



REPUBLIC OF KENYA



**KENYA LAW**

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**JESSE WAWERU WAHOME  
GEOFFREY NANGILLAH MAKANGA  
MAURICE OTIENO OLOO .....PETITIONERS**

(All suing for and on behalf of themselves and on behalf of the following persons)

**ALFRED KIPKOECH KIBET  
RICHARD GITURO GICHAGA  
PATRICK KARANJA MBUGUA  
MUSTAFA ALI AHMED  
JOSEPHINE WANJIKU MBUGU  
ALBERT KIPKORIR CHEMJOR  
ABRAHAM KIPKORIR LAGAT  
ROBERT K CHERUIYOT  
GILBERT KIMUTAI RONO  
BERNARD OCHIENG OSUNGU  
SAMUEL WEKESA WEKULO  
PATRICK GICHOHI WAITHANJI  
RAYMOND OTIENO OREDA  
JAMES MBUGUA MBURU  
PHILIP KIOKO NZIOKI  
DICKSON GICONI KIVINDU  
ALEXANDER MUTHAMI MULEKYA  
JOHN RONOH KIBET  
JANET ABISI SIMION  
ROBERT MAINA KARIUKI  
FREDRICK KAYASI MURIUKI  
FLORENCE WAMBUI MUNGAI  
HENRY NDEGWA NJUGUNA  
FRANCIS WAINAINA NJOROGE  
MICHAEL STANLEY LADO  
PETER ODHIAMBO OUKO  
MARK EKERU ACHILLA  
ANDREW WANJOHI KAGENYA  
JAMES GATHURU KIHU  
TIMOTHY MWENDA BAARIU  
JUMA NATHANIEL  
BERNARD OCHIENG MBEDA  
SIMON MBUGUA  
CHOKERA JOSHUA MURIITHI  
EDWIN KIPROTICH NG'ETICH  
OSCAR ROBERT MATANO  
PATRICK MATHENGE GITHINJI  
NGIGI NJOROGE DUNCAN  
WARUI MICHAEL MWANGI  
LICHORO CHARLES MUTURIA  
AND**

**KENYA ENGINEERS REGISTRATION  
BOARD ..... 1<sup>ST</sup> RESPONDENT**

**EGERTON UNIVERSITY ..... 2<sup>ND</sup> RESPONDENT**

**MINISTRY OF HIGHER EDUCATION  
SCIENCE AND TECHNOLOGY ..... 3<sup>RD</sup> RESPONDENT**

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

**CONSOLIDATED WITH PETITION NO. 207 OF 2011**

**BETWEEN**

**MARTIN WANDERI ..... 1<sup>ST</sup> PETITIONER**

**SUTTER JOEL ..... 2<sup>ND</sup> PETITIONER**

**MARK KAMAU ..... 3<sup>RD</sup> PETITIONER**

**MICHAEL OUTA ..... 4<sup>TH</sup> PETITIONER**

**SAMUEL MUKABI ..... 5<sup>TH</sup> PETITIONER**

**MAUREEN AKINYI ..... 6<sup>TH</sup> PETITIONER**

**JOHN MWENDA ..... 7<sup>TH</sup> PETITIONER**

**FRED WEKESA ..... 8<sup>TH</sup> PETITIONER**

**DAVID OWINO.....9<sup>TH</sup> PETITIONER**

**MERCY WANG'ALIA ..... 10<sup>TH</sup> PETITIONER**

**DENIS OSEWE ..... 11<sup>TH</sup> PETITIONER**

**BRIAN MABAKUK ..... 12<sup>TH</sup> PETITIONER**

**AND**

**MASINDE MULIRO UNIVERSITY OF SCIENCE  
AND TECHNOLOGY ..... 1<sup>ST</sup> RESPONDENT**

**MOI UNIVERSITY ..... 2<sup>ND</sup> RESPONDENT**

**THE ENGINEERS REGISTRATION  
BOARD OF KENYA ..... 3<sup>RD</sup> RESPONDENT**

**THE PERMANENT SECRETARY**

**MINISTRY OF HIGHER EDUCATION**

**SCIENCE AND TECHNOLOGY ..... 4<sup>TH</sup> RESPONDENT**

**THE COMMISSION FOR**

**HIGHER EDUCATION ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The two petitions in this matter were consolidated because they are grounded on similar facts and raise similar issues of law. The cases pit former students of Egerton University and Masinde Muliro University of Science and Technology (MMUST) against the respective universities, the Engineers Registration Board (ERB), the Ministry of Higher Education, Science and Technology (the Ministry) and the Commission of Higher Education (CHE).

2. The substance of the petitioners' claim is that after completing their engineering degree courses at the respective universities, they have been denied admission to practise the profession of engineering by the ERB and as such their fundamental rights and freedoms have been breached. The petitioners blame the universities for their predicament on the grounds that they were given an education that did not meet the requirements of the ERB. The ERB in turn blames the universities for failing to adhere to prescribed standards necessary of their graduates to be considered for registration. The Ministry, whose responsibility is to set overall education policy, took the position that it bears no responsibility in the matter as the other bodies; the Universities and the ERB, have a statutory mandate to discharge. The CHE, on its part, avers that it has no responsibility over public universities.

3. Caught in between these statutory bodies, are the petitioners who have completed their studies and have nowhere to turn to except the court to enforce their fundamental rights and freedoms protected by the Bill of Rights under the Constitution. At the core of the petitioners' claim is that as graduate engineers they are entitled to be considered by ERB for registration as engineers and the ERB cannot deny them registration.

4. Given the nature of the matter and in light of the provisions of **Article 159(2)(c)** of the Constitution I did, on 9<sup>th</sup> February 2012, direct the parties under the Chairmanship of the Secretary of Higher Education, Science and Technology, Professor Harry Kaane, to meet and resolve the matters in issue in the petition. By a letter dated 5<sup>th</sup> March 2012, Professor Kaane, informed the court that he, "... *convened three meetings between the petitioners and the respondents as directed by the court. However, the parties were unable to amicably agree on the matter.*" The matter therefore proceeded to full hearing.

5. I have heard the parties at length and considered the substantial written submissions filed on behalf of each party. I have come to the conclusion that this case really concerns the statutory mandates of the various statutory bodies; the universities and the ERB and their responsibility towards the students who have faithfully completed their studies at their respective universities. In the circumstances I have set out what I consider the salient and key issues necessary to determine the matters in issue.

6. During the pendency of these proceedings Parliament enacted the **Engineers Act, 2011 (Act No. 43 of 2011)** which repealed the **Engineers Registration Act (Chapter 530 of the Laws of Kenya)**. The new Act came into force on 14<sup>th</sup> September 2012 vide **Legal Notice No. 95 of 2012**. This case therefore deals with and applies to persons who graduated prior to the **Engineers Act, 2011** coming into force. The **Engineers Registration Act** therefore applies to the petitioners' case.

## **Petition No. 149 of 2011 – Egerton University Students**

7. The petitioners are all former students of the Egerton University who graduated between 2004 and 2010. They were admitted to pursue degree courses in engineering at the institution and subsequently graduated with degrees in various engineering disciplines namely Bachelor of Science in Instrumentation and Control Engineering; Bachelor of Science in Manufacturing Engineering and Technology, Bachelor of Science in Water and Environmental Engineering and Bachelor of Industrial Technology.

8. In the petition dated 25<sup>th</sup> August 2011 and the amended petition dated 31<sup>st</sup> January 2012, the petitioners state that after graduation they applied to the ERB to be registered as graduate engineers under the provisions of the **Engineers Registration Act**. The ERB rejected the petitioners' applications on the grounds that they had not met the requirements stipulated by the Act. The petitioners contend that following this rejection, they have written to several authorities including the Ministry, CHE and other authorities requesting them to look into their plight but nothing has been done.

9. The petitioners aver that upon attaining the minimum grade for university admission, they were selected by the university to pursue the respective courses with the expectation that upon attaining an engineering degree they would be registered as engineers and be recognised as such. The petitioners' claim is that the refusal by the ERB to register them is discriminatory, callous, against the law and public interest. As a result the petitioners have been denied their livelihood and they cannot be employed as engineers in both the private and public sectors.

10. The petitioners also contend that the university which has the statutory mandate to accredit and regulate implementation of its programs through the senate has not addressed the predicament faced by the petitioners. They further aver that the university continues to admit students to pursue the same degree courses that the petitioners undertook clearly ignoring the issues raised by the petitioners and exposing other students to the predicament.

11. Before commencing this action, the firm of *Mitey and Associates* issued a demand letter to the Registrar of the ERB dated 8<sup>th</sup> April 2011. The letter written on behalf of the petitioners stated in part, as follows;

*“We have been instructed by the Alumni Students of Egerton University who are holders of various Engineering degrees to address you on their behalf with regard to registration with the Board.*

*The students reliably inform us that they have made several attempts to submit their applications for registration with the Board, but their applications have since been rejected without any clear reasons preferred to them.*

*Kindly let us know the modalities that are required in order for them to be registered by your board since they have met the requirements ...”*

12. The ERB responded to the demand letter by a letter dated 24<sup>th</sup> May 2011 in the following terms;

*“In response to your demand letters above, we wish to state that your clients did not comply with the provisions of section 11 sub section 1(b)(i) and (2) of the Engineers Registration Act CAP 530 of the Laws of Kenya. Given the above, the Board was therefore unable to consider their application for registration as graduate engineers as they did not meet the minimum requirements as stipulated under the said provisions of the Act.” [Emphasis mine]*

13. The petition is supported by the affidavit of Jesse Wahome Waweru sworn on 25<sup>th</sup> August 2012 and which sets out the facts outlined in the petition. Annexed to the affidavit are various degree certificates issued by the university to the petitioners. The petitioners have attached evidence to demonstrate the fact that they cannot obtain employment as engineers. In a letter dated 17<sup>th</sup> February 2010, the ERB wrote to the Managing Director of the Kenya Pipeline Company Limited in respect of the 1<sup>st</sup> petitioner informing

it that, “Mr Wahome who was awarded the said degree [Bachelor of Industrial Technology] is therefore not registrable by the Board and he is not allowed to practice engineering, in any manner in Kenya. If he is doing so that is illegal and he is liable to prosecution.” Needless to state Mr Wahome’s application for employment was rejected.

14. Ms Macheru, counsel for the petitioners, adopted the written submissions dated 22<sup>nd</sup> March 2012. She submitted that the ERB had no jurisdiction to choose who should or who should not be registered as a graduate engineer as long as one has graduated from a university with the capacity to award degrees. She stated that there is nothing in the **Engineers Registration Act** that permits the ERB to accredit any university course as each university derives its mandate and authority to accredit its course from the respective statute establishing the university and these courses are not subject to approval by the ERB.

15. Counsel further submitted that the ERB is discriminative as it allows degrees from some universities and rejects others which is contrary to **Article 27(1) and (2)** which protects the right to equality and prohibits discrimination. Counsel urged the court to issue orders of certiorari to quash the decision of the ERB not to register them as engineers. She urged the court to grant relief as the students continue to suffer as they are unable to utilize the skills they have acquired.

### **Petition No. 207 of 2011 – Masinde Muliro University of Science and Technology Students**

16. The petitioners’ case is set out in the petition dated 18<sup>th</sup> October 2011 and is supported by the verifying affidavit of Martin Wanderi Mwangi sworn on 31<sup>st</sup> January 2012 which sets out the facts and documents in support of the petition.

17. The petitioners, after passing their high school examinations, qualified for university admission. They were initially admitted to Moi University (MU) to study Engineering. Upon admission to MU they were placed at the Western Campus situated in Kakamega town which later became MMUST in 2007 by the enactment of the **Masinde Muliro University of Science and Technology Act, (Chapter 210F of the Laws of Kenya)**.

18. After the **Masinde Muliro University of Science and Technology Act** came into force the petitioners, who were students of MU, were automatically absorbed by MMUST where they completed their engineering studies at the new university. The petitioners claim that their peers at MU studying engineering have been registered by the ERB as engineers after graduation.

19. The petitioners’ grievance is that despite the fact that all their courses were similar to those offered by MU they have not been registered as engineers. The petitioners say that they had a legitimate expectation that upon successfully completing the course approved by the university, they would be admitted by the ERB as engineers. Additionally, MMUST by offering the degree was in effect giving them a guarantee that they would qualify for consideration by the ERB.

20. The petitioners state that the ERB exceeded its statutory authority in refusing to admit the petitioners as graduate engineers. As a result of the grievances, the petitioners claim that their fundamental rights and freedoms have been violated and they have now moved the court for relief.

21. By a letter dated 27<sup>th</sup> September 2011, the petitioners, Joel Sutter, Martin Wanderi, Mark Kamau and Michael Ouko wrote to the ERB seeking clarification of their registration status. The letter stated in part as follows;

*“We write in our individual capacities and also representative capacities of other 15 (fifteen) and more engineers.*

*We were admitted to Moi University, Western University College of Science and Technology then being a constituent College of Moi University in the year 2004. The College was running the programmes of the parent, Moi University and we undertook training in engineering under Moi University programmes and*

Charter.

*The college was however chartered to an independent University and renamed Masinde Muliro University in the year 2007. We did therefore graduate under certification of Masinde Muliro University and not Moi University wherein we undertook its requisite engineering programmes as required by the Board.*

*Upon graduating, we intended to apply to the Engineers Board for registration as graduate engineers. We have visited the Board's offices on several occasions with requests for registration and the Board informed us that we could not be registered for reasons that;*

- (1) Masinde Muliro University is not recognised by the Board to offer the Engineering course we undertook.*
- (2) The certificates and degree attained by us could not be recognised by the Board.*

*We write as we hereby do to ask and have a clarification from your good offices in writing, that this is the position and as such advise us on the course of action. It is now almost three (3) years after graduating and have not been registered which situation has affected our livelihoods and expectations in general."*

22. The ERB responded to the letter by its letter dated 27<sup>th</sup> September 2011 where is stated;

*"This is to acknowledge receipt of your unreferenced letter of 27<sup>th</sup> September 2011 regarding the above subject.*

*Please note that the undergraduate engineering degree programmes from Masinde Muliro University of Science and Technology have not been recognised by the Board. Therefore, the graduates of the said programmes are not registrable with the Board pursuant to Section 11 (2) of the Engineers Registration Act.* [Emphasis mine]

23. Mr Katwa and Mr Sigei, counsels appearing for the petitioners, adopted written submissions dated 20<sup>th</sup> January 2012 and 23<sup>rd</sup> March 2012. They submitted that MMUST failed to meet the petitioners' legitimate expectation as it was required to provide education that would entitle them to be registered as graduate engineers. They also submitted that the ERB did not have the mandate to examine the petitioners' degrees issued by MMUST. They emphasised that ERB did not have the statutory authority to regulate or approve the degree programmes offered by MMUST.

### **Egerton University**

24. Egerton University is a statutory university established and governed in accordance with the provisions of the ***Egerton University Act (Cap 214 of the Laws of Kenya)***. It opposes the petition by the affidavit of Professor James Tuitoek, its Vice Chancellor, sworn on 26<sup>th</sup> January 2012.

25. The university's case is simply that it conducted and discharged its mandate to the students in accordance with its statute. According to the **section 4(1)** of the Act, the functions and objects of the University are as follows;

- (a) To provide directly, or in collaboration with other institutions of higher learning, facilities for University education (including technological and professional education), the integration of teaching, research and effective application of knowledge and skills to the life, work and welfare of the citizens of Kenya;*
- (b) To participate in the discovery, transmission and preservation of knowledge and to stimulate the intellectual life, economic and cultural development of Kenya;*

(c) *To conduct examinations for and to grant such academic awards as may be provided in the statutes.*

(d) *Subject to the Universities Act, to cooperate with Government in the planned development of university education and in particular to examine and approve proposals for new faculties, new departments, new degree courses or new subjects of study submitted to it by any constituent college or other post-secondary institution; and to determine who may teach and what may be taught and how it may be taught in the University.*

(2) *Admission to the University as candidates for degrees, diplomas, certificate or other awards of the University shall be open to all persons accepted as being qualified by the Senate, without distinction of ethnic origin, sect or creed and no barrier based on any such distinction shall be imposed upon any person as a condition of his becoming, or continuing to be, a professor, lecturer, graduate or student of the University, or of his holding any office therein, nor shall any preference be given to, or advantage be withheld from, any person on the grounds of ethnic origin, sect or creed.*

26. The university also relies on **section 22** of the Act which provides as follows;

(1) *In the performance of its functions under this Act, the Council shall, subject to this Act, make statutes generally for the government, control and administration of the university and for the better carrying into effect of the purposes of this Act and in particular for-*

(a) *The establishment of faculties, institutes and schools of the university;*

(b) *The description of degrees*

(c) *The requirements for the award of degrees*

(d) *The conduct of examinations*

(e) *Prescribing fees and boarding charges*

(f) *Settling the terms and conditions of service, including the appointment, dismissal and recommendation of retiring benefits of the members of the staff of the University;*

(g) *The constitution and procedure of meeting of the Council and the establishment, composition and terms of reference of committees of the council*

(h) *Prescribing the rules and regulations for the students' association.*

(2) *Notwithstanding subsection (1), the Council shall not make, amend or revoke any statute relating to the functions or privileges of the Chancellor, the Vice-Chancellor or the Senate without first ascertaining the opinion of the Senate.*

(3) *Statutes shall only be made by a resolution passed at one meeting of the Council supported by a majority of not less than three-fourth of the members present and voting being not less than half of the total membership of the Council.*

*Statutes or regulations made by the Senate under this Act shall be published in the Gazette but sections 27, 31 (e) and 34 of the Interpretation and General Provisions Act shall not apply to the Statutes or to be regulations.*

27. The university argues that its Council pursuant to the university statutes established the Facility of Engineering and Technology to offer graduate and undergraduate courses in Agricultural Engineering, Water and Environmental Engineering, Industrial and Energy Engineering and Instrumentation and Control Engineering. The content for these courses were also renewed and approved by the Senate

pursuant to powers granted to it under **section 14(2)(a)** of the Act.

28. The University submits that there is no legal requirement by the **Engineers Registration Act** or the **Egerton University Act** that prior approval must be obtained from the ERB in order to establish the engineering faculty, the curriculum content and standards of academic programmes offered by the University.

29. Egerton University contends that its graduates from its Faculty of Engineering including the petitioners have been trained, examined and evaluated and have been awarded degrees which are in accordance with the Act and which are conclusive evidence of their qualifications. The University denies any liability for violating the petitioners' rights and blames the ERB for arbitrary refusal to register the petitioners.

30. Counsel for Egerton University, Mr Okeche, reiterated the contents of the written submissions dated 26<sup>th</sup> March 2012 and submitted that Egerton University has a mandate to teach, research, carrying out examinations and award degrees to students admitted by the University for study of engineering disciplines under a curriculum approved by its senate. That the petitioners were admitted for study in various engineering programmes offered by the university and were provided with adequate and sufficient training in the engineering degrees they are holding. Mr Okeche emphasised that once the students had graduated, the university had no further role in training or registering students as engineers.

31. Mr Okeche stated that the ERB has a specific mandate of registering engineers for the purpose of practising engineering discipline and that it misconstrued its mandate to include accrediting universities, inspecting and approving any engineering programmes that may be conducted by universities. Counsel submitted that the ERB did not properly exercise its discretion and carried out its mandate in a capricious manner so as to deny the petitioners, who are qualified engineers access to employment contrary to **Article 55** of the Constitution. In counsel's view, the ERB has shut the door to the students by raising issues not contemplated by the Act.

### **Masinde Muliro University of Science & Technology**

32. Masinde Muliro University opposes the petition on the basis of the replying affidavit and further affidavits sworn by Professor Sibilike Khamala Makhanu sworn on 16<sup>th</sup> December 2011 and 15<sup>th</sup> March 2012 respectively.

33. Masinde Muliro University of Science and Technology is established by statute and the functions of the university are set out in **section 4(1)** of the **Masinde Muliro University of Science and Technology Act** and are as follows:

*(a) provide directly, or in collaboration with other institutions of higher learning, facilities for university education, including technological, scientific, professional education and research;*

*(b) participate in the discovery, creation, transmission, preservation and enhancement of knowledge and to stimulate the intellectual participation of students and staff in economic, social, cultural, scientific and technological development;*

*(c) harness acquired knowledge through scientific and technological innovation;*

*(d) conduct examinations for purposes of granting certificates, diplomas, degrees and such other academic awards as may be provided for in the statutes;*

*(e) determine who may teach, what may be taught and how it may be taught in the University, and*

*(f) play an effective role in the development and expansion of opportunities for university education.*

34. **Section 7(1)** of the Act, stipulates that subject to the Act, the University may confer any degree or award any diploma certificate or any other academic qualification which it is for the time being authorised by the statutes of the university to confer or award. **Section 16(3)** of the Act creates the Senate whose role is to among other things satisfy itself regarding the content and academic standard of any course. In exercising this vital role, it is contended that the senate does not receive direction from any party including ERB and as a creature of statute it can only undertake what the parent Act permits it to do.

35. The university avers that that the degrees it awarded to the petitioners were approved by its senate established at **section 16** of the Act and which senate had satisfied itself regarding the content and academic standards of the course of study in respect of that degree. It is the university's position that having conferred degrees to the petitioners, it became *functus officio* and there are no provisions under the Act under which it can readmit persons who have been lawfully conferred degrees for them to undertake additional undergraduate training. The university contends that it discharged its obligations, duties and functions under the Act competently lawfully and in accordance with the Act.

36. Mr Simiyu who appeared with Mr Masafu, counsel for MMUST, relied on the written submissions dated 27<sup>th</sup> March 2012. He submitted that the ERB's action was not only *ultra vires* but also unreasonable. That its discretion to consider applications by the university graduates was improperly exercised as it took into account matters it ought not have taken into account by attempting to open up degrees issued by the university through a power it did not possess. He also submitted that the refusal by ERB to register the petitioners was illegal, irrational and full of procedural impropriety. Counsel relied on ***Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 223, Padfield and Others v Minister of Agriculture, Fisheries and Food [1968] All ER 694*** and ***Muntu and Others v Kyambogo University [2008] EA 236*** as authority for the proposition that the court should intervene where discretion has been improperly exercised as is evident in this case.

### **Moi University**

37. The Moi University (MU) opposes the petition on the basis of the replying affidavit of Jacqueline Marani sworn on the 9<sup>th</sup> December 2011 and a further affidavit of Wilkista Muyoka Simiyu sworn on 19<sup>th</sup> March 2012.

38. The case against MU arises from its relationship with MMUST. According to MU, MMUST was established pursuant to the ***Masinde Muliro University of Science and Technology Act*** and was the legal successor to Western University College of Science and Technology, a constituent college of MU, and it took over all rights, duties, obligations, staff, assets and liabilities of the Western University College of Science and Technology existing at the commencement of the Act and which were automatically and fully transferred to MMUST.

39. According to MU, once MMUST became a fully-fledged university, it had the capacity to determine the nature and quality of degrees it offers and has the singular power to confer degrees upon its graduates pursuant to the provisions of **section 7(1)** of its Act. According to MU, this is a power that it cannot delegate to any other body and neither can it perform it in liaison with any other body whatsoever. It is in light of these averments that MU contended that it is wrongly sued in this petition and has no responsibility for the students who graduated from MMUST.

40. Counsel for MU, Mr Masika, adopted the written submissions dated 16<sup>th</sup> April 2012. He submitted that there was no cause of action against MU and that the petitioners, in the circumstances had not established a breach of fundamental rights and freedom by the university. Counsel relied on the cases of ***Anarita Karimi Njeru v Republic (No. 1) [1979] KLR 154*** and ***Matiba v Attorney General Nairobi HC Misc. App. No. 666 of 1990 (Unreported)***.

### **The Engineering Registration Board**

41. The ERB opposes the two petitions based on two affidavits sworn by Engineer Gilbert Arasa, the

Registrar of the ERB, on 18<sup>th</sup> January 2012.

42. The ERB is a statutory body established under the provisions of the **Engineers Registrations Act (Chapter 530 Laws of Kenya)** whose purpose is stated, “An Act of Parliament to provide for the registration of engineers and for purposes connected therewith.”

43. Registration and regulation of the engineering profession is the core function of the ERB and is provided for in **section 11** of the Act. **Section 11(1)(b)** states;

(1) *Subject to this Act, a person shall be entitled, on making an application to the Board in the prescribed form and on payment to the Board of the prescribed fee, to be registered under this Act and to have his name entered in the register as a registered engineer if he is-*

(a) *A member of an institution of engineers the membership of which is recognised for the time being by the Board as furnishing a sufficient guarantee of academic knowledge and practical experience in engineering; or*

(b) *A person who*

(i) *Is the holder of degree, diploma or licence of a university or school of engineering which may be recognised for the time being by the Board as furnishing sufficient evidence of an adequate academic training in engineering; and*

(ii) *Has had not less than three years’ practical experience of such a nature as to satisfy the Board as to his competence to practice as a registered engineer. [Emphasis mine]*

44. Counsel for the ERB, Mr Kerongo, relied on the submissions dated 19<sup>th</sup> March 2012 and supplementary submissions dated 2<sup>nd</sup> May 2012. Mr Kerongo submitted that for purposes of the petitioners’ case **section 11(1)(b)** of the Act is the relevant provision in relation to their demand or claim for registration. According to the ERB under this provision of law, the petitioners are entitled to be registered as graduate engineers, if they are holders of degree, diploma or licence of a university or school of engineering “***which may be recognised for the time being by the Board as furnishing sufficient evidence of an adequate academic training in engineering.***”

45. Engineer Arasa deponed that the applicants had applied for ERB registration as graduate engineers on various dates and upon scrutiny, their applications were rejected as the universities awarding degrees were not recognised and/or accredited as offering engineering disciplines. He further deponed to the fact that the universities and the public at large were notified of this fact.

46. It is the position of the ERB that the decision to reject and/or decline the accreditation of the degree courses of Egerton and Masinde Muliro Universities was duly communicated but these decisions were ignored to the detriment of the petitioners. Furthermore, ERB contended that the Ministry had raised the fact that there had been serious concerns about the quality of education of some of the graduates from the local universities and in line with its responsibilities as a regulatory body and in line with international standards, the ERB put in place measures to ensure that recognised universities offer quality engineering training to safeguard the public interest.

47. The ERB asserts that from a plain reading of the **section 11** of the Act, it is the degree, diploma or licence which has to be recognised by the Board and not the petitioners or individual persons. Further that it means that the ERB must accredit the degree programme or course that meets the standards set by the ERB. The ERB claims the mandate of satisfying itself that the person applying for registration has undergone training in engineering and that such training is adequate and in this regard the ERB must gather sufficient evidence of such training. According to counsel, it is the ERB to be satisfied, not the universities, their councils or senate or any other authority or person.

48. Engineer Arasa stated that there have been consultative meetings with Deans of Engineering

Departments and Vice Chancellors of most local universities on the need to improve the quality of training and some universities like MU had received the requisite approval of their courses.

49. On the whole therefore, the ERB rejects the contention that it is to blame in any way for the petitioners' plight. It asserts that it has a statutory mandate and the petitioners and their universities have not met the standards required by the statute. In the circumstances, the petitions should be dismissed.

### **The Commission for Higher Education**

50. I joined the CHE to these proceedings by an order of 27<sup>th</sup> January 2012 to enable the court properly adjudicate the matters in issues. Three affidavits were filed on its behalf and were sworn by its Deputy Secretary, Joel Mberia. Two of these were sworn on 21<sup>st</sup> March 2012 and a further one on 4<sup>th</sup> May 2012.

51. The CHE is established under **section 3** of the **Universities Act (Chapter 210B of the Laws of Kenya)**. The functions of CHE set out in **section 6** of the Act, include promoting the objectives of university education, advising the Minister on establishment of public universities and advising and making recommendations to the Government on matters relating to university education as well as collecting, examining and publishing information relating to education and research. One of the functions of CHE provided under **section 6(h)** of the Act is, *"to examine and approve proposals for courses of study and course regulations submitted to it by private universities."* Thus, according to CHE it is only permitted to examine and approve proposals for courses of study and course regulations submitted to it by private universities under its statute.

52. Mr Joel Mberia, in his affidavit, states that the CHE is involved in many activities and workshops concerning university education in Kenya and has in the circumstances received correspondence on the subject matter of this suit mostly for information and as a participant in activities within its mandate. He is clear that the CHE does not have the mandate to resolve the matters between the ERB and the universities.

53. Mr Nyaanga, counsel for the CHE, adopted the written submissions dated 26<sup>th</sup> March 2012. The thrust of his submissions was that CHE has no mandate or role when it comes to public universities as they are set up by independent Acts of Parliaments thereby becoming self-accrediting. Under their respective statutes it is the duty of the respective university senates and councils to determine their programmes in which the CHE has no role. Counsel further submitted that accordingly the CHE has not in any way deprived or contributed to the deprivation of the petitioners' rights and fundamental freedoms and the suit against it should be dismissed.

### **Ministry of Higher Education, Science and Technology**

54. The Ministry represented by the Office of the Attorney General, has filed three affidavits in this matter. The first two affidavits are sworn by Professor Kaane on 18<sup>th</sup> March 2012 and a third one sworn on 30<sup>th</sup> April 2012.

55. The Ministry's position is that its role is merely supervisory to ensure that universities adhere to their roles within their respective statutes. The Ministry also denies that it is responsible for approving programmes offered by universities and cannot direct the ERB to register petitioners.

56. The position of the Ministry is that each public university is mandated by its respective Act of Parliament to determine the requirements of the award of degree, diploma, certificate and other academic awards and also approve its own programmes.

57. The third affidavit was filed after I directed the Professor Kaane to file and serve a further affidavit setting out the following matters;

(i) *The policies and other measures taken by the state regarding the subject matter of this petition namely, the training of Engineers in Kenya and in particular those who have graduated from Egerton University and Masinde Muliro University of Science and Technology and in particular those who have been rejected by the Engineers Registration Board.*

(ii) *The steps taken to resolve the subject matter of this dispute referred to in the affidavit.*

58. According to the Ministry, the petitioners' predicament came to their attention in 2010, when some universities sought the intervention of the Ministry to have the ERB to recognize their programmes and thereafter Parliament, the Office of the Prime Minister directed the Ministry to address the matter. The Ministry thereafter constituted a committee comprising all Deans of Engineering of universities and their constituent colleges offering engineering programmes to examine and report on the status of engineering programmes in Kenyan higher education institutions.

59. The committee examined the issues and thereafter made recommendations which the Ministry forwarded to the ERB for consideration. The ERB agreed to meet each University individually to address specific issues. According to the Ministry it has put in place arrangements to facilitate the affected universities to procure teaching equipment and train more staff to meet ERB requirements.

60. The Ministry also noted that at the beginning of the year 2012, University of Nairobi, Moi University and Jomo Kenyatta University of Agriculture and Technology had resolved their issue with the ERB and when this matter was brought to court Egerton and MMUST were at an advanced stage of resolving their issues with ERB.

61. Prof. Kaane depones to the fact that when the court gave the parties the opportunity to resolve the matters all parties agreed that the students who had graduated be granted provisional registration. Prof. Kaane wrote to the ERB a letter dated 16<sup>th</sup> February 2012 requesting that the petitioners be granted provisional registration while the universities comply with ERB requirements. By the letter dated 28<sup>th</sup> February 2012, the ERB responded and noted that Jomo Kenyatta University of Agriculture and Technology had recalled engineering graduates to cover gaps by covering units that had not been covered and Egerton University and MMUST had proposed to do so. However, the ERB noted that there was no provision in the **Engineers Registration Act** to grant provisional registration.

62. In March 2012, the Committee of Parliament on Education summoned the contending parties to Parliament and after deliberations, the ERB agreed to grant provisional/interim recognition of the disputed programmes on offer and grant an immediate provisional registration of graduates from these programmes as graduate engineers. Professor Kaane states that the cost of filling-in the knowledge gaps was to be met by a fund of Kshs. 220 million made available for this purpose by the government but the ERB stood by its position that the **Engineers Registration Act** did not provide for provisional recognition or registration of the petitioners.

63. It is the Ministry's argument that these proceedings are premature since it was making good progress in resolving the matter. The Ministry therefore requests that there be provisional recognition of the ongoing programmes and a provisional period of three years for the parties to comply with the laws. It also requests the Court to make an order directing the ERB to allow the petitioners provisional registration and provisional registration of the programmes.

64. Mr Ojwang', counsel for the Ministry, submitted that the result of the meeting was that the universities were given three years to comply with ERB requirements and the petitioners' urged to go back to school but that they instead moved the court for relief. Counsel submitted that the blame for the petitioners' situation lies with the universities who failed to meet the ERB requirements.

### **Determination of issues**

65. Before I proceed to consider the substance of the petitions, I think it is important to set out the uncontested issues. First, it is not in dispute that the petitioners are all graduates of their respective

universities having been conferred engineering degrees in various specialities. Second, the legal capacity of the respective universities to confer degrees and other awards in accordance with their founding statutes and internal procedures is not contested. Third, ERB's position that it shall not register graduates from universities whose courses have not been accredited or approved by it is not contested.

66. The ERB has raised the issue that in fact the applicants have not made the application in the prescribed form and submitted it together with the prescribed fee as required **section 11(1)** of the **Engineers Registration Act**. This argument is at odds with the position the ERB has taken as evidenced in the letters written in response to the demand letters I have set out in paragraphs 12 and 22 above. An application made to the ERB under **section 11(1)** by any graduate from any of the universities whose courses were not accredited was bound to fail given the position taken by ERB.

67. Although the universities and the ERB have taken different positions in this matter, the February, 2011 Report of the Ministry of Higher Education, Science and Technology Task Committee titled, "*Report on Accreditation of Engineering Programmes in Kenyan Universities by Engineering Registration Board: Status and Strategies*" reveals that both institutions had a fluid understanding of their respective mandates. I will quote part of para 1.0 of their report which states, "*Undergraduate engineering programmes offered in universities in Kenya have to be registered by the Engineers Registration Board (ERB), if the graduates have to be licenced to practice ... Prior to 2008, the ERB only carried out the registration process outlined in the Act. In 2008 the Board developed "Accreditation criteria and procedures for undergraduate programmes in Engineering" that served as tool for the registration process. However, it is yet to be internalized by the universities ..... The Board has since 2008 been pro-active in the accreditation of undergraduate programmes on offer in Kenya ..... Most of the programmes on offer have failed the accreditation and the graduate outputs from them have thus not been registered (recognized) by the ERB. The Universities have argued their case but little progress has been realised. ...*"

68. What is clear from the facts is that the petitioners have not done or said anything to bring them in conflict with the universities and the ERB. That is why it is preposterous for the ERB to argue, as it has done, in its written submissions that the petitioners should not have continued with their studies once they knew ERB's position regarding the engineering courses they were undertaking. The petitioners have been put in a situation where dreams and expectations have been shattered. Simply put, the petitioners are not to blame!

69. Obviously, the ERB, the universities and the Ministry had identified problems with the quality of the engineering courses offered but as I stated at the introductory part of this judgment, the issues between the parties are to be resolved by determination of their respective statutory mandates. In the case of **Kenya National Examination Council v Republic ex-parte Geoffrey Gathenji and Others Nairobi CA Civil Appeal No. 266 of 1996 (Unreported)**, the Court of Appeal observed that, in respect of the Kenya National Examination Council, that, "*... As a creature of a statute, the council can only do that which it's creature (the Act) and the rules made thereunder permit it to do .... If it were to purport to do anything outside that which the Act and the rules permit it to do, then like all public bodies created by parliament, it would become amenable to the supervisory jurisdiction of the High Court.*"

### Mandate of the Universities

70. The universities are all statutory corporations with specific authority as outlined in their respective statutes. The common thread running through the **Egerton University Act** and the **Masinde Muliro University of Science and Technology Act** is that each institution is independent and has power to confer degrees and diplomas approved by its governing body. Egerton University under the provisions of **sections 6** and **9** of its Act and MMUST under **section 7** of its Act are entitled to offer degrees or other awards. Once these universities confer degrees and awards in accordance with the provisions of the statutes, the awards cannot be questioned by any person or authority except in accordance with the Act.

71. Universities have wide latitude in designing and determining the content, quality and standards of their academic programmes subject to the provisions of their Acts and regulations made thereunder. In

doing so, universities may co-operate with regulatory bodies and other stakeholders and this is indeed permitted by the functions and powers conferred on the universities by legislation. In this case though, it has not been alleged nor is it in dispute that the universities contravened the provisions of their statutes in any manner by failing to accede or accept the dictates of the ERB in the design and implementation of the engineering programmes.

72. I therefore find that both Egerton University and MMUST properly discharged their obligations under the powers and functions conferred upon them by their respective Acts of Parliament towards the petitioners. All the petitioners after completing their studies in accordance with the curriculum approved by the university through their respective statutes were awarded engineering degrees. Therefore the engineering degrees obtained by the petitioners and other students through the course of study and examination at Egerton University and MMUST and awarded in accordance with the respective Acts of Parliament are valid.

73. The position of Moi University in these proceedings is somewhat different. In this respect, I agree that once the students of the former Western Campus of Moi University were incorporated into MMUST by operation of law, Moi University ceased to have any responsibility for them. As I have found, the petitioners lawfully graduated from MMUST and Moi University cannot in law be responsible for their predicament. I therefore find and hold that there is no cause of action against Moi University.

74. I also find that mandate of the Commission for Higher Education is limited to accreditation of private universities and approval of courses and course regulations submitted by private universities. I therefore find and hold that there is no cause of action against the CHE.

### **Mandate of the Engineers Registration Board**

75. The question then for consideration is whether the ERB under the **Engineers Registration Act** has the statutory authority to supervise the engineering degrees and awards issued by the universities.

76. First and foremost, the provisions of the **Egerton University Act** and the **Masinde Muliro University of Science and Technology Act** do not provide for the ERB to have input in the design of curriculum, training and award of degrees. Although the universities have the power to co-operate with stakeholders to design their courses and programmes there is no legal requirement under the Acts of Parliament establishing these universities requiring them to seek prior approval of the ERB to mount engineering courses.

77. The argument by ERB that it is entitled to accredit degree courses from the two universities must therefore be located in the **Engineers Registration Act**. Is the ERB entitled to accredit degrees from the two universities? This is an issue that calls for an interpretation of the Act. Statutory construction is a holistic endeavour and the cardinal rule of construction is that a statute should be read as a harmonious whole, with its various parts being interpreted within their broader statutory context in a manner that furthers statutory purposes. According to **Halsbury's Laws of England, 4<sup>th</sup> edition, Butterworths 1995, Vol 44(1)**, Para 1484; *"It is one of the linguistic canons applicable to the construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act..."* In **Amalgamated Society of Engineers v Adelaide Steamship (1920) 28 CLR 129 at 161-2** Higgins J rightly observed thus, *"The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we consider the result to be inconvenient or impolitic or improbable."*

78. The purpose of the Act as stated in the statute is to provide for the **"registration of engineers."** According to **Black's Law Dictionary**, registration means, *"the act of recording or enrolling."* The

Board established under **section 3(1)** of the Act is responsible for, “***regulating the activities and conduct of registered engineers ...***”[Emphasis mine]

79. Registration of Engineers under the Act is dealt with in **Part IV. Section 11(1)(b)** of the Act provides that for a person to be registered as a graduate engineer, “...*a person must be a holder of a degree, diploma or licence of a university or school of engineering ***which may be recognised for the time being by the Board as furnishing sufficient evidence of an adequate academic training in engineering.****” The key and operative word here is “**recognition**” which is defined by the **Black’s Law Dictionary** as follows, “... *confirmation that an act done by another person is authorised ...*”

80. From the foregoing definitions, the petitioners and universities argue that the mandate of ERB is to register, that is, record and or enrol graduate engineers. ERB does this after recognition which legally means the act of confirmation that the degree belonging to the applicant was lawfully issued. In my view the plain and clear meaning of **section 11(1)(b)** of the Act is that the ERB has the specific mandate to register engineers and before registration, it need only be satisfied that the degree, diploma or licence was properly issued. This mandate does not extend to the approval of degree programs offered by the universities or making an inquiry beyond what is necessary to satisfy itself that the degree was lawfully issued.

81. ERB argues that recognition in **section 11(1)(b)** of the Act entitles it to accredit courses and that it is empowered that to accredit courses. Counsel referred to the meaning of “**accredit**” in **Black’s Law Dictionary** which means, “*To recognise (a school) as having sufficient academic standards to qualify graduates for higher education, or for professional practice,*” and therefore accreditation of courses is the process of reviewing an engineering programme to judge whether or not the same meets the defined quality standards set by the Board and indeed the international standards.

82. Apart from the statutory provisions, the ERB argues that accreditation is a worldwide practice in amongst other engineering bodies that accredit engineering courses. Counsel pointed out that accreditation is also done by other professions all over the world and the ERB is merely doing what is worldwide practice.

83. According to the ERB, it registers engineers from both local and foreign universities and in the discharge of its duty of registration it does, upon application in the prescribed form, make enquiries and gather sufficient evidence of the adequacy or inadequacy of the academic training in the particular engineering discipline. The fact that the particular university is recognised by Council of Higher Education and or Ministry of Higher Education will not in itself guarantee automatic registration under the Act as it is the singular authority and privilege of the ERB.

84. Whatever the motivations of the actions of ERB, this matter must be determined according to the statutory provisions and I must agree with the petitioners and universities that the word “**accredit**” or the meaning attributed to it does not appear anywhere in the Act. The powers of the Board are limited to registration of engineers and regulation of their conduct. The provisions relating to “*qualification for registration*” are clear that it is “**a person**” who is entitled to apply for registration. There is no corresponding provision which entitles a university or school of engineering to apply for “accreditation” or “registration.” I also agree that the meaning of recognition excludes any notion of accreditation. The act of recognition contemplated by the provisions of **section 11(1) (b)** of the Act only refers to the act of a confirmation that the degree conferred by the holder is lawful.

85. Every degree or academic award from a public university established by statute or chartered university is in my view, “*sufficient evidence of an academic training in engineering*” required by **section 11(1)(b)** of the Act. The sufficiency of evidence of academic training is underpinned by the Act of Parliament granting the university the authority to confer the degree, diploma or licence. A contrary position would mean that the ERB has, by assuming powers it does not possess, amended the various Acts of Parliament governing the universities and purported to arrogate to itself the statutory powers of the universities to determine the nature and content of engineering degrees awarded by the universities and stating whether the degree, diploma or licence is sufficient.

86. Accreditation by its nature is a process which requires the accrediting authority to carry out in-depth examination of the content, process and quality of the programme to determine whether the university has met certain standards. The ERB must therefore be authorised by legislation to prescribe these standards and procedure for accreditation must be clearly defined.

87. An examination of the entire Act does not support the jurisdiction asserted by the ERB to accredit universities. **Part II** which contains **section 3(1)** establishing the Board is clear that the functions are limited to regulating activities and conduct of registered engineers. The activities and conduct cannot by any stretch of the meaning of those words include or imply any form of accreditation or approval of university degrees. The substantive provisions contained in **Part III** and **IV** of the Act negative any intention by the legislature to grant the ERB authority to accredit universities.

88. **Part III** provides for the appointment of a registrar who is the custodian of the register of engineers. The registrar is required to cause a list of registered engineers to be published in the Gazette. There is nothing in these provisions that refers to the “accreditation” or “registration” of universities or schools of engineering. There is no provision for the registrar to keep a register of accredited universities and courses and publish them in the Gazette.

89. **Part IV** which I have alluded to earlier deals with registration of persons to become engineers. This is augmented by the provisions of the **Engineers Registration Regulations** which govern the process of registration. Once again nothing in the regulations is said about “**accreditation**” or “**recognition**” of universities or schools of engineering.

90. At the risk of repeating myself, accreditation is such a rigorous process and if the legislature had intended such an exercise be reposed within the mandate of the ERB then the legislature would have provided for this in very clear terms. For example, under the **Universities Act**, there is clear authority under **section 6(c)** and **(h)** of the Act for the CHE to accredit universities and to approve courses of study and course regulations for private universities. In order to effect these provisions the Minister has promulgated the **Universities (Establishment of University)(Standardization, Accreditation and Supervision) Rules, 1989** which guide the process.

91. An accreditation process must be underpinned by rules and procedures made in accordance with the parent statute. A reading of **section 22** of the **Engineers Registration Act** does not make reference to accreditation or recognition of the degree courses offered by public universities. **Section 22** of the Act empowers the Minister to make regulations for the better carrying out of the Act. **Section 22** provides as follows;

*22. Subject to section 18 (3), the Minister may make regulations generally for the better carrying out of the provisions of this Act, and, without prejudice to the generality of the foregoing, any such regulations may provide for -*

*(a) the conduct of the business of the Board and the procedure to be followed by the Board in any inquiry under this Act;*

*(b) the appointment by the Board amongst its members of sub-committees and the co-option of persons thereto;*

*(c) the duties of the Registrar;*

*(d) the issue of certificates of registration and annual licence*

*(e) the fees to be paid for anything which may be done under this Act;*

*(f) the forms to be used under this Act;*

*(g) the exemption of any persons or class of persons from all or any of the provisions of this Act, provided*

they comply with such conditions as may be prescribed by the regulations; and

(h) prescribing anything which under this Act may be prescribed.

92. Taking into account the tenor, scheme and context of the Act which is intended to provide for registration of engineers and to regulate their conduct and activities, and the plain and ordinary meaning of **section 11(1)(b)** of the Act, I find and hold that the ERB has no mandate to accredit universities as it has purported to do under the **Engineers Registration Act**.

93. I further hold that there is nothing in the **Engineers Registration Act** that allows or empowers the ERB to intervene in the affairs of universities and more particularly dictate to the universities what they can teach and what degrees they can award. Clearly, an attempt to do this would be to overstep the boundaries of its statutory mandate.

94. The enactment of the **Engineers Act, 2011** is a clear recognition that the **Engineers Registration Act** was deficient in certain respects. **Section 6** of **Engineers Act, 2011** provides, “The board shall be responsible for the registration of Engineers and firms, regulation of Engineering professional services, setting standards, development and general practice of engineering.” **Section 7(i)** of the Act empowers the Board to, “**approve and accredit engineering programs in public and private universities and other tertiary level educational institutions offering education in engineering.**” These provisions were lacking in the repealed legislation and point to the fact that the Board under the repealed legislation did not have power to approve and accredit degree courses from public universities.

#### **Breach of petitioners’ fundamental rights and freedoms**

95. Having come to the conclusion above, I now turn to the petitioners’ claim of breach of their fundamental rights and freedoms which is the basis of these petitions. In proceedings for enforcement of fundamental rights and freedoms, it is the duty of the petitioner to plead the alleged breach and spell out the nature of the breach in relation to him. (See **Anarita Karimi Njeru v Attorney General [1979] KLR 54** and **Matiba v Attorney General [1990] KLR 666**). In **Trusted Society of Human Rights Alliance v Attorney General and Others Nairobi Petition No. 229 of 2012 (Unreported)** the court went further and noted that it was not necessary to set out the violations with mathematical precision but in a manner that will enable the respondent have notice of the allegations and defend himself and enable the court adjudicate the violation.

96. The petitioners have alleged that the following rights and fundamental freedoms have been breached; **Article 27(4)** – freedom from discrimination, **Article 28** – right to human dignity, **Article 30** – freedom from slavery and servitude, **Article 40(3)** – protection of property, **Article 46** – protection of consumer rights, **Article 47** – right to fair administrative action, **Article 55** – right of affirmative action and empowerment of the youth on matters of education, employment and all economic, social and political opportunities.

97. Having considered the petitioners claims and submissions in view of the findings I have made, the petitioners’ grievances can properly be located within the provisions of **Article 47(1)**. Human dignity both as a fundamental right protected under **Article 28** and a national value and principle under **Article 10** infuses all the other rights with this element. The court then is obliged to interpret, apply and enforce fundamental rights and freedoms bearing in mind that the purpose of these rights to elevate the dignity of each and every person. **Article 55** is part of **Part 3** of the Bill of Rights and elaborates the application of certain rights to certain groups. The provisions of **Article 55** add value and content to the rights protected in the Bill of Rights and in this case the rights of the petitioners who fall within the category of the youth.

#### **Right to fair administrative action, right to human dignity and rights of the youth**

98. **Article 47(1)** provides that, “**Every person has the right to administrative action that is expeditious, efficient, lawful and reasonable and procedurally fair.**” The essence of the right to fair administrative action is to ensure administrative processes meet constitutional standards. The element that administrative

action must be “**lawful**” encapsulates the principle of legality and the fact that administrative action must be located in the law and must not be arbitrary.

99. I have found that the action of ERB in purporting to accredit universities and courses does not have any legal basis either under the **Engineers Registration Act, the Egerton University Act** or the **Masinde Muliro University of Science and Technology Act**. As an *ultra vires* act, it is in breach of **Article 47(1)**. Since the ERB lacks this authority it cannot, decline registration of an applicant’s under **section 11(1)(b)** of the Act on the basis that the applicant possesses a degree from a University or engineering course that has not been accredited by it.

100. The finding I have made would be enough to resolve the petitioners’ case but our Constitution requires us to look further and deeper as what the rights protected mean and what they are meant to achieve. The preamble to the Constitution states that we recognise the aspiration for all Kenyans for a government based on the essential values of human rights, equality, freedom, social justice and rule of law. The national values and principles enshrined in **Article 10** underpin the aspirations set out in the preamble. These values apply bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements public policy.

101. It is precisely to resolve the kind of situation where the petitioners remain blameless that the Constitution, at **Article 21**, imposes an obligation on State and every state organs to observe, respect, protect, promote and fulfil the rights and fundamental freedoms contained in the Bill of Rights. The petitioners completed their high school education and having scored high marks in the Kenya Certificate of Secondary Examination were all admitted to study engineering at our public universities. Their expectation and that of their parents and guardians was that they would complete their courses in five years be admitted as graduate engineers by ERB and thereafter contribute to nation building. This after all is the promise contained in the respective University Acts of Parliament and the **Engineers Registration Act**. The petitioners’ and their parents and communities supporting them had a legitimate expectation after successful completion of their degree courses they would by now be registered engineers. I find these expectations to be legitimate and reasonable and the same were breached and in all fairness the petitioners are entitled to come to this court to enforce the promises made to them.

102. All the petitioners and others who have not joined these suits have been graduating from public universities with engineering degrees yet they have no expectation they will be registered by the ERB. Their concerns remain unsettled and their search for employment on the basis of what they have sacrificed their time and energy is hampered by threats of criminal prosecution by the ERB. Although efforts to resolve the issues between the ERB and the some universities have borne fruits. It is clear that the issue has not been resolved at least for the students who have petitioned this court and who are not affected by the commencement of the **Engineering Act, 2012**.

103. In a country like ours where citizens place a premium on University Education, it is not right to leave graduates in a suspended state where they do not know their fate especially where parents have made sacrifices to educate their children, students have taken out loans from the Higher Education Loan Board (HELB) and are expected to re-pay these loans and the state has invested taxpayers money in investing in facilities and educating engineering graduates. This is a situation that cries out of justice, especially the kind of justice that is the promise enshrined in our Constitution.

104. The petitioners are part of a class of Kenya who the country desires to have, they have kept the faith by going to school, studied under a system that was guaranteed by the state and did was required of them at all stages of their young and productive lives. To leave them in a state where their chosen and cultivated path of success is uncertain is an affront to their human dignity. Every petitioner made a conscious decision to pursue education and career based on the expectation provided by the State through its Act of Parliament. Having to for several years of one’s productive life in the circumstances of the petitioners does not accord with human aspirations. The right to dignity is enshrined in **Article 28** which states that, “*Every person has inherent dignity and the right to have that dignity respected and protected.*” Apart from being a protected right, the right to human dignity is a foundational value of our

nation. I find and hold that the actions by the ERB have been in breach of the petitioners' right to dignity protected under **Article 28**.

105. This country's success is now staked on the youth and that is why **Article 55(a)** and **(c)** imposes on the state to, "*take affirmative measures, including affirmative action programmes, to ensure that the youth:-*

- a) *Access relevant education and training.*
- b) *Have opportunities to associate, be represented and participate in political, social, economic and other spheres of life.*
- c) *Access employment.*
- d) *Are protected from harmful cultural practices and exploitation."*

106. The state, which includes the universities and the ERB, have a special obligation to the youth inscribed in the Constitution. What the ERB has done is to close the door on the petitioners and others in a similar situation from taking an advantage of statutory provisions that clearly entitle them to registration as engineers. The petitioners' right to pursue careers and employment in a field which they have studied and which the State through its statutes has assured them of certain benefits accruing from their academic endeavour has been infringed.

107. I find it strange for the Ministry to argue that in fact these suits have been filed prematurely. Are these students to wait indefinitely to know their fate? The State bears responsibility to ensure that their status is resolved expeditiously and efficiently as required of all administrative actions under **Article 47**. I have read and reread the various reports and correspondence between the Ministry, Universities and ERB and it is clear that the attention is focused more on the future accreditation of the programmes rather than the fate of the graduates who fall in the black hole created by the *ultra vires* conduct of the ERB.

108. Obviously the proposed solutions made cannot work in the context of the applicable legislation. As Prof. Kaane stated in his affidavit, the **Registration of Engineers Act** does not provide for interim or provisional registration for the petitioners unless the Act is amended. Similarly, the Act of Parliament governing the Universities does not contemplate graduates revisiting their courses in order for their degrees to be "*recognised*" by the ERB. **The Engineers Act, 2011** now gives full authority to ERB to accredit engineering courses but this authority is prospective, it does not affect the petitioners and other students who graduated before it came into force. I have read the Act and it does not provide any assistance to the petitioners and those in their situation. It is in this vein that I now turn to consider the nature and extent of the remedies I should grant.

### **Relief and remedies**

109. **Article 23(2)** vests in the High Court the discretion to award relief, including the reliefs of the nature set out in the Article in order to vindicate the violation of the Bill of Rights. The High Court is granted wide latitude to frame appropriate relief according to the circumstances of each case. In **Fose v Minister of Safety and Security** 1997 (3) SA 786 (CC) at para. 19 the Constitutional Court of South Africa stated, "*Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.*"

110. The petitioners' have prayed for declarations, damages and incidental relief. I have already found the ERB liable for violating the petitioners' rights. A declaration to that effect will articulate the fact of infringement but this alone will not soothe the petitioners whose rights have been violated. I will now consider the nature of relief that I should frame to give full effect to the petitioners' rights.

111. The ERB's made its position very clear that it would not register students from universities that were not accredited. It was therefore unnecessary for these graduates to apply to be considered in view of the clear position that the ERB had taken. Other than the petitioners, other students, not only from Egerton University and MMUST but other public universities were therefore affected who may not be aware of these proceedings or did not join these suits for whatever reason. The relief I have made takes into account this fact, in order to avoid a multiplicity of suits and to do justice to all those affected by the ERB decision.

112. The petitioners would like the court to grant orders that they be admitted by the ERB as graduate engineers. Mr Kerongo, opposed this position on the ground that the ERB, as a statutory body, had the duty and obligation to maintain professional standards and this court should leave the issue to the Board. He relied on the case of **Republic v Council of Legal Education ex parte James Njuguna and Others Nairobi HC Misc. Civil Case No. 137 of 2004 (Unreported)** where Nyamu J stated, *"As stated above I have come to the conclusion that the facts of this case and demands of high standards of education for the advocates and other professions distinguish it from the line of authorities relied on by the counsel for the applicant. In addition I hold the view that while the court would otherwise be justified in claiming as much territory as possible in the name of fairness, this being its core business it is not necessarily the best judge in academic or professional matters .... The other reason why this court has declaimed to intervene is one of principle in that in academic matters involving issues of policy the courts are not sufficiently equipped to handle and such matter are better handled by the Boards entrusted by statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should be largely non justifiable. I see no reason why in democratically elected Government any detected defects in such areas including defects in policy should not be corrected by the Legislature."*

113. The position taken by the ERB is the one that I have rejected. Whatever the motivation of the ERB, its founding statute does not permit it to embark on the course it has adopted and when such a course violates the rights and fundamental freedoms of others, then the court must speak loud and clearly and put a stop to such conduct. In **Rita Biwott v Council of Legal Education and Another Nairobi HC Misc. Appl No. 1122 of 1994 (Unreported)**, a similar situation like that in this case arose.

114. In that case the Council for Legal Education (CLE) declined to admit the applicant to Kenya School of Law. At the material time the relevant regulations permitted graduates from certain foreign universities to be admitted to the School. University of Edinburgh was one of the universities whose graduates could be admitted. The applicant though a graduate, had taken a two year degree course causing the CLE to reject the application. After considering the application for orders of judicial review, the court (Justice A. B. Shah) held that, *"...despite full qualifications of the applicant CLE rejects her and that too in the face of full evidence provided or in possession of CLE that she has all the necessary basic qualifications to be admitted to the Kenya School of Law. Coming back to the case law that I went into earlier, I am able to say that the decision of CLE was unfair and unjust and it does not have powers to so act. CLE cannot in all fairness ask the applicant to back to Edinburgh as to complete a course which she has already completed. That is unjust and unfair and that is where the court can interfere with the discretion of CLE. With respect, CLE has no jurisdiction to act in a manner which would deprive a qualification candidate of two year or more of her professional life. Such discretion carries heavy responsibility and such responsibility cannot be abdicated. It was suggested by Mr. Okwach that she could go back to the United Kingdom and do either bar examinations or become a solicitor. I think in all circumstances of this particular case, that statement is not a careful statement. I will not say more. There is no doubt that CLE ought to have accepted the applicant for studies at Kenya School of Law. The term began on 16<sup>th</sup> September 1994. An order of mandamus goes forth now from this court to the Secretary of the Council of Legal Education to issue to Rita Biwott a certificate of enrolment with retrospective effect from 16<sup>th</sup> September 1994 ...."*

115. In this, like in **Rita Biwott's Case**, the petitioners are fully qualified in terms of **section 11(1)(b)** of the **Engineers Registration Act** as they possess engineering degrees conferred by public universities established by statute. The ERB has a statutory duty to consider an application that complies with **section 11(1)(b)** and as I have found that the ERB has no legal basis for denying petitioner's application, I hold

that an order of mandamus is an appropriate remedy to vindicate the petitioner's rights. (See also *Kenya National Examination Council v Republic ex-parte Geoffrey Gathenji and Others*).

116. At this juncture I would like to mention the Court's role and in this respect I would adopt the sentiments by the South African Constitutional Court in *Minister of Health and Others v Treatment Action Campaign and Others (2002) 5 LRC 216, 248* at paragraph 99, as adopted in *R v Independent Electoral and Boundaries Commission and Another ex-parte Councillor Eliot Lidubwi Kihusa and Others, Nairobi JR Misc. Appl. No. 94 of 2012 (Unreported)* where the court stated as follows, "The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the State to respect, protect, promote, and fulfill the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself."

117. Whether or not to grant compensation is a matter for the discretion of the court under **Article 23(2)**. A party who seeks compensation as part of the relief under **Article 23(2)** has the burden of proving the nature of and extent of the compensation in so far as it relates to the breach alleged. The petitioners have filed depositions to show that they are entitled to compensation on the basis of what they would have earned had they been admitted as graduate engineers. While this is a proper basis for calculating an appropriate award, I think it is fraught with difficulty. First, not all petitioners would be employed as engineers; some would probably choose other careers after acquiring the professional qualification. Second, the sum proposed is merely an average and not necessarily indicative of what each petitioner would have earned. Third, the mere fact of registration does not guarantee employment as an engineer.

118. A further reason, I would reject the claim for compensation is that such a claim is one in the nature of special damages and even though this is a claim under **Article 22**, it does not discharge the petitioners of the obligation to plead and prove the exact quantum of loss.

119. Notwithstanding the fact that I have not awarded compensatory damages, I have no doubt that the petitioners and persons who have been affected by the conduct of the ERB have suffered loss and damages. In order to recognise this loss, I think general damages or damages at large are appropriate in the circumstances. This award recognises that the petitioners' rights have been violated. In the circumstances I think a sum of Kshs. 200,000.00 for each petitioner and each graduate affected by the unlawful action of the ERB is appropriate. In light of the provisions of **section 11(1)(b)(ii)** of the *Engineers Registration Act* this award shall only be available to those who have graduated at least three years prior to the commencement of the *Engineers Act, 2011*.

120. I also think this is an appropriate case where costs should follow the event as the conduct of the ERB made it necessary for the petitioners to lodge this claim. Consequently the ERB shall bear the petitioners' costs.

121. I would like to thank all the counsels who appeared in this matter for their well-presented and helpful submissions.

### **Disposition**

122. Upon consideration of the consolidated petitions I now make the following orders;

(a) The petitions against Moi University, Egerton University, Masinde Muliro University of Science and Technology and the Commission for Higher Education are hereby dismissed but with no order as to costs.

(b) I hereby declare that the power of the Engineers Registration Board under the provisions of **section 11(1)(b)** of the *Engineers Registration Act (Chapter 530 of the Laws of Kenya)* to register

graduate engineers does not include the power to accredit and approve engineering courses offered by public universities incorporated under the Laws of Kenya.

(c) I hereby declare that the Engineers Registration Board has violated the petitioners right to fair administrative action protected by **Article 47(1)** of the Constitution and the petitioners right to human dignity protected by **Article 28** of the Constitution as read with **Article 55(a)** and **(c)** of the Constitution.

(d) I direct and hereby issue an order of mandamus directing the Engineers Registration Board to consider the applications of the petitioners and more particularly engineering graduates from Egerton University, Masinde Muliro University of Science and Technology and any other Kenyan public university who have graduated prior to 14<sup>th</sup> September 2012 in accordance with the **Engineers Registrations Act**.

(e) Within fourteen days of this judgment, the Engineering Registration Board shall publish in at least two newspapers of national circulation and in a prominent manner, an advertisement a copy of this decree and shall invite applications from any person eligible to be considered under **section 11(1)(b)** of the **Engineers Registration Act** and graduating with an engineering degree from Egerton University, Masinde Muliro University of Science and Technology and any other Kenyan public university prior to 14<sup>th</sup> September 2012 for consideration as graduate engineers and the applications lodged with the Board free of any charge.

(f) The Engineers Registration Board shall pay general damages assessed at Kshs. 200,000.00 to each petitioner and every Engineering graduate from Egerton University, Masinde Muliro University of Science and Technology and any other Kenyan public university graduating at least three years prior to the commencement of the **Engineers Act, 2011**. The said sum shall carry interest at a rate of 12% per annum from the date of this judgment.

(g) The Engineers Registration Board shall bear the petitioner's costs of these proceedings.

**DATED** and **DELIVERED** at **NAIROBI** this 15<sup>th</sup> day of October 2012.

**D.S. MAJANJA**  
**JUDGE**

Mr Katwa with him Mr Sigei instructed by Katwa and Kemboy Advocates for the petitioners in Petition No. 207 of 2011.

Ms Macheru instructed by Mitey and Company Advocates for the Petitioners in Petition No. 149 of 2011.

Mr Simiyu with him Mr Masafu instructed by Wekesa and Simiyu Advocates for Masinde Muliro University of Science and Technology.

Mr Masika instructed by Ochieng' Onyango Kibet and Ohaga Advocates for Moi University.

Mr Kerongo instructed by Kerongo and Company Advocates for the Engineers Registration Board.

Mr Okeche instructed by H. Okeche and Company Advocates for Egerton University.

Mr Nyaanga instructed by Mwaniki Gachoka and Company Advocates for the Commission for Higher Education.

Mr Ojwang', Litigation Counsel, instructed by State Law Office, for the Ministry of Higher Education, Science and Technology.