IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & SICHALE, JJ.A)

CIVIL APPEAL NO. 174 OF 2015

BETWEEN

MARTIN WANDERI & 19 OTHERS.....APPELLANTS

AND

THE ENGINEERS REGISTRATION BOARD OF KENYA.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

MR. GAKUNGA.....3RD RESPONDENT

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY.....4TH RESPONDENT

EGERTON UNIVERSITY.....5TH RESPONDENT

(An Appeal from the Judgment and decree of the High Court of Kenya at Nairobi (Mumbi Ngugi, J) delivered on 26th *November 2014)* ***in HC Petition No. 243 of 2012)***

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JUDGMENT OF THE COURT

1. This is an appeal from the Judgment of the High Court of Kenya (Mumbi Ngugi, J.) dismissing a constitutional petition where the appellants herein, graduates from Masinde Muliro University of Science and Technology and Egerton University, sought orders, *inter alia*, declaring **section 5**, **7** and **16** of the Engineers Act, No 43 of 2011(herein after referred to as "the Act") unconstitutional and therefore null and void; restraining the Engineers Registration Board (herein after referred to as "the Board") from recruiting 500 or any other number of interns, carrying out any training of interns or spending any public resources in training of any interns or posting any interns pending the hearing and determination of this petition; a declaration that the Act is unconstitutional and therefore, null and void for failure to consult all stakeholders, and a declaration that the Engineers Registration Board of Kenya is not properly constituted, and that it should be disbanded and reconstituted in compliance with the prescription of the new Constitution.

2. It was the appellants' case that: the provisions of **section 5** of the Act are discriminatory against other engineering bodies in Kenya, among them Institution of Technologists of Kenya, the Kenya Society of Electrical and Electronic Engineers (KSEEE), the Institute of Electrical and Electronics Engineers (IEEE) Kenya section and the Kenya Society of Agricultural Engineers (KSAE), as the Board consists of 10 members, 6 of whom must be members of the Institute of Engineers of Kenya (IEK). Further, that the Act is unconstitutional for placing its architecture in the IEK, this being a violation of the freedom of association as envisaged under **Article 36** of the Constitution; **section 7** of the Act is unconstitutional as it gives the Board power to approve and accredit engineering courses, curriculum and examination, including the award of degrees and diplomas within Kenya hence usurps the role of the Commission for University Education (hereinafter referred to as "the Commission") in the accreditation of curriculum for engineering courses; **section 16** of the Act is discriminatory against the petitioners on the basis of age, in total contravention of **Article 27 (4)** and **Article 55** of the Constitution with regard to affirmative action requirement in respect of the youth which is not a permissible limitation under **Article 24** and; there was no public participation in the process leading up to the enactment of the Act in contravention of **Article 47** of the Constitution in terms of public participation and inclusion of all genders.

3. The interested parties before the High Court, being in support of the petition reiterated the petitioners' averments save that each university, both public and private, should be accorded representation on the Board for effective decision making on matters affecting universities and the courses they offer.

4. In response, the 1st and 2nd respondents opposed the petition arguing that there was nothing unconstitutional about the provisions of **section 5**, **7** and **16** of the Act, and that there was elaborate stakeholders' participation, involvement, consultations and deliberations spanning over a period of years before the enactment of the Act into law.

5. The two main issues that fell for the consideration of the High Court were whether **sections 5**, **7** and **16** of the Act are Unconstitutional and; whether the Act is unconstitutional for offending the principle of public participation.

6. Upon hearing the matter, the learned Judge ultimately held that:-

> **"71. At any rate, with regard to the issues raised by the parties, my findings are as follows:**
>
> **1. The provisions of sections 5, 7 and 16 of the Engineers Act, No. 43 of 2011 are not unconstitutional;**
>
> **2. The provisions of section 7(1)(l) of the Engineers Act has however been repealed by the provisions of the Universities Act, No. 42 of 2012;**
>
> **3. The Engineers Act, No. 43 of 2011, is not unconstitutional for failure to consult stakeholders.**
>
> **72. In light of the above findings, I hereby discharge the conservatory orders issued by the court in this matter on 8th June 2012 restraining the Kenya Engineers Registration Board from recruiting interns from the *Engineering School."***

7. Aggrieved by the aforesaid determinations, the appellant herein appealed against the entire judgment, raising 23 grounds of appeal *inter alia* that the learned Judge erred in fact and law in finding that: section 5, 7 and 16 of the Engineers Act were not unconstitutional and that the Act had not violated the constitutional requirement of public participation hence was null and void.

8. The 1st respondent also filed a cross appeal but during the plenary hearing its counsel, while acknowledging that the powers of the 1st respondent, had been taken away by law following an amendment to the Act, still insisted that the same be considered albeit for academic purposes.

9. The appeal was canvassed by way of written submissions with oral highlights by learned counsel. Mr. Katwa, counsel for the appellants urged the Court to allow the appeal on two main grounds i.e. that: **section 5**, **7** and **16** of the Act were unconstitutional; that the Act itself was unconstitutional hence null and void for being enacted without the consideration of the constitutional criteria of gender, youth, and persons with disability; r lack of public participation in its enactment as envisaged in the Constitution; and the Board as established therein is in violation of the law.

10. On the first ground, he submitted that **section 5**, **7** and **16** of the Engineers Act are fatally unconstitutional contrary to **Article 2(4)** of the Constitution. Citing **Article 36** of the Constitution he argued that the IEK, being the learned society of the engineering profession, had been given unfair recognition and privileges under **section 5** of the Act which provides that the members of the Board must be members of IEK. Further, that the said provision was discriminatory against other engineering bodies in Kenya as it fails to incorporate the membership and representation of all the universities that are or would in the future offer engineering courses.

11. He contended that the background and history of the incorporation of the IEK reveals that it was just an association of some engineers registered under the registrar of societies and is definitely not an engineers' umbrella association. That as such, it was discriminatory to place the composition of the Engineer's Act, its constitution and architecture in the IEK despite the existence of many other engineering professional bodies.

12. Mr. Katwa submitted that if IEK is allowed to admit engineers into its membership before recognition and promotion in the engineering industry, then some graduates would be completely locked out of attaining the professional qualifications. He maintained that this would be discrimination on the basis of age in violation of **Article 27** of the Constitution against graduates, who are otherwise eligible engineers, from practising.

13. Placing reliance on among others the case of **Peter K. Waweru -v-Republic Misc. Civil Application 118 of 2004** and **Baker v. California Land Title Co. D.C CAL 349 F. Supp 235, 238, 239** counsel argued that the application of **section 16** of the Act as read together with the IEK by-laws which provide for the relevant qualifications as per the age of an eligible engineering professional, is discriminatory to the extent that its implications are that a person has to be at least 33 years old to qualify as a corporate member, and a person has to be at least 25 years to qualify as a member of IEK. He maintained that remaining as a graduate member is discriminatory on the basis of age as it denies the young graduates and other engineering membership their rights and benefits enshrined in the Constitution.

14. On the second and third ground, Mr. Katwa submitted that the Board as currently constituted under **section 5** of the Act contravenes the criteria set under the Constitution in respect of gender, youth and persons of disability. Further, that the process of its establishment was not done in a fair, transparent manner, inclusive of a consultation and vetting process.

15. Citing **Article 259(11)** of the Constitution he challenged the powers of the Board arguing that there was no approval, consent or consultation with the universities or the Ministry of Education before the transfer of the role of the Commission in the accreditation of curriculum for engineering courses to the Board. Counsel maintained that the Act was enacted without the involvement of all the stake holders and members of the public. He maintained that the Act was enacted in bad faith and in disregard of the spirit of the Constitution.

16. On the cross-appeal, Mr. Kerongo for the 1st respondent first submitted that the High Court's findings that **section 7(1)(l)** of the Act had

been repealed by the University Act, No. 42 of 2012 was wrong as the same had been saved by **section 5(3)** of the University Act, No. 42 of 2012. He further submitted that there was no overlapping of the mandate of the Engineers Board with that of the Commission and that the Commission, as established under the University Act, No. 42 of 2012 does not have the power to approve and accredit engineering programmes.

17. In support of the appeal, submitting on whether **section 5** of the Act is unconstitutional, Mr. Kerongo contended that at the time when the petition was filed, the Act which was enacted on 14th September, 2012 vide Legal Notice No. 95 of 31st August, 2012 had not come into force hence the Board had not been constituted under **section 5.** Further, that the appellant's argument as to its conformity with the gender rule was anticipatory.

18. Counsel submitted that the appellants' arguments that the section is discriminatory against other engineering professional bodies is unfounded as there is no evidence on record either showing that the appellants are members of any such body or that the bodies actually exist. He maintained that despite a newspaper advertisement, no such body came forward to be joined as an interested party in the petition before the High Court.

19. Mr. Kerongo contended that under the new Act, the statutory role in the affairs of engineer registration, training and practice of the IEK is now a mandate of the Board under the repealing Act. Further, that IEK being the only professional Engineering society and as a former regulator of the profession now has a role in the nomination of the Board's chairperson; that IEK has no powers under the repealing Act as purported by the appellants.

20. On whether **section 7** of the Act is unconstitutional, counsel urged that by virtue of the Rules of Interpretation, the Act being the latter Act after the Universities Act, will prevail over the Acts establishing the Universities hence where there is conflict between the provisions of **section 7** of the Act and that of any other written law currently, section 7 will prevail. He urged that the appellants had not demonstrated how the learned Judge had erred in finding that **section 7** was not unconstitutional.

21. On whether **section 16** of the Act is unconstitutional, Mr. Kerongo submitted that the appellants are neither members of the Board nor IEK. Further, that they have not applied for any such membership hence their arguments are only abstract. He posited that the appellants specifically challenged IEK's by-laws which are not subject of the instant appeal as IEK is not a party to the suit.

22. He maintained that the process of application is under section 18 of the Act and the appellants being graduates from local universities are eligible to apply under the said section, and that section 16 does not apply to them following their qualifications. Counsel submitted further that the appellants petition was unfounded as they had not followed any steps to being certified engineers hence, they cannot claim that the process is discriminatory.

23. On the issue as to whether there was public participation, Mr. Kerongo submitted that the evidence on record shows that there was adequate public participation leading to the enactment of the Act a fact that was conceded by the interested parties. Further, that there is evidence of the participation of numerous other stakeholders.

24. Urging the Court to dismiss the appeal, Mr. Thandi for the 2nd respondent submitted that the issues for determination before this Court are: Whether section 5 and 16 of the Act are unconstitutional and; whether section 43 of the Act is unconstitutional.

25. On the first issue relying on the case of **Andrews v. Law Society of British Colombia (1989) 1 SCR 321**, he submitted that the learned Judge was right in her observation that there were cogent and logical reasons as to why IEK was allowed to constitute a majority of the members in the Board; that there was nothing discriminatory in such constitution of the Board. He urged that there was no basis for the appellants' contention that their freedom of association had been infringed as it is a universal practice for professionals to be regulated by a single body.

26. Mr. Thandi submitted that the learned Judge was right in holding that the appellants' contention that the IEK by-laws were discriminative on the basis of age did not mean that the Act as a whole was unconstitutional. Citing the case of **Republic -v- The Council of Legal Education, Misc. Civil Case No. 137 of 2004** he maintained that the learned Judge was right in limiting herself from delving into the technical elements of academic or professional issues.

27. On the second issue he submitted that the learned Judge correctly observed that there was public participation before the enactment of the Act. He contended that the interested parties were indeed party to such public participation.

28. In opposition of the appeal, Mr. Wesonga submitted on behalf of the 2nd interested party. In view of the fact that this Court's rules do not provide for an Interested Party, the 2ndinterested party in the circumstances shall be identified as the 4th respondent for purposes of this appeal. Counsel submitted that the 4th respondent was opposing the appeal solely on the ground that the Act was enacted without public participation. He contended that despite the fact that the process of public participation was evident, the views of the stake holders were not put into consideration and no reasons were given for the exclusion. Relying on the case of **Robert N Gakuru & another v Governor Kiambu County & 3 Others [2013] eKLR** he submitted that the enactment of the Act did not meet the constitutional threshold of public participation hence it was unconstitutional.

29. In response to the 1st respondent's cross-appeal, Mr. Katwa for the appellants submitted that the 1st respondent had not given any compelling reasons as to why the learned Judge could be faulted for finding that **section 7(1)(l)** of the Act had been repealed by the University Act, No. 42 of 2012 as the same had been saved by **section 5(3)** of the University Act, No. 42 of 2012. He conceded that following the amendment of the Act there was no overlap of mandate between the Board and the Commission. He urged that the cross-appeal be dismissed.

30. This being a first appeal, this Court's duty is to subject the whole of the evidence to a fresh and comprehensive scrutiny and make its own conclusions. See: **Selle & Another -v- Associated Motor Boat Co. Ltd. & Others (1968) EA 123.** In view of the foregoing, having considered the record of appeal in entirety, we have identified the major issues for our determination as:-

i. Whether section 5, 7 and 16 of the Engineers Act, No. 43 of 2011 are unconstitutional;

ii. Whether there was public participation in the enactment of the Engineers Act, No 43 of 2011

31. On the first issue the appellants argued that **section 5, 7** and **16** are unconstitutional in the following manner:

a. That **section 5 and 7** of the Act are said to be unconstitutional on the basis that: The Board's is constituted of 10 members, 6 of whom are members of IEK which is discriminatory against other engineering professional bodies; that the membership to the Board requires one to be a professional engineer who is a corporate member of the IEK; that the composition of the Board violates the constitutional provisions in regard to consideration of representation based on the criteria of gender, youth, and persons with disability; and that the Board's powers under the Act usurp the powers of the Commission for accreditation;

b. Section **5 and 7** of the Act are discriminatory against other Engineers bodies including the Institution of Technologists of Kenya, KSEEE, KSAE and Agricultural Association of Kenya which are specific to various Engineering disciplines. It was contended that the IEK is given unfair recognition and privileges as against the aforecited engineering bodies;

c. That **section 16 of the Act** is unconstitutional on the basis that it is discriminative on the basis of age in that it prescribes that a person has to be at least 33 years to qualify as a corporate member and that a person has to be at least 25 years to qualify as a member of IEK. The appellant thus posit that the provision denies young graduates and other engineering membership their right and benefits enshrined in the Constitution.

32. The general principle of interpretation of statutes is that a law or regulation should as much as possible be read to be consistent and be declared unconstitutional or void only where it is impossible to rationalize or reconcile it with the Constitution or the Act respectively. See: **re Hyundai Motor Distributors (Pty) Ltd –v- Smit No [2000] ZALC12:2001(1) SA545(CC), 200(10) BCL1079 CC ZALC12:2001(1).**

33. In the case of **Political Parties Forum Coalition & Others –Versus-Registrar of Political Parties & 8 Others (2016) eKLR,** this Court emphasised on the presumption of constitutionality of statute in the following words;-

"It is well established that every statute enjoys a presumption of constitutionality and the court is entitled to presume that the legislature acted in a constitutional and fair manner unless the contrary is proved. (See Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers -v- Kenya Revenue Authority & others High Court Petition No. 544 of 2013). We are alive to the principle that there is a rebuttable presumption that any legislation is constitutional. (See Ndyanabo -v-Attorney General [2001] 2EA 485)."

34. In the persuasive High Court decision of **Law Society of Kenya –v-Attorney General & National Assembly (2016) eKLR** the court found that discrimination which is frowned upon by the Constitution is where it is unjustifiable and irrational. Therefore, it is always the duty of the party alleging discrimination to demonstrate that undeniably, there is unreasonable differential treatment rendered to persons of the same class or category to amount to actual discrimination. The Court further expounded, that it is not every differential treatment that amounts to discrimination. Therefore, it is paramount to identify the criteria that separates legitimate differential treatment from constitutionally impermissible differential treatment. (See: **Federation of Women Lawyers Kenya (FIDA-K) & 5 Others -v- Attorney General & Another [2011] eKLR**).

35. It is trite that he who alleges must prove. Further, **Section 109** of the Evidence Act states that ***"the burden of proof as to any particular fact* lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."**

Therefore, the burden of proof is on the appellants to demonstrate that they have suffered discrimination and that the aforementioned impugned sections of the Act are unconstitutional.

36. On the constitutionality of section 5 and 7 of the Act, the appellants contend that the said provisions elevate IEK and accords it preference over other professional bodies in the engineering sector. In urging their case, the appellants simply listed the alleged institutions but have not given any proof to demonstrate that the alleged institutions are indeed bodies of equal status as the IEK so as to demonstrate that they ought to be recognized in equal measure. As far as these bodies are said to be adversely aggrieved by the provisions of the said law, they were not made parties to these proceedings in order to ventilate their respective positions. Further, it has not been demonstrated whether the petitioners are indeed members of these institutions so as to establish whether they are directly affected by the impugned provisions. In our view therefore, they have failed to demonstrate any such violation of the Constitution.

37. Further, since the petitioners' alleged discrimination is said to be against the alleged bodies, then the proper party to claim such violation is the party discriminated against or a party instituting on behalf of a party that cannot act in their own name. In the instant case, the nexus between the appellants and the alleged bodies has neither been established nor has evidence been tendered in that respect; the appellants neither alleged that they are members of the said bodies nor provided any evidence of such membership before the Court.

38. It is common ground that an advertisement was placed in the media following Orders by the High Court on joinder of interested parties.

There were no such applications for joinder on record by the said bodies seeking to join the proceedings as interested parties in order to ventilate their grievances and concerns, if at all. It is therefore evident that had such alleged bodies been aggrieved by the enactment of the Act they would have equally made applications for joinder as interested parties so as to ventilate their grievances and concerns.

39. We find no fault with and endorse the finding of the learned Judge to the effect that:-

> **"I agree with the 1st respondent on this issue. Article 22(2)(a) provides that a petition may be brought by "a person acting on behalf of another person who cannot act in their own name." There is no averment by the petitioners that they have brought the petition on behalf of the named associations or any others; and there is nothing to show why those other bodies, had they been aggrieved, did not join in the present proceedings, the court having made an order that the proceedings should be advertised in the media."**

40. The appellants further claim discrimination contending that the requirements of being a professional engineer are discriminative as they require membership to the IEK as a precondition and not any other society hence breaching their freedom of association enshrined under Article 36 of the Constitution. Again, in this instant, the appellants have not demonstrated the manner in which their right to freedom of association has been violated since as shown above, other than merely mentioning the said bodies, the appellants have not proved the existence of other professional societies for engineers to which they would be accorded accredited membership of equal status as corporate members of IEK. Therefore, the appellants' argument that **section 5** of the Act is unconstitutional was not proved to the expected threshold.

41. On the Constitutionality of **section 16** of the Act, the appellants challenged the trial court's findings on grounds that the learned Judge erred by failing to find that the requirements for the qualifications to be an engineer as provided for under the IEK's By-laws are discriminatory on the basis of age. It was contended that by reason of **section 16** of the Act, for a person to be eligible for registration as a professional or consulting engineer, the person has to be a corporate member of the IEK. In this respect, the appellants cite the IEK By-laws which prescribe age qualifications.

42. On this aspect, and as submitted by the appellants, the age requirements are set out in the IEK By-Laws and not expressly prescribed in the impugned Act. It cannot therefore be said that the Act is discriminatory against the appellants on the basis of age since the age requirements are expressly set out in the IEK By-laws and not under the provisions of **section 16** of the Act as alleged. The learned Judge was on point when she observed that the discriminatory provisions are not contained in the Act but in the IEK By-laws. If the appellants were aggrieved by the By-laws, then they should have challenged them and not the section of the Act on which they are anchored. On this issue, the learned Judge expressed herself as follows:-

> **"As submitted by the respondent, the fact that by-laws made pursuant to the provisions of an Act may be discriminatory does not make the Act itself unconstitutional. The petitioners' challenge ought to have been directed at the by-laws so that arguments can be made and considered with regard to their compliance with the requirements of the Constitution."**

We agree with the learned Judge on that on the above finding.

43. In a nutshell, based on the foregoing reasons, we find that the appellants have failed to establish any violation of their Constitutional rights and their contention that **section 5**, **7** and **section 16** of the Act are unconstitutional is unfounded.

44. On the issue of **public participation**, it is common ground that an invitation for public participation was made to all stake holders based on a factual finding by the High Court. The appellants faulted the learned Judge's decision on the ground that despite such public participation, the views of the stake holders were not taken into consideration. The respondents in opposition argued that the mere fact that the stakeholder's views were not taken into consideration does not mean that there was no public participation.

45. In the recent past most Kenyan Courts have cited with approval Sachs J. in the South African case of **Minister of Health & Another –v- New Clicks South Africa (Pty) Ltd & Others 2006 (2) SA 311 (CC)** where at para. 630, he noted that:-

> **"The forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case."**

46. In the case of **Kiambu County Government & 3 Others -v- Robert N. Gakuru & Others (2017) eKLR**, this Court had the opportunity to examine the principle of public participation in law making and pronounced itself as follows;-

> **"The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation, but does not define or say how it should be implemented. In Article 196, it commands County Assemblies to, inter alia, facilitate public participation and involvement in the legislative and other business of the Assembly and its committees, but again does not say how."** (Emphasis supplied)

47. The above sentiments were expounded by this Court in its decision in the case of **Legal Advise Centre & 2 Others –v- County Government of Mombasa & 4 Others, (2018) eKLR**, in which it rendered itself as follows:-

> **"It is now settled, that what matters in determining whether the constitutional threshold of public participation has been met is that at the end of the day a reasonable opportunity is offered to the members of the public and/or all interested parties to know about the issue/project and to have an adequate say on the same. See this Court's decision in Nairobi Metropolitan Psv Saccos Union Limited & 25 others vs. County of Nairobi Government & 3 others [2014] eKLR."**

48. As correctly observed by the learned Judge, there is evidence, on record, that there was some level of public participation before the Act was eventually enacted in 2012. These findings of fact are in fact conceded to by the 3rd to 5th respondents (interested parties before the High Court), the contention being only that the views of the deans of various institutions were not taken into account. There is no requirement in law that all stakeholders' views collected and collated in the course of public participation must be incorporated in the proposed Bill. After public participation follows the exercise of sieving the collected suggestions/material to separate the 'wheat from the chaff' and some material will inevitably be discarded. There is no legal imperative for reasons or explanation to be given to any stakeholder whose views were not incorporated. The complaint by the respondents that no explanation was given to them as to why their views were not incorporated in the Act is superfluous and has no basis in law.

49. In view of the above, and the fact that all stakeholders were provided with a forum to give their opinions the impugned law passed the constitutional test of public participation and as such there is no reason to impeach the said provisions on the premise urged by the appellant.

50. In regard to the cross-appeal by the 1st respondent, as conceded by the 1st respondent the same is an invitation to the Court to make a determination on an academic question as the provisions in question have since been amended. We do not see any need to engage in such an exercise.

On the whole, we find no merit in both the appeal and cross appeal and dismiss both with orders that each party bears its own costs.

Dated and delivered at Nairobi this 7th day of August, 2020.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR