



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 37 OF 2017

**IN THE MATTER OF ALLEGED THREAT OF CONTRAVENTION OF ARTICLE 5(1), (10) AND 118 OF THE
CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF UNIVERSITY EDUCATION (AMENDMENT), ACT 2016

AND

IN THE MATTER OF THE MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS ACT, CAP 253 A

AND

IN THE MATTER OF THE MEDICAL PRACTITIONERS AND DENTISTS BOARD ACT CAP 253

AND

IN THE MATTER OF THE PHARMACY AND POISON BOARD ACT CAP 244

AND

IN THE MATTER OF THE NURSING COUNCIL OF KENYA CAP 257

AND

IN THE MATTER OF KENYA NUTRITIONISTS AND DIETICIANS INSTITUTE ACT NO 18 OF 2007

BETWEEN

KENYA MEDICAL LABORATORY TECHNICIANS AND

TECHNOLOGISTS BOARD.....1ST PETITIONER

KENYA MEDICAL PRACTITIONERS AND DENTISTS BOARD.....2ND PETITIONER

KENYA PHARMACY AND POISON BOARD.....3RD PETITIONER

THE NURSING COUNCIL OF KENYA.....4TH PETITIONER

KENYA NUTRITIONISTS AND DIETICIANS INSTITUTE.....5TH PETITIONER

PUBLIC HEALTH OFFICERS AND TECHNICIANS COUNCIL.....6TH PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERALRESPONDENT

AND

COUNCIL OF LEGAL EDUCATIONPETITIONER

KENYA LAW REFORM COMMISSION..... 2ND INTERESTED PARTY

LAW SOCIETY OF KENYA..... 3RD INTERESTED PARTY

KENYA NATIONAL ASSOCIATION OF

PRIVATE UNIVERSITIES.....4TH INTERESTED PARTY

BOARD OF REGISTRATION OF ARCHITECTS AND

QUANTITY SURVEYORS.....5TH INTERESTED PARTY

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 106 OF 2017

ENGINEERS BOARD OF KENYA.....PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERALRESPONDENT

AND

COMMISSION FOR UNIVERSITY EDUCATION..... INTERESTED PARTY

AND

CONSOLIDATED WITH

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 49 OF 2017

COUNCIL OF LEGAL EDUCATION..... PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERALRESPONDENT

AND

KENYA LAW REFORM COMMISSION.....1ST INTERESTED PARTY

LAW SOCIETY OF KENYA.....2ND INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. The three Petitions are interrelated and were directed by this court to be heard together, the lead file being HC Petition No. 37 of 2017.

2. In High court Petition No. 37 of 2017 the Petitioner in its Petition seek, inter alia the following reliefs:-

- a) A declaration that section 5 of the Universities (Amendment) Act, No. 48 of 2016 is unconstitutional and unlawful.**
- b) A declaration that Section 5 of the University (Amendment) Act is hereby struck out.**
- c) Costs of the Petition.**
- d) Any other orders, writs and directions the Honourable Court considers appropriate and just to grant for the purpose of the Petitioner's constitutional rights.**

3. Conservatory orders were granted on the 10th day of February 2017 suspending the implementation of the said provision of the Universities (Amendment) Act.

4. In the High Court Petition No. 106 of 2017 the Petitioner seek inter alia; the following prayers:-

- a) A declaration that the act or deed of the National Assembly of the Republic of Kenya in enacting the Universities Amendment Act, 2016 was invalid for being unconstitutional, in violation of the duty by the National Assembly to facilitate public participation before enactment;***
- b) A declaration that the Universities Amendment Act, 2016 is invalid and void for being an enactment of the National Assembly of the Republic of Kenya in violation of Article 10 and 232 of the Constitution.***
- c) A declaration that Universities Amendment Act, 2016, and every provision contained therein is null, void and of no legal effect;***
- d) A declaration that Section 5A of the Universities Act 2016, incorporated through / by the Universities Amendment Act, 2016 in so far as it criminalizes acts done under un-repealed Acts of Parliament of the Republic of Kenya, is unconstitutional and threatens violations of fundamental rights to fair hearing, of agents of state agencies established under the said un-repealed Acts of Parliament, guaranteed under Article 50(2) of the Constitution of Kenya;***
- e) A declaration that Section 5A of the Universities Act 2016, incorporated through / by the Universities Amendment Act, 2016 in so far as it criminalizes acts done under un-repealed Acts of Parliament of the Republic of Kenya, is unconstitutional and threatens the Rule of Law, the doctrine of legality;***
- f) A declaration that the supremacy provided for and intended at Section 5A(1) of the Universities Amendment Act, 2016 does not extend to nor affect the mandate of the Engineers Board of Kenya under Section 7 1(1) of the Engineers Act No. 43 of 2011 to approve and accredit engineering education providers in Kenya;***
- g) The cost of and relating to this Petition.***
- h) Such other or further Orders as this Honourable Court may deem just and expedient in the circumstances in protection of the Constitution and protection against violation of fundamental rights.***

5. The Petitioners and the Respondents and the parties filed submissions which they all opted to rely on without highlighting on the same.

THE PETITIONERS CASE

6. The Universities Amendment Act 2016 was asserted to on 23rd December 2016 and come into effect on 13th January 2017. The amendments introduced at Section 5 of the act purporting to repeal statutes that establish Petitioners by criminalizing their functions, in particular but not limited to Section 5 A of the aforesaid Act. The amendments introduced at Section 5A of the Act purport to take away function from regulatory bodies established by statute and vest them in the interested party to the extent of those functions but still use the expertise of the aforementioned bodies.

7. It is Petitioners position that the implementation of the Universities (Amendment) Act 2016 will have far reaching implications on the role of the Petitioners in the regulation, licensing and supervision and as such interfere with the mandate of the Petitioners to enforce quality standards.

8. The amendments introduced at Section 5 of the aforesaid Act purports to take away functions from regulatory bodies established by statute and vest them in the Interested Party to the extent of those functions but still use the expertise of the aforementioned body in particular but not limited to 5A (3) and 5A (4).

9. It is urged that enactment of the Universities (Amendment) Act 2016 lacked the requisite public participation as envisaged under **Articles**

1, 10 and 118 of the Constitution of Kenya.

RESPONDENTS RESPONSE

10. The Petitions are opposed on various grounds and mainly on the ground that the Petitions are implied and do not disclose any violations to the Constitution; that all Acts of Parliament are presumed to be constitutional until the contrary is proven; that the Petitioners have failed to demonstrate how the Amendment Act violates the Constitution; therefore failing to rebut the presumption of constitutionality; that in line with Article 194 of the Constitution of Kenya, parliament is the only organ vested with the legislative authority mandate of making laws in the Republic of Kenya. It is further averred that the enactment of the Universities (Amendment) 2016 was done within the confines of the law; laid down procedure and Law including public participation.

11. The Respondents further urge the legality and object of the Universities (Amendment) Act 2016 is connected to a just and legitimate purpose. That the entire petitions lack merit and are abuse of the Court process.

ANALYSIS AND DETERMINATION

12. I have very carefully considered the Petitioners pleadings, the Respondents and Interested Parties responses, the rival submission by both the Petitioners and Respondents and Interested Parties and from the aforesaid the following issues arises for consideration: -

a) Whether the Universities (Amendment) Act 2016 is improper and unconstitutional?

b) Whether Section 5A of the Universities (Amendment) Act, 2016 is unconstitutional?

A. WHETHER THE UNIVERSITIES (AMENDMENT) ACT 2016 IS IMPROPER AND UNCONSTITUTIONAL?

13. **Article 2 of the Constitution** has supremacy clause of the constitution declaring that the constitution is the Supreme Law of the Republic of Kenya and binds all persons and all State organs at both levels of government. It further provides that no person may claim or exercise state authority except as authorized under this constitution and that the validity or legality of this Constitution is not subject to challenge by or before any court or other State organs.

Article 2(4) (5) and (6) of the Constitution states as follows:

“2. Supremacy of this Constitution

(4) Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

(5) The general rules of international law shall form part of the law of Kenya.

(6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution”

14. It therefore follows from **Article 2(4) of the Constitution** that parliament in performance of its role under **Part 4 of Chapter 8 of the Constitution of Kenya**, is bound by the Constitution to act in accordance with its provision and legislate laws that are in conformity with the Constitution and any act or omissions in contravention of this Constitution are invalid.

15. In dealing with this Petition, the Court have to seek guidance from the substance in **Doctors for life International Vs. Speaker of the National Assembly and Others (CCT 12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** where the Court rendered itself as follows:

“But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament ‘must act in accordance with, and within the limits of, the constitution’, and the supremacy of the Constitution requires that ‘the obligations imposed by it must be fulfilled.”

16. Under **Article 10 of the Constitution of Kenya 2010**, includes public participation as a national value and principle of governance. **Clause 2 (a) of the Article** explicitly mentions public participation of the people as such. Thus value and governance principle is indeed supposed to be adhered to whenever a state organ, state officer, public officer and all persons whenever any of them enacts, applies or interprets any law or makes or implements public policy decisions. It therefore follows that the process of enacting the Universities (Amendment) Act, 2016 was bound by the provision of the Constitution.

17. The Parliament is further enjoined to the values of public service by **Article 232 of the Constitution** which states as follows:

“Values and principles of public service

(1) The values and principles of public service include—

a) high standards of professional ethics;

- b) *efficient, effective and economic use of resources;*
- c) *responsive, prompt, effective, impartial and equitable provision of services;*
- d) *involvement of the people in the process of policy making;*
- e) *accountability for administrative acts;*
- f) *transparency and provision to the public of timely, accurate information;*
- g) *subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;*
- h) *representation of Kenya's diverse communities; and*
- i) *affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—*
 - i) *men and women;*
 - ii) *the members of all ethnic groups; and*
 - iii) *persons with disabilities.*

18. The above-mentioned duties are further summarized under **Article 118(2) of the Constitution**, in part in the following terms:

“Public access and participation

(1) *Parliament shall—*

(b) *facilitate public participation and involvement in the legislative and other business of Parliament and its committees.”*

19. *One may wonder what does “facilitation of public participation” connote?* The question is however not without precedent as it was dealt with by the South African Court in the case of **Doctors for Life International V. Speaker of the National Assembly and Others** (CCT 12/05) (2006) (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) where the Court stated:-

“The phrase “facilitate public involvement” is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in the phrase are “facilitate” and “involvement”. To “facilitate” meant to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while participation is defined as “9a) taking part with others (in an action or matter); ... the active involvement of members of a community or organization in decisions which affect them”. According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process... .. the Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies.”(emphasis mine)

20. It is clear in my mind that the duty to facilitate public participation is not a hollow, formalistic one and for its sake, as it entails qualitative participation by members of public and of stake holders members for their in put is supposed to be considered seriously by parliament in any enactment.

21. This duty of facilitating public participation has since been judiciously defined to mean qualitative public participation, in the leading case of **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others (2014) eKLR**, in importing and applying the decision in **Doctors for Life International vs. Speaker of the National Assembly and Others** (*supra*), it was held thus:-

“in my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough in my view to simply “tweet” messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation”.

22. On public participation the Respondents and Interested Parties urge, that the National Assembly on 25th February 2016 published a notice in the Daily Nation inviting members of public to submit their views and memoranda on the proposed amendments in compliance with **Article 118 of the Constitution**. They urge that the mere fact that the Petitioners did not submit their views cannot be said that public participation was not considered as the Petitioners had an opportunity to have their views and/or grievances disputing the law making process which they did not.

23. The Respondents and Interested Parties therefore contend that there is uncontroverted evidence that there was public participation during the legislative process and placed their reliance on the case of **Were Samwel & 14 others vs. Attorney General & 2 Others [2017] eKLR** where Justice Mwita stated that :-

“Complying with the requirement to Public Participation does not mean every affected person, group of persons or segment of the society be contacted and heard individually. It would simply be impossible to hear everybody who claims to be affected by a given legislation. However, it suffices if the public including those to be affected were made aware of the impending legislative process and accorded an opportunity to participate. Therefore, failure to participate despite the opportunity given cannot invalidate the amendments for lack of Public Participation.”

24. The Respondents further urge the same Act was challenged in the case of **Were Samwel & 14 others vs. Attorney General & 2 Others [2017] eKLR** in which the Petitioners challenged the Constitutionality of **Section 18(1 C) (1D) and (1 E) of the Universities (Amendment) Act 2016** for lack of public participation. This Court in dismissing the petition held as hereunder:

“Regarding the standard to be applied in determining whether or not there was public participation, the Constitutional Court of South Africa stated in Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others [20016] ZAACC22.

“The standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament’s conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament’s conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances. ⁽¹⁾ as the power to determine how participation in the legislative process will be facilitated rests upon Parliament.

The Court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public.”

*The petitioner have argued that they form the section of the public that is potentially affected by the impugned amendments and that they should have been contacted for purposes of public participation before the amendments to the statute were effected. The amendments took place in the National Assembly because it was a legislative process. It was the National Assembly’s duty to ensure that there was Public Participation in accordance with **Article 118 of the Constitution** and had the responsibility to determine how public participation was to be facilitated and achieved.*

*In complying with the **Constitution** and the law with regard to Public Participation, the national Assembly called for memoranda through an advertisement published in the News Papers. Members of the Public who include the petitioners were made aware of the impending legislative process and had an opportunity to participate by submitting their views to the National Assembly. It was not necessary, in my view, that the Petitioners be invited individually, to participate in that legislative exercise.*

Complying with the requirement to Public Participation does not mean every affected person, group of persons or segment of the society be contacted and heard individually. It would simply be impossible to hear everybody who claims to be affected by a given legislation. However, it suffices if the public including those to be affected were made aware of the impending legislative process and accorded an opportunity to participate. Failure to participate despite the opportunity given, cannot invalidate the amendments for lack of Public Participation.

*I agree with the Court in **Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others (supra)**, that Public Participation ought to be real and not illusory and ought not to be treated as a mere formality for purposes of fulfilment of the constitutional dictates. There must be evidence that the public was accorded an opportunity to participate taking into account the circumstance s of each case.*

Applying the principals underlined in the above decisions to the circumstance of this Petition, I see no fault on the part of the respondents considering that indeed Public Participation was conducted for purposes of the impugned legislation. The public including the Petitioners were accorded reasonable opportunity by the National Assembly, and before then, through stakeholders’ engagement forums.

In the end the conclusion I come to is that I am not persuaded that this petition has merit. Consequently the petition dated 24th January 2017 is declined and is hereby dismissed. I make no order as to costs.”

25. Having considered the rival submission and authorities relied upon by both parties I am satisfied that the Respondents and the Interested Parties demonstrated that Parliament in enacting the Universities (Amendment) Act, 2016, did in fact observe the National values and Principles of governance as enshrined in **Article 10 of the Constitution**. The passing of the Bill was responsive, accountable and transparent. The parliament ensured public participation in the law making process which the Petitioners have not controverted, that the National Assembly had on 25th February 2016 published a Notice in the Daily Nation inviting members of public to submit their views and memoranda on proposed amendments in compliance with **Article 118 of the Constitution**.

Further the court in the case of **Were Samwel & 14 others vs. Attorney General & 2 Others [2017] eKLR** in dismissing the petition challenging the Universities (Amendment) Act, 2016 for lack of public participation found there was public participation. I cannot find otherwise as the Respondents have shown there was public participation. From the aforesaid I find no evidence to justify any finding and holding that the University (Amendment) Act 2016 is improper and unconstitutional under this issue.

B. WHETHER SECTION 5A OF THE UNIVERSITIES (AMENDMENT) ACT, 2016 IS UNCONSTITUTIONAL?

26. The Petitioners argue that **Section 5A of the University Amendment Act 2016** is vague and imprecise and presents both operational challenges and substantive Constitutional problems.

27. The Respondents contend the petitioners are challenging the constitutionality of **Section 5A of the Universities (Amendment) Act 2016** which provides that :-

“(1) If there is a conflict between the programmes provisions of this Act and the provisions of any other Act in matters relating approval or accreditation of academic programmes offered by universities, the provisions of this Act shall prevail.

(2) Despite the provisions of any other law, the recognition, licensing, student indexing, approval or accreditation of any academic programme including postgraduate degrees, diplomas including postgraduate diplomas and other academic certificates offered at a university shall be the exclusive mandate of the Commission to be exercised in accordance with this section at the exclusion of any other person or body.

(3) The Commission may, before approving any academic programme consult with any relevant body established by written law to regulate the profession to which the academic programme relates where such law empowers the professional body to approve or accredit courses offered at any university or colleges.

(4) Pursuant to section 5(2), the Commission may engage—

Professional bodies and associations to carry out inspection of universities on its behalf; the Auditor-General to offer the Commission professional opinion on management and financial positions of a particular university

(5) A person who without the authority of the Commission under this Act purports to license, accredit, recognise, audit, inspect, index students or collect a fee or a charge from a University or a student commits an offence and shall be liable on conviction to a fine not exceeding two million shillings or imprisonment for a term not exceeding two years or both. (emphasis added)”

28. On supremacy of **Section 5A (1) of the Universality (Amendment) Act, 2016**, the subsection points to the supremacy of the Act over the provisions of any other Act, however it is contended that the said supremacy is premised and/or limited to matters relating to approval, or accreditation of academic programmes offered by Universities, whereof it is urged as evident that this Section does not confer supremacy in relation to licensing.

29. In **Petition number 106 of 2017**, it is averred **Section 7(1) (j) of the EBK** on approval and accreditation of Engineering Education is still a life issued left to EBK under the **Engineers Act No. 43 of 2011**. Further in **Petition No. 37 of 2017** the Petitioner like any other professional body has the responsibility of licensing its professionals. In the health sector the responsibility to regulate the professionals lies with their professional body.

30. The Respondents and Interested Parties urge that the supremacy clause in **Section 5A of the Act** is clear and it therefore means it shall apply to all Regulatory bodies without any special treatment to be received by certain regulatory body.

31. The Petitioner in **Petition No. 49 of 2017** urged that the Licensing as conferred upon the petitioner by **Section 8 of the Legal Education Act No. 27 of 2012** as one of its functions, has not been made subject to the Supremacy ingredients of **Section 5A (1) of the Universities (Amendment) Act, 2016**; and so are functions of the other Petitioners in this Petition. It is urged that for the licensing of the Petitioners professionals herein is still a live issue under the ambit of the Petitioners' professional bodies.

32. On turning to **Section 5A (2) of the University (Amendment) Act 2016** the subsection confers exclusive mandate to the commission of Universities Education in what the subsection outlines as **“the recognition, licensing student, indexing, approval or accreditation of any academic programme including post graduate degree, diploma and other academic certificates offered at a University.”**

33. This subsection then provides that all the stated functions are **“to be exercised in accordance with this section.”** Which is in accordance with **Section 5 and / or 5A of the impugned Act** read as a whole.

34. From the reading of the impugned provision it is urged by the petitioners that it presents extremely difficulties as the Act has not amended the University Act at Section 5 to confer the commission for University Education with any additional functions. The Petitioners argue that the Act has not amended the University Act, to confer the commission of University Education with the Functions of licensing universities as legal education provider or as Engineering Education provider or Health provider and they urge as such functions of commission are still what has been provided for at Section 5 of the Universities Act, 2016.

35. It is urged that the only function touching on licensing is what **Section 5(1) (c) of the Universities Act** has provided **“to licence any student recruitment agencies operating in Kenya and any activities by foreign institutions.”** The Commission of University Education cannot therefore perform a function not granted to it by statute. **Section 5A (2) of the Act**, it is contended by Petitioners does not confer any new functions to the commission, it only confirms the functions already conferred at **Section 5(1) of the Act**, but now spells them to be exclusive and non-shared functions by the Commission of University Education.

36. It is further asserted that it is clear that the same issue plagues the meaning and interpretation of recognition. For Commission of University Education under University Act, under **Section 5(1) (g)** recognition is the mandate to **“recognize and equate foreign qualifications”**. For the Engineers Board of Kenya, which is strictly for professional purposes under **Section 1(h) and (j)**, the recognition /

certificates by the petitioner is different from recognition of Commission of University Education under the Universities Act, as amended.

37. The petitioners urge that the Commission of University Education cannot perform a function not granted to it by a statute and in support of its proposition the Petitioners rely on the case of ***Khelef Khalifa & 2 Others Vs. IEBC (2017) eKLR*** where it was held:-

“Statutory bodies derive their authority or jurisdiction from a legal instrument establishing them, and may only do what the law authorises them to do.”

38. I find by dint of the foregoing and the blatant fact that ***Section 5(2) of the Act does not confer any new functions to the commission***; I find the Commission is limited to that said functions and no more. The issue is therefore whether the licensing envisioned as the mandate of the respective Petitioners as provided in different statutes in respect of the respective professions are in conflict with any of the provisions of the Universities Act as amended. I find that licensing under ***Section 5 of the Universities Act*** and by extension ***Section 5(2) of the Act*** is different from licensing under either Legal Education Act or under relevant provisions regarding Engineering or Health Profession. Unlike for example the Universities Act Licensing is as provided for under Section 5(1) (e) to license students recruiting agencies, while under the legal education Act licensing is to license Legal Education providers in Kenya.

39. It is neatly worthy noting for example that Engineering Education is fundamental to the practice of engineering and accordingly to ***Section 7(1) of the Engineers Act requires Engineers Board of Kenya*** to approve and accord it engineering program's in public and private Universities and other tertiary level education institutions offering education in engineering. In the Supreme Court in the case of ***Martin Wanderi & 106 Others Vs. Engineers Registration Board and 10 others (2018) eKLR*** the Court observed :-

“We agree with the petitioners that under the new Engineering Act, the Board now has an express mandate to accredit universities offering engineering programs...”

40. I find from the aforesaid that ***Section 5A contradicts the other provisions of the Act*** and it does not meet the test of the Rule of Law prescribed under Article 10 of the Constitution which militates against contradiction and inconsistency. I further find that Section 5A though the object of the amendment was introduced to create certainty, it has created a vague and confusing situation as it has not clearly contradicted any provisions. In the case of ***Law Society of Kenya v. Kenya Revenue Authority & Another (2017) eKLR*** the court upheld its jurisdiction to declare as unconstitutional a legislation that is vague and contradictory and infringing or threatening to infringe Constitutional rights.

41. The Respondents and Interested Parties contend that the Universities (Amended) Act 2016 has as a consequence impliedly repealed Section 7 of the Engineers Board Act. The Petitioners contend that contention is based on misunderstanding of not the doctrine of repeal but also on scope and object of the Engineers Board Act. It is further urged that the Law is clear that the intent to repeal must clearly appear and such a repeal will be avoided at all possible ways. That the presumption against the intent to repeal by implication vests upon the assumption that the legislature enacts law with complete knowledge of all existing laws; pertaining to the same subject, so that the failure to add a repealing clause indicates that the intent was to repeal existing legislation on the matter. It is further submitted that Universities (Amendment) Act 2016 contains no express clause seeking to repeal law related to professional bodies Acts. It is urged that the presumption against the repeal by implication survives in the instant case. The Petitioners submit the courts do not look with favour upon the concept of implied repeal of statute, and in unclear circumstances the presumption in such circumstances is always against the intention of the legislative to repeal by implication. In the case of ***Republic v Council of Legal Education & another ex parte Mount Kenya University [2016] eKLR*** Hon. Justice Odunga observed that:-

“Whereas both the legal Education Act and the Universities Act confer upon the Respondent and the Commission the power to carry out regular visits and inspections of legal education providers and inspect university programme In Kenya, I am not prepared to invoke the doctrine of implied repeal in order to declare one such power redundant.”

The learned Judge further expounded on the doctrine of implied repeal in the same matter where he relied on the decision of Uganda Supreme Court in Attorney General vs. Silver Springs Hotel Limited and others SCCA No. 1 of 1989 that :-

“...unless the earlier Act and the later one are so plainly repugnant to each other that effect cannot be given to both at the same time a repeal will not be implied. It is well settled that the court does not construe a Later Act as repealing an earlier one unless it is impossible to make the two Acts or the two sections of the Acts stand together i.e. if the section of the Later Act can only be given a sensible meaning if it is treated as impliedly repealing the section of the earlier Act.”

42. The impugned Act and ***Sections 5A (3), 5A (4) of the Universities (Amendment) Act 2016*** gives the Commission of Universities Education discretion; If it so wishes to engage other regulatory agencies in the system of the statutory mandate, where it provides as follows:-

“The Commission may before approving any academic programme consult with any relevant body established by written law to regulate the profession to which the academic programme relates where such law empowers the professional body to approve or accredit courses offered at any university or colleges.

Pursuant to Section 5(2) the Commission may engage –

(a) Professional bodies and associations to carryout inspection of universities on its behalf;” (our emphasis)

43. This presents a serious conflict for agencies whose establishing statutory set them up as the exclusive bodies for the particular assignments, whose decisions on such matters in their prevalence is final. This for example is more compounded by ***Section 12 of the Legal***

Education Act which mandates the Petitioner to;

“exercise its functions in compliance with the general Government Policy and NOT subject to the control of any person or authority”

43. On the side of Engineers Board of Kenya it is specifically clear under **Section 7(2) of the Engineers Act 2011** which provides:-

“Where any conflict occurs between the provisions of this Section and other provision of any other written law for the time being in force, there provisions of this section shall prevail.”

44. In the instant Petition, the impugned Act purports to declare exclusivity to the Commission of Universities Education to perform functions that are still currently and that have been provided as exclusive to the other Acts of Parliament. The special acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is necessary inconsistency in the two Acts standing together against this background. I find that the Universities Act 2012 states that the Act is intended to, inter alia, provide for the development of Universities Education; the establishment of the Kenya Universities and College Central Placement Services Board and the repeal of certain laws. On the other hand, for example the Engineers Act preamble states that:-

“The Engineers Act is an Act of Parliament to provided for training, registration and licensing of engineers, the regulation and development of the practice of engineers and for connected purposes.

45. From the above it is clear the role of the Commission under University Act, 2012 is general, while that of the Engineers Board of Kenya or the Council of Legal Education or the Kenya Medical Practitioners and Dentists Board and other Boards; are governed by specific statutes whose functions have not been dealt with, despite the amendments in the Universities (Amendment) Act 2016. Further Section 49 of the Universities Regulations 2014 deals with approval of professional programme and provides that:-

“Functions of the Commission

1) The functions of the Commission shall be to –

a) Promote the objectives of university education;

b) Advise the Cabinet Secretary on policy relating to university education.

c) Promote, advance, publicize and set standards relevant in the quality of university education, including the promotion and support of internationally recognized standards;

d) Monitor and evaluate the state of university education systems in relation to the national development goals;

e) License any students recruitment agencies operating in Kenya and any activities by foreign institutions;

f) Develop policy for criteria and requirements for admission to universities;

g) Recognize and equate degrees, diplomas and certifies conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set by the commission from time to time;

h) Undertake or cause to be undertaken, regular inspections, monitoring and evaluation of universities to ensure compliance with the provisions of this Act or any regulations made under Section 70;

i) Collect, disseminate and maintain data on university education;

j) Approve universities in Kenya;

k) Regulate university education in Kenya;

l) On regular basis, inspect universities in Kenya;

m) Promote quality research and innovation; and ...”

46. The Respondents and Interested Parties urge that the Rule of Law is the restriction of the arbitrary exercise of power by subordinating it to well-defined established laws while the doctrine of legality is optioned in the latin phrase **“nulla poena sine lege”** which roughly translated, means **“no crime nor punishment without law.”** The Respondent and Interested Parties aver that the Petitioners in **Petition No 49 of 2017** seem to be misinterpreting and misapplying these doctrines and urged they have failed to show how Section 5A is unconstitutional.

47. The Respondents and Interested parties aver that the amendment has curtailed the arbitrary exercise of power granted through the statutes to various professional bodies. That the accreditation, licensing and recognition of University Education has been legally vested in

Commission of University Education as opposed to multiple bodies manned by professional body. The Interested Parties relies on the case of *EMMH vs RH Misc. Case No. 50 of 2016* where it was held:-

“Where the provisions of the status are in conflict, the provisions of a more recent statute is taken to have repealed the earlier statute, In *STREETS ESTATE LTD V MINSITER FOR HEALTH (1934) 1 KB* the court observed this about Parliament “But it can also do it another way, namely, by enacting a provision clearly inconsistent with the previous act; without going through them... without using the word repeal” parliament has repealed a previous provision by enacting a provision inconsistent with it...”

48. Further in the case of *David Sajjaka Nalima v. Rebecca Musoke Civil Appeal No. 12 of 1985* the Court held:-

“if the provisions of a later Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier Act is impliedly repealed by the latter Act. It is immaterial whether both Acts are Penal Acts or both refer to Civil Rights.

The former must be taken to be repealed by implication. Another branch of proposition is that if the provisions are not wholly inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provision of the Act...”

49. In *Martin Wanderi and 19 others v Engineers Registration Board and 5 others Pet No. 248 of 2012* Hon. Justice Mumbi held:-

“the effect of the enactment of the Universities Act after the Engineers Act, with the same power vested in the Commission for University Education to accredit courses for universities, takes away the power vested in the Board by Section 7(1) (L).

A fortiori, the power to recognize, license, index, approve or accredit any academic programme previously vested in any of the professional bodies in respect of university education is now within the domain of the Commission for University Education...”

50. It is clear from the provisions of the University (Amendment) Act, 2016 that it controls the exercise of powers granted to the Petitioner’s professional bodies through the status. The accreditation, licensing and recognition of University Education has now been vested into Commission Office, Commission of Universities Education as opposed to multiple bodies manned by professional bodies. The statutes governing the professional bodies are no doubt in conflict with the University (Amendment) Act, 2016 which is a more recent Statute. Where the provisions of the statutes are in conflict, the provisions of a more recent statute is taken to have repealed the earlier statute. I find that the Parliament can also repeal a statute by enacting a provision clearly inconsistent with the previous Act, without expressly using the word repeal. I find the parliament in the instant suit can be taken to have repealed a previous provision in the statute to various professional bodies by enacting a provision inconsistent with the previous provisions in the acts governing the professional bodies.

51. The Petitioners urge that at law until statute establishing other agencies have been repealed restricting their functions, they are still valid statutes. It is however urged that by implications of University (Amendment) Act 2016 encompassing the doctrine of **“implied repeal”** these are matters of statutory interpretation which can only be done by the Judiciary on application. The Petitioner further submit where a statute purports to criminalize functions in another statute which is not repealed, such provision is invalid. I find that in this Petition by Parliament enacting a more recent statute, in which the provisions of the that statute are in conflict with an earlier statute; the provisions of the more recent statute should be taken to have repealed the earlier statute even without express provisions to that effect. As regards the criminal offence the Act is clear that Section 5A (1) has been repealed only to the extent that it is in conflict with the Universities (Amendment) Act 2016 in matters relating to approval or accreditation of academic programmes offered by University. The amendment are not for threatening the doctrine of legality nor the rule of law. The reason for the amendment was to remove the duality in accreditation which has led to uncoordinated and sometimes contradictory directions. It should further be noted that in criminalizing acts done under the un-repealed Acts of Parliament, Section 5A(1) of the Act clearly provides that in case of conflict between the Act and any other law on the approval or accreditation of academic programme, the universities Act shall prevail. It follows therefore to this extent, the commission has the sole mandate of performing the above mentioned functions as opposed to multiple bodies manned by professional bodies. This clearly removes any conflicts that may arise. The University (Amendment) Act, 2016 was meant to clarify the respective roles of the commission and various professional bodies.

52. On principle of implied repeal and guided by the provisions of the interpretation and General Provisions Act, (Cap 2) Laws of Kenya, where the Act of Parliament concerning the same subject matter cannot subsist as in accordance with the doctrine of implied repeal, the statute enacted later takes precedence and the one predating the other is impliedly repealed to the extent of its inconsistency. In support of this preposition the Respondent rely on the case of *Street Estates Limited vs. Minister of Health [1934] 1 KB* as was cited in *Republic v. Council of Legal education & another Ex- Parte Mount Kenya University [2016] eKLR* where it was held that:-

“But it can also do it another way, namely, by enacting a provision clearly inconsistent with the previous Act; without going through them, four pages of *MAXWELL ON THE INTERPRETATION OF STATUTES* are devoted to cases in which without using the word “repeal” Parliament has repealed a previous provision by enacting a provision inconsistent with it. In those circumstances it seems to me impossible to say that these words ... have no effect.”

53. The Respondents also rely on the holding in *High Court Petition No. 320 of 2011 Elle Kenya Limited & Others vs. The Attorney General and Others*, where it was stated:-

“It seems to me, in the first instance, plain that the legislature is unable, according to our Constitution, to bind itself as to the

form of subsequent legislation; it is impossible for Parliament to say that in a subsequent Act of Parliament dealing with this subject matter shall there never be an implied repeal. If Parliament chooses in a subsequent Act to make it plain that the earlier statute is being to some extent repealed, effect must be given to the intention just because it is the will of the Legislature.”

54. This principle was also adopted by the Uganda Court of Appeal in ***David Sejjaka Nalima vs. Rebecca Musoke Civil Appeal No. 12 of 1985*** where it was held that:

“According to the principles of construction if the provisions of a later Act are so inconsistent with repugnant to those of an earlier Act that the two cannot stand together, the earlier Act stands impliedly repealed by the latter Act. It is immaterial whether both Acts are Penal Acts or both refer to Civil Rights.

The former must be taken to be repealed by implication. Another branch of the proposition is that if the provisions are not wholly inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the Act.”

55. From the above on the general principles of construction the court would treat the earlier decision as *pro tante* repealed by the later.

56. Having considered the pleadings, the rival submissions and authorities relied upon by the parties. I find that the petitioners have failed to demonstrate how the amendment of the Universities Act through the University (Amendment) Act, 2016 violate their fundamental rights and freedoms under the Constitution. The Petitioners first set out the Articles of the Constitution without substantiation and that is not enough. It has further been established that Section 5A of the Universities (Amendment) Act 2016, grants commission of University Education the sole mandate of regulating and accrediting universities and if there is any conflict with the professional bodies, the provisions of the Act prevails, this does away with the issue of overlapping mandate.

57. From the above I find that the Petitioners have failed to demonstrate that Section 5A of the Universities (Amendment) Act 2016 is unconstitutional, how and in what manner.

58. To the extent of my findings herein and considering the nature of the petition, I find and hold that the Petition has no merit. I dismiss the same and direct that each party do bear its own costs.

Dated, Signed and Delivered at Nairobi on this 11th day of June, 2020.

.....

J. A. MAKAU

JUDGE