Macharia v High Education Loans Board (Petition E431 of 2023)
[2025] KEHC 5663 (KLR) (Constitutional and Human Rights) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5663 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E431 OF 2023

LN MUGAMBI, J

MAY 8, 2025

BETWEEN

MAURICE KAMOTHO MACHARIA ..... PETITIONER

AND

HIGH EDUCATION LOANS BOARD ..... RESPONDENT

JUDGMENT

Introduction

1. The petition dated 3rd November 2023 is supported by the petitioner's affidavit in support and a further affidavit dated 3rd September 2024.

2. This suit revolves around the challenge to the constitutionality of the action by the respondent of imposing penalties on unpaid student loans allegedly basing its said action under Section 15(2) of the *Higher Education Loans Board Act* (HELB Act). The Petitioner arguing that the said Act only provides for payment of fine of Kshs.5000/- upon one being found guilty of an offence for not complying with conditions set under Section 15 (1) chief among them failing to commence repayments of the loan within one year from the date of completion of the studies and that is if the Respondent decides to use the prosecution option. The Petitioner contends that the respondent lacks the authority to impose the penalty on its own as that power is vested on the Court only after the loanee is convicted.

3. Consequently, the petitioner seeks the following reliefs against the respondent:

    a. A declaration that the action by the respondent to impose penalties of Kenya shillings five thousand for every deduction not made pursuant to Section 15 (2) of the *Higher Education Loans Board Act* without according the petitioner and any other affected loanee the right to a fair trial and the due process of the law is illegal, unconstitutional and void.

b. A declaration that the respondents does not have powers to impose penalties on a loanee and such powers are vested in a court under section 25 and 26 of the High Education Loans Board, 1995.

c. An order to issue directing the respondent to remove the illegal penalties from the petitioner's and other loanees accounts and calculate loan balances without factoring the illegal penalties.

d. A declaration be made that all amount recovered from the petitioner and all other loanees in illegal penalties imposed by the respondent pursuant to section 15(2) are refundable to the affected persons and such affected persons are entitled to a refund and/or a set off against the loan and interest rightfully due.

e. An Order to issue directing the respondent to refund amount recovered in illegal penalties from the petitioner and any other loanee who shall make a claim within 60 days from the date such a claim shall be submitted to the respondent.

f. Compensatory damages for violation of the petitioner's and other loanees constitutional rights as the court shall deem just to grant.

g. Costs of this petition

h. Such other order(s) as this Court shall deem just and mete to grant.

Petitioner's Case

4. The petitioner states that he enrolled at the University of Nairobi back in 2005 to pursue a course in Bachelor of Laws. On that account, he applied for the respondent's loan and was granted Ksh.35,000 per year of study. He also avers that in the year 2007, he received Ksh.11,600 to enable him attend a compulsory clinical attachment during his second year. At the end of his studies, the respondent had issued him Ksh.151,600 as the principal sum for the loan.

5. The petitioner completed his studies in July 2009 and graduated in December. He thereafter in 2010 enrolled at the Kenya School of Law for his Post graduate Diploma. Upon successful completion, he was admitted to the bar on 2nd December 2011.

6. He asserts that while continuing his studies at the Kenya School of Law, the respondent started imposing penalties for his loan. The penalties were charged at Ksh.5000 per month in view of his failure to commence payment of the loan.

7. The petitioner decries that by the time he was admitted to the bar and secured employment, the loan amount had increased exponentially to Ksh.586,000 by 2018. He informs that he placed a Standing Order of Ksh.3200 for repayment of the loan in January 2018 and has been diligently paid the monies since then.

8. As at October 2023, he informs that he had repaid a sum of Ksh.224,000. Additionally, owing to other intermittent payments in between, he avers that the total amount was close to Ksh.250,000. He however depones that the respondent has not been updating his payments regularly yet has even supplied the bank statements. This has led to a discrepancy in view of his pending balance.

9. The petitioner makes known that these monies have been utilized by the respondent to recover the imposed penalties. As such, the petitioner is yet to pay for the principal. Consequently, the petitioner's loan balance as at 30th September 2023 was Ksh.289,413.

10. In view of the foregoing, the petitioner contends that the penalties imposed by the respondent as provided under Section 15 of the HELB Act are illegal and unconstitutional. The petitioner argues that this section criminalizes failure to commence repayment of the loan one year after completion of studies.

11. The petitioner contends that Section 15(2) of the Act provides that imposition of the penalties is preceded by Court proceedings before a Magistrates Court as stated under Section 26 of the Act. It is alleged that this Section provides that it is the Court that imposes the fines not the respondent. Moreover, the petitioner depones that he was never charged neither convicted by the Court before the penalties were imposed. Considering this, it is argued that the respondent usurped the Court's power in imposing the penalties.

12. The petitioner also takes issue with the respondent's action as violated his constitutional rights under Article 27(1) and 50 of *the Constitution*. This is by subjecting him to the adverse action without having the power to do so and in contravention of the HELB Act.

13. Furthermore, the petitioner informs that a similar petition which has already been determined, Anne J. Mugure & 2 others v Higher Education Loans Board (Petition E002 of 2021) also challenged the issue of excessive penalties under Section 15(2) of the HELB Act. Hon. Justice A. Mabeya determined in the end that this Section was unconstitutional to the extent that it leads to the interest rate and fines becoming more than the principal amount.

14. It is argued however that the instant petition differs from that the cited petition in that it challenges the penalties that are imposed by the respondent without subjecting one to the due process in a Court of law.

Respondent's Case

15. In reply, the respondent filed grounds of opposition dated 28th February 2024 on the grounds that:

    i. The petitioner has not demonstrated that the penalties imposed on his account for non - payment of the loan qualify as fines according to Section 15(2) of the Higher Education Loans Board (HELB) Act.

    ii. The petitioner has also not established any basis to warrant the issuance of orders for the respondent to provide information regarding the penalties it has imposed.

    iii. The application and petition raise no genuine constitutional violation and are solely aimed at evading commercial obligations.

    iv. The substratum of the petition will not be rendered nugatory if the application is dismissed, as the amounts charged as penalties are liquidated amounts and any loss suffered can be compensated.

    v. Should the Court, however, issue the orders sought the respondent will be incapable of executing its mandate to provide financial assistance to students to access higher education under Section 11(2) of the HELB Act.

    vi. It is, therefore, in the public interest that the application be dismissed with costs.

16. Furthermore, the respondent filed its replying affidavit by its head of legal services and corporation secretary Bernadette Masinde, sworn on 29th April 2024.

17. She states that the respondent derives its mandate from the HELB Act. She informs that as per Section 13 and 15 that the HELB Act, the respondent operates a revolving fund where an interested student applies for a loan and where eligible the respondent disburses the money pursuant to the loan agreement. Thereafter, the student is required to start repayment of the loan within one year of completion of his studies. She notes that the respondent under section 14 of the Act has the authority to establish conditions for granting a loan to a beneficiary hence imposition of the obligation under Section 15 of the Act.

18. In response, to the petition, it is deponed that the petitioner submitted his loan application form and agreement as follows: 26th July 2005;27th March 2006; 28th February 2007 and 22nd May 2008. In total the respondent issued a principal loan amount of Ksh.151,200.

19. She points out that the petitioner admitted that he completed the degree in July 2009. It is emphasized that as per the signed loan agreements for the various years as stated above, the term was that repayment would be due one year after completion of the course. As such, it is stated that the petitioner's loan became due for repayment in December 2010.

20. It is deponed that the petitioner defaulted on repayment of his loan when it was due for 63 months. This being the period between December 2010 to July 2016. It is noted that the petitioner made payments of Ksh.2,050/- for August 2012 and Ksh.4000 for the months of September, October, November and December 2015. Thereafter the petitioner made a payment of Ksh.2,000/- in January, April and May 2017.

21. She avers that the petitioner in 2018 paid consistent amounts of Ksh.3200. It is averred that he defaulted again between January and September, 2019. As a result, the respondent on 26th July 2019, referred the matter to Quest Holdings which is a debt collector. Soon after the petitioner resumed payments from October 2019 until November 2020. He defaulted once again and resumed repayment in March 2021.

22. She avers that due to the numerous defaults, the petitioner's loan accrued substantial penalties. It is stated however that following the High Court's pronouncement in Anne J. Mugure & 2 others (supra) which declared Section 15(2) of the HELB Act unconstitutional, the respondent reviewed the interest rates and fines exceeding the principal amount downwards to Ksh.164,464.01. As a consequence, the respondent as from August 2016 to date did not impose any further penalties on the petitioner's account.

23. Given the history stipulated herein, the respondent informs that the petitioner's total repayment is Ksh.168,759 ((excluding the debt collectors fees) in view of the owed loan amount.

24. She further informs that the charges levied against the petitioner's account do not constitute fines as envisaged under Section 15(2) of the HELB Act rather penalties according to the terms outlined in the loan agreement. It is said that the petitioner did not raise any issues concerning his inability to comprehend the agreement terms. This is despite the information also being available on the respondent's website.

25. To that end, it is asserted that the petition does not raise any constitutional issues as alleged but is an attempt by the petitioner to evade his commercial obligations in the loan agreement. It is highlighted that owing to the numerous default payments by the petitioner and other loanees, the same has had a negative impact on the respondent's mandate to loan eligible student funds as was evident in the 2020/2021 academic year.

Petitioner's Submissions

26. The petitioner filed submissions dated 3rd September 2024, through Machari Burugu and Company Advocates. To commence with, Counsel submitted that the petitioner has the requisite locus standi to file this suit as is made manifest under Article 22 of *the Constitution*. Reliance was placed in Albert Ruturi & J.K. Wanywela on behalf of Kenya Bankers Association vs The Minister for Finance & The Attorney-General & The Central Bank of Kenya [2001]eKLR where it was held that:

> " In constitutional questions, human rights cases, public interest litigation and class actions ... any person or social action groups, acting in good faith, can approach the court seeking judicial redress for a legal injury caused or threatened to be caused to a defined class of persons represented, or for a contravention of *the Constitution*, or injury to the nation ..."

27. Like dependence was placed in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR and John Harun Mwau & 3 others v Attorney General & 2 others [2012] eKLR.

28. Counsel turning to the substantive issue, stated as averred by the petitioner that Section 15(2) of the HELB Act creates an offence against any loanee who fails to comply with the provisions of Section 15(1).

29. Referring to Section 15, 25 and 26 of the HELB Act, Counsel submitted that a loanee is supposed to be accorded the right to a fair hearing as guaranteed under Article 50 of *the Constitution* before being condemned to pay the fine of Ksh.5000/-.

30. It was asserted however that the respondent had failed to do so. Furthermore, Counsel asserted that Section 3 of the *Criminal Procedure Code* states that all offences under any written law shall be conducted in line with the Code. It was argued that there was nothing in the HELB Act which shows exclusion of the application of the *Criminal Procedure Code* in the cited proceedings.

31. Counsel furthermore emphasized that the respondent cannot resile from the position it took in Anne J Mugure & 2 others(supra) and purport to base the Kshs.5,000/- penalty it unilaterally imposes on a different position from the one taken in the earlier case. In Counsel's view, the respondent imposes the Ksh.5,000/- because it is the amount mentioned in section 15 (2) of the HELB Act, however, it has no power in law to impose the fine. As such, Counsel stressed that the Ksh.5,000/- under Section 15 (2) is contextually a fine upon conviction and so cannot be converted by the respondent to a penalty without a basis in law.

32. Consequently, Counsel submitted that it was certain that the petitioner's right to a fair trial had been violated yet cannot be limited as envisaged under Article 25 of *the Constitution*. Reliance was placed in Githiga & 5 others vs Kiru Tea Factory Limited [2019]eKLR where the Supreme Court held that:

> " Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo judex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, Judicial Review: Law, Procedure and Practice 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated..."

33. Counsel in view of this submitted that the respondent's action was ultra vires as it has no power under the HELB Act to impose a fine of Ksh.5,000/- as this power is reserved for the Court after due process has been completed. To buttress this point reliance was placed in Jaqluene Resley –vs- City Council of Nairobi [2006] eKLR where it was held that:

> " As we stated earlier, the purpose of the court is to ensure that the decision making process is done fairly and justly to all parties. Blatant breaches of statutory provisions cannot be termed as mere technicalities by the defendant. That law must be followed is not a choice and the courts must ensure it is followed. The statements by the defendants that this court's role is only supervisory will not be accepted and neither will the view that this court will usurp the functions of the valuation court in determining this matter. This court is one of inherent and original jurisdiction and it is our duty to ensure that the law is followed. In the case of Bradbury & Others –vs- Enfield London Borough Council (1976) 1 WLRP 1131 it was stated that:'If a local authority does not fulfil the requirements of the law, this court will see that it does fulfil them. It will not listen readily to suggestions of "chaos". Even if chaos should result, still the law must be obeyed."

34. Similar dependence was placed in Republic vs PPARB Exparte Rongo University (2018) eKLR and Reg. v. Hull University Visitor, Ex parte Page [1993] AC 682, 701.

35. It was further argued that the stated penalties were not disclosed by the respondent in the contractual documents that the loanees signed. According to Counsel, Section 15 (1) (b) only obligates a loanee to begin repayment of his loan together with any interest accrued thereon. The said section does not envisage penalties unilaterally imposed by the Respondent as part of the obligation of a loanee. Further that it does not state the frequency of the repayments, so as to justify the imposition of a monthly penalty. Counsel pointed out that the agreement annexed by the respondent only indicates the interest chargeable on the loan as 4%. Likewise, it stipulates of penalties but does not provide specific details or reason for imposing the penalties.

36. Reliance was placed in Givan Okallo Ingari & Another vs. Housing Finance Co. (K) Ltd Nairobi HCCC No. 79 of 2007 [2007] 2 KLR 232 where it was observed that:

> " The primary complaint is that the defendant has unilaterally and in breach of the express provisions of the charge instrument levied unsanctioned interest rates, penalty charges and default charges on the loan account, which have erroneously increased the plaintiffs' indebtedness thereby frustrating and/or clogging the efforts of the plaintiffs to redeem the charge property. Such grave accusation needs and/or requires rebuttal from the defendant. However, the defendant says that the charges were levied in accordance with the implied terms of the charge document, prevailing customs and trade usage in the banking and financial industry... In my view any rate of interest to be charged on a loan account must be provided by the contractual document and must be in accordance with the parties' agreement. I have gone through the charge document and there is no provision that allowed the defendant to levy or vary the rate of interest or to charge the rate of interest it so charged on the account of the plaintiffs. In my view if the defendant applied default charges on the plaintiffs account but which was not permitted or provided by the charge document then that is prima facie uncontractual or illegal. There is nothing as prevailing customs or trade usages, which can allow the defendant to commit acts of fundamental breach to the contractual document..."

37. Equal dependence was placed in Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Limited [2014] eKLR, Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999 and Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited [2014] eKLR and Mugure & 2 others (supra).

38. Ultimately, Counsel submitted that the petitioner was entitled to the relief sought in the circumstances of this case. Reliance was placed in Article 23(3) of *the Constitution* and case of Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR where it was held that:

> " However, I think this is a proper case for this court to fashion appropriate reliefs as the justice and circumstances of the case demand. This Court is empowered by Article 23 (3) of *the Constitution* to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. Perhaps the most precise definition "appropriate relief" is the one given by the South African Constitutional Court in Minister of Health & Others vs Treatment Action Campaign & Others[102]thus:- "...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 court may even have to fashion new remedies to secure the protection and enforcement of these all important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be to achieve this goal."

Respondent's Submissions

39. In support of its case, the respondent filed submissions dated 1st October 2024 through Gikera and Vadgama Advocates. Counsel sought to primarily discuss whether the respondent's action of imposing penalties on the petitioner and other loanees is illegal and unconstitutional in three parts. That is the constitutionality of the penalties imposed by the respondent; whether the penalties were a stipulated part of the loan agreement and whether the petitioner is entitled to the relief sought.

40. Counsel on the first point argued that the petitioner's interpretation of Section 15(2) of the HELB Act is flawed as it fails to account for the full range of recovery actions available to the respondent under the section. This authority is as well echoed under Section 20 of the Act in view of recovery of the loan.

41. For context, Counsel submitted that the Act under Section 15(2) informs that the respondent's authority is twofold against loan defaulters. First, impose a fine, subject to the defaulter being found guilty of an offence and second, take any other action necessary to recover the outstanding amounts from the defaulter. Thus, the petitioner's interrogation of this section is argued to be restrictive in view of the respondent's' recovery power.

42. It is noted in addition that Section 26 of the Act which the petitioner relied on in light of court proceedings underscores that any person that is convicted of an offence under the Act, shall without prejudice to any civil remedy, order such person to pay to the Board, as the case may be, the amount of any outstanding loan repayments and interest or any other sum, together with any penalty thereon, found to be due from such person to the Board. Counsel in addition stated that the petitioner had misinterpreted the Court's decision in Mugure & 2 Others (supra).

43. Counsel stated that every statute is presumed constitutional unless it can be proved otherwise by the party alleging so as held in Kiambaa & 3 others v Ethics and Anti-Corruption Commission & 2 others; Equity Bank Limited & another (KECA 94 (KLR). Counsel as well submitted that the principles

of constitutional and statutory interpretation are now well established as seen in Apollo Mboya v Attorney General, National Assembly & Senate [2018] KEHC 6933 (KLR).

44. Reliance was placed in Council of County Governors v Attorney General & another [2017] eKLR where it was held that:

> " There are numerous rules of interpreting a statute, but in m)' view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative invention to the contrary, the language must ordinarily be taken as conclusive. In any event, one possible suggestion of the indeterminacy of canons is that statutory construction should be a narrow pursuit, not a broader one. Thus when the language is clear, then it is not necessary to belabour examining other rules of statutory interpretation."

45. Like dependence was placed in Connecticut National Bank v. Germain, 503 U.S 249-54 (1992).

46. In view of the foregoing, Counsel submitted that the object and purpose of the HELB Act is straightforward being to ensure the proper management of a Fund used for granting loans to assist Kenyan students in obtaining higher education at recognized institutions. It is stressed that the respondent has continued carry out this function despite the challenges it has faced due to limited resources.

47. Consequently, Counsel submitted that the respondent in imposing penalties on defaulting loanees, had not violated any loanee's constitutionally guaranteed right to a fair hearing, but rather had opted to utilize one of the recovery mechanisms specified in Section 15(2) of the HELB Act.

48. On the second point, it was submitted that the respondent incorporates these recovery mechanisms in the loan agreements with loanees which binds them. It states as follows:

> 4. If a loanee defaults in repayment when the loan is due, the whole amount shall become due and payable and the loanee shall be bound to pay all other charges that may arise as a result of the default including but not limited to the Advocates fees and penalties.

49. Reliance was placed in Givan Okallo lngari & Another vs. Housing Finance Co. (K) Ltd Nairobi HCCC No. 79 of 2007 [2007] 2 KLR 232 where it was held that:

> " .. .In my view if the defendant applied default charges on the plaintiffs account but which was not permitted or provided by the charge document then that is prima facie contractual or illegal. There is nothing as prevailing customs or trade usages, which can allow the defendant to commit acts of fundamental breach to the contractual document... The charges debited in the plaintiff's account were done without any legal basis and in my humble view made the account irredeemable. It is my position such debits could only have been made with the consent of the plaintiffs or being a provision in the charge document that allowed the defendant to do so. By engaging in acts outside the contractual document, the defendant made it difficult for the plaintiff to perform their part of the bargain. The acts of the defendant, in my view amount to muddling the waters that were for the benefit of all parties. This Court cannot force the plaintiffs to drink from a well muddled by the hands and legs of the defendant. To do so would be inequitable ... When parties to an instrument of charge have a clear agreement on the interest and charges to be charged on the facility, parties must be guided by the terms and conditions as set out in the charge document. In

my humble opinion, a party in breach of the contractual document cannot be allowed to benefit from his own transgression... "

50. To that end, Counsel submitted that the petitioner having failed to demonstrate the unconstitutionality of the impugned Section was not entitled to the relief sought in the petition.

Analysis and Determination

51. It is my considered view that the issues that arise for determination in this matter are as follows:

    i. Whether the respondent's action of imposing penalties for non-repayment of the loan purportedly in reliance of Section 15 (2) of the HELB Act is illegal and unconstitutional.

    ii. Whether the petitioner is entitled to the reliefs sought.

52. In interpreting *the Constitution*, the Court is guided by *the Constitution* itself, that is, Article 259 (1) of *the Constitution* and also has regard to principles of Constitutional interpretation that Courts have developed through precedents. *The Constitution* declares that whenever the Court required to interpret it, it should do so in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of rights in a manner that contributes to good governance. More emphasis is to be found in Article 159 (2) (e) which obliges the Court in exercise of its judicial authority to protect and promote the purposes and principles of *the Constitution*.

53. In Ferdinand Ndung'u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 others [2014] eKLR the Court observed:

> "... *the Constitution* must be interpreted in a liberal, purposive and progressive manner, in order to give effect to the principles and values contained therein. This is found at Article 259 (1) of *the Constitution* which is framed as follows:
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> Article 259. (1) This Constitution shall be interpreted in a manner that—
>
> a. promotes its purposes, values and principles;
>
> b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;
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> c. permits the development of the law; and
>
> d. contributes to good governance.
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> These principles have been reiterated time and again by our courts. In Njoya & 6 others - vs- Attorney General & 3 others No 2 [2008] 2 KLR (EP), this Court held that:
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> *The Constitution* is not an Act of Parliament but the supreme law of the land. It is not to be interpreted in the same manner as an Act of Parliament. It is to be construed liberally to give effect to the values it embodies and the purpose for which its makers framed it."

54. Correspondingly, the Supreme Court in the Matter of the Interim Independent Electoral [2011] KESC 1 (KLR) guided as follows:

> "(86)" .....The rules of constitutional interpretation do not favour formalistic or positivistic approaches (Articles 20(4) and 259(1)). *The Constitution* has

incorporated non-legal considerations, which we must take into account, in exercising our jurisdiction. *The Constitution* has a most modern Bill of Rights, that envisions a human-rights based, and social-justice oriented State and society. The values and principles articulated in the Preamble, in Article 10, in Chapter 6, and in various other provisions, reflect historical, economic, social, cultural and political realities and aspirations that are critical in building a robust, patriotic and indigenous jurisprudence for Kenya. Article 159(1) states that judicial authority is derived from the people. That authority must be reflected in the decisions made by the Courts.

(87) In Article 259(1) *the Constitution* lays down the rule of interpretation as follows: "This Constitution shall be interpreted in a manner that – (a) promotes its purposes, values and principles; (b) advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the law; and (d) contributes to good governance." Article 20 requires the Courts, in interpreting the Bill of Rights, to promote: (a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and (b) the spirit, purport and objects of the Bill of Rights.

(88) These constitutional imperatives must be implemented in interpreting the provisions of Article 163(6) and (7), on Advisory Opinions. Article 10 states clearly the values and principles of *the Constitution*, and these include: patriotism, national unity, sharing and devolution of power, the rule of law, democracy, participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability, and sustainable development.

(89) It is for these reasons that the Supreme Court, while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting *the Constitution*, is a task distinct from interpreting the ordinary law. The very style of *the Constitution* compels a broad and flexible approach to interpretation."

55. In this Petition, the Petitioner is asking the Court to determine the constitutionality of the Respondent's actions of imposing penalties for delayed student loans repayments in what the petitioner argues is a misapplication of Section 15 (2) of the Higher Loans Board Act which does not give the Respondent such powers as that power belongs to the Court.

56. In my humble view, the question here is not the constitutionality of Section 15 (2) of the HELB Act, rather, is the respondent's action of imposing penalties that the petitioner complains is illegal because it is not a power that the respondent is authorized under section 15 (2) or any other provision of the HELB Act to exercise.

57. The question thus turns on the interpretation of the scope of application of Section 15 (2) of the Act and any other statutory provision vis-à-vis the Respondents action complained of.

58. The jurisdiction of this Court under Article 165 (3) (d) (ii) is to determine whether anything said to be done under authority of this constitution or of any law is inconsistent with, or contravention of *the constitution*.

59. In principle, there is general presumption that every Act of Parliament is deemed constitutional and thus the burden is on the person alleging its unconstitutionality to prove otherwise. This principle was articulated by the Court of Appeal of Tanzania in Ndyanabo vs. Attorney General [2001] EA 495 which reiterating the English case of Pearlberg vs. Varty [1972] 1 WLR 534 as follows:

> "Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative"

60. Discussing the same principle, the Supreme Court of India in Hamdard Dawakhana vs. Union of India Air (1960) AIR 554, 1960 SCR (2)671 explained thus:

> "In examining the Constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment."

61. The burden of rebutting the presumption of constitutionality of a statute as already observed on the on the person who alleges that the Statute is unconstitutional as was held in the following persuasive authority of U.S. vs Butler 297 U.S. 1 (1936), where the Court stated thus:

> "When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of *the Constitution* which is invoked beside the statute which is challenged and to decide whether the latter squares with the former."

62. Further, another important consideration that the Court may have regard to is the purpose and effect of the impugned provision. If the purpose stated in the object aligns with *the Constitution*, the Court may go a step further and interrogate the effect of applying the legislation in question and find out if it aligns with the Constitutional dictates. This principle received judicial consideration in the case of R vs Big M Drug Mart Ltd 1985 CR 295 which was cited with approval in Geoffrey Andare v Attorney General & 2 others [2016] eKLR and amplified as follows:

> "Both purpose and effect are relevant in determining constitutionality, either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of legislation, object and its ultimate impact are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

63. The Constitutional Court of Uganda also applied the same principle in Olum and another vs Attorney General [2002] 2 EA in which the Court rendered itself as follows:

> "To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by *the constitution*, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its

implementation infringes a right guaranteed by *the constitution*, the impugned statute or section thereof shall be declared unconstitutional…"

64. The Petitioner is questioning the constitutionality of the respondent's imposition of penalties on loan repayments insisting that it has no power to do so and is in fact a usurpation of the power of the Court under Section 15 (2) of the HELB Act.

65. The Petitioner pointed that in bank statement showing repayments, entries show that the respondent has been deducting 'penalties from those payments. The Petitioner complained the respondent has no authority to impose to penalties since section 15 (1) (b) of the HELB Act only obligates a loanee to pay 'repay the loan together with interest accrued thereon' and that a 'fine' can only be imposed under Section 15 (2) upon a finding of guilty by a Court of law and not by unilateral decision of the respondent.

66. Further, he argued that the loan agreement does also not provide that a loanee will be charged a penalty of Kshs. 5000/-for every month payment not received hence there is no statutory or contractual basis of the respondent's action against the petitioner. He argued that the Respondent in imposing the said fine or penalty usurped the power of the Court under Section 15 (2) of the Act. He maintained that the petitioner is not permitted to impose on a loanee an unconscionable deduction citing the case of Givan Okallo Ingari & Anor v Housing Finance Co. (K) Ltd Nairobi HCCC No. 79 of [2007]2KLR 232 and also Francis Joseph Kamau Ichatha v Housing Finance Company of Kenya Ltd [2014] eKLR.

67. The Respondent faulted the Petitioner for misinterpreting the provisions of Section 15 (2) of the HELB Act stating that he does not appreciate the wide range of recovery options available to the respondent under this section. In this regard, the Respondent stated that the petitioner did not pay regard to the phrase 'in addition to any other action the Board may take against them' which the Respondent stated gives the respondent authority to pursue additional recovery options such as imposition of penalties on defaulters.

68. The contestation between the petitioner and the respondent in my view arises from the differences in understanding of the relevant provisions of the HELB Act. In resolving the dispute between the Petitioner and the Respondent therefore, the Court has to closely examine the wordings with a view to determining the full import of those provisions as well as refer to the principles of statutory interpretation where necessary. On statutory interpretation, I am guided by the authority of Republic v Kenya Medical Laboratories Technicians and Technologists Board Ex-Parte Archdiocese Nairobi Kenya Registered Trustees [2018] KEHC 9303 (KLR) where the Court eloquently set out the principles of statutory interpretation as follows:

> " 23. It is an elementary rule of statutory construction that no one provision of the statute is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be interpreted as to effectuate the greater purpose of the instrument. It is the duty of a court in construing statutes to seek an interpretation that promotes the objects of the legislation and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the purposes of the legislation.
>
> 24. Courts have on numerous occasions been called upon to bridge the gap between what the law is and what it is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In

performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute, a document or an action of an individual which is certain to subvert the societal goals and endanger the public good...

27. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate...

...The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot legislate itself...

32. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it."

69. Further, in Isaac Robert Murambi v Attorney General & 3 others [2017] KEHC 3034 (KLR) the Court expressed as follows:

"...the Court must also be guided by the cardinal rule that a statute should be construed according to the intention expressed in the statute itself-see Halsbury's Laws of England, 4th ed. Vol. 44(1) para 1372b. The Court of Appeal confirmed this principle when it stated in County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR that:

"The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore, the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context..."

62. In stating that particular principle of interpretation the Court cited the Australian decision in the case of Amalgamated Society of Engineers v Adelaide Steamship Company Ltd. & others (1920) 28 CLR 129 where it was held that:

"The fundamental rule of interpretation, to which all others are subordinate, is that statute is to be expounded according to the intent of 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...."

70. I must thus consider all the relevant provisions with a view to determining if they perpetuate the overall object of the Act rather than looking at any single provision in isolation. In this regard, I shall consider Sections 14 (1) a & b, 15 and also Section 20 of the HELB Act which I consider germane in this determination. For context, I will set out these provisions in full. Section 14 authorizes the Board to impose conditions of loan as follows:

14. Conditions for grant of loan

1. The Board may—

a. accept or reject any application for a loan;

(b) grant a loan to any student and in so granting impose conditions, demand security and require repayment in installments at such times and within such periods as the Board deems fit:

Provided that and subject to the provisions of this section the Board may upon the request by any student to whom a loan has been granted at any time vary

i. the condition subject to which the loan was made;

(ii) any security given in relation to the loan;

(iii) any of the terms of repayment of the loan

71. Moving further, there is section 15 which addresses the obligations of the loanee.

15. Obligations of the Loanees

1. A loanee shall be required, subject to and in accordance with this Act or any regulations made thereunder, within one year of completion of his studies or within such a period as the Board decides to recall its loan whichever is the earlier—

a. to inform the Board of his contact address;

b. to begin repayment of his loan together with any interest accrued thereon;

c. if he is in formal employment, to authorize his employer to deduct the loan repayment and to remit it to the Board in such manner as the Board may direct.

2. Any loanee who fails or neglects to satisfy the requirements of subsection (1) within the stipulated time shall, in addition to any other action that the Board may take against him, be guilty of an offence and liable to a fine of not less than five thousand shillings in respect of each loan deduction Kenya that remains unpaid in accordance with provisions of subsection (1) and such fine shall be payable to the Board

72. The Act then goes ahead to prescribe what would happen in case of default or when the Board senses signs of default. Section 20 states:

Section 20. General provisions

1. if in the opinion of the Board there has been or is likely to be any breach of or failure to comply with any condition or term of repayment respecting a loan the Board may forthwith—

a. recover from the person from whom the loan was made or his personal representative as a civil debt under the *Debts (Summary Recovery) Act* (Cap. 42) the amount of the loan or the amount thereof then remaining unpaid together with interest thereon;

b. enforce or realize any security relating thereto.

(2) The Board may, in exercise of the powers conferred by subsection (1), engage the services of private legal practitioners

73. A reading of Sections 14 reveals that Board has unfettered power to determine the conditions subject to which the loan is granted and terms of repayment thereof. In fact, for good reason the Board may vary terms of the loan on application by a loanee. The setting of or imposition of conditions of loan is thus a discretion that is given to the Board under Section 14. Matters therefore such as the interest

rate to be applied to the loan, the fixing of the total amount that a borrower can borrow inclusive of whether there may be any fees that may be charged thereon, whether a deposit of collateral is needed, whether any default interest is chargeable on late payment and are matters that I find will fall within the purview of the Board under Section 14 which empowers it to impose conditions of loan.

74. Nothing therefore, would stop the Board from imposing a penalty or better still default interest rate on delayed repayments as long as it forms part of the conditions it considers for inclusion in the loan contract. The intention of the legislature is to clothe the Board with power to impose all necessary conditions for grant of repayment of loans.

75. Section 15 (1) (b) only applies to repayments made by a loanee within one year of completion of his studies or within such period as the Board decides to recall its loan for the repayment of loan together with any interest accrued thereon.' The meaning of this section is unambiguous and requires no further elaboration.

76. Section 20 contemplates a situation where there has been default or where the Board considers that a default is likely;

1. if in the opinion of the Board there has been or likely to be any breach of or failure to comply with any condition or term of repayment respecting a loan the Board may forthwith:

    a. recover from the person, from whom the loan was made or his representative as a civil debt under the *Debts (Summary Recovery) Act* (Cap 42) the amount of the loan then remaining unpaid together with interest thereon

    b) enforce any security thereon

2) the Board may exercise the powers conferred by subsection (1), to engage the services of private legal practitioners

77. The Act lays emphasis to 'loan together with interest thereon'. Interest as already noted may take different attributes, and could refer to interest on principal amount or even default interest/penalties arising from delayed repayments which the Board can impose as a part of the condition of loan contract under Section 14 of the HELB Act. In addition, under the functions of the Board provided for in Section 6, one of the functions set out in Section 6 (c) is to set the criteria and conditions governing granting of loans including rate of interest and recovery of loans.

78. The phrase 'In addition to any other action that the Board may take against them' as used in Section 15 (2) in my view means that the Respondent is not limited to using the option of prosecution as the only means of pursuing loan defaulters, but may make use of all other lawful processes at its disposal which ejusdem generis might include using civil debt recovery processes, realization of security or enforcing the guarantees. Imposition of penalties or default interest for non-payment is not a process and cannot thus appropriately be construed ejusdem generis as falling with Section 15 (2), that is a term or condition which if it is not provided for specifically in the contract, cannot be classified as being statutorily permissible under this provision.

79. Considering therefore that the Board may in the light of Section 14 impose conditions of loan, my view is that this can lawfully be done in a loan contract between the loanee and the Board. The complaint by the Petitioner is thus not a constitutional question as such conditions as to penalties for late payment may lawfully be imposed as conditions of loan repayment in a contract between the parties.

80. The issue of whether a general clause without specifying the actual rates/penalties on default is sufficient as the basis for levying such penalties, or whether the respondent has been correctly updating the repayments done by the Petitioner or dispute as what the petitioner says he has paid vis-à-vis what

the respondent says is actually owed or whether the petitioner should pay the charges arising out of services for the debt collector who was allegedly assigned despite him continuing to pay his loan are, with all due respect not constitutional questions. This is a pure contractual dispute that does compel this Court to invoke *the Constitution* to resolve. As was held in Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another [2016] eKLR;

> "... Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation..."

81. Nevertheless, I wish to reiterate that the imposition of penalties or interest cannot be more than double the principal amount of the loan borrowed as held in Mugure & 2 others v Higher Education Loans Board [2022] KEHC 11951 (KLR) where the Court stated that the respondent cannot charge exorbitant interest and penalties beyond double of the principal amount owed. The Court reasoned thus:

> "32. Undoubtedly, the continued imposition of interest and penalties on non-performing loan accounts even when the interest and penalties had exceeded the principal amount violates the in duplum rule. As borrowers, the petitioners were being discriminated upon from those borrowing from banks who are protected by section 44A of the *Banking Act*. Although their rate of interest is low, their personal circumstances of being students from humble and financially challenged background, necessitated protection.
>
> 33. Their socioeconomic rights under article 43(1)(e) and (f) and consumer rights under article 46(1)(c) of *the Constitution* have accordingly been violated. This has the counter-effect of making it difficult for them and others in the same situation to conveniently repay the loan...
>
> 35. In this particular case, the petitioner's case does not challenge the state in the action it has taken, but rather seeks the aid of this court to give effect to those measures. Having recognized the gap that existed before, that is, the lack of legislation that would protect borrowers from exorbitant and never-ending interest rates, the state introduced the in duplum rule vide section 44A of the *Banking Act*.
>
> 36. Through the aforesaid legislation, the state sought to ensure fairness and justice in matters borrowing even where the lender has a higher bargaining power. There is nothing to bar the extension of such relief and accommodation to the specific borrowers under the HELB Act.
>
> 37. Accordingly, the court finds that the application of the in duplum rule to the loans borrowed by the petitioners is not discretionary by the respondent but as a matter of right and law.
>
> 38. In this regard, the court would not declare section 15(2) of the HELB Act unconstitutional, but it would read into that section the in duplum rule. That upon the amount due clocks double the principal sum, the interest and fines shall cease to apply..."

82. That said, this court finds that this is a pure contractual dispute camouflaged as a constitutional petition. This Petition therefore offends the doctrine of constitutional avoidance. I hereby dismiss the same with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF MAY, 2025.

.....

L N MUGAMBI

JUDGE