REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 248 OF 2012

MARTIN WANDERI & 19 OTHERS
…….....PETITIONERS

Versus

THE ENGINEERS REGISTRATIO BOARD OF KENYA….....…….1ST RESPODNENT

ATTORNEY GENERAL…. …….....…2ND RESPODNENT

JOHN WAWERU GAKUNGA…….....….....1ST INTERESTED PARTY

MASINDE MULIRO UNIVERSITY OF SCIENCE & TECHNOLOGY…..2ND INTERESTED PARTY

MOI UNIVERSITY…….....3RD INTERESED PARTY

EGERTON UNIVERSITY……..…….....4TH INTERESTED PARTY

JUDGMENT

Introduction

1. The petitioners filed the present petition challenging the provisions of the Engineers Act, No 43 of 2011. The basis of the challenge was that the provisions of the Act are unconstitutional in that among other things, they discriminated against parties such as the petitioners on the basis of age. It appears that the petition was precipitated by an advertisement in the Daily Nation of 16th May 2012 seeking to recruit 500 engineering interns into the Engineering School established under the Act.

2. Together with the petition, the petitioners filed an application under certificate of urgency in which they sought to restrain the Engineers Registration Board established under the Act from recruiting engineers to attend the engineering school to be established by the Board.

3. At the time this petition was filed, there was pending before Majanja J High Court Petitions Nos. 207 of 2011 and 149 of 2011. Upon hearing the application for conservatory orders, the court ruled that such recruitment as was contemplated would prejudice the rights of the petitioners in Petition No. 149 and 207 of 2011 who were then pursuing their right to be registered as engineers. It therefore issued orders restraining the Kenya Engineers Registration Board by itself, its employees, servants or agents from recruiting interns as advertised pending further orders of the court.

4. Subsequent to applications made pursuant to advertisements in the media on the orders of the court, Mr. **John Waweru Gakunga**, **Masinde Muliro University of Science and Technology, Moi University** and **Egerton University** were enjoined to the proceedings as the 1st, 2nd, 3rd, and 4th interested parties respectively.

The Petition

5. In the petition dated 6th June 2012, the petitioners seek orders declaring section 5, 7 and 16 of the Act unconstitutional and therefore null and void. They also sought orders restraining the Engineers Registration 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.

6. They further prayed that the court issues a declaration that the Engineers Act, No 43 of 2011 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.

7. The respondents opposed the petition, but all the interested parties supported it. The parties filed affidavits in support of their respective cases as well as extensive submissions and authorities.

Preliminary Issue

8. Before dealing with the substantive issues raised by the parties, it is best to dispose of two preliminary issues raised in the responses to the petition. The 1st respondent filed a notice of preliminary objection dated 3rd June 2013 in which it alleged that the present petition is premature as the petition was filed before the Engineering Act, which is the subject of challenge, came into force. The second limb of the objection is that the petition offends the principle of *res judicata* as the issues that it raises had been the subject of Petitions Nos. 149 and 207 of 2011.

9. Mr. Kerongo, Learned Counsel for the 1st respondent, submitted that the petitioners moved to court to challenge the Engineers Registration Act before it had the force of law, and that the suit was therefore premature and is a nullity. Counsel relied on the Special Issue of the Kenya Gazette dated 31st August 2012, **Legal Notice No. 95 of 31st August, 2012**, which gives the commencement date of the Act as 14th September 2012. It was his submission that at the time the suit was filed on 6th June 2012, the Act was not operational and did not therefore have the force of law.

10. The 1st respondent makes a similar argument with regard to the challenge to the composition of the Board under the Act. It contends that as the Board was constituted on 26th August 2012, there was no Board at the time of the filing of the suit that could be challenged as unconstitutional. It argues therefore that the suit was in all respects premature and therefore null and void.

11. In response to these arguments, Learned Counsel for the petitioners, Mr. Katwa, submitted that the Engineers Act was assented to on 27th January 2012 and came into force on 14th September 2012, while the Board was constituted on 27th August 2012. He contended that the moment the Act is assented to, the legislation has crystallized and the commencement date is a question of logistics, and that is what the Attorney General and Minister had in mind when constituting the Board. The petitioners therefore submitted that the petition was sanitised as it was filed 6 months after the Act was assented to. It is also their case that the petition is based on Article 22 of the Constitution, and the moment the Act was assented to, it created the likelihood of infringement in the future, and the petition was therefore properly before the court.

12. I have considered the respective submissions of the parties on this point. It is indeed correct that the Act was assented to in January 2012 with the effective date as 14th September 2012, while the petition was filed on 6th June 2012. I take the view that while the petition was filed before the Act came into force, it was, due to a combination of factors, heard long after the commencement of the Act. Consequently, at the time the objection with regard to its being premature was being raised, the issues that it raised were live and properly before the court. I also agree with the petitioners that to strike out the petition on this basis would serve no useful purpose as they would simply file another to challenge the Act as the issues that they raise are still in dispute.

13. With regard to the contention that the petition is *res judicata,* the 1st respondent submits that this petition raises the same issues as were raised by the petitioners in Petition Nos. 149 and 207 of 2011 which sought registration by the Engineers Registration Board of students from Masinde Muliro University of Science and Technology and Egerton Universities. The respondents argue that in his judgment on the consolidated petitions, Majanja J ruled that the powers of the Board under the Act do not include the power to accredit and approve engineering courses offered by public universities.

14. While denying that this petition raises the same issues as the said petitions, the petitioners argue that the present petition is different in that it seeks declarations of unconstitutionality of section 5, 7 and 16 and nullification of the entire Act.

15. I have considered the judgment of Majanja J in the consolidated petitions. It is indeed true, as contended by the 1st respondent, that the court considered the power of the Engineers Registration Board to accredit courses for engineering courses at universities. I note that in his judgment, Majanja J was of the view that the Engineering Registration Board had no mandate, under the provisions of the then **Engineers Act, Cap 530** of the Laws of Kenya, to approve courses and curriculum. He held as follows in his judgment:

> ***"I hereby declare that the powers of the Engineers Registration Board under the Provisions of Section 11(1)(b) of the Engineers Act (Chapter 530***

> ***Laws of Kenya) to register Engineers <u>does not include the power to accredit and approve engineering courses offered by public universities incorporated under the Laws of Kenya.</u>"*** (Emphasis added)

16. Mr. Katwa is correct that the judgment of the court in that matter did not deal with the provisions of section 7 of the current Act, dealing, as it did, with the provisions of section 11(1)(b) of the Engineers Act which has been repealed by the current Engineers Act. It is my finding therefore that the issues raised in this petition are not ***res judicata.***

Issues for Determination

17. Having disposed of the preliminary issues, I now turn to consider the substantive issues raised in the petition. The petitioners claim that the provisions of section 5, 7 and 16 of the Engineers Act, No 43 of 2011, are unconstitutional, and that the Act is also unconstitutional for being enacted without public participation as required under the Constitution. The two main issues for consideration therefore are, in my view, as follows:

> ***i. Whether sections 5, 7 and 16 of the Engineers Act No 43 of 2011 are Unconstitutional;***
>
> ***ii. Whether the Act is unconstitutional for offending the principle of public participation.***

Whether Section 5 of the Act is Discriminatory

18. Section 5 of the Act provides for the composition of the Engineers Registration Board. The petitioners allege that its provisions are discriminatory against other engineering bodies in Kenya in that while the Board consists of 10 members, 6 of those must be members of the Institute of Engineers of Kenya (IEK). In his affidavit in support of the petition, Mr. Wanderi depones that the advantages given to the IEK, which the petitioners describe as a private body, is at the expense of many other private engineers associations registered under the Societies Act. He names some fifteen such associations, including the 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).

19. The petitioners further contend that they should have a choice as to which association to join, and they argue therefore that the Act violates Article 36 on the right to freedom of association, and that the Act is unconstitutional for placing its architecture in the IEK.

20. The petitioners' position is supported by the interested parties, though for different reasons. In its affidavit in support of the petition sworn by **Prof J. K. Tuitoek** on 10th October 2013, Moi University contends that section 5 of the Act provides for the appointment to the Board of only one member representing the universities offering engineering courses in Kenya; that there are today many public and private universities in Kenya; that there should be more than one representative on the Board; and each university should be accorded representation on the Board for effective decision making on matters affecting universities and the courses they offer. These averments mirror the positions taken on the issue by the other universities.

21. In response, the 1st respondent argues that there is no evidence that the alleged engineering associations exist, contending that if they did, there was no reason why they did not apply to be enjoined in the proceedings as interested parties. It argues, further, that under the provisions of the repealed Engineers Act, the Institute of Engineers of Kenya was statutorily recognized, but that such powers as it had under the Act have now been taken away and vested in the Board, and it now plays only a peripheral role. It is also its case that the provisions of section 5 are not discriminatory; that it is the Chairman of the IEK who is made a member of the Board by section 5(e); and that the IEK has membership across all fields of engineering.

22. 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.

23. With regard to the argument by the universities that they should all have representation on the Board for effective decision making on matters affecting universities and the courses they offer, I believe two responses suffice. First, as will emerge later in this judgment, it is my view that the provisions of the Universities Act impliedly repeal the provisions of section 7(1) of the Engineers Act and that the Board therefore does not have power to accredit or approve curriculum for universities.The second reason is based on the practicality of the interested parties' argument, and its impact on the effectiveness of the Engineers Registration Board. As the university interested parties observe, there are more than 7 public universities and several private universities offering engineering courses in Kenya. It would make for an unwieldy and unworkable Board if it was to comprise of membership from all universities in Kenya.

24. I have noted also the historical background which seems to have informed the choice of the IEK as the body in which the architecture of the Act is primarily reposed, and which, in my view, gives a rational basis for this choice. First, it was the body which had the mandate under the repealed Engineers Act, to register engineers. As submitted by the petitioners:

> "***It is to be understood that the origin of IEK is that the Institution of Engineers of Kenya (IEK) is the learned society of the engineering profession and co-operates with national and other international institutions in developing and applying engineering to the benefit of humanity. The East African Association of Engineers (EAAE), which was the precursor to the Institution of Engineers of the Kenya (IEK), was formed in 1945 as a professional and learned body, independent of control by governments and with membership spread in the original East Africa i.e. Kenya, Uganda, and Tanzania (Tanganyika and Zanzibar). The break up of the East African Community in the early 1970's resulted in the splitting of most of the professional/learned bodies, among them the EAAE. IEK was born out of this split. IEK was registered as a professional/learned and independent body in 1972."***

25. The petitioners are, nonetheless, unhappy about its position in the Act, arguing that it is an association of some engineers registered under the Registrar of Societies and not an engineers' umbrella association.

26. It appears to me, however, that the intention behind the Act was to regulate the engineering profession, and to do this through the setting of uniform standards. I am not satisfied that this can be achieved through a situation in which the regulation of a critical profession such as engineering can be left in the hands of several, disparate bodies as the petitioners seek.

27. The petitioners have also argued that the Engineers Registration Board is unconstitutional and should be reconstituted to reflect constitutional prescriptions on representation and gender, among others. No evidence was tendered in this regard, and so I make no findings with regard thereto.

Whether Section 7 of the Act is Unconstitutional

28. The petitioners and the interested parties are unhappy with the provisions of section 7 of the Engineers Act which they see as usurping the role of University Senates in the accreditation of curriculum for engineering courses. Mr. Katwa submitted that Section 7 of the Act is unconstitutional as it gives the Engineers Registration Board power to approve and accredit engineering courses, curriculum and examination, including the award of degrees and diplomas within Kenya. This argument was supported by the 2nd, 3rd and 4th interested parties, who submitted that the provisions of the Act are unconstitutional and in conflict with the Universities Act which gives the Senate of universities the mandate to accredit and approve courses.

29. This argument is well articulated and expounded upon in the affidavit sworn on behalf of the 2nd interested party, Masinde Muliro University, by **Professor Sibilike Khamala Makhanu** on 29th November 2012 and in their written submissions. The 2nd interested party submits that under Section 7 (1)(l) of the Act, the Board is given powers to:

> ***"…approve and accredit engineering programs in public and private universities and other tertiary level educational institutions offering education in engineering for the purposes of registration as graduate engineers……."***

30. The 2nd interested party further submit that at section 2 of the Universities Act, No. 42 of 2012, 'accreditation' means the procedure by which the Commission for University Education (CUE) formally recognizes an institution or university under part III of the Act. Further, it submits that under section 5 of the Universities Act, the functions of the Commission for University Education include, among other things, to accredit and regulate university education in Kenya; and to accredit and inspect university programs in Kenya. Section 5(2) of the Act gives power to the Commission, where it deems appropriate, to delegate its functions under Section 5 to any suitably qualified person or body. The 2nd interested party contends that there is no evidence that there has been any formal delegation of power from the Commission for University Education to the Board.

31. It is further submitted on behalf of the 2nd interested party that the predecessor of the Commission for University Education, the Commission for Higher Education, has always worked hand in hand with university senates rather than the Engineers Registration Board in the accreditation and approval of curriculum for engineering courses at universities. It is its case therefore that the powers of its senate conferred by the provisions of sections 5, 20 and 23 of the Universities Act cannot be taken away by the Board, as this would be to usurp or amend the powers granted by Parliament through the back door; and that this would amount to a violation of Chapter Eight of the Constitution, which establishes the legislature and vests in it the legislative power of the state.

32. Moi University, the 3rd interested party, agreed with the 2nd respondent on this issue. It was submitted on its behalf that section 7 of the Act, which gives the Engineers Registration Board power to accredit courses, when read with section 46 of the Act which creates offences for one to offer courses not accredited by Board, effectively make it an offence for the senates of universities to do that which they are permitted to do by law. It was also its submission that sections 7 and 46 of the Act stifle the right to education under Article 43 and the obligation of the state to take affirmative action measures under Article 55 to offer education to the youth.

33. The 1st and 2nd respondents contended that there was nothing unconstitutional about the provisions of section 7 of the Act. The 1st respondent submitted that the constitutionality of section 7 of the Engineers Act was at issue in Petition No. 149 and 207 of 2011; that if it was not, it should have been, and that therefore the matter is *res judicata*.

34. Mr. Kakoi for the 2nd respondent submitted that section 7 operationalizes the Act and is not in conflict with any provisions; that section 7(2) is clear that if there is any conflict with any Act, its provisions shall prevail; and that its provisions are not unique to the engineering profession. Mr. Kakoi, Learned Counsel for the Attorney General, submitted that a look at different legal regimes governing professional bodies showed that there were similar provisions. He cited the Council of Legal Education Act which establishes the Council of Legal Education and submitted that there is a similar provision that provides for training of Advocates and gives the role to the Council of Legal Education. He asked the court, in considering the prayers sought, to consider the implication of the prayers to other legal regimes and find that the section is constitutional.

35. I have considered the provisions of section 7 of the Engineers Act and the submissions of the parties with regard thereto. The sections of the Act relevant for our purposes are section 7(1)(l) and 7(2), but it is perhaps best to set out section 7 in its entirety in order to adequately capture the competing concerns of the parties with regard to the Act. The section is in the following terms:

> ***7(1) "The functions and powers of the Board shall be to—***
>
> ***(a) receive, consider, make decisions on applications for registration and register approved applications;***
>
> ***(b) keep and maintain the Register;***
>
> ***(c) publish the names of registered and licensed persons under this Act;***

(d) issue licences to qualified persons under the provisions of this Act;

(e) publish and disseminate materials relating to its work and activities;

(f) carry out inquiries on matters pertaining to registration of engineers and practice of engineering;

(g) enter and inspect sites where construction, installation, erection, alteration, renovation, maintenance, processing or manufacturing works are in progress for the purpose of verifying that—

(i) professional engineering services and works are undertaken by registered persons under this Act;

(ii) standards and professional ethics and relevant health and safety aspects are observed;

(h) assess, approve or reject engineering qualifications of foreign persons intending to offer professional engineering services or works;

(i) evaluate other engineering programmes both local and foreign for recognition by the Board;

(j) enter and inspect business premises for verification purposes or for monitoring professional engineering works services and goods rendered by professional engineers;

(k) instruct, direct or order the suspension of any professional engineering services works, projects, installation process or any other engineering works, which are done without meeting the set out standards;

(l) approve and accredit engineering programs in public and private universities and other tertiary level educational institutions offering education in engineering;

(m) set standards for engineers in management, marketing, professional ethics, environmental issues, safety, legal matters or any other relevant field;

(n) prepare detailed curriculum for registration of engineers and conduct professional examinations for the purposes of registration;

(o) establish a school of engineering and provide facilities and opportunities for learning, professional exposure and skills acquisition, and cause continuing professional development programmes for engineers to be held;

(p) establish the Kenya Academy of Engineering and Technology whose purpose shall be to advise the National and the County Governments on policy matters relating to engineering and technology;

(q) plan, arrange, co-ordinate and oversee continuing professional training and development and facilitate internship of graduate engineers;

(r) collaborate with engineering training institutions, professional associations, engineering organizations and other relevant bodies in matters relating to training and professional development of engineers;

(s) determine the fees to be charged by professional engineers and firms for professional engineering services rendered from time to time;

(t) hear and determine disputes relating to professional conduct or ethics of engineers;

(u) develop, maintain and enforce the code of ethics for the engineers and regulate the conduct and ethics of engineering profession in general;

(v) determine and define disciplines of engineering recognised under this Act;

(w) conduct recruitment of staff of the Board through a competitive process; and

(x) carry out such other functions related to the implementation of this Act.

36. At section 7(2), the Act provides for conflict with other laws by providing as follows:

(2) Where any conflict arises between the provisions of this section and the provisions of any other written law for the time being in force, the provisions of this section shall prevail.

37. Section 7(1)(l) of the Act thus gives to the Board the same mandate as was given to the Commission on University Education and the University Senates by the Universities Act which I have considered above. It appears to me that there is a clear conflict with regard to the accreditation and approval of curricula for engineering courses at universities in Kenya, created by Parliament through the enactment of the two Acts which were enacted in the same year, and came into force within months of each other.

38. As I observed elsewhere above, Majanja J had made a finding in Petition Nos. 149 and 207 of 2011 that the powers of the Engineers Registration Board under section 11(1) (b) of the repealed Engineers Act did not ***"include the power to accredit and approve engineering courses offered by public universities incorporated under the Laws of Kenya."*** I understand from the petitioners that this finding by the Court is still the subject of appeal before the Court of Appeal. However, it seems to me that this finding has been given legislative force by Parliament with the enactment of the Universities Act, No. 42 of 2012. Whether this development was deliberate or not, this court is not in a position to say. Suffice to say that the effect of the enactment of the Universities Act after the Engineers Act, with the same powers vested in the Commission for Universities Education to accredit courses for universities, takes away the powers vested in the Board by section 7(1)(l). This is because of the canons of interpretation with regard to the timing of legislation, and the doctrine of implied repeal, which is to the effect that where provisions of one Act of Parliament are inconsistent or repugnant to the provisions of an earlier Act, the later Act abrogates the inconsistency in the earlier one.

39. As noted earlier, the Engineers Act was assented to on 27th January 2012 and came into force on 14th September 2012. Conversely, the Universities Act was assented to on 13th December 2012, with a commencement date of the same day. It was thus enacted about 11 months after the Engineers Act and came into force, three months after the commencement of the Engineers Act.

40. It is true, as submitted by the respondents, that section 2 of the **Engineers Act** provides that ***"Where any conflict arises between the provisions of this section and the provisions of any other written law for the time being in force, the provisions of this section shall prevail***." The operative words are ***"for the time being in force',*** meaning, in my view, any legislation that predates the Engineers Act. So what is the position where the provisions of the Act are in conflict with legislation enacted **subsequent** to the Act, as is the case with the Universities Act?

41. Several decisions, local and foreign, have considered and ruled on similar situations. In the case of **United States vs Borden Co 308 US 188, (1939)** the court stated as follows:

> ***"…It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal 'must be clear and manifest'. It is not sufficient as was said by Mr. Justice Story in Wood v. United States, 16 Pet. 342, 362, 363, 'to establish that subsequent laws cover some or even all of the cases provided for by (the prior act); for they may be merely affirmative, or cumulative, or auxiliary'. There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy'…"***

42. In the case of **Steve Thoburn v Sunderland City Council 2002 EWHC 195** the court stated as follows:

> ***"… [42] Mr Shrimpton cited a library's worth of authority on the doctrine of implied repeal. It is no injustice to his clients if I do not refer to all the cases. The essence of the doctrine is very clear and very well known. He placed particular emphasis on two authorities, Vauxhall Estates Ltd [1932] 1 KB 733 and Ellen Street Estates Ltd [1934] 1 KB 590. These both concerned the same slum clearance legislation. S.2 of the Acquisition of Land (Assessment of Compensation) Act 1919 provided for the assessment of compensation in respect of land acquired compulsorily for public purposes according to certain rules. Then by s.7(1):***
>
> ***"The provisions of the Act or order by which the land is authorised to be acquired, or of any Act incorporated therewith, shall, in relation to the matters dealt with in this Act, have effect subject to this Act, and so far as inconsistent with this Act those provisions shall cease to have or shall not have effect…"***

S.46 of the Housing Act 1925 provided for the assessment of compensation for land acquired compulsorily under an improvement or reconstruction scheme made under that Act in a manner which was at variance from that prescribed by the Act of 1919. In Vauxhall Estates Avory J (sitting in this court) stated at 743 - 744:

"… I should certainly hold… that no Act of Parliament can effectively provide that no future Act shall interfere with its provisions… [I]f they [the two statutes] are inconsistent to that extent [viz. so that they cannot stand together], then the earlier Act is impliedly repealed by the later in accordance with the maxim 'Leges posteriores priores contrarias abrogant'."

In Ellen Street Estates it was submitted that Vauxhall Estates had been wrongly decided. In the Court of Appeal Scrutton LJ addressed the contention that the earlier Act prevailed over the later at 595 – 596:

"That is absolutely contrary to the constitutional position that Parliament can alter an Act previously passed, and it can do so by repealing in terms the previous Act… and it can do it also in another way – namely, by enacting a provision which is clearly inconsistent with the previous Act."

Maugham LJ said at 597:

"The Legislature cannot, according to our constitution, bind itself as to the form of subsequent legislation, and it is impossible for Parliament to enact that in a subsequent statute dealing with the same subject-matter there can be no implied repeal. If in a subsequent Act Parliament chooses to make it plain that the earlier statute is being to some extent repealed, effect must be given to that intention just because it is the will of the Legislature."

Now as I have explained, Mr Shrimpton's case is that s.2(2) of the ECA is only repealed pro tanto – to the extent that it empowered legislation which would be inconsistent with s.1 of the 1985 Act as enacted. Authority to the effect that the doctrine of implied repeal may operate in this limited fashion is to be found in Goodwin v Phillips [1908] 7 CLR 1, in the High Court of Australia, in which Griffith CJ stated at 7:

"… if the provisions are not wholly inconsistent, but may become 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 later Act."

In my judgment this also represents the law of England; indeed the proposition stated is no more than a necessary concomitant of the implied repeal doctrine…" (Emphasis added)

43. In this jurisdiction, Lenaola, J had occasion to address his mind to this point in **High Court Petition No. 320 of 2011 Elle Kenya Limited & Others –vs- The Attorney General and Others.** The court was in that case concerned with the apparent conflict

between the provisions of the **Alcoholic Drinks Control Act**, which prohibited packaging of alcoholic drinks in bottles of less than 250ml, enacted in 2010 and which came into operation on **22nd November, 2010,** and the **Finance Act, 2010** which amended section 91 A of the Customs and Excise Act to provide for packaging of alcoholic beverages in bottles of not less than 200ml and which was assented to on **21st December, 2010,** but whose provisions were to apply retrospectively from 11th June 2010. In finding that the later Finance Act repealed the Alcoholic Drinks Control Act, the court relied on several foreign and local decisions. It stated as follows at paragraphs 39-41 of its decision:

> [39.] In the English case of ***Vauxhall Estates Ltd v Liverpool Corporation*** **[1932] 1K.B.,** the court stated as follows at page 746;
>
> ***"If it is once admitted that Parliament, in spite of those words of the sub-section has power by a later Act expressly to repeal or expressly to amend the provisions of the sub-section and to introduce provisions inconsistent with them, I am unable to understand why Parliament should not have power impliedly to repeal or impliedly to amend these provisions by the mere enactment of provisions completely inconsistent with them."***
>
> [40.] In **Street Estates, Limited v Minister of Health[1934]1 K.B.** at page 389, the Court stated;
>
> **"*I asked counsel what meaning he attached to those words, and he said they meant nothing, because the Act of 1919 had said that nothing inconsistent with it shall have any effect. That appears to me absolutely contrary to the constitutional provision that parliament can alter an Act which it has previously passed. It can do so by repealing the previous Act, and I gather counsel admits that, if it does that, it does not matter that the Act of 1919 has said that Act shall have no effect. 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 by enacting a provision inconsistent with it. In those circumstances it seems to me impossible to say that these words...have no effect."***
>
> [41.] Further at page 390, Maugham L.J. went on to state as follows,
>
> ***"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 that intention just because it is the will of the Legislature."***

44. The court also placed reliance on the decision of Hayanga J in **Nzioka & 2 others v Tiomin Kenya Ltd, Mombasa Civil Case No. 97 of** 2001 in which he observed as follows:

> ***" ...The EMC Act being a more recent Act must be construed as repealing the old Act where there is inconsistency....where the provision of one statute are so inconsistent with the provisions of a similar but later one, which does not expressly repeal the earlier Act, the courts admit an implied repeal*** **(**See also Karanja Matheri v Kanji[1976-80]1 KLR 140)".

45. In the case of **Crywan Enterprises Limited v Attorney General & Another, Petition No. 196 of 2011** the court took the following view:

> ***"The petitioner's claim is based on the apparent inconsistency between the two Acts in so far as they relate to packaging. In my view, there is no conflict as it is now settled that where there are two provisions in Acts of Parliament that are in conflict, the later Act repeals the former I agree with the dictum of*** **Avory J in Vauxhall Estates Limited v Liverpool Corporation(supra) that, "...if they are inconsistent to that extent, then the earlier act is impliedly repealed by the later."**

46. I fully agree with the sentiments and findings of the court in the decisions cited above. The Universities Act, being a later legislation, impliedly repealed the provisions of the Engineers Act in so far as the accreditation of courses at universities is concerned.

Whether Section 16 is Discriminatory on the Basis of Age

47. The petitioners argue that section 16 of the Act is discriminatory against them on the basis of age, in total contravention of Article 27 (4). Mr. Katwa submitted that the **by-laws** of IEK provide that one should not be registered as an engineer until they reach 25 years of age; that one needs to be at least 33 to be a corporate member, and cannot be a member of Institute of Engineers of Kenya (IEK) if after the age of 40, one is still a graduate member. They submit that this is discrimination on the basis of age and a violation of Article 55 with regard to affirmative action requirement in respect of the youth, and is not a permissible limitation under Article 24.

48. This position was supported by Mr. **John Gakunga**, the 1st interested party, who avers in his affidavit sworn on 30th June 2013 that he had suffered through the actions of the Engineers Registration Board and has not been able to register as an engineer; and that the actions of the Board violate the provisions of Articles 27 and 55 of the Constitution. The universities also support the petitioners, arguing that the failure to register the petitioners has made the courses offered at their institutions unattractive and led to loss of revenue for them.

49. Section 16 of the Engineers Registration Act is in the following terms:

> ***"Subject to the provision of this Act, a person shall be eligible for registration under this Act as a professional or consulting engineer if:-***
>
> ***a. For a professional engineer, that person***
>
> ***(iii) is a corporate member of the Institution of Engineers of Kenya;***

50. The petitioners argue that the discrimination under the section is indirect and is to be found in the by-laws of the Institute. They submit that according to the by-laws, to qualify as a Fellow Engineer, one should have been a member of the Institute of Engineers of Kenya for at least 3 years and must be over 33 years of age; to qualify as a member, one is required to have academic qualification in engineering approved by the Institute of Engineers of Kenya, and 3 years' experience, and be at least 25 years of age. Further, the by- laws provide that to qualify as a graduate member, a person must have a degree in engineering or equivalent academic qualification in engineering approved by the Institute of Engineers of Kenya. The by-laws also provide that no person is allowed to remain a graduate member of the Institute of Engineers of Kenya after the end of the calendar year in which he or she attains the age of 40 years.

51. It should be observed, first, that the discriminatory provisions are not contained in the Act but in the IEK by-laws. 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.

52. In any event, the 1st respondent submits, and I am inclined towards this argument, that there is a relationship of proportionality between the measures imposed in the Act and the by-laws, and the goal set to be achieved by the Engineers Board, namely the setting and maintenance of high standards in the Engineering profession. The respondent has relied on the decisions in the case of **Republic -vs- The Council Of Legal Education Misc Civil Case No 137 of 2004** in which Nyamu J (as he then was) stated;

> ***"As stated above I have come to the conclusion that the facts of this case and demands of high standards of education for Advocates and other professions distinguish it form the line of authorities relied on by the counsel for the applicant. In addition I hold the view that while the Court would otherwise be justified in claiming as much territory as possible in the name of fairness, this being its core business it is not necessarily the best judge in academic or professional matters….."***

53. The Court further observed at page 13 of the decision that*:*

> ***"The other reason why this Court has declined to intervene is one of principle in that in academic matters involving issues of policy the Courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should be largely non justiciable. I see no reason why in a democratically elected Government any detected defects in such areas including defects in policy should not be corrected by the Legislature."***

54. The respondents have also referred the court to the decision of Majanja J in **Petition Number 126 of 2011 Okenyo Omwanza & Another –vs- The Attorney General** where he

expressed himself as follows in relation to whether Section 32 of the Advocates Act is unconstitutional:-

> **"*Firstly the pursuit of a legal career is a voluntary act and those who choose to join the legal professions do so out of choice and therefore agree to abide by the terms of engagement which are regulated by statute. These terms include regulation of training, qualification and practice.*"**

55. I fully agree with the sentiments expressed by the court in these matters.

56. When one considers the provisions of the two Acts of Parliament in contention, the **Engineers Act** and the **Universities Act,** and the acrimonious positions taken by the parties in this matter, one gets the distinct impression that the parties are operating at cross-purposes, and that there is no effort being made to find common ground, and to work towards the enactment by Parliament of legislation that meets the greater needs of society. The main protagonists in the matter are the Engineers Registration Board, the Institute of Engineers of Kenya, and the universities which carry out the training of students. The Board and IEK see their role as the setting and maintenance of engineering standards, and to this end, they wish to have a role in the accreditation of courses at universities offering engineering degrees.

57. The universities, judging from their submissions, have a major concern about their revenue, which is doubtless a legitimate concern, hence their submission that the failure by the Engineers Registration Board to register their former students will make their courses unattractive. The petitioners, on the other hand, seem caught in a situation not of their making, where they enter institutions on the assumption that what they get from their universities of choice will make them acceptable professionally, and therefore able to earn a living from their training as engineers.

58. Which raises the question: is there any consultation between the Board, the institute, and the universities in the choice of curriculum, and with regard to the standards to be met by those who wish to practice as engineers in Kenya? In the enactment of the two statutes that gave the 1st respondent and the Commission for University Education under the Universities Act the same mandate, was there any participation by stakeholders? The principles of consultation and public participation are central to Kenya's new constitutional dispensation, and are at the core of the final issue for determination in this matter.

Public Participation in the Enactment of the Act

59. The court has had occasion to consider the issue of public participation as required under the Constitution in many decisions, one illustration of which will suffice. In the case of **Kenya Small Scale Farmers Forum & 6 Others V Republic Of Kenya & 2 Others [2013] eKLR** the court held as follows:

> ***"One of the golden threads running through the current constitutional regime is public participation in governance and the conduct of public affairs. The preamble to the Constitution recognizes, "the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law." It also acknowledges the people's 'sovereign and inalienable right to determine the***

form of governance of our country…" Article 1 bestows all the sovereign power on the people to be exercised only in accordance with the Constitution. One of the national values and principles of governance is that of 'inclusiveness' and 'participation of the people."

60. See also **Nairobi Metropolitan PSV SACCOS Union Ltd and 25 Others vs County Government of Nairobi and 3 Others High Court Petition No. 486 of 2013.**

61. In this case, the petitioners allege that there was no public participation in the process leading up to the enactment of the Act. They term this a violation of Article 47 in terms of public participation and inclusion of all genders. They allege that the documents relied on by the 1st respondent annexed to the affidavit in reply sworn by Eng. Gilbert Arasa, which are intended to show public participation have no relevance to the Act in dispute; that the 1st respondent mischievously used meetings held on 2nd March 2011 and another meeting held on 6th August 2009 as evidence of participation; and that the 1st respondent's alleged consultative process does not purport anywhere to have consulted universities or the Ministry of Education in purporting to usurp the powers of universities. While conceding that consultations took place, the 2nd Interested Party's submissions on this issue are that the consultations undertaken were not sufficient and the views of the Deans of several universities were not taken into account.

62. In response, the 1st respondent provided a bundle of documents annexed to the affidavit of Eng. Arasa in reliance on which it was submitted that there were elaborate stakeholders participation, involvements and consultations and deliberations spanning over a period of years before the enactment of the current law. Mr. Kerongo submitted that there had been various forums attended by various interested groups, among them the 2nd and 3rd interested parties. He also pointed out that Counsel for the 2nd interested party had conceded that there had indeed been such consultation, but that the views of the interested parties were not taken into account. It was the 1st respondent's case that what was required was consultation, the implication being that the views did not have to be taken into account, and the constitutional requirement had therefore been satisfied.

63. The constitutional requirement that there must be public participation in the enactment of legislation, or in any act undertaken by public authorities that affects the rights of citizens, is a matter that is now, I believe, beyond dispute. In the present case, there is evidence, in the documents relied on by the 1st respondent, that there was some level of public participation for quite some time before the Act was eventually enacted in 2012. This is in fact conceded by the interested parties, the contention being only that the views of the deans of various institutions were not taken into account.

64. The importance of consultation and participation is demonstrated by the conflict between the Engineers and the Universities Act. It is evident that there was insufficient consultation in the enactment of the Universities Act, for had there been such consultation, the current scenario in which we have two conflicting legislation on the same issue, enacted in the same year and coming into force within months of each other, could have been avoided.

65. What is the duty of the court when faced with a situation such as is currently before me? In the case of **Elle Kenya Limited** (supra) Lenaola J stated as follows:

[34.] I must at this point point out, as courts have always done that in interpreting legislation it is not the role of this court to interrogate the wisdom or otherwise of its enacted laws. As the court stated in Re Application by Bahadur [1986] LRC 545 ***(Const.), "I would only emphasise that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown…***Further at page 304 it was stated that; ***"It is not the function of the Court to form its own judgment as to what is fair and then to "amend or supplement it with new provisions so as to make it conform to that judgment."***

[35.] It is therefore not the business of this court to distil what it thinks should have been the law; whether the 200ml or the 250 ml is the 'right' or 'wrong' or 'fair' measure. As this Court stated in the case of ***Mount Kenya Bottlers Limited & 3 others v Attorney General & 3 others, Petition No. 72 of 2011,*** *the Courts cannot act as "regents" over what is done in Parliament because such an authority does not exist.*

[36.] The US Supreme Court in ***U.S v Butler*****, 297 U.S. 1[1936]**had this to ay on a similar issue;

"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. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."

66. I fully agree with the sentiments of Lenaola J set out above. In the circumstances before me, it is not the duty of the court to say, nor is it qualified to say, whether the accreditation of courses and curricula for students undertaking engineering courses in public universities is best done by those in academia, who have the day to day duty of educating the students; or by the Registration Board, which deals with engineers engaged in practice and may well claim to be well versed in the practical application of engineering courses and are best suited to set guidelines and criteria for one to eventually qualify for registration, the ultimate aim being to render quality, safe engineering services to members of the public.

67. What appears to be self-evident is that the 1st respondent and the 2nd, 3rd and 4th interested parties are in a close symbiotic relationship, and cannot properly work at cross-purposes if societal interests in a well-trained and qualified corps of engineers is to emerge from the institutions of higher learning.

68. What I am under a duty to do is to make a determination whether the impugned provisions of the Engineers Act are in violation of the Constitution. It is my finding, and I do hold, that there is no violation of the Constitution by the provisions of sections 5, 7 and 16 of the Engineers Registration Act impugned by the petitioners and the interested parties.

69. I do find, however, that with regard to section 7(1)(l) of the Act, the provisions thereof, in so far as they vest in the 1st respondent the mandate to accredit courses and curricula for engineering courses at universities, has been repealed by the provisions of the Universities Act which vests such mandate in the Commission for University Education.

70. It is, I believe, incumbent on the 1st respondent and the interested parties to go back to the drawing board and consult with a view to having legislation enacted that is in the best long term interests of parties in the position of the petitioners but, more importantly, in the greater public interest.

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 for the Engineering School.

73. With regard to costs, I direct that each party bears its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 26th day of November 2014

MUMBI NGUGI

JUDGE