

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**CONSTITUTIONAL PETITION NO. E412 OF 2023**

KENYA HUMAN RIGHTS COMMISSION ..... 1<sup>ST</sup> PETITIONER  
BOAZ WARUKU ..... 2<sup>ND</sup> PETITIONER  
ELIMU BORA WORKING GROUP ..... 3<sup>RD</sup> PETITIONER  
THE STUDENT CAUCUS.....4<sup>TH</sup> PETITIONER

**VERSUS-**

THE ATTORNEY GENERAL..... 1<sup>ST</sup> RESPONDENT  
THE CABINET SECRETARY FOR EDUCATION ..... 2<sup>ND</sup> RESPONDENT  
THE HIGHER EDUCATION LOANS BOARD ..... 3<sup>RD</sup> RESPONDENT  
THE TRUSTEES OF THE  
UNIVERSITIES FUND KENYA..... 4<sup>TH</sup> RESPONDENT  
THE KENYA UNIVERSITIES AND  
COLLEGES PLACEMENT SERVICE ..... 5<sup>TH</sup> RESPONDENT

**3<sup>RD</sup> AND 4<sup>TH</sup> RESPONDENTS' WRITTEN SUBMISSIONS**

May it Please your Lordship.

**A. INTRODUCTION**

1. Article 43 on right to education enjoy both vertical and horizontal application and such both State and non-State actors are bound to observe, respect, protect, promote and fulfil the same.
2. In fulfillment of Article 21(2) of the Constitution, we wish to submit that the Respondents upon conducting public participation, proceeded to take legislative, policy and other measures, including setting of standards, thus coming up with the New Funding Model (*hereinafter referred to as "NFM"*) to achieve the progressive realization of the rights guaranteed under Article 43 of the Constitution which includes the right to education.

## **B. BRIEF FACTS AND BACKGROUND**

3. Your Lordship, this is the humble submission of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents opposing the Petitioners' Petition dated **13<sup>th</sup> October 2023** supported by an affidavit sworn by Davis Malobe dated **11<sup>th</sup> October 2023**.
4. In making these humble submissions, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents place heavy reliance on their Replying Affidavits sworn by Charles Mutuma Ringera and Mr. Geoffrey Monari respectively and dated evenly on **14<sup>th</sup> November, 2023**.
5. Your Lordship, the Petitioners herein are challenging the constitutionality and or the legality of NFM and seeking this Honourable Court to grant them orders that:
  - i. A declaration to be hereby issued by this Honourable Court that NFM as it currently stands is unconstitutional, null and void.*
  - ii. A declaration that the Respondents actions are in contravention of Section 53 and 54 of the Universities Act and thus, such actions are unconstitutional, null and void.*
  - iii. An order of prohibition and or injunction restraining the Respondents or their agents from implementing the NFM.*
  - iv. A declaration to be issued by this Honourable Court that the Students right to legitimate expectation has been infringed by the Respondents.*
6. Your Lordship, these prayers are made on contention that NMF and its adoption is unconstitutional and violates several fundamental constitutional requirements, the Presidential directive to adopt NMF was illegal lacking compliance with public fiscal responsibility principles test, failing to meet legitimate expectation, and further, they content that the directive and actions of the Respondents are in violation of fair administrative action and that the Respondents have acted ultra vires in the implementation of the funding model.

## **C. ISSUES FOR DETERMINATION**

7. Your Lordship, flowing from the foregoing, the Petitioners averments crystalizes to the following issue for analysis by this Honourable Court.
  - i. Whether the adoption and implementation of NFM is unconstitutional; and*
  - ii. Who bears the costs*

## **D. ANALYSIS OF THE ISSUES**

8. Your Lordship, we wish to buttress these issues as follows: -

(I) **Whether the adoption and implementation of NFM is unconstitutional?**

9. Your Lordship, we submit that the adoption and consequent implementation of the NFM stands the test of constitutionality.

10. **Article 2(4) of the Constitution**, emphasizing the supremacy of constitutional law, stipulates that "**any law, inclusive of customary law, conflicting with this Constitution is null and void to the extent of the inconsistency, rendering any act or omission in violation of the Constitution invalid.**" Further, Article 165(3)(d)(i) grants the High Court jurisdiction to ascertain whether any law exhibits inconsistency with or contravention of the Constitution.

11. The determination of the invalidity of a law hinges on an objective examination of its alignment with the Constitution. The doctrine of objective constitutional invalidity, as established in the Canadian case of **Ferreira vs Levin (Case No CCT 5/95)**, underscores that identifying a law in conflict with the Constitution "does not invalidate the law; it merely declares it to be invalid." Consequently, a law found to be inconsistent with the Constitution loses its legal efficacy and ceases to have any legal consequences.

12. Your Lordship, with the foregoing in mind we wish to buttress each issue of alleged inconsistency with the Constitution of Kenya, 2010 of the adoption and operationalization of NFM.

a) **Violation of Article 27 of the Constitution**

13. Your Lordship, we wish to submit that NFM does not contravene the provisions of **Article 27 of the Constitution** of Kenya.

14. Article 27 ensures equality and protection from discrimination. Specifically, **Article 27 (4)** states that the state must not engage in direct or indirect discrimination based on various grounds, such as race, sex, pregnancy, marital status, health, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language, or birth. The Petitioners' allegation that the NFM is discriminatory on grounds of age is not only farfetched but hysterical and totally unsubstantiated.

15. Clearly, such allegations were made by the Petitioner without having the benefit or blatantly ignoring the Cabinet MEMO directing that the minors be granted

access to both Scholarships and Loans to fund their education. Prior to the directive, all students including the Minors had access to the Scholarship applications at the Universities and TVET levels. The Cabinet directive relating to minors has since been effected.

16. As such your Lordship, we submit the Petitioners have not raised any valid particular to show that the NFM in effect discriminate against any students in terms of age and any other such form of discrimination premised on any of the prohibited grounds.

17. Your Lordship, this ground should be dismissed.

**b. Violation of the Principle of Public Participation**

18. Your Lordship, it is our submission that public participation was properly, efficiently and sufficiently conducted prior to the recommendation and adoption of the NFM and the same meets the constitutional threshold.

19. Your Lordship, the principle of Public Participation is premised in the Constitution under **Article 10** on the national values and Principles of governance.

20. The threshold for achieving this principle was enunciated in the case of *Khelef Khalifa & 2 others vs Independent Electoral and Boundaries Commission & another [2017] eKLR* wherein the Honourable Justice Mativo restated with approval the elements of public participation as stated by the three (3) judge bench in *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others [2015] eKLR* as follows:

*First, it is incumbent upon the government agency or public official involved to fashion a programme of public participation that accords with the nature of the subject matter. It is the government agency or Public Official who is to craft the modalities of public participation but in so doing the government agency or Public Official must take into account both the quantity and quality of the governed to participate in their own governance. Yet the government agency enjoys some considerable measure of discretion in fashioning those modalities.*

*Second, public participation calls for innovation and malleability depending on the nature of the subject matter, culture, logistical constraints, and so forth. In other words, no single regime or programme of public participation can be prescribed and the Courts will not use any litmus test to determine if public participation has been achieved or not. The only test the Courts use is one of effectiveness. A variety of mechanisms may be used to achieve public participation.*

*Third, whatever programme of public participation is fashioned, it must include access to and dissemination of relevant information. See Republic vs The Attorney General & Another ex parte Hon. Francis Chachu Ganya (JR Misc. App. No. 374 of 2012). In relevant portion, the Court stated:*

*“Participation of the people necessarily requires that the information be availed to the members of the public whenever public policy decisions are intended and the public be afforded a forum in which they can adequately ventilate them.”*

*Fourth, public participation does not dictate that everyone must give their views on the issue at hand. To have such a standard would be to give a virtual veto power to each individual in the community to determine community collective affairs. A public participation programme, must, however, show intentional inclusivity and diversity. Any clear and intentional attempts to keep out bona fide stakeholders would render the public participation programme ineffective and illegal by definition. In determining inclusivity in the design of a public participation regime, the government agency or Public Official must take into account the subsidiarity principle: those most affected by a policy, legislation or action must have a bigger say in that policy, legislation or action and their views must be more deliberately sought and taken into account.*

*Fifth, the right of public participation does not guarantee that each individual’s views will be taken as controlling; the right is one to represent one’s views – not a duty of the agency to accept the view given as dispositive. However, there is a duty for the government agency or Public Official involved to take into consideration, in good faith, all the views received as part of public participation programme. The government agency or Public Official cannot merely be going through the motions or engaging in democratic theatre so as to tick the Constitutional box.*

*Sixthly, the right of public participation is not meant to usurp the technical or democratic role of the office holders but to cross-fertilize and enrich their views with the views of those who will be most affected by the decision or policy at hand.*

21. Your Lordship, as narrated in Paragraph 46, 47, 48, 49 and 50 of the 3<sup>rd</sup> Respondents Replying Affidavit dated 14<sup>th</sup> November, 2023; prior to recommending the adoption of the NFM, the Presidential Working Party on Education Reform conducted an analysis of the education sector wherein they, as per their report, collected data from the public including Kenyans in the diaspora by way of both physical and digital submissions; and listening to the stakeholders’ views in Town hall meetings at county level. They received submissions from

learners, teachers, parents, faith-based organizations, youth, teachers' associations, workers' unions, civil society, academia, private sectors, elected leaders and development partners among others. Further, they conducted interviews and Focus Group Discussions with key stakeholders and relevant representatives of government ministries, departments and agencies.

22. Your Lordship, we contend that engaging stakeholders, as highlighted above herein, is the most effective method for conducting public participation. Flowing from the foregoing, it is asserted that public participation was conducted appropriately, efficiently, and adequately before recommending and adopting the NFM, meeting the constitutional requirements.

c. **Violation of Article 47**

23. On this allegation, we wish to submit that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents never contravened **Article 47** of the Constitution.

24. Article 47 guarantees individuals the right to administrative actions that are prompt, effective, legal, rational, and procedurally just. Additionally, under Article 47 (2), if an individual's right or fundamental freedom is or is likely to be negatively impacted by administrative action, they have the entitlement to receive written explanations for such actions.

25. Mwita J, in **Petition No. 45 of 2017 - Maya Duty Free Limited v Hon. Attorney General & 3 Others** stated that:

*"It is, therefore, inappropriate for parties to rush to institute constitutional petitions alleging violation of rights under Article 47 (1) or any other constitutional rights or fundamental rights when these petitions raise no constitutional issues at all for the Court's determination. It is also the position in law that parties should pursue remedies available to them instead of instituting constitutional petitions."*

26. Your Lordship, we have demonstrated that Petitioners averments that the Respondents contravened Article 47 by the fact that they did not issue a notice to prepare Kenyans for the NFM, did not collect public view, did not consider the students, parents and guardians in making the final decision and is not only untrue, but also untenable and should not be entertained.

27. Your Lordship, it is a matter of public knowledge, that the Address to the Nation by the His Excellency the President on **3<sup>rd</sup> May 2023**, addressed the reasons for NFM and the same was available to the Public, widely circulated to all key

stakeholders including the parents and students; through mainstream media and social media. The hef.co.ke online application portal has additional information on why NFM and extensively laid out on FAQs available on Portal as well and Social Media handles.

28. Further your Lordship, there exists an online appeal process for applicants to seek review of their initial awards.
29. Your Lordship, this allegation is wild and farfetched and thus should not be allowed to hold in this Honourable Court.

**d. The issue of legitimate expectation**

30. Your Lordship, we submit that this allegation is not properly pleaded in the Petition. The Petitioner seems to be in a fishing expedition for any orders without properly pleading for the same.
31. The principle of legitimate expectation as elaborated in the case of *Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others [2014] eKLR* connotes the following attributes;
  - i. *There must be an express, clear and unambiguous promise given by a public authority;*
  - ii. *The expectation itself must be reasonable;*
  - iii. *The representation must be one which it was competent and lawful for the decision-maker to make; and*
  - iv. *There cannot be a legitimate expectation against clear provisions of the law or the Constitution.*
32. It is an old Constitutional litigation principle that litigants ought to take notice of, as set in the case of *Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272* stating that

*“a party seeking a constitutional remedy is required to set out with reasonable precision that which is complained of, noting to stipulate which constitutional provisions have been infringed and how they have been infringed.”*
33. This principle fundamentally urges litigants to present their cases with a heightened level of detail, aiming to streamline the Court's proceedings by expeditiously identifying the specific issues that necessitate examination of pertinent evidence and applicable law.



34. In reinforcing this principle, the Court of Appeal in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR (the Mumo Matemu Case)*, not only maintained its essence, but also applied a contemporary outlook to its enduring legacy. In the Mumo Matemu Case, the Court of Appeal observed that the precision requirement in the Anarita Karimi Case is not to be mistaken for exactitude. Rather, the doctrine in the Anarita Karimi Case is applied to ensure that upon proper definition of the issues in a constitutional petition, the Court can apply its mind to the real issues at hand, thereby saving on judicial resources.
35. Your Lordship, a thorough interrogation of the Petitioners' Petition, one wonders why this allegation was made in the first place. It is wild, and no substantiation has been provided. Moreover, no specific breach of a provision of the Constitution is pleaded therein.
36. This clearly fails the test of specificity and precision and therefore we pray that it should be disregarded.
37. Your Lordship, we submit that the adoption and implementation of the NFM is thus in line with the express dictates of the Constitution and the allegations of legitimate expectation to the contrary flies in the face of the law.
38. Contrary to the allegations by the Petitioners, HELB Loan is available for all students enrolled in all Public and Private Universities. The HELB Act further guides on the appraisal and administration of Funds. The application process is equally simple and direct, thus the continued access by millions of applicants.

**e) Alleged Contravention of Sections 53 and 54 of the Universities Act, 2012**

39. Your Lordship, we wish to address the Petitioners' allegation regarding the contravention of Sections 53 and 54 of the Universities Act, 2012.
40. Section 53 of the Universities Act establishes the Universities Fund, aimed at financing universities. The Fund's sources include monies provided by Parliament, donations received by the Board, funds designated by the Board from its own resources, income from investments made by the Trustees, and endowments, grants, and gifts from various sources.
41. Section 54 outlines the permissible expenditures from the Universities Fund, which include funding for public universities, conditional grants and loans to



private universities, and expenses related to the administration of the Fund as authorized by the Trustees.

42. The Petitioners contend that the New Funding Model (NFM) deviates from the provisions of these sections. However, we submit that the NFM aligns with the constitutional and statutory framework governing university funding. The NFM, as part of the policy and legislative measures, ensures equitable and transparent allocation of resources, in line with the principles of public fiscal responsibility and the objectives of the Universities Fund.
43. Your Lordship, the NFM does not contravene Sections 53 and 54 of the Universities Act. Rather, it enhances the effectiveness of the Universities Fund by ensuring that funds are allocated based on the differentiated unit cost model, which is designed to promote equity and transparency in higher education funding.
44. We submit that the Petitioners have not provided any substantial evidence to demonstrate how the NFM contravenes the specific provisions of Sections 53 and 54. On the contrary, the NFM's design and implementation are consistent with the statutory requirements and objectives outlined in the Universities Act.
45. Your Lordship, we, therefore, pray that the claims of contravention of Sections 53 and 54 of the Universities Act be dismissed for lack of merit and evidence.

## **(II) CONCLUSION**

46. In conclusion your Lordship, we submit that the NFM is not unconstitutional for want of public participation as the same was done in accordance with the constitution and the law.
- 
47. Further, the NFM in no way violates, infringes or threatens the Petitioners' rights to education, non-discrimination or fair administrative action and in any event no proof of such a violation has been provided by the Petitioners. In the contrary, the model seeks to observe, respect, protect, promote and fulfil the right to education and equity in allocation of fund to the institutions as well as the students.
  48. Further your Lordship, we submit that the model also promotes transparency in funding of the tertiary education institutions and is in line with public fiscal responsibility principles.

49. Your Lordship, we therefore submit that in the interests of justice that the Petition dated 13<sup>th</sup> October 2023 in its entirety be dismissed with costs to the 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

DATED at NAIROBI this 27<sup>th</sup> day of MAY ..... 2024

~~ROBSON HARRIS ADVOCATES LLP  
ADVOCATES FOR THE 3<sup>RD</sup> & 4<sup>TH</sup> RESPONDENTS~~

**DRAWN & FILED BY:**

Robson Harris Advocates LLP  
Transnational Plaza, 9<sup>th</sup> Floor,  
City Hall Way,  
P.O Box 67845-00200,

**NAIROBI**

Email: [litigation@robsonharris.com](mailto:litigation@robsonharris.com)

Tel: +254722218900

**TO BE SERVED UPON:**

Mitullah Shako & Associates Advocates LLP,  
Lower Hill Duplex Apartments, Suite 37,  
Off Lower Hill Road, Upperhill,  
P.O. Box 142-00502,

**NAIROBI**

Email: [info@mitullahshakolaw.com](mailto:info@mitullahshakolaw.com) / [mitullahshakowlaw@gmail.com](mailto:mitullahshakowlaw@gmail.com)

Tel: +254204401660/ +254748945685

CS for Education,  
Ministry of Education,  
Jogoo House "B" Taifa Road,  
P.O Box 300400-00100

**NAIROBI.**

Email: [info@education.go.ke](mailto:info@education.go.ke)

Office of the Attorney General,  
Sheria House,  
Harambee Avenue,  
P.O Box 40112-00100,

**NAIROBI.**

Email:- [communications@ag.go.ke](mailto:communications@ag.go.ke)

Kenya Universities and Colleges Central Placement Service (KUCCPS),

ACK Gardens, 1<sup>st</sup> Ngong' Avenue, Upper-Hill,  
P.O Box 105166-00101,  
**NAIROBI**  
**Email:- [info@kuccps.ac.ke](mailto:info@kuccps.ac.ke)**