

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
CONSTITUTIONAL PETITION NO. E 412 OF 2023

KENYA HUMAN RIGHTS COMMISSION..... 1ST PETITIONER
BOAZ WARUKU..... 2ND PETITIONER
ELIMU BORA WORKING GROUP..... 3RD PETITIONER
THE STUDENTS’ CAUCUS.....4TH PETITIONER

VERSUS

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

PETITIONER’S SUBMISSIONS

If it may please your Lordship, the Petitioners herein present these submissions in compliance with the Honourable Court’s directions dated the 23rd day of October 2023.

INTRODUCTION AND BRIEF BACKGROUND

1. The Petition dated 13th October, 2023 challenges the Variable Scholarship and Loan Funding (VSLF) Model (or New Higher Education Funding Model) that was launched by President William Samoei Arap Ruto on 3rd May 2023. The Petitioners submit that this funding model and its adoption is unconstitutional, and violates several fundamental constitutional requirements including it being a breach of

fundamental rights, an illegal presidential directive, lacking compliance with public fiscal responsibility principles, failing the public interest test, failing to meet legitimate expectations, being in violation of Fair Administrative Act, and that the Respondents have acted ultra vires in the implementation of the funding model.

ISSUES FOR DETERMINATION

- i. Whether the Respondents have breached Article 43(1)(f) of the Constitution in tandem with Article 13(2) of the International Covenant on Economic, Social and Cultural Rights
 - ii. Whether there was sufficient public participation prior to the launch and implementation of the Variable Scholarship and Loan Funding (VSLF) Model
 - iii. Whether the Presidential Directive is an illegality and the consequent implementation of the Variable Scholarship and Loan Funding (VSLF) Model is *Ultra Vires*
 - iv. Whether the implementation of the Variable Scholarship and Loan Funding (VSLF) Model is discriminatory and unconstitutional
 - v. Whether the implementation of the Variable Scholarship and Loan Funding Model infringed on university students' legitimate expectations
- (i) **Whether the Respondents have breached Article 43(1)(f) of the Constitution in tandem with Article 13(2) of the International Covenant on Economic, Social and Cultural Rights.**
2. Article 43(1)(f) of the Constitution espouses that every person has a right to Education while Article 13 of the ICESCR recognises the universal right to equal

access to higher education on the basis of capacity, measures to literacy, and quality improvement. Article 55(a) of the Constitution places the onus on the Respondents to ensure that the youth have access to relevant education and training including tertiary education.

3. We submit that the Respondents are failing to meet their Constitutional and statutory obligations by transferring the bulk of university funding to students and their parents and making tertiary education arbitrarily expensive. This in turn has adverse effects on the availability of tertiary education to the youth in the country. Further, the categories by which students seeking tertiary education are considered for funding are narrow and not properly identified. In addition, the criteria for which the government will consider funding of tertiary education only considers the familial financial background of the applicant students and fails to consider other factors such as affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups, for example the youth living with disabilities.
4. We also submit that education is a public good, and a state responsibility. To shift this responsibility to the learner and their parents or guardians, requires justification in line with the tests set out in Article 24 of the Constitution of Kenya, and to fail to justify, would amount to the State's abrogation and dereliction of its duties and a breach of Article 43(1)(f) of the Constitution of Kenya. This is further buttressed by the fact that higher education is increasingly more costly and inaccessible, especially to the most vulnerable and marginalised.
5. Given that the Maximum Differentiated Unit Cost (DUC) established in Sections 53 and 54 of the Universities Act, 2012 is the lawful funding model, a change of this model to the VSLF model, must be justified as comparatively making higher

education generally more available and accessible for students who are willing and qualify to enhance their educational prospects. To that extent, it is our submissions that the Respondents have not and cannot demonstrate how they have met this criteria in changing the university funding model, leading to a breach of the provisions of Article 43(1)(f) of the Constitution of Kenya.

6. Article 21 of the Constitution enjoins the State and all State organs are enjoined to take measures to achieve the progressive realization of the rights guaranteed under Article 43. It is our submission that this shift in funding models that increasingly moves the responsibility of funding university education to students and parents is an abrogation of this provision of the law and the principle of progressive realisation. On this submission, we place reliance on *Supreme Court Advisory Opinion No 2 of 2012 - In the Matter of the Principle of Gender Representation* and assert that even though the right to higher education is subject to this principle, it must be progressive and not regressive. We also rely on the High Court decision of *Michael Mutinda Mutemi vs. Permanent Secretary, Ministry of Education & Others (2013) eKLR* for this submission.

(ii) **Whether there was sufficient Public Participation on the Variable Scholarship and Loan Funding Model**

7. Article 10 of the Constitution includes public participation as a national value and this is picked up by various pieces of legislation. There are two broad approaches to participation in legislation: one is concerned with general public participation, people who may have views but may not be specially affected. The other approach is concerned with the involvement of people who are specially affected by decisions. The Petitioners rely on the guiding principles of public participation set

out in the Supreme Court decision in *British American Tobacco Kenya, PLC v Cabinet Secretary for the Ministry of Health and Others [2019] eKLR*.

8. While the Respondents claim to have undertaken public participation with respect to the VSLF model, the purported public participation exercise was carried out prior to the preparation of the said VSLF model and not after. The 3rd Respondent admits this in their replying affidavit sworn on 14th November 2023. It is therefore undisputed that after the policy was formulated based on the recommendations of the Presidential Working Party on Education Reforms (PWPER), the VSLF model was not subjected to any public participation exercise but was unilaterally and unlawfully implemented. On this submission we place reliance on the High Court decision in *Republic v Cabinet Secretary, Ministry of Agriculture, Livestock & Fisheries & 4 others Ex Parte Council of County Governors & another (2017) eKLR*
9. Secondly, the Respondents did not outline the ways in which the public participation exercise prior to drafting the PWPER recommendations was meaningfully conducted. The Respondents have also not demonstrated that the views by the general public and relevant stakeholders were collected, collated and considered. It is also evident that only a minute fraction of the participants in the purported public participation exercise were the people directly affected by the implementation of the VSLF Model. For this submission reliance is placed on *Mugo & 14 others vs. Matiang'i & Another; Independent Electoral and Boundaries Commission of Kenya & 19 others (Interested Party) Constitutional Petition No. 4 of 2019 (2022) KEHC 158 (KLR)* as well as the High Court's decision in *Kenya Medical Practitioners, Pharmacists and Dentists' Union v University of Nairobi & another (2021) eKLR*

10. The Petitioner further submits that the issue of funding of tertiary education being an issue of public interest and specific to those who would be directly affected, the Respondents have not produced any evidence to prove that reasonable opportunity was granted to major stakeholders such as parents and tertiary education students to participate in the purported public participation exercise and we place reliance on the holding of Odunga J. in *Robert N. Gakuru & Others vs. Governor Kiambu County & 3 Others (2014) eKLR*
11. We therefore submit that the Respondents failed to subject the VSLF model to real, inclusive and meaningful public participation as per Article 118 of the Constitution and the well-established principles in *British American Tobacco Kenya, PLC v Cabinet Secretary for the Ministry of Health and Others* (supra).

(iii) Whether the Presidential Directive and the consequent implementation of the Variable Scholarship and Loan Funding Model is Ultra Vires and unconstitutional

12. We submit that the Presidential Directive that instituted the VSLF model is an illegality, unconstitutional, and an attempt to usurp Parliament's law-making role as it is stated in Article 94(5) of the Constitution. While Article 132 (3)(b) of the Constitution empowers the President to direct and coordinate the functions of ministries and government departments, it doesn't empower him to pass and implement a policy or any provisions having the force of law in Kenya. He can only pass edicts as outlined in Article 135 of the Constitution and he did not.
13. Sections 53 and 54 of the Universities Act, 2012 provide for the management, allocation and apportionment of the Universities Fund and for the Maximum Differentiated Unit Cost (DUC) funding model. As such, it is unlawful and *ultra*

vires to implement the VLSF model without amending or repealing these particular provisions of the law. It is our submission that these sections have not been amended or repealed and as such any deviation from them is an illegality that cannot be countenanced by this Honourable Court. Further, the responsibility to propose and establish the maximum differentiated unit cost for university programmes is placed on the Trustees of the said Fund.

14. The PWPER, in its report of June 2023 submitted specific proposals for legislative amendments to the Universities Act, to repeal the existing provisions on general financial provisions in relation to universities. They made recommendations to incorporate the VSLF model under the Draft Bill on Tertiary Education Placement and Funding, 2023, but the same have not been enacted by Parliament and yet are being implemented by state organs and officers. We submit that this is an illegality and all implementation of the PWPER report and the VSLF model are unlawful and a departure from the provisions of Article 94(5) of the Constitution. We place reliance on the decision of the High Court in *Ombati v Chief Justice & President of the Supreme Court & another; Kenya National Human Rights and Equality Commission & 2 others (Interested Party) (Petition E242 of 2022) [2022] KEHC 11630 (KLR)*.

(iv) **Whether the implementation of the Variable Scholarship and Loan Model is discriminatory and unconstitutional**

15. The Petitioner submits that implementation of the VSLF model is in further breach of the principles of equality and non-discrimination in Article 27 of the Constitution. Section 3 of the Universities Act includes as objectives of university education “promotion of gender balance and equality of opportunity among students and employees”; and “promotion of equalisation for persons with disabilities, minorities

and other marginalised groups”. We place reliance on the Supreme Court decision in the case of *Gichuru vs Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR) (Civ) (22 October 2021)*.

16. The funding model discriminates against certain students in the sense that it does not provide for different classes of students, including those living with disabilities in such a manner that it would promote affirmative action programmes or any other policy measures as required by Article 27(6) and 56 of the Constitution. It sets out very narrow categories which are purely financial when there are several factors that need to be considered to avoid unintended discrimination. Students need to be treated differently and not necessarily pegged on their households’ income. We place reliance on the High Court decision in *Centre for Minority Rights Development (CEMIRIDE) & 2 others v Attorney General & 2 others; Independent Electoral and Boundaries Commission (Interested Party) (Petition E002 of 2022) [2022] KEHC 955 (KLR) (4 April 2022) (Judgment)*.
17. The criteria for determining the financial needs of students is not yet clear, transparent and inclusive. While the criteria claims to consider the financial and educational institution background of the students, it fails to consider other socio-economic factors such as the increased costs of living and rising risk of unemployment.
18. The Petitioner submits that the criteria employed by the Respondents to correct inequality through different treatment in itself gives rise to a breach of Article 27 of the Constitution. From the Respondents’ criteria, students who previously attended private learning institutions, students from two-parent family backgrounds and students from higher-earning family backgrounds despite family size will be deemed unworthy of government funding in tertiary education, despite being in

need of financial assistance despite their backgrounds. We place reliance on the decision in *John Mwai & 3 others vs Kenya National Examination Council & 2 others (2011) eKLR* citing with authority the decision of the United States Supreme Court where it has met with differing treatment in the case of *Regents of the University of California –Vs- Bakke 985. Ct.2733 (1978)*.

19. Further, the VSLF model caters for only tuition fees and ignores accommodation, upkeep and costs of study materials. This still exposes the students from poor backgrounds as evidenced by the number of students who are not able to meet these costs being constrained to abandon their tertiary education altogether.
20. Your Lordship, we therefore submit that the students in Private Tertiary Institutions Universities have experienced differential treatment and that the students in Public Tertiary Institutions have privilege conferred on them thereby a certain group of people thus can claim that they have and continue to face discrimination from the Respondents.

(v) Whether the implementation of the Variable Scholarship and Loan Funding Model infringed on university students' legitimate expectations

21. We submit that the basic premise underlying the protection of legitimate expectations is the promotion of legal certainty. University students who had already commenced their studies under one funding model that was founded in law, should be able to rely on government actions and policies in relying on the DUC to shape their lives and planning on the promise that they their higher education would only be funded under this model and they would not have to struggle or adjust to a new model that would further deprive them of higher education of funding without their consultation or participation. The trust engendered by such reliance is central

to the concept of the rule of law and abrogation therefrom breaches the rights and interests of these university students. We rely on the Supreme Court decision in *Communications Commission of Kenya & 5 Others v Royal Media Services & 5 Others SC Petition Nos. 14, 14A, 14B & 14C of 2014*.

22. We further submit that the Respondents are in breach of the legitimate expectations of university students and parents who had already joined university prior to the constitution of the PWPER and its consequent report and as such the VSLF model was unlawfully and unjustly applied to them to their detriment. Their expectations were established in law and were legitimate because of the said legal representations. Reliance is placed on the High Court's decision in *Republic v Kenya Revenue Authority; Proto Energy Limited (Exparte) (Judicial Review Application E023 of 2021) [2022] KEHC 5 (KLR) (24 January 2022) (Judgment)*

CONCLUSION

23. It is our humble submission that we have proved that the Respondents have violated and infringed on constitutional rights and have acted in excess of their Constitutional powers and mandates. In view of the foregoing, we humbly submit that the Petition dated **13th October, 2023** is with merit and the prayers sought therein allowed.

DATED at Nairobi this.....22ND.....day ofMAY.....2024


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