of the legal Order. In my respectful view, the clear intention discernible from the statutes is that the petitioners were students of the 3<sup>rd</sup> respondent for purposes of award of degrees.

68. There was a contention that the 2<sup>nd</sup> respondent took over assets obligations and liabilities of the university college to imply that the petitioners were also taken over by the 2<sup>nd</sup> respondent. With respect, the fact that the 2<sup>nd</sup> respondent assumed rights, duties, obligation, assets and liabilities of the university college, did not mean it assumed the petitioners because as human beings they were not assets or liabilities capable of being taken over. If the intention was to have the petitioners remain as students of the 2<sup>nd</sup> respondent, the charter would have provided so.

69. I therefore find and hold that to the extent that the legal order gave the petitioners the right to be awarded degrees of the 3<sup>rd</sup> respondent, and the transition clause in the charter left them out of those who were to get academic certificates of the 2<sup>nd</sup> respondent, they were deemed to be students of the 3<sup>rd</sup> respondent and were therefore entitled to her degrees.

70. The court was referred to the Court of Appeal decision in *Oindi Zaippeline & 39 others V Karatina University and Another (Supra)* for guidance. The facts of that case are not on all fours with those of the present petition. In the *Oindi case*, the appellant was admitted to Moi University and placed at Central campus, (Karatina town) of Chepkoilel university college then a constituent college of Moi university. Later the campus became Karatina university college, a constituent of Moi University and then Karatina university. The appellant filed a petition contending that he was not a student of Karatina University but the court ruled that he was. On appeal, the Court of Appeal reversed that decision holding that there was no relationship between the appellant and Karatina University and therefore the appellant was a student of Moi University.

71. After analyzing the facts of the case and statutes, the Court of Appeal observed;

***“On a factual basis, we find that the appellant was never a student of Karatina University College or Karatina University. Legal Notice No. 163 of 2010 at paragraph 5 acknowledges this position and created an exception by stipulating that the degrees to be awarded by Karatina University College were to be degrees of Moi University. The status of the appellant as a student of Moi University was preserved by Paragraph 5 of the Legal Notice.”***

72. Although the facts of that case were not similar to the one before me, I am inclined to follow the legal position in that case that paragraph 5 of the Legal Notice establishing Karatina university college created an exception that degrees to be awarded by the university college were those of Moi university. In the present case the statutes were clear that the petitioners were to be awarded degrees of the 3<sup>rd</sup> respondent because the university college had no legal capacity to award degrees of its own. This position was also acknowledged by the charter when it excluded students pursuing degree courses from getting the 2<sup>nd</sup> respondent's degrees. They were not left in the wilderness. They had a home to take refuge in and that was the 3<sup>rd</sup> respondent.

73. The 4<sup>th</sup> respondent supported the petitioners' case that they were students of the 3<sup>rd</sup> respondent. It also pointed out that it had issued guidelines to manage transition in case a University College was awarded a charter to full University. The guidelines, **known as Universities standards and guidelines, 2014**, provide at paragraph 7(a) that students who complete their academic studies under the constituent college graduate and get degrees of the mentoring University. Paragraph 7(b) thereof provides that where students were admitted to a constituent college, but have to graduate after the constituent college attains a charter, the students would elect whether to graduate as students of the new University or the Mentoring University.

74. The guidelines however well intended, do not have the force of law and, therefore, cannot override legal instruments such as a Legal Notice or charter. In any case the guidelines were issued in 2014 while the university college was awarded the charter in 2013 and therefore are inapplicable in the present case.

75. Closely related to this was the petitioners' contention that their legitimate expectation was violated. They argued that they had a legitimate expectation that on completion of studies, they would be awarded degrees of the 3<sup>rd</sup> respondent but ended up with degrees of the 2<sup>nd</sup> respondent against that expectation. Legitimate expectation is founded on the principle of fairness based on clear express and unambiguous promise made by a public authority or on its behalf, which promise has been acted upon by the person to whom it was made with the reasonable expectation that the authority or body making the promise would act accordingly.

76. In the case of *Communication Commission of Kenya & 5 others v Royal Media Services & 5 others*, the Supreme Court enumerated what constitutes legitimate expectation (at paragraph 269) thus-

***a. There must be an express, clear and unambiguous promise by a public body.***

***b. The expectation itself must be reasonable.***

***c. The representation must be one which it was competent and lawful for the decision maker to make.***

***d. There cannot be a legitimate expectation against a clear provision of the law or the constitution.***

77. This was reiterated in the case of *South African Veterinary Council & another v Creg Szymanski (Case No. 79/2001)*, where the

Supreme Court of Appeal of south Africa stated;

*“The requirements relating to the legitimacy of the expectation upon which an applicant may seek to rely have been most pertinently drawn together by Heher J, in National Director of Public Prosecutions v Philips and others 2002 (4) SA 60. He said- ‘The law does not protect every expectation but only those which are legitimate. The requirements for legitimacy of the expectation include the following;*

- i. *“the representation underlying the expectation must be clear, unambiguous and devoid of relevant qualification,*
- ii. *The expectation must be reasonable.*
- iii. *The representation must have been induced by the decision maker.*
- iv. *The representation must be one which it was competent and lawful for the decision maker to make without which the reliance cannot be legitimate.”*

78. The Constitutional Court of South Africa also addressed the same issue in President of the Republic of South Africa and others v South Africa Rugby Football Union and Others 2000(1) SA I CC stating-

*“Legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.”*

79. Supreme Court of Canada on its part had this to say in the case of Canada (Attorney General) v Mavi 2011 SCC 30

*“Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision maker’s statutory duty. Proof of reliance is not a requisite”*

80. The University College order 2007 was express and unambiguous that the petitioners would be awarded degrees of the 3<sup>rd</sup> respondent. When the university college attained the charter, the charter left the petitioners out among students who would be awarded academic certificates of the 2<sup>nd</sup> respondent. The fact that the petitioners would get degrees of the 3<sup>rd</sup> respondent was not only a representation and practice but was also anchored in law (statutes). The petitioners therefore continued with their studies with the knowledge that this would be the case.

81. Applying the principle in the decisions referred to above and taking into account the facts of this case, I am satisfied that the petitioners had a legitimate expectation that on completion of their studies they would be awarded degrees of the 3<sup>rd</sup> respondent, an expectation that was violated when they were awarded degrees of the 2<sup>nd</sup> respondent.

82. The petitioners have also contended that the 5<sup>th</sup> respondent wrongly declined to register them as graduate engineers and have asked the Court to order the 5<sup>th</sup> respondent to register them as such. They have argued that the issue of accreditation of academic programmes in universities is now the mandate of the 4<sup>th</sup> respondent and therefore the 5<sup>th</sup> respondent has no role to play.

83. Although the Court appreciates the petitioners’ concerns in seeking such an order, and given the Court’s findings and the appropriate orders the Court is to make I do not think the order is appropriate in the circumstances. The petitioners must first get their degree certificates and then make applications to the 5<sup>th</sup> respondent for registration. Ordering the 5<sup>th</sup> respondent to register them now will, in my view, be premature.

84. In conclusion, I am satisfied that the petitioners have established a basis for granting this petition. They were wrongly awarded degrees by the 2<sup>nd</sup> respondent against their expectation that they would be awarded degrees by the 3<sup>rd</sup> respondent as the law required. Consequently the petition dated 25<sup>th</sup> August 2015 is allowed and I make the following orders which I consider appropriate.

- 1. A declaration is hereby issued that the petitioners and the other 55 were valid students of the University of Nairobi having been enrolled at Kenya Polytechnic University college which was a Constituent College of University of Nairobi.**
- 2. An order is hereby issued nullifying degree certificates issued by the 2<sup>nd</sup> respondent to the petitioners and the other 55 on 18<sup>th</sup> December 2013 .**
- 3. An order is hereby issued compelling and directing the 2<sup>nd</sup> respondent to forward with immediate effect the names of the petitioners and the other 55 to the 3<sup>rd</sup> respondent for inclusion in the 3<sup>rd</sup> respondent’s list of graduands for the next graduation to be held by the 3<sup>rd</sup> respondent.**
- 4. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents will meet costs of the petition.**

Dated Signed and Delivered at Nairobi this 29<sup>th</sup> Day of September 2017

**E C MWITA**

**JUDGE**