

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. OF 2023

IN THE MATTER OF THE CONTRAVENTION AND THREATENED CONTRAVENTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 21, 27, 28, 31,
35, 43(1)(F), 47, 55 AND 56 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ENFORCEMENT AND PROTECTION OF THE BILL OF
RIGHTS UNDER ARTICLES 19, 20, 21, 22, 23, 24, 165, 258, AND 259 OF THE
CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE PRESIDENTIAL WORKING PARTY ON EDUCATION
REFORMS APPOINTED VIDE GAZETTE NOTICES NUMBER 11920 OF THE 30TH
DAY OF SEPTEMBER 2022

AND

IN THE MATTER OF THE CONSTITUTIONALITY OF THE DEVIATION OF HIGHER
EDUCATION FUNDING FROM THE MAXIMUM DIFFERENTIATED UNIT COST
ESTABLISHED IN THE UNIVERSITIES ACT, 2012

AND

IN THE MATTER OF THE FAIR ADMINISTRATION ACT, 2015

AND

IN THE MATTER OF THE CONTRAVENTION OF SECTIONS 53 AND 54 OF THE
UNIVERSITIES ACT, 2012

AND

IN THE MATTER OF ARTICLE 13(2)(C) OF THE INTERNATIONAL COVENANT ON
ECONOMIC, SOCIAL AND CULTURAL RIGHTS

BETWEEN

KENYA HUMAN RIGHTS COMMISSION 1ST PETITIONER
BOAZ WARUKU 2ND PETITIONER
ELIMU BORA WORKING GROUP..... 3RD PETITIONER
THE STUDENTS' CAUCUS4TH PETITIONER

VERSUS

THE ATTORNEY GENERAL 1ST RESPONDENT
THE CABINET SECRETARY FOR EDUCATION 2ND RESPONDENT
THE HIGHER EDUCATION LOANS BOARD3RD RESPONDENT
THE TRUSTEES OF THE UNIVERSITIES FUND KENYA 4TH RESPONDENT
KENYA UNIVERSITIES AND COLLEGES CENTRAL PLACEMENT
SERVICE..... 5TH RESPONDENT

PETITION

TO: THE HIGH COURT OF KENYA

NAIROBI

THE HUMBLE PETITION OF KENYA HUMAN RIGHTS COMMISSION AND BOAZ
WARUKU WHOSE ADDRESS FOR SERVICE FOR PURPOSES OF THIS PETITION
ONLY SHALL BE CARE OF MITULLAH SHAKO & ASSOCIATES ADVOCATES, LLP
LOWER HILL DUPLEX APARTMENTS, SUITE 37 OFF LOWER HILL ROAD, UPPER
HILL P.O BOX 142-00502 NAIROBI IS AS FOLLOWS: -

A. DESCRIPTION OF THE PARTIES

1. The 1st Petitioner is a Non-Governmental Organisation (NGO) registered in Kenya that champions for human rights centred governance at all levels and strives to root human dignity, freedoms, and social justice in Kenya and beyond.
2. The 2nd Petitioner is a member of the Elimu Bora Working Group which is a network of Civil Society Organizations working to promote the right to Education in Kenya through awareness creation, research, policy influencing, advocacy and partnership building.
3. The 3rd Petitioner is a network of Civil Society Organizations working to promote the right to Education in Kenya through awareness creation, research, policy influencing, advocacy and partnership building.
4. The 4th Petitioner is a group representing different student leaders across the country whose overall mission is to expand the shrinking civic space within Kenyan universities and by extension the country.
5. The 1st Respondent is the principal legal advisor to the Government and is statutorily mandated by Article 156(4)(b) of the Constitution to represent the National Government in court and has been sued in that capacity.
6. The 2nd Respondent is a Constitutional Office Holder under Article 152 of the Constitution and performs among other functions, formulation of education policy, supervision and inspection of Education Institutions and updating the Parliament on the progress of Education in the country.
7. The 3rd Respondent is a Statutory Body under The Higher Educations Loans Board Act, CAP 213A of the Laws of Kenya charged with the mandate of among other functions, to set the criteria and conditions governing the granting of loans

including the rate of interest and recovery of loans and to enter into contracts with financial institutions for the purpose of loans disbursement and recovery.

8. The 4th Respondent is a statutory body established by Section 54 of the Universities Act, 2012 and its task is to manage the University Fund under Section 53 of the Universities Act 2013 which provides funds for financing universities.
9. The 5th Respondent is a State Corporation that provides career guidance and selects students for admission to universities, national polytechnics, technical training institutes and other accredited higher learning institutions for Government of Kenya-sponsored programmes.

B. BACKGROUND INFORMATION AND FACTS OF THE CASE

10. This Honourable Court bears the solemn responsibility of upholding and safeguarding the rights and essential freedoms enshrined in the Bill of Rights as prescribed by Article 21(1) of the 2010 Constitution of the Republic of Kenya. Under Article 23(1) of the Constitution, the High Court is vested with the authority to hear and adjudicate cases pertaining to the denial, violation, infringement, or potential threat to any rights or fundamental freedoms outlined in the Bill of Rights. Furthermore, Article 165(3)(d) confers upon the High Court the jurisdiction to interpret the Constitution, including the determination of the compatibility or non-compliance of any legislation and/or policy with the Constitution.
11. Article 258 of the Constitution establishes the inherent right of any individual to initiate legal proceedings, whether individually or in the interest of the public, asserting that the Constitution has been violated or is at risk of being violated.
12. This Honourable Court is also mandated to construe the Constitution in a manner that promotes the rule of law, as well as the human rights and fundamental freedoms outlined in the Bill of Rights, as specified in Article 259(1)(b).

13. Article 23(3) (a-e) of the Constitution grants this Honourable Court jurisdiction to grant “an appropriate relief”, including a declaration of rights, a conservatory order, an injunction, a declaration of the invalidity of a law and an order for compensation.
14. The Petitioners’ herein present this petition challenging the Variable Scholarship and Loan Funding (VSLF) Model (or New Higher Education Funding Model) that was launched by the President William Samoei Arap Ruto on 3rd May 2023. This new model would affect funding of University Education for Technical and Vocational Education and Training (TVET) to universities.
15. The President vide a Gazette Notice number 11920 and dated 30th September 2022, appointed a Presidential Working Party on Education Reform comprising a total of 49 members: 42 members, and 7 Secretaries. Their Terms of Reference included among others:
 - a) To review and recommend a governance and financing framework for TVET training and development, university education, research and training
 - b) To study all laws governing the tertiary education subsector and make recommendations for review of these legislations with a view to streamlining effectiveness and efficiency in the subsector
 - c) To review and recommend legislation to facilitate amalgamation of HELB, TVET and University Funding Boards with a view of harmonising and merging all tertiary education funding entities.
16. The Working Party, after concluding their functions, presented a report dated 9th June 2023 and titled Transforming Education, Training and Research for Sustainable Development in Kenya.

17. This report made several recommendations on funding of Tertiary Education, including the following recommendation.

Government to implement the Variable Scholarship and Loan Funding (VSLF) Model (or New Higher Education Funding Model) to replace the Differentiated Unit Cost Model (Appendix 10.2). The Model combines scholarships and loans and is appropriate for different categories of students: Vulnerable, extremely needy, needy, and less needy Scholarships and loans will be distributed to four distinct categories of Universities/TVETs/TTCs students as shown below:

Student category	Scholarships (%)	Loans (%)	Household (%)
<i>Vulnerable</i>	82	18	0
<i>Extremely Needy</i>	70	30	0
<i>Needy</i>	53	40	0
<i>Less Needy</i>	38	55	7

18. It is this recommendation that the President partially adopted in creating the Variable Scholarship and Loan Funding (VSLF) Model (or New Higher Education Funding Model).

19. The Variable Scholarship and Loan Funding (VSLF) Model (or New Higher Education Funding Model) is designed to provide financial support to students enrolled in Universities and TVET institutions through a combination of loans, government scholarships and household contributions.

20. According to the official website, "It is a new way of providing financial support to students enrolled in Universities & TVET institutions to ensure every Kenyan student is assisted according to their level of need."

21. These scholarships and loans are apportioned according to a system that categorizes students as follows:

- I. Vulnerable
- II. Very needy
- III. Needy
- IV. Less needy

22. The students are expected to individually apply for the loans and scholarships, and the applications are considered based on a model that uses a Means Testing Instrument (MTI) to determine “the student’s level of financial need so as to ensure they are supported adequately.”

23. The Petitioner’s contend that this Variable Scholarship and Loan Funding (VSLF) Model (or New Higher Education Funding Model) and its adoption is unconstitutional, and violates several fundamental constitutional requirements including it being a breach of human rights, an illegal presidential directive, lacking compliance with public fiscal responsibility principles, failing the public interest test, failing to meet legitimate expectations, and being in violation of Fair Administrative Action. The Petitioners also aver that the Respondents have acted ultra vires in the implementation of the funding model.

PARTICULARS OF BREACH OF FUNDAMENTAL HUMAN RIGHTS

Article 43(1)(f) of the Constitution on education as a basic human right

24. The Petitioners aver that the Variable Scholarship and Loan Funding (VSLF) Model (or New Higher Education Funding Model) is arbitrary, obscure, expensive, undefined, and an illegality, is an affront to the right to education as part of economic social rights under Article 43(1)(f) of the Constitution in the rushed implementation.

25. By implementing the Variable Scholarship and Loan Funding (VSLF) Model (or New Higher Education Funding Model) as it currently is, the Respondents have

failed to observe their duty under Article 21(2) of the Constitution to protect, promote, respect and fulfil these rights, including the right to education.

26. By initiating the Variable Scholarship and Loan Funding (VSLF) Model (or New Higher Education Funding Model) which will lock out millions of students from getting university funding, the Respondents are violating the constitutional requirement to provide education as a basic human right and specifically to protect vulnerable members of the society which include children and youth.

Article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights

27. As a signatory of Article 13(2)(c) of the International Covenant on Economic, Social and Cultural Rights, the state should ensure full realisation of higher education and make it accessible to all. The funding model as it is currently being implemented is exclusive, and discriminatory against students whose family backgrounds are not covered by the narrow categories that the Respondents have not even properly identified.

28. The Respondents are also failing to meet their obligations under this Section by transferring the bulk of University Funding to students and their parents, and making tertiary education more expensive, instead of making it progressively free as the Covenant obliges them to.

Article 27 of the Constitution on Equality Freedom from Discrimination

29. The Funding model is also discriminatory because of the requirement that a student must be above the age of 18 to apply for funding. This is a violation of Article 27 of the Constitution as it locks out students who have not attained the age of 18 from being able to apply for funding.

30. The Petitioners further aver that the Funding Model discriminates against millions of students who are subjected to arbitrary classifications that are not based on merit or qualification, but on the financial ability of the students.

31. The Petitioner aver that these classifications will lead to many deserving students being unable to apply for funding if they do not fit in the narrow categories that the new model sets out.

Article 35 of the Constitution on Access to Information

32. The Petitioners also contend that as it currently stands, the Funding Model is a breach of the Right of Access to information. Among critical information that students do not currently have even as the system is currently running include the following:

- i. The percentage of allocation of loans, scholarships and home contribution for the four categories of students as the Funding Model specifies.
- ii. The loan terms including the interest rates, repayment terms, and what happens in the event of a default.
- iii. The workings of the Means Testing Instrument (MTI) as a “scientific way of determining need.”
- iv. The process of appealing a declined scholarship request.
- v. The reason behind the categorization of students based on needs.
- vi. The fate of students who do not fit the exact categories of needs as they currently stand.
- vii. The system of dispersing bursaries, its management and the role that they play
- viii. The fate of students who do not complete their studies within the stipulated time for factors beyond their control. The current model will not pay for students who do not complete the course in the stipulated time.

33. By withholding, or not being clear on this critical information, the Petitioners urge this Court that millions of students will not be able to make informed decisions with regard to their tertiary education, and miss out on funding as a result.
34. These students will be unable to afford the new prohibitive school fees and be denied their Constitutional right to education.

PARTICULARS OF ILLEGALITY OF THE PRESIDENTIAL DIRECTIVE

35. The Petitioner's humble contention is that the President is in breach of his prerogatives in launching the Funding Model. His powers are defined in Article 131(2) of the Constitution in requiring him to uphold the Constitution, and protect human rights and fundamental freedoms and the rule of law.
36. The Petitioner's aver that this Funding Model fails to uphold the spirit of those constitutional provisions because they violate the rights of millions of Kenyans in their quest for quality and affordable tertiary education.
37. It is a requirement in Article 94(5) that only Parliament is allowed to make provisions having the force of law in Kenya. Universities Funding is governed by the Higher Education Loans Board and the Universities Fund, both statutory bodies that have their mandate spelled out clearly in statute. There is presently no statute upon which this Funding Model is based hence it has no legal feet upon which to stand.
38. In addition to that, the President has no power to make law by himself, and as such is acting ultra vires in launching a legal program, without following the laid down legal channels.
39. The directive was issued subject to the recommendations of a Taskforce constituted by the President. It made recommendations, the bulk of which have been ignored completely leading to the present illegality to wit, the Variable

Scholarship and Loan Funding (VSLF) Model (or New Higher Education Funding Model).

40. The petitioners aver that had the recommendations should have been followed, including the adoption of the proposed Tertiary Education Placement and Funding Bill.

PARTICULARS OF LACK OF PUBLIC PARTICIPATION

41. Article 10(2)(a) of the Constitution of Kenya 2010 lists public participation as a value that binds all State Organs. It is the Petitioner's contention that there was no public participation in the implementation of this Funding Model. The President announced this New Model without considering the views of the hundreds of thousands of students from the Class of 2022 that were suddenly required to adjust to a new way of funding their tertiary education.

42. Besides, the Funding Model was implemented suddenly, and with no gradual and systematic efforts to widely consult the parents, students and other parties who were going to be adversely affected by it.

43. The students have been forced to seek alternative sources of funding for the few who can, and many more are now locked out of their respective placements because they have no source of income.

PARTICULARS OF LACK OF FAIR ADMINISTRATIVE ACTION

44. The Respondent has made the decision to implement this model arbitrary, capricious, unfair, unlawful and ultra vires in violation of Article 47 of the Constitution of Kenya and Section 5 of the Fair Administration Act, 2015.

45. The Respondents did not issue a notice to prepare Kenyans for the funding model, they did not collect public views, they did not consider the students, parents and guardians in making the final decision.
46. The Respondents did not give any reasons in the implementation of the model. Furthermore, this Honourable Court will take note of the fact that no mechanism has been issued to appeal this decision and many students have missed out on funding as a result causing them to report late, or even have to forfeit their placements.
47. The Petitioners humbly present this Petition before this court to seek legal redress on behalf of the students.

PARTICULARS OF FAILURE TO OBSERVE PUBLIC FISCAL RESPONSIBILITY PRINCIPLES

48. Article 201 of the constitution lists the prerequisite principles that should guide all matters pertaining public finance in the Republic of Kenya. The Petitioners avers that the proposed funding model and the means by which funds shall be acquired during its implementation, as proposed by the respondent, does not meet the guiding parameters as set out in Article 201 such as; openness and accountability, public participation in financial matters and that the public finance system shall promote an equitable society.
49. The Respondent failed to issue a notice to the general public regarding the proposed funding model and the means by which funds would be collected for its implementation. There was no collection of views regarding the removal of HELB facilities for an entire sub-section of the university student population (private universities). Further, there was no public participation and collection of views

regarding the categorization of students and the consequential and differential funding expectations of each of these categories.

50. The lack of transparency and public participation regarding the proposed university funding model that essentially sets in law a national higher education policy that contributes to an unequal society, increases risk of mismanagement of funds, and is an affront to not only the principles of public financial management but the rights of millions of Kenyans who seek higher education.

PARTICULARS OF FAILURE TO MEET LEGITIMATE EXPECTATION

51. The Respondents herein, by virtue of being public bodies, charged with playing several roles in the advancement and functioning of tertiary education, have created a legitimate expectation on the part of students all over the country.

52. The implementation of the Variable Scholarship and Loan Funding (VSLF) Model (or New Higher Education Funding Model) countermands this legitimate expectation, and places the millions of students at risk of not being able to access tertiary education.

53. The Petitioners aver that the actions of the Respondents have infringed on the legitimate expectations of Kenyan students by implementing a system that is expensive, convoluted, riddled with mystery, and unconscionable, with scant regard for Constitutional and statutory fidelity.

PARTICULARS OF ULTRA VIRES

54. Section 53 and 54 of the Universities Act, 2012 establishes the Universities Fund and spells out its mandates including but not limited to providing funds for financing Universities. The Respondents are in breach of this provision, in seeking to usurp a statutory mandate to manage university funding. They are

acting ultra vires and are taking over a responsibility that has already been given to the Universities Fund.

55. The 4th Respondent is also acting ultra vires because it is sharing the mandate of funding Universities that belongs exclusively to it with the rest of the Respondents who do not have any legal basis for implementing this funding model.

56. The Respondents are also acting ultra vires in contravention of Section 45(4)(e) of the Universities Act in implementing the Variable Scholarship and Loan Funding (VSLF) (or New Higher Education Funding Model) instead of the Differentiated Unit Cost that is provided for in the law.

57. The propositions and recommendations raised in the report as issued by the commission are not congruent and aligned with all relevant national legislation currently governing higher education in the country. The recommendations that are to be implemented as national policy are misaligned with the Universities Act of 2012 and the Basic Education Act of 2013.

RELIEFS SOUGHT

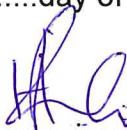
58. The Respondents are required to uphold, honour, safeguard, advance, and fulfil the rights and freedoms as outlined in the Bill of Rights, which is found in Chapter Four of the Constitution.

YOUR PETITIONERS therefore humbly pray for the following orders

- A. A Declaration that the implementation of Variable Scholarship and Loan Funding (VSLF) Model (or New Higher Education Funding Model) as it currently stands is unconstitutional, null and void.

- B. A Declaration that the Respondents are in contravention of Sections 53 and 54 of the Universities Act, and to that extent their actions are unconstitutional, null and void.
- C. An order of PROHIBITION or INJUNCTION restraining the implementation or coming into force or continued operation of the Higher Funding Model until all the Respondents comply with all the Constitutional Requirements.
- D. An order of PROHIBITION restraining the Respondents either jointly or severally by themselves, officers subordinate to them, agents, assigns, representatives, employees, servants or otherwise howsoever from taking any steps to enforce or in any way implement the Variable Scholarship and Loan Funding Model (or New Higher Education Funding Model).
- E. An order that the Respondents are to report back to this Honourable Court regularly, as the court may direct, to update the court on the measures taken to correct and prevent further infringement of the breaches of fundamental rights and citizens occasioned by the unjust implementation of the Variable Scholarship and Loan Funding Model (or New Higher Education Funding Model) and the measures taken to ensure equitable access to higher education.
- F. A declaration that the students' right to legitimate expectation has been infringed by the Respondents.
- G. Any other relief that this honourable court deems fit to grant in the interests of justice and that may become apparent and necessary in the course of these proceedings.

DATED at Nairobi this.....13TH.....day ofOCTOBER.....2023



MITULLAH SHAKO & ASSOCIATES ADVOCATES

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