REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

PETITION NO. 19 OF 2015

(Coram: Mwilu DCJ & Vice-President, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ)

1. **MARTIN WANDERI**
2. **JOEL RUTTO SUTTER**
3. **ALFRED CHOMBAH**
4. **ALFRICK OTIENO**
5. **ANGELA MURIGI**
6. **ANTHONY OKAVA**
7. **ANTHONY OMARI**
8. **BEATRICE WANGARI**
9. **BEN ODHIAMBO**
10. **BRIAN MABATUK and 96 OTHERS ..... PETITIONERS**

–VERSUS–

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

MOI UNIVERSITY ..... 2ND RESPONDENT

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY ..... 3RD RESPONDENT

COMMISSION FOR HIGHER EDUCATION ..... 4TH RESPONDENT

MINISTRY OF HIGHER EDUCATION SCIENCE AND TECHNOLOGY ..... 5TH RESPONDENT

–AND–

EGERTON UNIVERSITY ..... 1ST INTERESTED PARTY

1. **JESSE WAHOME WAWERU**
2. **GEOFFREY NANGILLAH MAKANGA**
3. **MAURICE OTIENO OLOO**

4. **ALFRED KIPKOECH KIBET**
5. **RICHARD GITURO GICHAGA**
6. **PATRICK KARANJA MBUGUA**
   and 37 OTHERS ..... 2ND INTERESTED PARTY

–AS CONSOLIDATED WITH–

PETITION NO. 4 OF 2016

MASINDE MULIRO UNIVERSITY OF
SCIENCE & TECHNOLOGY ..... PETITIONER

–VERSUS–

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

JESSE WAWERU WAHOME & OTHERS ..... 2ND RESPONDENT

MOI UNIVERSITY ..... 3RD RESPONDENT

EGERTON UNIVERSITY ..... 4TH RESPONDENT

COMMISSION FOR HIGHER EDUCATION ..... 5TH RESPONDENT

MINISTRY OF HIGHER EDUCATION
SCIENCE AND TECHNOLOGY ..... 6TH RESPONDENT

(Being an appeal under Article 163(4) of the Constitution against the judgment of the Court of Appeal at Nairobi (Hon. Justice D.K. Maraga (as he then was), Hon. Justice R. N. Nambuye & Hon. Justice G.B.M. Kariuki JJA) delivered on 12th June 2015 in Civil Appeal No. NAI 240 of 2013)

JUDGMENT

I. INTRODUCTION

[1] The petitioners in *Petition No. 19 of 2015* filed their appeal in this Court on 1st December, 2015 seeking the following orders:

(1) An order setting aside in toto the Court of Appeal decision and for resolution of transition issues of appellants who were taking recognized Moi University programmes during the time and

thereby reinstatement of the High Court Judgement made by Hon. Majanja, J on 15th October, 2012.

(2) In the alternative, and without prejudice to the above prayer, for orders:

(i) To be rightfully awarded and issued with Moi University degrees.

(ii) Entitling them to registration as graduate engineers with effect from such years as they graduated, or otherwise from such time as the Court may deem fit and just.

(iii) For such fair damages and compensation as the Court may deem fit and just.

(iv) Costs from the High Court petition, Court of Appeal and this Supreme Court appeal.

(3) Costs for the High Court petition, Court of Appeal and this appeal to the Supreme Court.

[2] Their petition was premised on the following summarized grounds, that:

(1) The petitioners were entitled to be registered as engineers upon completing their undergraduate engineering degrees.

(2) The petitioners committed no fault in the entirety of their training programme, hence cannot be punished by depreciation to practice the engineering career, they have worked so hard for.

(3) The 1st respondent, the Engineers Registration Board (hereinafter referred to as ERB), did not have powers it arrogated itself to:

(a) Under sections 5 and 11 of the Engineering Act, Cap 530 of 1969 to 'Recognize' and/or 'accredit' and/or 'approve' the petitioners' degree so as to register them as

engineers. The 1st respondent did not have powers to go behind the degree programmes offered by universities.

(b) To supervise university degrees.

(4) That the petitioners' express and implied fundamental rights have been violated in the denial by the respondents jointly and severally to practice their careers hence are entitled to compensation.

[3] Subsequently, and also aggrieved by the same Court of Appeal decision delivered on 12th June, 2015, Masinde Muliro University of Science and Technology, MMUST, filed its appeal to this Court, *Petition No. 4 of 2016,* seeking the following reliefs:

(1) That the entire judgment made by the Court of Appeal on 12/06/2015 be set aside and instead, the High Court Judgment given by honourable Justice Majanja be re-instated.

(2) In the alternative and without prejudice to the above, the order on costs issued by the Court of Appeal on 12/06/2015 against the petitioner be reversed.

[4] This *Petition No. 4 of 2016,* was premised on the following grounds, reproduced *verbatim*;

(1) Lawful exercise of statutory power under the Masinde Muliro University of Science and Technology Act, No. 18 of 2006.

(2) Petitioner's programmes and degrees justified under the Universities Act.

(3) Masinde Muliro University of Science and Technology's programmes, degrees, diplomas and certificates are valid.

(4) The Engineers Registration Board had no power, mandate and/or jurisdiction to accredit programmes under the

repealed Engineers Registration Act, Cap 530 of the Laws of Kenya.

(5) *The Engineers Registration Board's actions were ultra vires and unreasonable.*

(6) *Engineers Registration Board's actions amounted to a misfeasance in public office.*

(7) *Refusal by the Engineers Registration Board to register the petitioners was illegal, irrational and full of procedural impropriety.*

(8) *Equality and discrimination.*

(9) *Masinde Muliro University of Science and Technology is not to blame for the lack of policy harmonization.*

(10) *The concept of accreditation was only provided for in the new Engineers Act of 2011.*

[5] By the order of this Court made on 6th June 2016, the consent dated 11th May 2017 filed by the parties in this matter was adopted by the Court thereby consolidating the petitions for purposes of hearing and determination.

II. BACKGROUND

[6] The petitioners and 2nd interested parties graduated as engineers in various engineering disciplines from Egerton University and Masinde Muliro University of Science and Technology (MMUST) between 2004 and 2010. Of the petitioners, MMUST graduates were students admitted to Moi University from 2002 to 2006 to pursue Bachelor's Degrees in Engineering disciplines but were designated to, and undertook their studies at, a campus in Kakamega, then called Western University College of Science and Technology, WUCST which in effect was a constituent college of Moi University. Other engineering students admitted at the same time remained at Moi University, Main Campus, Eldoret. In 2006, WUCST

was Chartered as a University known as MMUST from which the petitioners graduated with engineering degrees from the year 2007.

[7] All applications by the petitioners from MMUST to be registered as graduate engineers by the Engineering Registration Board (hereinafter the ERB/ Board) were denied on the ground that the petitioners had undertaken their courses from a university that was not "recognized" "accredited" and/or "approved" by the ERB. The Board stated: *"the undergraduate engineering degree programmes from Masinde Muliro University of Science and Technology have not been recognised by the Board. Therefore, the graduates of the said programmes are not registrable with the Board pursuant to section 11(2) of the Engineers Registration Act."*

[8] As regards the 2nd interested parties who are graduates from Egerton University, the ERB denied them registration on the ground that they had not met *"the minimum requirements as stipulated under the Engineers Registration Act"*.
[9] The petitioners and 2nd interested parties were aggrieved by that decision and lodged two separate constitutional petitions at the High Court against MMUST, Egerton university, Moi University, the Permanent Secretary Ministry of Higher Education Science and Technology, and the Commission of Higher Education and the Board.

(a) High Court

[10] In their petitions before the High Court, the petitioners sought: a declaration that they were duly qualified engineers and that the engineering degrees they held were proper and valid and entitled them to be registered as graduate engineers; a declaration that the ERB's refusal to register them violated their constitutional rights; an order of *certiorari* to quash the Board's decision not to register them; an order of mandamus to compel the Board to register them; damages for lost

opportunities and for the suffering the Board had caused them; and costs of the petitions.

[11] The two petitions were consolidated and heard by *Majanja, J*. The trial judge of the High Court agreed entirely that the petitioners were not at fault. In this regard, the Court stated:

> *"what is clear from the facts is that the petitioners have not done or said anything to bring them in conflict with the universities and the ERB. That is why it is preposterous for the ERB to argue, as it has done, in its written submissions that the petitioners should not have continued with their studies once they knew ERB's position regarding the engineering courses they were undertaking. The petitioners have been put in a situation where dreams and expectations have been shattered. Simply put, the petitioners are not to blame!"*

Consequently, the learned judge made findings, *inter alia,* that it could not see any fault on the part of the petitioners upon which to deny them registration and the ERB's role was limited to regulating engineers and the Engineering Industry, not regulating universities. He found that "recognition" neither referred to the universities and their programmes nor was it the same as "accreditation" and/or "approval".

[12] The learned judge dismissed the claims against Moi University, the Ministry of Education and the Commission. Save for the prayer for special damages, he granted all the other prayers sought in a judgment delivered on 15th October, 2012, issuing the following orders, produced *verbatim*:

> *(a) The petitions against Moi University, Egerton University, Masinde Muliro University of Science and Technology and the Commission*

for Higher Education are hereby dismissed but with no order as to costs.

(b) I hereby declare that the power of the Engineers Registration Board under the provisions of section 11(1)(b) of the Engineers Registration Act (Chapter 530 of the Laws of Kenya) to register graduate engineers does not include the power to accredit and approve engineering courses offered by public universities incorporated under the Laws of Kenya.

(c) I hereby declare that the Engineers Registration Board has violated the petitioners' right to a fair administrative action protected by Article 47(1) of the Constitution and the petitioners' right to human dignity protected by Article 28 of the Constitution as read with Article 55(a) and (c) of the Constitution.

(d) I direct and hereby issue an order of mandamus directing the Engineers Registration Board to consider the applications of the petitioners more particularly the engineering students from Egerton University, Masinde Muliro University of Science and Technology and any other Kenyan public university who have graduated prior to 14th September, 2012 in accordance with the Engineers Registration Act.

(e) Within fourteen days of the judgment, the Engineering Registration Board shall publish in at least two newspapers of national circulation and in a prominent manner, an advertisement of the decree and shall invite applications from any person eligible to be considered under Section 11 (1) (b) of the Engineers Registration Act and graduating with an engineering degree from Egerton University, Masinde Muliro University of Science and Technology and any other Kenyan public university prior to 14th September,

2012 for consideration as graduate engineers and the applications lodged with the Board free of charge.

(f) The Engineers Registration Board shall pay general damages assessed at Kshs. 200,000.00 to each petitioner and every Engineering graduate from Egerton University, Masinde Muliro University of Science and Technology and any other Kenyan public university graduating at least three years prior to the commencement of the Engineers Act, 2011. The said sum shall carry interest at a rate of 12% per annum from the date of judgment.

(g) The Engineers Registration Board shall bear the petitioners' costs of these proceedings.

[13] Aggrieved by this High Court decision, the Board preferred an appeal to the Court of Appeal.

(b) Court of Appeal

[14] In its appeal to the Court of Appeal, the Board argued that it was a professional body which had been mandated by sections 3 and 11 of the Engineering Registration Act (hereinafter referred to as the Act) to regulate the profession of engineers and that the High Court's decision was a misapprehension of the Board's mandate under the Act. As a result of the decision, the Board's mandate of registration of graduate engineers had been reduced to clerical duties. The Board faulted the High Court for falling into grave error by isolating the term 'recognize' from its context in section 11(1)(b) of the Act and relying only on its dictionary meaning. It argued that to 'recognize' was akin to 'accreditation' although the Act did not expressly authorize the Board to accredit universities whose degrees it recognises. The Board faulted the High Court for granting relief to even petitioners who had not applied for registration and people who were not parties to the petition.

[15] The Court of Appeal considered two main issues for determination: *the scope of the Board's role in the registration of graduate engineers under the now repealed Engineers Registration Act, Cap 530, Laws of Kenya; and whether the Board's refusal to register the petitioners violated their constitutional rights and if so what remedies they were entitled to*. The appellate Court, in its judgment, allowed the appeal, holding that *"the appellant (ERB) did what the law required them to do: to recognize by the process of professional accreditation that the degrees granted by Egerton and Masinde Muliro Universities met the requisite threshold to practice the profession of engineering."*

[16] The appellate Court held that the learned Judge of the High Court erred in finding that the appellant (ERB) did not require to go behind the degree certificates issued by Egerton and Masinde Muliro universities. In its decision, the appellate Court considered that to get sufficient evidence of adequate training, the appellant was obliged to go, as it did, into the details of the engineering courses offered by not only two but all those of other universities whose degrees it was called upon to recognize. Having found that the Board had not breached the law, the Court of Appeal faulted the learned judge of the High Court's holding that the appellant violated the respondents' constitutional rights under Articles 27, 28, 47 and 50 of the Constitution," and held there was no violation.

[17] Ultimately, the Court of Appeal held that the respondents (petitioners and 2nd interested parties herein) were not entitled to any damages at all, special or general from the appellant (ERB). That if they were entitled to any relief, then, it was certainly not against the appellant, ERB. The Court of Appeal allowed the appeal with costs to the appellants (Board) against Egerton and Masinde Muliro Universities, with the other respondents bearing their own costs.

[18] Aggrieved by that Court of Appeal decision, the petitioners have now moved this Court under Article 163(4) of the Constitution on appeal, their petitions being consolidated for purpose of hearing and determination as earlier stated.

III. SUBMISSIONS BEFORE THE SUPREME COURT

(a) The petitioners in Petition No. 19 of 2015

[19] These petitioners were represented by counsel Messrs Katwa Kigen appearing for the 1st -52nd petitioners, and Senior Counsel Prof. Ojienda together with Ms. Owuor appearing for the 53rd -106th petitioners. The first batch of petitioners (1st - 52nd) filed their submissions on 23rd February, 2016 while the second batch (53rd - 106th) filed their submissions on 17th June 2016.

[20] In summary, Prof. Ojienda submitted that the petitioners' appeal was grounded on the grievance that the Court of Appeal erred in law and in fact in: (i) making a finding that the Board has not violated the petitioners' fundamental rights yet the 1st respondent indeed violated and trampled on, with sheer impunity the constitutional rights of the petitioners under Articles 47, 28, 30, 50 , 46, 40(3) and 55 of the Constitution; (ii) misdirecting itself and straying from the real issues submitted for determination, by focusing on perceived disputes between the Board, and the universities, in the process condemning the petitioners to the dark corner in that they were treated as complete aliens to their own proceedings; and (iii) purporting to make a finding that the Board had mandate/powers to 'accredit' engineering courses in public universities under sections 5 and 11 of the Act.

Jurisdiction by the Supreme Court

[21] Counsel urged that this Court had jurisdiction to hear this matter. Citing the case of ***Samuel Kamau Macharia & another v Kenya Commercial Bank limited & 2 others*** [2012] eKLR, (***S.K. Macharia*** case) he submitted that jurisdiction flows from either the Constitution or legislation or both. He urged that this Court's jurisdiction under Article 163(4)(a) of the Constitution had properly been invoked since matters of violation of rights are matters touching on interpretation and application of the Constitution. Counsel also referred to the cases of ***Lawrence Nduttu & 6000 others v Kenya Breweries Ltd &***

another, [2012] eKLR (***Lawrence Nduttu*** case) and ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*** [2014] eKLR, (***Munya 1*** case) to urge that this matter was rightly before this Court.

[22] The petitioners framed the following issues for determination:

(1) *whether the Court of Appeal erred in fact and law in finding that the 1st respondent had not violated the petitioners' fundamental constitutional and statutory rights;*
(2) *whether the relationship between the petitioners and a university is contractual;*
(3) *whether the petitioners can be graduated by a university that did not admit them;*
(4) *whether adequate comprehensive legislation exists for purpose of transitions from satellite college campus (herein Moi University, Kakamega Campus) to chartered universities (herein MMUST);*
(5) *whether the petitioners had legitimate expectation to be awarded Moi University degrees and also be admitted by the ERB as engineers;*
(6) *whether the Court of Appeal had jurisdiction to entertain appeal from the High Court taking into account section 18 of the Act; and*
(7) *whether the repealed Act conferred the Board with powers to accredit engineering courses in public universities.*

The Petitioners proceeded to address the issues as framed in the following manner:

i) *On breach of fundamental rights and freedoms*

[23] The petitioners urge this Court to intervene and redress the long standing violation of the petitioners' fundamental constitutional rights. They argued that their right to ***human dignity*** as provided for in Article 28 of the Constitution

had been infringed. It was submitted that academic competition in Kenya's institutions of learning is cut-throat and the petitioners are among the few who survived the cut-throat academic competition, registered a spectacular performance and were admitted to study Engineering courses by the Joint Admission Board (JAB)[1] and successfully pursued the Bachelor of Engineering under the tutelage of lectures and facilitation of Moi University.

[24] However, upon graduation; they were denied registration as graduate engineers by ERB without any basis in law and fact. This refusal violated their inherent human dignity as it exposed them to a 'second' level of graduation. This was contemptuous to: the many years of hard work, determination and discipline that petitioners have channeled into their studies from kindergarten to university; the petitioners' parents or guardians efforts of taking loans, selling their pieces of land and cattle to ensure that their children acquire quality education and subsequently register as professionals to enable them earn a living; and the petitioners' dedication to honor their side of the contract with the Moi university while the university violated their side of the bargain with sheer impunity.

[25] It was submitted that the petitioners' dignity had been trampled upon in that: despite the fact that they are trained engineers, they have been unjustly barred from utilizing their skills, instead they were forced to serve as Engineers' clerks, office assistants and other non-professional engagement, this predicament is causing them untold suffering and humiliation, time without numbers, on this ground they are ridiculed and looked down upon by their workmates, peers and members of the society they live in; they were also rendered destitute and beg for support and upkeep, despite qualifying and being capable of taking care of themselves. They have been compelled to live life of humiliation, destitution, embarrassment and servitude.

[1] since replaced by the Kenya Universities and Colleges Central Placement Services (KUCCPS).

[26] It was urged that the Court of Appeal's decision reversing the High Court order for registration of the petitioners only prolonged the infringement on the human dignity, psychological, physical and emotional suffering and servitude that the petitioners are unfairly and unjustly subjected to. They cited the Indian Supreme Court case of ***National Legal Services Authority v Union of India and others*** [Civil Original Jurisdiction Writ Petition (Civil) No.400 of 2012; Writ Petition (Civil) No.604 of 2013] where it was observed that human dignity is intertwined with the development of a nation. They also cited the South African case of ***S v Makwanyane*** 1995 (6) BCLR 665 (CC) in which O'Regan J stated that: *recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings, human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in the Bill of Rights*. They urged that the Court of Appeal failed to address the violation of the rights of the petitioners which amount to inhumane treatment and servitude.

[27] The petitioners submitted that they were also discriminated upon as they were accorded different treatment from their peers who took same courses with same lecturers and facilities. They had legitimate expectations that if they studied hard, passed exams, maintained discipline, and got the help of parents and guardians to pay fees, they would get a legitimate degree from a statutory university. Hence the fault of the universities should not be attributed to them in a discriminatory manner.

[28] They submitted that the discrimination was two-fold. First, they were discriminated by Moi University when it failed to confer them with Bachelors' degrees from Moi University, since to those whom Moi university conferred the degrees, they were registered by the ERB while the petitioners continue to suffer. Moreover, Moi University refused to graduate the petitioners leaving it to MMUST who wanted to graduate them for political reasons hence delayed them. Secondly,

that they were discriminated by the ERB when it denied them registration yet they had undergone same training and been taught by the same lecturers while it recognized the same programmes administered by Moi university at the time to the other students it registered.

[29] Lastly, buttressing the issue of discrimination, it was submitted that the petitioners were ready to graduate in 2007 like their colleagues at Moi University, but had to wait for one year until 2008. That the basic requirement is that they be recognized as graduate engineers, thereafter after 9 years they will be consultant engineers. Unfortunately, while their colleagues are now consultant engineers, they are yet to begin as graduate engineers.

[30] It was also submitted that the petitioners were denied the right to affirmative action given that they are youth yet they continue to wallow in professional irrelevance despite all the training they had amassed.

ii) Contractual relationship between the petitioners and the university

[31] The Petitioners faulted the Court of Appeal in making a finding that the petitioners were not students of Moi University. In this regard, it was urged that when the petitioners were admitted by Moi University, they entered into a contract with the university with obligations on both sides. The petitioners cited the persuasive Court of Appeal decision of ***Oindi Zaippeline & 39 Others vs Karatina University and Moi University,*** Civil Appeal No. 52 of 2014[2], in which the Court of Appeal rendered itself on this contractual relationship issue

[2] This matter is pending before the Supreme Court on appeal as ***Moi University v Oindi Zaippeline & Karatina University,*** *Application No. 27 of 2015*. It has been filed as an application for review of denial of certification and grant of leave to appeal to the Supreme Court by the Court of Appeal. The application was filed before the Supreme Court on 27th October, 2015 and is pending hearing, all parties having complied with the Deputy Registrar's directions. The matter originated in the High Court at Nyeri where 40 applicants, students, who were by then fourth year students at Karatina University moved the High Court seeking orders that they be granted Moi University degrees upon the completion of their studies and not Karatina University degrees. They had been admitted by Moi University and placed in Central Kenya Campus in Karatina, then a constituent of Moi University, which subsequently became fully-fledged Karatina University. Wakiaga, J dismissed their application and on appeal to the Court of Appeal, the appellate Court agreed with them. Moi University now seeks leave to appeal that decision to this Court

thus: *"It is our finding that based on these facts, the relationship between the appellant and the 2nd respondent is a contractual relationship."*

[32] Consequently, it was submitted that while the petitioners honoured their part of the contract by maintaining discipline, paying school fees on time, sitting and passing exams administered by the Moi University, the university violated its contract, especially, by its refusal to grant the petitioners their engineering degrees. In this regard, the petitioners submitted that the Court of Appeal misdirected itself when it made a finding that the petitioners were not students of Moi University. It was hence urged that despite the charter conferred to MMUST, formerly Western University College of Science and Technology, the petitioners remain part of the admitting university, Moi University, and ought to be issued with degree certificates of Moi University. As such, the petitioners argued that the appellate Court failed to address the undoings of Moi University in regard to the contract they had with the students.

[33] Counsel Katwa on behalf of the second batch of petitioners urged that a look at the degree courses offered by both Moi University and MMUST reveals that they are different. MMUST offers 6 engineering degrees that are different from what the petitioners studied and that MMUST never applied to offer these degrees to its students. He contended that the degrees that the students studied have never been offered by MMUST because they were programmes of Moi University. Hence, MMUST never offered the degrees that they now purport to have graduated the students with. Mr. Katwa also reiterated that there existed a contract between Moi University and the petitioners. That even after being 'taken over' by MMUST, Moi University continued treating the petitioners as its students by using lecturers, course structure, administration and mode of instruction of Moi University.

iii) Legitimate expectation

[34] It was urged that the petitioners had legitimate expectations that they will graduate from Moi University. Counsel submitted that legitimate expectation, though not defined by any law, is another doctrine fashioned by the Court to review administrative action. He relied on the definition by Lord Frazer in ***Council of the Civil Service Union v Minister for the Civil Service*** 1985 AC 374, H.L. thus:

> ***"Where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefits or privilege and if so, the courts will protect his expectation by judicial review as a matter of public law."***

In this regard, it was submitted that legitimate expectation arises where a legitimate public authority in practice undertakes certain functions and enters into a relationship with a private citizen that the same will lead to the ordinary outcome. Hence, the petitioners legitimately expected that they will graduate as engineers from Moi University, and not serve as clerks to engineers or as tellers in supermarkets, upon successfully undertaking their undergraduate studies in engineering.

[35] To buttress this, counsel also cited Lord Diplock in ***O'Reilly v Mackman*** *[1983] 2 AC 237* thus: *"legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."* Reference was also made to the Indian case of ***Madras City Wine Merchants Association v state of Tamil Nadu***, [1994] 5SCC 509 by counsel who argued that applying the criteria in that case, *(that if there is an express promise given by a public authority; because of the existence of a regular practice which the claimant can reasonably expect to continue; such expectation must be reasonable),* the petitioners had an express promise in the form of section 11(1)(b) of the Repealed

Engineers Registration Act, that they will be admitted as graduate engineers once they successfully complete their engineering degrees from a recognized public university such as Moi University.

[36] The petitioners urged that there was also a regular practice which they expected to continue since 1969 when the Engineers Registration Board was established: it has been registering students like the petitioners to be graduate engineers without fail. Hence, the petitioners should not be treated differently and their expectation is reasonable as they had fulfilled all the requirements expected of them for registration. It was also urged that the petitioners had a legitimate expectation to graduate as Moi university graduates because it is Moi University that admitted them and facilitated their learning process and they had a contract with Moi University. It urged that legitimate expectation as a doctrine has now been reflected in our judicial practice and referred to the cases of ***Republic v Kenya Revenue Authority, ex parte Aberdare Freight Services Limited*** [2004] 2 eKLR 530 and this Court's decision in ***Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others,*** [2014] eKLR, (The ***CCK*** case) which asserted the emerging principles on legitimate expectation in our jurisdiction.

[37] On his part, learned counsel Katwa made further submissions on behalf of the 1st-52nd petitioners. He reiterated that on legitimate expectation, the petitioners expected that if they worked hard, passed their exams and paid fees, they would end up in High Schools and finally with degree certificates. That after passing exams, they qualified to do engineering courses and were placed at Moi University. Thereafter, Moi University in exercise of discretion placed them in a campus in Kakamega, Western University College. In essence, the petitioners had no say in how they ended up at the Western University College as the selection was random. Counsel referred to the letter(s) of admission to buttress the submission that the petitioners were admitted to Moi University.

[38] It was argued that in creating MMUST, section 3(3) of the MMUST Act makes provision for the transfer of things to MMUST. Counsel submitted that students were not part of the things transferred to MMUST and that there is nowhere indicated that students were transferred.

[39] It was also contended that the Court of Appeal erred in making a finding that under sections 5 and 11 of the Engineers Registration Act and section 5 of the Universities Act, the Board has the mandate to accredit engineering courses in public universities. That the ERB acted *ultra vires* its mandate in purporting to examine the content of the degrees awarded to the petitioners. They urged that the ERB's mandate was simply to register and not to act as an examining body. The petitioners submitted that there was a distinction between 'recognition' and 'accreditation'. It was contended that the board purported to accredit the petitioners' degrees and not to recognize them, which was *ultra vires* its mandate.

iv) Jurisdiction of the Court of Appeal in light of section 18 of the Act

[40] Learned counsel submitted that the Court of Appeal erroneously admitted the appeal from the High Court, yet under section 18 of the Act, it is unequivocally stated that the decision of the High Court is final; It was further submitted that under section 18 of the Engineers Registration Act, no appeal lay to the Court of Appeal from the High Court; hence the Court of Appeal had no jurisdiction to hear the appeal in the first instance. That the appeal to the Court of Appeal was not appealable as the decision of the Board laid to the High Court on a final appeal. Counsel urged that the Court of Appeal did not consider this question.

(b) 3rd Respondent (Petitioner in Petition No. 4 of 2016), MMUST.

[41] The crux of its appeal was that the Court of Appeal erred in its award of costs and urged that its appeal involved the interpretation and/or application of the Constitution. It filed written submissions on 23rd May 2016 and was represented at the hearing by learned counsel, Mr. Ben Simiyu.

[42] MMUST agreed that there was a violation of the fundamental rights of the students, their co-petitioners in this matter when they failed to be registered by ERB. It was however emphatic that MMUST lawfully graduated its students.

[43] As to whether the petitioners (students) were to graduate as students of Moi University, it was submitted that this was an issue that was being raised for the first time before this Court. That it was never an issue before the High Court and the Court of Appeal. Had it been raised, they would have had a chance to guide the Court of Appeal on it.

[44] It urged that while indeed the students had a contract with Moi University, the same was frustrated by operation of the law. It submitted that a letter of admission is not conclusive that one will graduate for one has to pay fees, do exams certified by the senate of the university failure of which one cannot graduate. Hence it was argued that MMUST validly graduated the students. It conceded that indeed there are challenges of transition like in this case but such challenges are not fundamental enough to affect the process.

Erroneous award of costs

[45] It was submitted that the Court of Appeal ordered that costs be met by Egerton University and MMUST. There was absolutely no reason given on how the two entities were singled out to bear the costs. That the High Court found MMUST had properly discharged its mandate and dismissed the petition against it, hence there was no fault attributed to the petitioner (MMUST) over its role in training engineering graduates. It was urged that the ERB appealed the High Court decision and in all its grounds of appeal, no challenge was made to the order dismissing the petition against MMUST. It was therefore submitted that the parties in the Court of Appeal, ERB and the student petitioners, had no basis for an order for costs as against the petitioner, MMUST.

[46] It cited this Court's decision in ***Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others*** *[2014] eKLR* (***Jasbir Rai*** case) on the principles of awarding costs. It submitted that costs follow events as a general principle, hence it was the students who would have been condemned to pay costs as their petition against MMUST was dismissed. It was urged that if the learned judges of the Court of Appeal felt like departing from this general principle, then they ought to have given some explanation.

[47] MMUST urged that it performed its statutory role under the MMUST Act No. 18 of 2006 by teaching, examining and awarding degrees and nobody (not even Commission for High Education (CHE) and/or the parent Ministry) had challenged the validity of the university degrees awarded to the petitioners. It cited the persuasive Court of Appeal decision in ***Kenya National Examination Council vs Republic, ex parte, Geoffrey Gathenji and 9 others****, Nairobi, Civil Appeal No. 266 of 1996* [1997] eKLR where the Court of Appeal observed as follows with regard to KNEC:

> **"*... as a creature of Statute, the council can only do that which its creature (the Act) and the rules made thereunder permit it to do...*"**

Hence, it was submitted that it was unfair to punish the petitioner, MMUST, for doing what its establishing Statute required it to do as doing so would result into some absurdity and also encourage abdication of obligation.

[48] MMUST argued that costs are not meant to punish the losing party. In this regard, it cited Justice Kuloba's words in his book-*Judicial hints on Civil Procedure* thus:

> **"*... the object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal***

measure….costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action…"

It submitted that MMUST was being ordered to pay costs as a punitive measure.

[49] The petitioner contended that the nature of these proceedings is public interest litigation: which litigation is exempted from costs. That this case advances public interest and the stakeholders in the engineering profession are very many hence, it is a prudent case for ordering each party to bear its costs. It referred to the ***Jasbir Rai*** case for the Supreme Court's jurisprudence on costs in public interest litigation.

Wrong interpretation of Statutes

[50] It was submitted that when this matter was brought before the High Court at the first instance, the applicable legislation was the Engineers Registration Act, Cap 530, and not the new Act and that Cap. 530 provided for 'registration'. That the Black's Law dictionary defined 'registration' to mean, "the act of recording or enrolling". Hence, it was urged that the Court of Appeal erred in equating 'registration' and/or 'recognition' to 'accreditation' yet under Cap. 530, accreditation does not feature anywhere. Accreditation is only introduced in the new Engineers Act; hence under the old applicable regime of law, the ERB could not have powers to accredit.

[51] It was urged that section 11(1)(b) of Cap. 530 provided that for one to be registered as a graduate engineer: *"… a person must be holder of a degree, diploma or license of a university or school of engineering which may be recognized for the time being by the Board as furnishing sufficient evidence of an adequate academic training in engineering."* In this regard, it was submitted that the key word is "recognition' which is defined in the Black's Law Dictionary as *"confirmation that an act done by another person is authorized…"*. On the

contrary the petitioner submitted that the same dictionary defines 'accreditation' thus: "giving official authorization or status or recognize a school as having sufficient academic standards…"

[52] It was urged that the mandate of ERB is to register, that is, to enroll graduate engineers. This is done after recognition, which legally means the act of confirmation that the degree belonging to the applicant was lawfully issued. MMUST submitted that as both the Commission for Higher Education (CHE) and Ministry had confirmed that MMUST was authorized to train engineers, their degrees are valid. The petitioner urged that MMUST, as a creature of Statute, does what Statute authorizes it to do. Hence, it is only CHE, now CUE that could ask if MMUST is authorized to offer the degree, as it is the one that accredits, not ERB. It urged that contrary to the Court of Appeal's finding, the concept of recognition cannot be the same as accreditation. If that was the case, it was paused, why was there need to introduce the concept of accreditation in the new Act with a clearer meaning, well defined mandate and larger scope? In the 3rd respondent's submission, this was a clear admission by the Board that it did not have the power or mandate to accredit engineering programmes under the repealed Cap 530.

Remedies

[53] It was submitted that the High Court having found that the Petitioners' rights were violated by the Board's failure to register them, it fell upon the High Court to fashion the appropriate remedies. Citing the Constitutional Court of South Africa's case of ***Fose v Minister of Safety and Security,*** 1997(3) SA 786 CC it was submitted that it matters not whether the prayers, remedies or reliefs were specifically sought for or otherwise. In that case, it was held: *"… depending on the circumstances of each particular case, the relief may be declaration of rights, an interdict, a mandamus or such other relief. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement*

of these all important rights." In the premises, the award of Ksh.200,000/- as general damages was not unreasonable and/or out of character.

[54] In conclusion, it was urged that MMUST has suffered since the Court of Appeal decision as there is a perception that it is issuing bogus programmes. The effect is reduction in income being made by the university given that engineering is a core course. They therefore prayed that their appeal be allowed.

(c) 4th Respondent's (Egerton university)

[55] Egerton university filed its written submissions on 23rd January 2017 and was represented by learned counsel Mr. D. Ouma. Egerton University supported MMUST's appeal and submitted that an order for costs must be justified. It also urged that there was no time in its decision that the Court of Appeal questioned the validity of the degrees of Egerton University or found Egerton University to be liable for any incidence of error, of omission or commission. That the award of costs against them was without rationale as they had not preferred any appeal to the Court of Appeal and the case in the High Court against them had been dismissed.

[56] They urged that at all times material to this suit, the 4th Respondent's status was guided by the Egerton University Act and section 4(1) of that Act gives the functions and objectives of the University. The university has the power to determine the content of its degrees and has the power to teach, examine and award degrees. Hence, what it did complied with the law and the Board, under the Engineers Regulation Act, had no powers to determine the content of the courses Egerton University offered.

(d) 5th Respondent's, (Commission for Higher Education) position.

[57] The 5th Respondent remained passive in the proceedings. Through its learned counsel, Mr. Mumia, the Commission did not file or make any submissions in the matter, indicating that no course of action had been founded against the Commission.

(e) 6th Respondent's, (Ministry) position.

[58] The Ministry filed its submission on 5th July 2016. The Ministry submitted that it draws its mandate from various legal instruments: the Constitution, various education Acts of Parliament, as well as Executive Order No. 2 of 2013.[3] It urged that in the circumstances of this dispute, its responsibility was limited and remains limited to policy making and supervision of universities to ensure they comply with their statutory mandates. It urged that it bears no responsibility in this matter as each statutory body, the universities and the ERB, bears their respective statutory responsibilities.

[59] The Ministry submitted that it first became aware of the petitioners' predicament in 2010 when universities sought its intervention to have ERB to recognize their programmes. It constituted a committee comprising of Deans of Engineering of universities and their constituent colleges to examine and report on the status of engineering programmes in Kenyan Higher education institutions. Thereafter, the Ministry undertook several measures to have the issues resolved by all parties concerned. ERB was to meet each university individually to address specific issues.

[3] Under Executive Order No. 2 of 2013 on the organization of the Government of the Republic of Kenya, the Ministry of Higher Education Science and Technology is responsible for, among other things, education policy management, standards and norms, quality assurance, university education policy management, university education, Public Universities and Tertiary Institutions.

[60] It submitted that at the beginning of 2012, University of Nairobi, Moi University, and Jomo Kenyatta University of Agriculture and Technology, had resolved their issues with ERB. However, at the time of filing this matter in court, Egerton and MMUST were at an advanced stage of resolving the issue with ERB. They had been given 3 years to comply with the ERB requirements and petitioners were asked to go back to school but instead went to court. The Ministry blamed the universities as they knew well in advance the problem faced by the students but refused and/or neglected to take necessary steps to mitigate the problem like other public universities did. It submitted that ERB was not in violation of any of the petitioners' rights.

[61] Mr. Onyiso appearing for the Attorney General supported the submissions made by Mr. Pheroze Nowrojee, learned counsel for the 1st respondent.

(f) 1st Respondent's, (Engineers Registration Board) position

[62] The 1st Respondent, ERB, through its written submissions filed on 5th August 2016 delineated two issues for determination: *whether the Board had powers, under the Act, to recognize or examine the academic and course outlines of the institution awarding them in order to satisfy itself that the holder has "adequate academic training in engineering"; and whether the 1st respondent violated the fundamental rights of the petitioners by its acts and/or omissions*.

i) Recognition vis-à-vis accreditation

[63] The 1st Respondent faulted the High Court's pronouncement on 'recognition' as used in the Act and agrees with the Court of Appeal's finding on the role and mandate of the ERB. It submitted that registration of engineers is its core business. That a person or graduate may apply for registration as an engineer and it is only once the registration is complete that one is recognized as an engineer. It was argued that section 11 of Cap. 530 that provides for registration denotes some form of discretion granted to the Board in the recognition of degree, diploma or license

and/or the university or school of engineering. That as such, the Board has developed criteria for recognition that is applied in equal measure, for all local universities. That from section 11 of the Engineers Registration Act, the Board has to be satisfied as to the "adequate academic training in engineering" through the presence of enough or sufficient evidence thereof.

[64] The Board submitted that if the degree courses offered do not meet the required criteria for professional practice, then it must reject such degrees as not offering sufficient evidence of an adequate academic training in engineering. In this regard, reference was made to the case of ***Eunice Cecilia Mwikali Muema v Council for Legal Education and 2 others*** [2013] eKLR. The Board urged that they cannot compromise standards since in the absence of registration and regulation standards, there will be anarchy and chaos in the profession.

[65] It submitted that in the superior courts, it had submitted that when the petitioners and the universities comply with the requirements, then the petitioners shall be registered. It contended that there is no dispute that the undergraduate degree programmes in relation to several local universities had issues which some universities addressed, and were subsequently recognized and/or accredited, and graduates have since been registered. That MMUST and Egerton did engage the 1st respondent and did agree on the way forward, but it seems they had no intention of going forward with the 1st Respondent's recommendations. Hence, it agreed with the Court of Appeal finding that, *"the Act vested the appellant [Board] with authority to set up the Professional Standards of engineering and ensure that the people it registered qualified for registration and lived up to those standards."*

[66] It was also urged that all parties were aware of the 1st respondent's position as regards recognition of degree programmes for MMUST and Egerton. That the graduates did not wake up to find that the 1st Respondent had shifted the goal posts. For instance, it published in the Kenya Gazette the Engineering programmes and the universities that offer them; engaged all universities and petitioners, and

universities were aware of the shortcomings of the degrees they were undertaking, that they were not recognized and would not lead to registration. That even the universities had agreed and/or proposed to invite the affected graduates, the Petitioners, to abridge the deficit in engineering programmes.

Award of Moi University degrees to petitioners

[67] Countering the submissions by the petitioners that MMUST awarded them degrees though the programmes were not theirs and that the programmes are not in MMUST's Statutes, and seeking that the degrees be annulled and they be awarded degree certificates of Moi University, it was submitted that the same degrees which the petitioners are asking ERB to use to register them, are the same they want to annul. This is a late realization by the petitioners that their remedy lies elsewhere other than the pursuit of the 1st Respondent. Be that as it may, the 1st respondent argues that if petitioners are awarded such degrees, it will still argue that as they were not taught by Moi University, their degrees will still fall short of the requirements and will have to make up for the deficits.

[68] It was also argued that the petitioners had urged the superior court that they be declared graduates of Moi University and be issued with Moi University degrees but the High Court declined this prayer. This verdict was not cross-appealed to the Court of Appeal, and cannot therefore now be raised before the Supreme Court.

ii) Violation of constitutional rights

[69] On the issue of violation of the petitioners' constitutional rights, the Board submitted that it exercised a discretion bestowed upon it by statute, and that discretion was exercised fairly. It submitted that courts should decline to interfere in academic and/or professional matters which are governed by statute and more particularly where a body has been bestowed with discretion. It cited the case of ***Republic v Council for Legal Education ex parte James Njuguna & others***, Nairobi HC Misc. Civil Case No. 137 of 2004 [2007] eKLR thus:

> ***"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."***

[70] They argued that the petitioners had not shown any proof of violation by the 1st respondent. It is submitted that there was no discrimination as the accreditation was developed and applied across the board for all universities.

iii) Legitimate expectation

[71] On the issue of legitimate expectation, it was submitted that the petitioners were asking the Supreme Court to order their registration, not because the statute allows, but because there are other circumstances. That they were contending that there was a promise and a regular practice of Moi University to graduate students. To the contrary, the Board urged that there is no such regular practice that since the petitioners were regularly registered by Moi University, it was automatic that they will graduate. It submitted that there is no promise given by ERB since under section 11 of the Act there is none. Further, that there is no express promise by a public authority that the petitioners will be registered. That section 11 of the Act makes no promise but sets conditions and vests discretion in the Board and discretion is not a promise to act either way.

iv) Remedies

[72] It is also submitted that the order for mandamus, given by the High Court against the ERB, was not available to the appellants as the decision of the ERB declining registration was before the Court. The ERB had performed its function under the Act and the appellants, under the Act, can appeal to the High Court.

[73] As regards costs, it was submitted that under section 27 of the Civil Procedure Act the costs of and incidental to all suits shall be in the discretion of the Court or Judge. It also cited section 3(2) of the Appellate Jurisdiction Act and urged that the Court of Appeal in awarding costs to the successful party was simply exercising such discretion.

[74] The 1st respondent's position was articulated during the oral highlighting of submissions before this court by learned counsel Mr. Pheroze Nowrojee who appeared with Mr. Kerongo.

v) Jurisdiction of the Court of appeal and section 18 of the Engineers Registration Act

[75] On whether the Court of Appeal had jurisdiction to hear and determine the appeal under section 18 of Cap. 530, it was submitted that this issue was being raised for the first time before the Supreme Court. The Board urged that the petitioners are estopped from raising such an issue now. It also submitted that the petition at the High Court was commenced, not because the ERB made any individual decision as contemplated by section 18 but, based on a joint letter. It was never stated in the petition that it was based on section 18 of the Act. It was submitted that by suing other entities, the petitioners took the matter outside the realm of section 18 of Cap. 530.

(g) 2nd Respondent, Moi University

[76] Moi University submitted that the petitioners' petition against them in the High Court was dismissed with no order as to costs and the same was not appealed at the Court of Appeal. Hence, it was submitted that the alternative prayer sought that they be issued with Moi University degrees is improperly before this Court and should not be entertained. The same is issue estopped and cannot be brought before this Court. They urged that under section 3 of the MMUST Act, the issue of "assets and liabilities" of Western University College being transferred to MMUST

is a matter of interpretation and transfer of obligations cannot be de-linked from 'students'.

[77] Mr. Masika, counsel appearing for the 2nd respondent reiterated the above position, relying on the written submissions filed on 1st September 2016.

IV. ISSUES FOR DETERMINATION

[78] Before delimiting the issues for determination in this matter, it is important that as a Court, we decipher this case and lay it bare. While parties have submitted on a number of issues, we take note that the petitioners moved this Court on appeal under Article 163(4)(a) of the Constitution. This Court has addressed its role as an appellate Court in a number of cases. The jurisprudence laying down the guiding principle is in the case of ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others,*** [2012] eKLR, (***Ngoge*** case) thus (para. 30):

> ***"In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court."***

[79] More recently in the case of ***Kenya Commercial Bank Limited vs Muiri Coffee Estate limited and another,*** [2016] eKLR, the Court elaborated on this appellate role when it remarked [para.90]:

> ***"... the Supreme Court's role is mainly an appellate one: and therefore, it is generally to be moved only on matters***

that have already progressed through the judicial hierarchy."

[80] It emerges that the guiding principle in this Court's exercise of its appellate jurisdiction is deference to the judicial hierarchy of courts. A matter has to legitimately rise through the other superior courts (High Court and Court of Appeal) before it can be admitted for determination before this Court. The Supreme Court will not readily accept matters on appeal where those matters have not been subject of proceedings before the other superior Courts. This is the judicial comity rationale that this Court alluded to in the ***Ngoge*** case when it talked of "*the chain of Courts in the constitutional set-up, running up to the Court of Appeal, having (sic) the professional competence and proper safety designs, to resolve all matters turning on the technical complexity of the law.*"

[81] While parties have addressed us on a number of issues, this Court will be guided by what the case was before the High Court and the Court of Appeal. The crux of the petitioners' case before the High Court is captured in paragraph (2) of the High Court Judgment thus:

> "***The substance of the petitioners' claim is that after completing their engineering degree courses at the respective universities, they have been denied admission to practice the profession of engineering by the ERB and as such their fundamental rights and freedoms have been breached."***

[82] Upon evaluation of the evidence on record, the learned Judge of the High Court stated thus: *"I hereby declare that the Engineers Registration Board has violated the Petitioners' right to fair administrative action protected by Article 47(1) of the Constitution and the Petitioners' right to human dignity protected by Article 28 of the Constitution as read with Article 55(a) and (c) of the*

Constitution." Evidently, at the High Court, the court was confronted with the question of breach of fundamental rights by the Board's refusal, to register the petitioners.

[83] At the Court of Appeal, the learned Judge (*Maraga, JA* as he then was), framed two issues for determination thus:

> **"*This appeal, in my view, raises two main but fairly complex issues. The first one relates to the role and function of the Engineers Board of Kenya in its recognition of degrees awarded by various universities for purposes of registration, under the now repealed Engineers Registration Act, of holders thereof as graduate engineers. ... The second issue is whether or not the appellant's refusal to register the holders of those degrees as graduate engineers violated their constitutional rights and if so what remedies were they entitled to?*"**

[84] The appellate Court then proceeded to determine the first issue making a finding that the Board had the legal mandate to interrogate the degrees awarded to the appellants so as to get sufficient evidence of adequate training by the universities for the degrees it was being called upon to recognize. On the second issue, the appellate Court found that there was no violation of any constitutional rights and freedoms of the petitioners. Again, the Court of Appeal determined the matter before it on two issues only.

[85] Against this background, the following issues for determination emerge:

(a) Whether this Court has the Jurisdiction to hear and determine this matter.

(b) Whether the Court of Appeal had jurisdiction to hear the appeal from the High Court, given the provisions of section 18 of the Engineers Registration Act.

(c) Whether the Board acted ultra vires its mandate in rejecting the petitioners' applications for registration as engineers.

(d) Whether there was breach of the petitioners' constitutional fundamental rights and freedoms.

(e) Whether the Court of Appeal erred in its award of costs as against Masinde Muliro University of Science and Technology and Egerton University.

(f) Whether this Court can, and should order that the petitioners be awarded with Moi University degrees, and on that basis the Board be ordered to register them as engineers.

(g) Appropriate relief

V. ANALYSIS

[86] Having considered the record, the written and oral submissions of the parties, we now proceed to render our determination on the issues as framed above.

(a) Whether this Court has the Jurisdiction to hear and determine this matter.

[87] Counsel for the 1st Respondent, Senior Counsel Pheroze Nowrojee, supported by Counsel Mr. Onyiso, for the Attorney General, challenged this Court's jurisdiction to determine this matter. It was averred that the issues being raised before this Court had not been before the Court of Appeal hence cannot lie on appeal before this Court. Particularly, it was contended that the Court of Appeal

made no finding on the issue of violation of constitutional rights and freedoms of the petitioners, hence that issue cannot lie before this Court.

[88] The Petitioners urged that this Court has jurisdiction to hear and determine this matter. They cited this Court's jurisprudence in ***S. K. Macharia***, ***Lawrence Nduttu*** and ***Munya 1*** cases and submitted that their appeals meet the jurisdictional threshold within the four corners of Article 163(4)(a) of the Constitution.

[89] We summarily determine that the appeal before us is proper and meets the jurisdictional threshold. An evaluation of the record shows that the petitioners moved the High Court vide constitutional petitions raising allegations of breach of fundamental rights and freedoms as we have outlined in this Judgment (above). We note that both superior Courts below dealt with the question of whether there was a violation of the petitioners' fundamental rights. Specific constitutional provisions were raised and pleaded, and both Courts made a finding on them. While the Court of Appeal made a general determination that there was no violation of fundamental rights, the High Court had found violations of Articles 28, 47(1) and 55(a) and (c) of the Constitution. The issue of breach of fundamental rights, being a question of interpretation and application of the constitution, has duly risen through the judicial hierarchy leading to the appeal now before the Supreme Court as contemplated by Article 163(4)(a) of the Constitution. The challenge to our jurisdiction is therefore without merit.

(b) Whether the Court of Appeal had jurisdiction to hear the appeal from the High Court, given the provisions of section 18 of the Engineers Registration Act.

[90] The petitioners argued that the Court of Appeal should not have made the decision it made as it had no jurisdiction to even admit and determine the matter

since section 18 of the Engineers Registration Act (the Act) provided that the High Court's order was final. Section 18 of the Act provided in relevant part thus:

> ***"18(1) Any person aggrieved by a decision of the Board to refuse to register his name, or to remove a name of a registered engineer, registered consulting engineer, registered graduate technician engineer, registered technician or a registered graduate engineer from the register, or to suspend the effect of registration of his name, or to refuse to restore his name to the register, may appeal to the High Court against the decision of the Board and in any such appeal the High Court may give such directions in the matter as it thinks proper, and any order of the High Court under this section shall be final."*** (Emphasis added)

It is on the basis of this 'finality' provision that the petitioners argued that the decision made by the High Court was final and the 'further' appeal to the Court of Appeal was irregular. The 1st and 2nd Respondents opposed this contention. First, they argued that this opposition was never raised in the Court of Appeal, and secondly, that when the petitioners approached the High Court, they did not invoke section 18 of the Engineers Registration Act.

[91] Upon evaluation of the petitions filed at the High Court, we agree with the 1st and 2nd Respondents. The matter originated in the High Court as constitutional *Petitions No. 149* and *No. 207*. The crux of the petitioners' case was that in failing to register them, the Board had violated their fundamental rights and freedoms under the Constitution. The petitions in the High Court were brought under Articles 19, 20, 21, 22, 23, 25, 40, 47, 50(1), 165(3), 258, 259 and 260 of the Constitution. We find that at no time was section 18 of the Act pleaded and/or mentioned.

[92] Being aggrieved by the decision of the Board not to register them as graduate engineers, this Court finds that the petitioners had two avenues to seek redress. They could either approach the High Court under section 18 of the Act to challenge the Board's decision not to register them, whereupon, we are in agreement with the petitioners that the High Court's order would have been final; or they could proceed, as they did, under Article 22 of the Constitution alleging violation of fundamental rights and freedoms, by filing a petition to the High Court. In our view, an application predicated upon section 18 of the Act would be limited to challenging the decision of the Board and the Board would be the only respondent in such an application.

[93] Consequently, having approached the High Court under Article 22 of the Constitution, the petitioners cannot now turn around and raise section 18 of the Act, as a bar to the respondents appealing to the Court of Appeal. There is no bar against an aggrieved party to a determination by the High Court under Article 22 of the Constitution appealing to the Court of Appeal as the right of appeal is guaranteed within the same Bill of Rights that the petitioners had founded their cause of action upon. Moreover, as rightly pointed out by the 2nd respondent, the petitioners' redress as sought in their petition went beyond the Board or its decision on the registration of petitioners. The petitioners' grievances transcended to the breach of fundamental rights, damages, claims against the Universities, the Ministry of Education and the Commission on Higher Education, all of which were beyond the scope of the said section 18 of the Act.

[94] From the record, there is no demonstration that the Court of Appeal's jurisdiction was challenged in this regard. The upshot is that we find that the Court of Appeal did not err in hearing the appeal before it as it had the requisite jurisdiction.

(c) Whether the Board acted ultra vires its mandate in rejecting the petitioners' applications for registrations as engineers.

[95] This issue forms the core of the dispute in this matter. While the High Court found that the Board had no mandate to 'go behind' the degrees of the petitioners, the Court of Appeal was emphatic that the Board cannot be reduced to doing 'clerical work' of merely registering engineers and found that the Board had to interrogate the degrees so as to establish whether there was sufficient evidence of qualification.

[96] It is common ground that the applicable law when this cause of action arose was the Engineers Registration Act, Cap. 530, Laws of Kenya. Though the Act has since been repealed, it forms the basis of our interrogation of the mandate of the Board. The short title defines it as: *[a]n Act of Parliament to provide for the registration of engineers and for connected purposes*. Section 3(1) establishes the Board thus: *"There is hereby established a Board, to be known as the Engineers Registration Board, which shall have responsibility for regulating the activities and conduct of registered engineers in accordance with the functions and powers conferred upon it by this Act"*.

[97] From section 3(1), it emerges that the Board is mainly charged with the responsibility of regulating the activities and conduct of registered engineers. The Act has no express provision that exclusively provides for the functions of the Board. Looking through the Act, section 6 provides for the keeping of a register of engineers by the Registrar appointed under section 5. Particularly, section 6(2) empowers the Board *to direct how the register should look like,* that is*, the different parts in which it should be divided*. Under section 7(1), the Board may *direct the Registrar to cause to be published any amendment to or deletion from the register*. Part IV of the Act deals with registration of persons as engineers. Section 11 in relevant parts provides:

> "***11(1) Subject to this Act, a person shall be entitled on making an application to the Board in the prescribed form and on payment to the Board of the prescribed fee, to be***

registered under this Act and to have his name entered in the register as a registered engineer if he is-

...

(b) a person who-

***(i) is the holder of a degree, diploma or license of a university or school of engineering which may be <u>recognized</u> for the time being by the Board as furnishing sufficient evidence of an adequate academic training in engineering;*" (Emphasis supplied).**

[98] It is the interpretation of this section 11 that is at the core of this case, particularly, the definition or meaning to be accorded to the word 'recognized' as used in the section 11. In assigning meaning to the word 'recognize,' this Court, like the superior Courts below, will also have to assign meaning to the word 'accredit' which though not found in the Act, was at the centre of the findings of the Court of Appeal.

[99] The *Oxford Advanced Learners Dictionary*, International Student's Edition, New 8th Edition, defines 'recognize' as:

"***1. to know who somebody is or what something is when you see or hear them, because you have seen or heard them or it before. 2. to admit or to be aware that something exists or is true 3. to accept or approve of somebody/something officially.*"**

In the same Dictionary, 'recognition' is defined as:

> "***2.the act of accepting that something exists is true or is officially.***"

Notably, the synonym given for the word 'recognize' is 'acknowledge'.

[100] The above dictionary defines 'Accredit' thus:

> "***3. something/somebody to officially approve something/somebody as being of an accepted quality or standard*****:** *Institutions that do not meet the standards will not be accredited for teacher training*.**"**

and 'Accreditation' as:

> "***Official approval given by an organization stating that somebody/something has achieved a required standard*****:** *a letter of accreditation*."

[101] It therefore emerges that in conventional English language, the two words, 'recognize' and 'accredit', are not synonymous. 'Accreditation' has got to do with approval of someone/something as meeting a particular criterion for doing something. It goes to standard setting or meeting a particular set threshold for doing something. The dictionary example given is thus: *Institutions that do not meet the standards will not be accredited for teacher training*. On the other hand 'recognize' has the connotation of taking note that something/someone exists, that is, that what is said to be, indeed is.

[102] In this matter, the High Court relied on the Black's Law Dictionary definition of 'recognition', that is: *'confirmation that an act done by another person is authorized'* and 'accredit': *to recognize (a school) as having sufficient academic standards to qualify graduates for higher education or for professional practice*." In finding that the two terms are different, the learned Judge stated:

"I also agree that the meaning of recognition excludes any notion of accreditation. The act of recognition contemplated by the provisions of section 11(1)(b) of the Act only refers to the act of a confirmation that the degree conferred by the holder is lawful"

[103] On the contrary, the Court of Appeal referred to *Halsbury's Laws of England*[4] in finding that no provision of any legislation should be treated as 'standing alone' and that an Act of Parliament should be read as a whole, the essence being that "*a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act."* The Court of Appeal disabused the sole reliance on the dictionary meaning of the word recognized stating thus:

"Counsel for the parties made heavy weather of the meaning of the term 'recognized' in this provision mainly referring us to its dictionary meaning. Whereas I agree that it is the operative word in the provision, I think we shall fall into grave error if we rely on the dictionary meaning alone and do not seek to ascertain its meaning from the context of not only section 11 but the entire Act as well."

[104] Citing the short title of the Act: *an Act of parliament to provide for the registration of engineers and for connected purposes*, the learned Judge of appeal interpreted the role of the Board not to 'merely to register', that is, to record or enroll graduate engineers, that being the Registrar's role. In this regard, he stated:

"*With due respect I do not think that the role of the appellant (Board) (sic) was simply "to register i.e. record*

[4] Paragraph 1484 of 44 Halsbury's Laws of England, 4th Edition, Butterworths 1995.

or enroll graduate engineers." In my humble view, that is the role of the Registrar appointed by the Minister under section 5 of the Act. Sections 6 to 10 of the Act made (sic) that quite clear. In the circumstances, I agree with counsel for the appellant that to limit the role of the appellant to confirming that an applicant who sought registration as a graduate engineer was a holder of a degree lawfully and properly issued by a public university would have been tantamount to reducing the appellant's role to clerical duties. If that were the intention of Parliament, it would not have established the appellant Board. As I have said, the Registrar would have satisfactorily performed those duties. In my humble view the Act vested the appellant with authority to set up the professional standards of engineers and ensure that the people it registered qualified for registration and lived up to those standards."

[105] With great deference to the learned judge of Court of Appeal, this was the first instance where he fell into error. The role of the Registrar is to maintain a register. Under the Act, the role of registering is solely the Board's. This is clearly illustrated by section 6 of the Act which provides that the Registrar maintains a register *"in which the name of every person entitled to have his name entered therein shall be entered as soon as is practicable after being accepted by the Board for registration."* Simply put, once the Board has accepted a person's application for registration, the final step in the process of registration is for the Registrar to 'formalize' the Board's acceptance by entering the name of the person/applicant in the register she/he keeps. We find that this act of entering a name into the register does not in any way make the Registrar the registering entity. The Registrar is the Board's secretariat. This finding is further buttressed by the fact that an application for registration, under section 11 of the Act, is made

to the Board, as the registering entity, and not the Registrar. Consequently, we find that the Court of Appeal misinterpreted the provisions of the Act as regards who the registering entity is, and to that extent erred in its finding.

[106] In its registering role, the Board under section 11 of the Act, has to first recognize the degree, diploma or license of the applicant. What then did the Court of Appeal find the word 'recognize' to mean? The Appellate Court stated:

> "***What is to be recognized in this provision: is it the certificate or the institution issuing it? In my humble view, it does not matter whichever answer one gives to this question. What matters is that for it to recognize either the degree certificate or the institution issuing it, the appellant was supposed to be furnished with sufficient evidence of an adequate academic training in engineering. In other words, the appellant was supposed to be satisfied, upon being furnished with sufficient evidence, that the appellant was "academically qualified for registration as a registered engineer.***"

[107] The Court of Appeal then proceeded to hold that sufficient evidence cannot be furnished by just flashing a degree certificate. For one to furnish sufficient evidence: *"it could not be furnished by the degree certificate alone. The appellant required evidence that the training offered by the universities whose degrees it was called upon to recognize met the threshold depth and breadth of adequate training in engineering. That is why it came up with in my view quite properly, what it termed "accreditation criteria."* With this statement, the Court of Appeal introduced 'accreditation' in its construction of section 11 of the Act thus: *"In my respective view, the term "recognition" used in the Act, embraced "accreditation" and vice versa."* The Appellate Court then went on to define what accreditation is.

[108] While agreeing with the learned judges' line of questions on what is to be recognized and that it did not matter whichever answer was given between recognition of the certificate or the institution issuing it, we take the view that the Board had to bear in mind that in the absence of questioning the authenticity of the degree certificate, the universities were chartered as public universities by their respective statutes which also govern the courses offered. Accreditation of universities and their courses offered was within the purview of other bodies. For the MMUST graduates in particular, the Board should have taken into consideration the transition period and the particular mode of undertaking the studies for the degrees awarded, and not merely resorting to wholesale refusal to register.

[109] Academic training in our view is an ongoing exercise subject to review from time to time based on the emerging needs and challenges and is something undertaken in a multifaceted approach amongst the various stakeholders. If there were areas of concern noted by the Board as relates to training of engineers by MMUST and Egerton University, the Board should have resorted to addressing the same with the stakeholders and coming up with a transition road map. The road map would bear in mind the fate of those who had already been trained under the existing regime.

[110] In light of the above, we disagree with the judge's interpretation of what is to be 'recognized' by the Board under section 11 of the Act, as stated above.

[111] The Court of Appeal having sought to rely on the principle of a holistic interpretation of a provision of Legislation, we are unable to agree that such a holistic interpretation of the Act could be used to define 'recognize' as including 'accredit'. The Board should have asked itself whether, on the basis of the materials placed before it, there was sufficient evidence of adequate training in Engineering AND NOT whether the respondent universities had been accredited.

[112] We see no ambiguity in the Engineers Registration Act, as regards the use of the word 'recognized' in section 11. Its use in that section is not shrouded in any ambiguity as to call for the invocation of any other rules and/or principles of statutory interpretation. Hence, we find that its interpretation could not have been anything but its plain meaning, which meaning cannot embrace accreditation.

[113] Be that as it may, even with a purposive interpretation of the Act and section 11 of the Act, 'recognition' cannot be interpreted as embracing 'accreditation.' The purpose of the Act as discerned from the short title is clear: *"(a)n Act of Parliament to provide for the registration of engineers and for connected purpose"*. 'Connected purposes' can only be those acts linked to registration of engineers and not accreditation of universities to offer engineering courses. Such may include the mode of application, fees payable, subscription, continuous training just to name a few. Even allowing for the fact that the meaning of the word 'recognition' as used in the Act goes beyond the dictionary definition, the same does not in our view go as far as to equate it with 'accreditation'.

[114] In our determination above, we have also examined The Universities Act, Cap. 210B, that was in operation at the same time with Engineering Registration Act, Cap. 530. In section 6, it gives the functions of the Commission of Higher Education established under section 3. One of them is '*to accredit universities*'. Section 2 of the Act also defined a university to mean the University of Nairobi, Moi University (established under Acts of Parliament), and any other university, whether public or private, established after the commencement of this Act. Clearly the Legislature would not have given two or more entities the same function if the interpretation of the Court of Appeal that the Board could accredit was to stand. The short title of The Universities Act states: [a]*n Act of Parliament to make better provisions for the advancement of university education in Kenya and for connected purposes*. This is wide enough to include accreditation which is given to the Board under section 6.

[115] We also note that under The Universities Act, there is subsidiary legislation(s) made pursuant to section 21. One of the subsidiary legislations is the *Universities (Establishment of Universities) (Standardization, Accreditation and Supervision) Rules, 1989*. Under these rules 'accreditation' is defined thus:

> "***Accreditation" means public acceptance and confirmation evidenced by grant of charter under section 12 of the Act that a university meets and continues to meet the standards of academic excellence set by the Commission.***

This clearly fortifies the argument that the legislation that dealt with accreditation of universities when this cause of action arose was not the Engineers Registration Act, but the Universities Act, which defines accreditation and provides the matrix on how to establish both private and public universities.

[116] We have also perused the Engineering Act, 2011. Its short title defines it as: *[a]n Act of Parliament to provide for the training, registration and licensing of engineers, the regulation and development of the practice of engineers and for connected purposes*. While this Act does not form the basis for determination of this matter, we note that it has now 'expounded' and streamlined the scope of the Board perhaps to address some of the grey areas that had come out. The Board is established under section 3 and sections 6 and 7 provide for its object and purpose, and functions and powers. Particularly, section 7(1)(l) states:

> ***"approve and accredit engineering programs in public and private universities and other tertiary level educational institutions offering education in engineering;***

We agree with the petitioners that under the new Engineering Act, the Board now has an express mandate to accredit universities offering engineering programs. However, under Cap. 530, as it applied at the time of the dispute under our consideration, accreditation work was a preserve of the Commission for Higher Education.

[117] The upshot of the foregoing is that we find that in 'purporting' to interrogate the degrees held by the petitioners so as to establish whether they were from universities duly accredited to offer engineering courses, at the time, the Board acted *ultra vires* its mandate and the Honourable Court of Appeal erred in its finding that the Board acted within its mandate.

(d) Whether there was breach of the petitioners' constitutional fundamental rights and freedoms.

[118] Having found that the Board acted within its mandate, the Court of Appeal summarily held that there was no violation of the petitioners' fundamental rights. This was a departure from the High Court's decision which had found that indeed in failing to register them, the Board violated the petitioners' rights particularly, the right to fair administrative action under Article 47(1) of the Constitution, and the right to human dignity protected by Article 28 as read with Article 55(a) and (c) of the Constitution, 2010.

[119] Before this Court, the petitioners have relatively advanced the same case advanced before the superior courts below as regards violation of their rights. They urged that they were discriminated against by both the universities and the Board. That while they were admitted with other students and taught by the same lecturers from Moi University, they were not awarded Moi University degrees. They also submitted that they were denied registration while their colleagues were registered as engineers. They anchored their case on discrimination on breach of a legitimate expectation they had to be registered as graduate engineers.

[120] Secondly, they urged that their inherent human dignity was violated. That by being denied registration and left destitute, their dignity was violated. They decried that they were humiliated since, despite training as engineers, they were reduced to the laughing stoke of society and had to resort to becoming tellers in supermarkets and serving as clerks to engineers, some of whom were their student contemporaries.

[121] The 1st respondent, Board, as did before the superior courts denied any violation of constitutional rights and freedoms of the petitioners. It disabused the existence of any right anchored on legitimate expectation as the Board did what it was statutorily mandated to do and cannot be held liable. It submitted that the petitioners' dignity was not violated as they had been informed of what was happening between the Board and the universities.

[122] While Article 23(1) of the Constitution clothes the High Court with the *jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights*, that duty is not solely the High Court's in the judicial set-up. Article 2(1) of the Constitution binds all persons and all State organs to enforce the Constitution. Furthermore, Article 159 provides for the exercise of judicial authority by all courts and tribunals guided by the principles therein.

[123] As regards this Court, in addition to exercising its jurisdiction under Article 163(4)(a) of the Constitution as is the case herein, section 3 of the Supreme Court Act, 2011 on this Court's objectives is also illuminating. Particularly, the Court has the role to: *assert the supremacy of the Constitution and the sovereignty of the people of Kenya*. All these facts taken into consideration, it emerges that this Court has a very pivotal role in cases where enforcement of the Bill of Rights is concerned, specifically bearing in mind that under Article 163(7) of the Constitution, the Supreme Court's decisions are binding to all other courts. It is with this background that we proceed to determine the alleged contravention of constitutional rights, having also determined that the Board had acted ultra vires its powers.

[124] In the High Court, the petitioners alleged breach of several rights, namely: freedom from discrimination, right to human dignity, freedom from slavery and servitude, protection of property, protection of consumer rights, right to fair

administrative action, and right to affirmative action and youth empowerment. The High Court contextualized the petitioners' case and determined it within the provisions of Article 47(1), 28, and 55 of the Constitution – the right to fair administrative action, the right to human dignity, and the right to affirmative action as youth, respectively.

[125] In finding that there was violation of Article 47(1), the High Court stated that *"the essence of the right to fair administrative action is to ensure administrative processes meet constitutional standards. The element that administrative action must be "lawful" encapsulates the principle of legality and the fact that administrative action must be located in the law and must not be arbitrary."* Consequently, having found that the Board had no mandate to do what it did, hence acted unlawfully, the Court concluded that there was breach of Article 47(1) of the Constitution.

[126] In examining Article 47(1) of the Constitution, the starting point is a presumption that the person exercising the administrative power has the legal authority to exercise that authority. Once satisfied as to the lawfulness of the power exercised, is when the court will delve into inquiring whether in the carrying out of that administrative action, there was violation of Article 47(1). This is the test of legality. So that the question of the unlawfulness or otherwise to act is at the onset of the inquiry. Where the act done was *ultra vires* the mandate of the administrative entity, the act is void *ab initio* and the inquiry stops there as there is an outright violation of the Constitution. The question of legality or the lawfulness of an act lies at the core Article 47(1).

[127] In this regard, we endorse the persuasive Court of Appeal decision in ***Judicial Service Commission v Mbalu Mutava & another,*** [2015] eKLR where in drawing a distinction between the right to fair hearing and fair

administrative action, the issue of lawfulness of the act is listed as a key component, thus:

> "***The right to fair hearing under the common law is a general right, albeit, a universal one. It refers to the three features of natural justice identified by Lord Hodson in*** *Ridge v Baldwin* ***(supra). Although it is applicable to administrative decisions, it is apparently limited in scope in contrast to right to fair administrative action under article 47(1) as the latter encompasses several duties – duty to act expeditiously, duty to act fairly, duty to act lawfully, duty to act reasonably and, in the special case mentioned in article 47(2), duty to give written reasons for the administrative action. The duty to act lawfully and duty to act reasonably refers to the substantive justice of the decision whereas the duty to act expeditiously, efficiently and by fair procedure refers, to procedural justice.***"

[128] Consequently, as the lawfulness of an act under Article 47(1) of the Constitution goes to substantive justice, having found that the Board acted *ultra vires* its mandate, it outrightly breached Article 47(1) of the Constitution. Notably in ***Judicial Service Commission v Mbalu Mutava & another,*** (above), the Court of Appeal also noted that fair administrative justice embodies dignity.

[129] Again, it therefore follows that a breach of Article 47(1) of the Constitution, where proved, amounts to a violation of the right to human dignity. Hence, having found that Article 47(1) of the Constitution was breached, it follows that that breach also resulted in the violation of the petitioners' right to human dignity.

[130] Be that as it may, the petitioners also made a case for discrimination and breach of their human dignity. It is a reality that in our country, education has been placed at the core of realization of one's dream of success in life. As a result, it is true that despite the high levels of poverty amongst her citizens, Kenya has a resilient crop of parents who struggle to have their children acquire this precious investment called education. We are persuaded by the finding of the High Court in this regard.

[131] Suffice it to say this, there can be no clearer case, than this one, where this Court and the judiciary in general is called upon to rise up and do justice. The situation in this case calls for the invocation of the maxim: ***Fiat Justitia ruat Caelum:*** *Let justice be done though the heavens fall*.

[132] Drawing from comparative jurisprudence, the Constitutional Court of South Africa has placed the right to dignity at the core of a violation of other fundamental rights and freedoms in the case of ***Dawood v Minister of Home Affairs,*** [2000] (3) SA 936(CC) where it was stated:

> "***Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. . . dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.***"

[133] It is not in dispute that having been in school for all that time, the petitioners expected that once they graduated they would be registered as graduate engineers. No fault has been attributed to the petitioners in the course of their study at the universities leading to their graduation. This was the norm as it was provided for in the applicable law, the Engineers Registration Act. We find merit in the petitioners' assertions that their failure to be registered as graduate engineers has exposed them to societal ridicule as being "second class" and/or unqualified engineers. It was argued that some took up casual jobs as supermarkets tellers and clerks. With total deference and without disregard to the noble work that supermarket tellers and clerks do, in the case of the petitioners, we find them, trained engineers, being forced to undertake these tasks which they did not study for at the universities, as an affront to their dignity. To the extent that it is the Board that failed to register them in sheer overstepping and misinterpretation of its mandate, we find the Board liable for violation of the petitioners' human dignity.

[134] While the 1st respondent was emphatic that there is no basis for legitimate expectation, we find that a case for legitimate expectation has been made out as alleged by the petitioners. This Court addressed the issue of legitimate expectation in the case of ***CCK case,*** (above), where we rendered ourselves thus:

> ***"[264] In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.***
> ***[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has***

aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation has to show that it has locus standi to make a claim on the basis of legitimate expectation."

[135] The Court continued to set out the principles governing the doctrine of legitimate expectation thus:

> **"[269]** ***The emerging principles may be succinctly set out as follows:***
>
> ***(a) there must be an express, clear and unambiguous promise given by a public authority;***
>
> ***(b) the expectation itself must be reasonable;***
>
> ***(c) the representation must be one which it was competent and lawful for the decision-maker to make; and***
>
> ***(d) there cannot be a legitimate expectation against clear provisions of the law or the Constitution."***

[136] Examining the facts before this Court, we find that the petitioners have made out a case for a claim founded on legitimate expectation. The Board was and is the public authority that was, by statute, solely charged with registration of graduate engineers in Kenya. This mandate was not granted to any other entity apart from the 1st respondent. The expectation of being registered was reasonable as the students had done all that was required of them, had passed their exams and been awarded their graduate degrees from public universities authorized by statute, made applications to the Board and paid the requisite fees.

[137] The petitioners also raised the issue of discrimination alleging that they were discriminated against in that they were the only ones who were not registered yet their colleagues in the same university, Moi University, with whom they had

studied same courses and were taught by the same teachers were registered. Examining the record, it emerges that the High Court did not make any finding on the question of discrimination but instead made a finding in favour of the petitioners for breach of Article 55(a) and (c) of the Constitution. As earlier stated in this Judgment, neither the High Court nor the Court of Appeal dealt with this issue. As this is an appeal from the Court of Appeal and given the principles we earlier alluded to on the exercise of this Court's appellate jurisdiction, we decline to delve into the interrogation of this issue of discrimination, as it is not properly before us.

[138] The 1st respondent raised the defence of operation of law. That may well be so. However, without disregarding the 1st respondent's argument, we note that the same operation of law cannot be construed to the detriment of the petitioners. It is a fundamental cannon of law that the law should not have a retrospective application particularly as to affect by way of diminishing the subsisting accrued rights of an individual at the time of coming into force of the law unless the law specifically so contemplated. The statutory instruments granting the charter to MMUST did not expressly provide for such diminishing of the petitioners' rights and we are reluctant to hold otherwise.

[139] Having faulted the Court of Appeal's finding on breach of the petitioners' fundamental rights and freedoms, we also see no need to disturb the High Court's finding regarding breach of the provisions of Article 55 of the Constitution and reiterate the same.

(e) *Whether the Court of Appeal erred in its award of costs as against Masinde Muliro University of Science and Technology and Egerton University.*

[140] This was the main grievance in the petitioners' case in *Petition No. 4 of 2016*. MMUST and Egerton University urged that it was wrong for the Court of Appeal

to have ordered costs against them given that at the High Court, the petitioners' (students) case as against them had been dismissed and the same was not appealed at the Court of Appeal. It was urged that the Court of Appeal negated the principle that costs follow the event and as such the students, who lost their case at the Court of Appeal should have borne the costs. In the alternative, it was submitted that the Court of Appeal should have given an explanation as regards its award of costs.

[141] Secondly, it was urged that they, MMUST and Egerton University had merely carried out their mandates in accordance with the law, hence they should not be punished for doing that which the law mandated them to do. They opined that the award of costs against them was punitive as it was in form of punishment without justification. In any event, it was submitted, this matter was public interest litigation hence each party should have been ordered to bear its own costs.

[142] The 1st respondent, Board, urged that under section 27 of the Civil Procedure Act, the court or Judge has a discretion to exercise in the award of costs. It also cited section 3(2) of the Appellate Jurisdiction Act and argued that the Court of Appeal, in awarding costs to the successful party, was simply exercising such discretion.

[143] It is imperative to first outline the High Court and Court of Appeal findings as regards these two appellants: MMUST and Egerton University. It is not in dispute that before the High Court, the petitioners cited MMUST and Egerton University among the respondents. However as regards all the universities respondents, the High Court found that they had discharged their duties as statutory mandated, thus:

> "***I therefore find that both Egerton University and MMUST properly discharged their obligations under the powers and functions conferred upon them by their respective Acts of Parliament towards the petitioners. All the petitioners***

after completing their studies in accordance with the curriculum approved by the university through their respective statutes were awarded engineering degrees. Therefore, the engineering degrees obtained by the petitioners and other students through the course of study and examination at Egerton University and MMUST and awarded in accordance with the respective Acts of Parliament are valid."

[144] In disposing of the matter, the findings of the High Court were as follows as regards the universities:

"***Upon consideration of the consolidated petitions I now make the following orders:***

(a) ***The petitions against Moi University, Egerton University, Masinde Muliro University of Science and Technology and the Commission for Higher Education are hereby dismissed but with no order as to costs.***"

[145] Evidently, at this juncture, the petitioners' case as against MMUST and Egerton University was closed and the universities were 'off the hook". It could only be 'reopened' upon an appeal being lodged to the Court of Appeal. So who went to the Court of Appeal?

[146] It is the Board that appealed to the Court of Appeal against the orders of the High Court, particularly, those ordering for the registration of the petitioners. This can be clearly seen upon perusal of the memorandum of appeal filed at the Court of Appeal. In the eighteen (18) grounds of appeal set out in the memorandum of appeal, there is no mention of the order of the High Court dismissing the case as against MMUST and Egerton. Hence, it is true that the case as against the

universities was not appealed at the Court of Appeal. However, in making its final orders, the Court of Appeal rendered itself thus:

> ***"For these reasons, I allow this appeal with costs to the appellants against Egerton and Masinde Muliro universities. The other respondents shall bear their own costs."***

It is this order that forms the basis of MMUST and Egerton University's petition of appeal to the Supreme Court.

[147] This Court has had opportunity to render itself on the issue of costs in the ***Jasbir Rai*** case which the petitioners have referred to. We reiterate the jurisprudence therein on this issue of costs. The first principle was that the award of costs is at the discretion of the court. In that regard, the Court held:

> **"From the foregoing provisions, it is clear that the Supreme Court, much like the other superior Courts, has an open-ended mandate of application of *discretion* to ensure *ends of justice*. This element of the judicial mandate is to be found in other law as well. Thus the Civil Procedure Act (Cap. 21, Laws of Kenya), the primary law of judicial procedure in civil matters, thus stipulates (Section 27(1)):**
>
> > *"Subject to such conditions and limitations' as may be prescribed, and to the provisions of any law for the time being in force,* ***the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid,*** *and to give all necessary directions for*

the purposes aforesaid; and the fact that the court or judge has no jurisdiction shall be no bar to the exercise of those powers:

Provided that the ***costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order****".*

[148] It therefore follows that the award of costs is a discretion to be exercised by the Judge or court. Secondly, in the exercise of this discretion, the guiding principle is that costs follow the event: so that a successful party will ordinarily be awarded costs of the suit. Thirdly, that where a court decides to depart from this general principle that costs follow the event, then reasons should be given.

[149] The need for reasons where a judge departs from the general principle can be well located even in the Bill of Rights. Article 47 of the Constitution, which we have already rendered ourselves on in this judgment, recognizes written reasons for an action as a core component of the right to fair administrative action. Consequently, in the exercise of a discretion departing from the norm, if no reasons are given, then the discretion can be said to have been exercised arbitrarily. In the ***Jasbir Rai*** case, this Court endorsed the dictum of *Odunga J*, thus:

> **"The foregoing provision of the Civil Procedure Act has featured in judicial deliberations; and in *Joseph Oduor Anode v. Kenya Red Cross Society,*** Nairobi High Court Civil Suit No. 66 of 2009; [2012] eKLR **Odunga, J. thus observed:**
>
> ***"...whereas this Court has the discretion when awarding costs, that discretion must, as usual, be exercised judicially. The first point of reference, with respect to the exercise of discretion is the guiding principles provided under the law. In matters of***

costs, the general rule as adumbrated in the aforesaid statute [the Civil Procedure Act] is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so. In my view it is the failure to follow the general principle without reasons that would amount to arbitrary exercise of discretion …"

[150] As regards the non-punitive nature of award of costs, the Supreme Court stated thus:

> **"So the *basic rule* on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to *penalize the losing party*; rather, it is for *compensating the successful party* for the trouble taken in prosecuting or defending the suit. In Justice Kuloba's words [*Judicial Hints on Civil Procedure,* at p.94]:**
>
> ***"[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure…Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action."***

[151] At the risk of sounding repetitive, we finally summed up the jurisprudence on awarding costs in ***Jasbir Rai*** case thus:

> ***"[18] It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the* judiciously-exercised discretion of the Court, *accommodating the* special circumstances of the case, *while being guided by* ends of justice. *The* claims of the public interest *will be a relevant factor, in the exercise of such discretion, as will also be the* motivations and conduct of the parties, *prior-to, during, and subsequent-to the actual process of litigation."***

[152] With this legal position, the question this Court has now to answer is; what is the principle the Court of Appeal used in its award of costs? Unfortunately, a read of the Court of Appeal's decision does not reveal any reasons given by the appellate Court in its award of costs. From the foregoing, it is clear that the appellate Court exercised discretion. However as already said, that discretion ought to be exercised judiciously not whimsically.

[153] The first principle is that costs follow the event, hence as the Board was successful on appeal, then it would have been expected that it was the one entitled to costs. Any order contrary to this established principle called for an explanation, particularly, where, like in this case, it is the party who was sued alongside the appellant that was ordered to bear the costs of the appellants. Hence, we find that while the Court of Appeal was at liberty to exercise its discretion 'anyway' in the award of costs, it was imperative that an explanation be given. The absence of

reasons given for such a departure and exercise of discretion amounts to abuse of discretion.

[154] Notably, in not giving reasons for its decision on costs, the Court of Appeal disregarded its own precedent set out in the case of **Supermarine Handling Services Ltd vs. Kenya Revenue Authority**, [2010] eKLR, where it had earlier expressed itself thus:

> "***Costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. See Section 27 (1) of the Civil Procedure Act.***

Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised non judicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. In the appeal now before us, the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was shown that the defendant had been guilty of some misconduct which led to litigation. In our view the learned Judge's order was wrong." (See also the decision by the Supreme Court of Uganda in ***Impressa Ing Fortunato Federice vs. Nabwire*** *[*2001] 2 EA 383)

[155] The upshot of the foregoing is that, we find as we must in the circumstances of the matter, that the Court of Appeal in ordering costs as against the MMUST and Egerton University, without reasons, amounted to abuse of discretion. Their appeal in this regard succeeds.

(f) Whether this Court can, and should order that the petitioners be awarded with Moi University degrees, and on that basis the Board be ordered to register them as engineers.

[156] In the alternative, the petitioners prayed that this Court orders that they be issued with Moi University degrees. The petitioners' alternative prayer is premised on the fact that when they were first admitted to study Engineering degrees, they were admitted as Moi University students. They were then placed at Western University College of Science and Technology, then a constitute campus of Moi University.

[157] It is common ground that after three years of the petitioners' studies, Western University College of Science and Technology, WUCST, was granted a charter and converted to a fully chartered university, MMUST, sometime in the year 2006. The petitioners were then 'taken over' and finished their studies as students of MMUST graduating, albeit a year later than scheduled, with degrees issued by MMUST. MMUST in opposition to this prayer argued that under section 3 of its enabling statute the university was allowed to take those students (petitioners) as the section allowed transfer of all assets and liabilities of WUCST to MMUST, the said section 3 being a matter of proper construction. The petitioners did not share this position arguing that they were excluded from such assets and liabilities to be transferred. For avoidance of doubt, the said section 3(3) provides:

> ***"(3) The University is the successor to (WUCST)…and subject to this Act, all rights, duties, obligations, staff, assets and liabilities of (WUCST) existing at the commencement of this Act shall be automatically and fully transferred to (MMUST) and any reference to (WUCST) in any contract or document shall, for all purposes, be deemed to be a reference to (MMUST)"***

[158] The scenario unfolding in this case brings to the fore the challenges that come with transitions for such institutions of higher learning. The case lays bare the predicaments of students who find themselves victims of policy decisions undertaken without a pragmatic consideration of all the relevant ramifications. This case should be an eye-opener to all stakeholders in the education sector who are charged with overseeing such activities as commissioning and granting of charters to new universities, especially 'upgrade' of constituent colleges to fully chartered universities. The intentions may be noble but the same should not be at the expense of the students affected by such intentions.

[159] As a Court, we agree that when it comes to matters of policy formulation, we have a very minimal role to play, in matters education as especially professional training. However, we are cognizant of the fact that where such policy decisions affect the fundamental rights and freedoms protected by the Constitution, then those actions invite this Court and courts in general to intervene and safeguard those rights and freedoms. In this regard, see ***Community Advocacy and Awareness Trust & 8 Others vs Attorney General & 6 others*** [2012] eKLR where it was held that the court is not the appropriate forum for issuing guidelines.

[160] Be that as it may, we urge the relevant parties herein that there is need to always act pragmatically during key decision-making forums. The fate of students, youth who are at the core of the learning institutions should always be considered. It is evident that with hind sight, the situation herein could have been handled differently.

[161] Though we sympathize with the petitioners' plight, we reiterate what *Ibrahim, SCJ* held in ***Yusuf Gitau Abdallah v Building Centre (K) Ltd & 4 others,*** [2014] eKLR thus: *[e]ven as the Court seeks to do justice, it cannot be lost to it that despite having a conscience, it is a court of law and not of mercy.* Consequently, as to whether we can order the award of Moi University degrees to

the petitioners, we find that this issue is not properly before us for consideration. Firstly, on the basis of the principles of exercise of this Court's appellate jurisdiction we alluded to before, we find that this issue was not before the Court of Appeal. The High Court 'absolved' Moi University thus:

> **"*The position of Moi University in these proceedings is somewhat different. In this respect, I agree that once the students of the former Western Campus of Moi University were incorporated into MMUST by operation of law, Moi University ceased to have any responsibility for them. As I have found, the petitioners lawfully graduated from MMUST and Moi University cannot in law be responsible for their predicament. I therefore find and hold that there is no cause of action against Moi University*."**

This finding was never appealed by the petitioners to the Court of Appeal. Hence, we find that they are estopped and cannot be allowed to reopen the issue on appeal before this Court at this late hour.

[162] Secondly, while the issue raised by the petitioners is very novel and beckons for settlement by an apex court, we are cognizant of our unique position in the court hierarchy as an appellate Court. The Supreme Court should not be and we are not ready to develop an unorthodox 'appetite' of accepting and determining matters based on their novelty. The Court should wait until matters come properly before us.

[163] The petitioners having already presented their degree certificates from MMUST to the Board for registration as graduate engineers, they cannot then at this juncture successfully seek the alternative prayer to be issued with degree certificates from Moi University. In the circumstances, we decline to consider the alternative prayer as sought by the petitioners.

(g) Appropriate Reliefs

[164] The final task before this Court in light of the findings made above is a consideration of the appropriate remedies to issue in this matter. Both petitioners as consolidated are in agreement in their appeal in so far as they seek to set aside *in toto* the Court of Appeal decision and reinstate of the High Court Judgment. The Petitioners in petition No.19 of 2015 further seek to resolve transition issues with their Moi University programmes while also seeking alternative prayers already highlighted at the beginning of this judgment. The Petitioner in Petition No. 4 of 2016 seeks an alternative prayer to reverse the order on costs against it issued by the Court of Appeal.

[165] In our view, the transition issues relating to the petitioners from MMUST who were initially admitted to Moi University are not ripe for our determination. This is in light of the pending case before us in ***Moi University v Oindi Zaippeline & Karatina University*** which as we have pointed out, arises out of and if determined may address the transition of the students in a constituent college upon its charter as a university. Moreover, it is apparent that this issue has been raised before us for the first time and not through the court hierarchy.

[166] We take note that this matter originated as a constitutional petition under Article 22 of the Constitution hence we agree with the High Court that the remedies at the disposal of a court stream from Article 23(3) which provides:

> **"In any proceedings brought under Article 22, a court may grant appropriate relief, including-**
>
> **(a) a declaration of rights;**
> **(b) an injunction;**
> **(c) a conservatory order;**

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review."

[167] Further, in determining how to award costs, this Court is guided by Rule 3(5) of the Supreme Court Rules, 2012 thus:

> **3(5) Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders or give directions as may be necessary for the ends of justice or to prevent abuse of the process of the Court.**

We are cognizant of the jurisprudence in ***Republic v Council for Legal Education ex parte James Njuguna & others***, (above), which we reproduce:

> ***"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."***

[168] Through the proceedings right from the High Court and Court of Appeal, the Board has not submitted that the petitioners did not meet the threshold of section 11 of the Engineers Registration Act. The Board's case was that the degrees they held were not from universities accredited to issue engineering degrees. No evidence has been tendered that even, had the Board correctly interpreted its mandate, the petitioners, or some of them would not have qualified to be

registered. From the above, we hold that the Board exceeded its statutory mandate by confusing its duty to consider, whether there was evidence of adequate training in Engineering, with a non-existent power, to determine whether the respondent universities had been accredited. Consequently, we see no other reason why the Board should not have registered the applicants. We hereby direct that the Board proceeds to register the applicants as engineers in light of the unique circumstances of the petitioners and 2nd interested parties in Petition No.19 of 2015.

[169] The court is concerned that the petitioners have been forced to undergo a bruising battle spanning almost 10 years in addition to having to undertake the graduate studies while having stagnated in their professional careers as a result of the Board's actions in breach of the petitioners' constitutional rights as held by the High Court. This in our view was the import of the High Court Judge's exercise of discretion to award general damages of Kshs.200,000/-. The petitioners urge that the decision of the High Court, which granted the damages, be reinstated. On its part, the Board has not made a case for our interference of that award. We therefore find that in the justice of this case, that award should be left to stand.

[170] Lastly, as the students have been successful in their appeal as against the Board; we allude to the general principle on award of costs: that costs follow the event and find that the Board shall bear the costs of the students. We see no reason to depart from this principle.

VI. THE DISSENTING OPINION OF NJOKI NDUNGU, SCJ

[171] I have read the decision of the majority. While I am in agreement that this Court has jurisdiction to hear this matter, I am of a different opinion particularly regarding the issue of *whether the Board acted ultra vires its mandate in rejecting the petitioners' applications for registration as engineers.*

[172] The gist of this cause is that the Engineers Registration Board (the Board) rejected the Masinde Muliro University of Science and Technology (MMUST) graduates' applications for registration as engineers on the basis that it had not recognized and/or accredited MMUST's undergraduates' degree programmes.

[173] For the petitioners who are graduates from Egerton University, the Board denied them registration on the basis that they had not met the *minimum requirements as stipulated under the Engineers Registration Act*.

[174] In my considered view, that the question as to whether the Board acted *ultra vires* turns to the interpretation of section 11(1) (b) of the repealed Engineers Registration Act CAP 530 (repealed Act), which was the relevant statute when this cause arose.

[175] Section 11 (1) (b) of the repealed Act provides:

> ***11. (1) Subject to this Act, a person shall be entitled, on making an application to the Board in the prescribed form and on payment to the Board of the prescribed fee, to be registered under this Act and to have his name entered in the register as a registered engineer if he is—***
>
> ***(b) a person who—***
>
> ***(i) is the holder of a degree, diploma or licence of a university or school of engineering which may be recognized for the time being by the Board as furnishing sufficient evidence of an adequate academic training in engineering; … (emphasis mine)***

[176] My brothers and sister in the majority assessed the dictionary meanings of the words '*recognize*' and '*accredit*'. They are of the view that these two words are not synonymous. So much so that the Board had no business scrutinizing Egerton and MMUST universities' (the universities) engineering academic programmes.

[177] As such, they found that the Board acted *ultra vires* its mandate by purporting to interrogate the degrees held by the petitioners so as to establish whether they were from universities duly accredited to offer engineering courses at the time.

[178] The majority also determined that accreditation of the universities and the courses offered was within the purview of the Commission of Higher Education (the Commission). This to me, as will be illustrated shortly, and with profound respect to the majority, is not the correct position in law.

Meaning of the words recognized and accredited

[179] The term '*recognized*' is neither defined in the repealed Act nor is it defined in **Black's Law Dictionary, Ninth Edition** (*Black's Law*). However, *Black's Law* at page 1385 defines '*recognition*' as:

> ***"1. Confirmation that an act done by another person was authorized. 2.The formal admission that a person entity or thing has a particular status..."***

[180]Similarly, the word *accredit* is neither defined nor found in the repealed Act. Since this cause largely revolves on whether the term *'recognized'* as used in the repealed Act embraced '*accreditation*' and vice versa, it is prudent for me to reproduce the legal meaning of the term '*accredit*.' *Black's Law* at page 23 defines '*accredit*' as:

> ***"1. To give official authorization or status to. 2.To recognize (a school) as having sufficient academic standards to qualify graduates for higher education or for professional practice."***

[181] In my considered opinion, the act of recognition contemplated by section 11 (1) (b) of the repealed Act does more than merely confirm that the degree conferred by the holder is lawful.

[182]The presence of the words '*recognized for the time being by the Board as furnishing sufficient evidence of an adequate academic training in engineering'* introduces a discretionary power of the board to determine if a degree, diploma or licence is from an academic institution that provides sufficient evidence of an adequate academic training in engineering.

[183]This, to my mind, would necessitate scrutinizing the degree and posing questions such as: *does the curriculum or course content leading to the attainment of this degree evidence adequate academic training in engineering? Was the staff adequately qualified to train the graduates? Was there sufficient infrastructure for the training?*

[184]The provisions of the Subsidiary legislation (***Engineers Registration Regulations***) on 'application for registration' as spelt out in the repealed Act further fortify my convictions.

[185] Regulation 9 (1) provides:

> **9 (1) Every application for registration under the Act shall—**
>
> **(*a*) be in the English language in a form which shall be supplied by the Registrar upon request;**
>
> **(*b*) be addressed to the Registrar;**
>
> **(*c*) state the qualifications upon which the application is based and have attached copies of such certificates or other documents as are necessary to evidence those qualifications;**
>
> **(*d*) be accompanied by a fee of one hundred shillings which shall not in any circumstances be refundable.**
>
> **(3) The Board may require an applicant for registration to furnish such further information or evidence of eligibility for registration as it may think, and may require the applicant to**

attend personally before the Board or a subcommittee at his own expense, and the Board may refuse to consider the application of any person who fails to comply with a requirement made under this paragraph.

[186] From the above provisions, it is mandatory to attach degree certificates. This notwithstanding, the Board may still require a graduate to furnish further information or evidence for eligibility of registration. All the evidence is geared towards establishing that the applicant has adequate academic training in engineering.

[187] Isolating and interpreting the term '*recognized*' in a 'stand alone' fashion poses the danger of whittling down the obligations of the Board as the regulator of the engineering profession. It is my view that section 11 (1) (b) of the repealed Act must be read as a whole as opposed to only assigning meaning to the term '*recognized*'.

[188] When read as a whole, it is clear in my mind that this 'recognition' introduces an element of '*accreditation*' though not expressly set out by the repealed Act. Further, I am clear that Black's Law definition of the term '*accredit*' captures the essence of section 11 (1) (b) of the repealed Act.

[189] It is my considered opinion that finding that the Board could accredit the undergraduate degree programmes has a rational nexus to the objects of the repealed Act. In my view, this finding cannot be regarded as shockingly unreasonable, perverse or improper.

[190] In addition, I am persuaded by Maraga's JA (as he then was) sentiments on '*accreditation*' in the Court of Appeal's judgment in this matter. Quoting from *Lazar Vlasceanu, Laura Grunberg and Dan Parlea-Quality Assurance and Accreditation: A Glossary of Basic Terms and Definitions, UNESCO-CEPES, Bucharest 2007,* he delivered himself thus at paragraph 46:

"Accreditation takes various forms including assessment; audit; benchmarking; evaluation and recognition. In this case, we are concerned with recognition which falls into two main categories: academic and professional recognition. Academic recognition is the "approval of courses [and] qualifications…from a higher education institution…for purposes of… [inter alia] access" to the labour market. Professional recognition on the other hand refers to the professional status accorded to a holder of a qualification to practice in that profession. Recognition of an individual's qualifications is therefore done with a view to facilitating access of holders to education and/or employment activities."

[191] I am convinced by the 1st respondent's contentions that the mandate of the *'recognition'* by the board is one of a professional nature. In other words, recognition for professional practice.

[192] The Board as the regulator of the engineering profession in accordance to section 3 of the repealed Act, and pursuant to section 11 (1) (b) was expected to demand evidence of adequate academic training before registering engineers to practice as professionals.

[193] As a consequence thereof, and having earlier expressed the view that term '*accredit*' captures the essence of section 11 (1) (b) of the repealed Act, the Board cannot have acted *ultra vires* its mandate.

Accreditation by the Commission for Higher Education or 'self-accrediting?'

[194] The majority is of the view that *accreditation* of the Universities was a preserve of the Commission. I humbly disagree with them.

[195] The legislation which dealt with *accreditation* when this matter arose was the *Universities Act, Chapter 210B* (repealed). This Act under section 3, established the

Commission. In section 6, it outlined the functions of the Commission one of them being to '*accredit*' universities.

[196] The subsidiary legislation enacted pursuant to section 21 of the Act; the *Universities (establishment of universities) (standardization, accreditation and supervision) Rules, 1989* operationalized section 6 of the Act.

[197] Under these rules, 'accreditation' was defined as:

> ***"accreditation" means public acceptance and confirmation evidenced by grant of charter under section 12 of the Act that a university meets and continues to meet the standards of academic excellence set by the Commission"***

[198] Rule 3 was categorical where the accreditation rules applied. It provided:

> ***3. Application***
>
> ***(1) These Rules shall apply to—***
>
> 1. ***(a) any private university;***
> 2. ***(b) any public university other than a public university established by an Act of Parliament;***
> 3. ***(c) any university established outside Kenya; and***
> 4. ***(d) any agent or agency of such a university as is specified in paragraphs (a), (b) and (c) operating or intending to operate as or on behalf of such university within Kenya.***

[199] Bearing these provisions in mind, it is without doubt that these rules and criteria of accreditation did not apply to both Egerton University, a Public University established by an Act of parliament, (***Egerton University Act, Chapter 214, Laws of Kenya, repealed***) and **MMUST** a public University also established by an Act of Parliament (***Masinde Muliro University of Science and Technology Act No. 18 of 2006, repealed).***

[200] This position is indeed confirmed, by the Commission itself in its deposition in the High Court, sworn by Joel M. Mberia on 4th May, 2012 in his capacity as Deputy Commission Secretary. Herein, the Commission was adamant that it had no authority to interfere with public university programmes and/or courses which was left to the exclusive power of the senates of the universities.

[201]Mr. Mberia deposed that the Commission had no power at all to formulate the contents of the courses of the universities. In addition, he swore that the Commission had no power or authority to require the Board to *accredit,* recognize and/or register the universities qualifications.

[202] It was his deposition that the universities respective Senates had a duty and responsibility to liaise with the Board and sort out whatever misunderstandings existed as far as the courses under question were concerned.

[203] By parity of reason, therefore, it cannot be, as advanced by the majority, that the Commission *accredited* the engineering programmes of the universities. It is therefore evident to me, that the Board, could and did, legally *accredit* the universities.

[204] Further, I am doubtful that the universities were *self-accrediting*. *Self-accrediting* institutions *accredit* their programs without requiring approval from external quality assurance agencies.

[205] In the journal article***, Karen Hui-Jung Chen, Angela Yung-Chi Hou, "Adopting self-accreditation in response to the diversity of higher education: quality assurance in Taiwan and its impact on institutions"*****, Asia Pacific Education Review, 2016, Volume 17, Number 1,*** the authors examine the *self accreditation* of universities approach adopted by the Taiwanese government in 2012. In so doing, they assess other countries which have done the same namely; the United Kingdom, Australia, Hong Kong and Malaysia.

[206] The authors interrogate the elements of *accreditation* and *self accreditation* and explain that *accreditation* normally involves External Quality Assurance (EQA) evaluation while *self-accreditation* involves Internal Quality Assurances (IQA) techniques. They note at page 2:

> ***"EQA bodies demonstrate public accountability, whereas IQA is a quality assessment process performed autonomously by institutions, and it <u>emphasizes self-improvement.</u>***
>
> ***In accreditation, EQA bodies are responsible for developing predefined review standards and facilitating institutions and programs in complying with various requirements. Institutions provide evidence of their quality according to fixed standards and produce self-evaluation reports. Subsequently, the evidence is examined by a panel of experts during a visit to the institutions. The quality of institutions is ensured through internal and external procedures.***
>
> ***By contrast, self-accreditation, derived from accreditation, <u>involves a mature institution conducting its IQA and being exempted from external accreditation.</u> Self-accreditation relies more on institutional IQA than on EQA. A self-accrediting institution is fully authorized to invite external reviewers to inspect the deficiency of institutional or program quality. By establishing an institutional IQA system, an institution can stimulate institutional autonomy and enhance its capacity for managing quality concerns." (emphasis mine)***

[207] Under their respective repealed statutes, it was the duty of the respective university senates and councils to determine the requirements of the award of degree, diploma, certificate and other academic awards and also approve their own programmes with a view of facilitating the holders of the degrees' entry into the job market.

[208] However, I am unconvinced that this meant that they were *self accrediting*. I am emphatic that they needed external quality assurance from the regulatory body of the profession; in this case - the Board. I will demonstrate how shortly.

The necessity of a regulatory body under the circumstances

[209] The majority are of the view that with regards to the MMUST graduates, the Board should have taken into consideration the transition period and the particular mode of undertaking the studies for the degrees awarded and not merely resort to wholesale refusal to register.

[210]With utmost respect to my sister and brothers in the majority, it is evident to me that there was no 'wholesale' refusal to register. One only need go to the record for the clear picture of events to emerge.

[211] I noted, that MMUST, prior to this suit had been submitting its curriculum for *accreditation* to the Board. By letter dated 29th July 2009, MMUST wrote to the Board regarding its *Bachelor of Science programmes*. It stated that it had revised these programs for the Board's consideration.

[212] MMUST also wrote that it purchased laboratory equipment of which list it was forwarding to the Board. It also notified the Board that it had recruited additional staff in the faculty of engineering in the last year.

[213] In another letter dated 19th February 2010, MMUST wrote to the Board referencing the letter*: Accreditation of Engineering Degree Programmes at Masinde Muliro University*.

[214] In said letter, MMUST addressed the issues of curriculum, staff, infrastructure and equipment. It stated that it had addressed the issue of curriculum as raised by the Board and thanked the Board for acknowledging that.

[215] MMUST also wrote that the Board's concern on staff had been addressed by the University Senate and Council and that the issue on infrastructure and equipment had been taken up by the Ministry of Higher Education Science and Technology (Ministry).

[216] The university also attached a schedule of degree programmes for the Board's approval. It penned off by assuring the Board that it would continue to offer quality training in the Engineering discipline.

[217] The record additionally reveals that Egerton University similarly submitted its programmes for review and *accreditation*. The dean of the Faculty of Engineering and Technology wrote to the Board on 8th September, 2008 regarding the Universities programmes for review and accreditation.

[218] Attached to this letter were copies of the universities academic programmes, list of full time academic staff, their academic and professional qualifications, their areas of specialization and the computing facilities in the departments.

[219] Further, on 1st March 2010, there was correspondence from Egerton University's Vice Chancellor, Professor James K. Tuitoek to the Board. The correspondence discloses that the Board had expressed concerns about some of the university's programmes of which concerns had been addressed by the university. The university was therefore resubmitting the programmes *'for the Board's approval and accreditation.'*

[220] I also took note of the *Report on Accreditation of the Engineering Degree Programmes of Kenyan Public Universities* prepared by the Board in July 2010. Therein, it assessed Moi University, Jomo Kenyatta University of Agriculture and Technology (JKUAT), MMUST, Kenyatta University (KU), Kimathi University College, Kenya Polytechnic University College, Egerton University, and the University of Nairobi. All

these universities had submitted to the Board, for approval and *accreditation*, their undergraduate engineering programmes.

[221] The Board made a detailed assessment of the universities curriculums, adequacy of laboratories and staff and made the requisite recommendations. Amongst the observations made were that some programmes that had been approved by some Universities did not qualify for *accreditation*.

[222] For instance, Nairobi University had approved a course and argued that because it was popular, it qualified for *accreditation*. The Board was unequivocal that *the argument that a course is popular and therefore qualifies for accreditation as a standard engineering degree programme is not an acceptable measure of quality for engineering registration.*

[223] The Board also observed that some universities like MMUST were utilizing technicians and physics graduates to teach core engineering courses and some like KU had only had two members of staff who were not even registered engineers, all of which the Board deemed unacceptable.

[224] In my considered opinion, this is just a snippet of the Board's significance as an external quality assurance of engineering degree programmes of public universities. Left to their own devices, it is arguable that universities can cut corners and even go as far as approving undergraduate degree programmes not because they are relevant to the job market and profession, but because they are popular and attract high numbers of enrolment.

[225]I also took note of the fact that the Ministry, as detailed in its letter to the Board, dated 12th April, 2011, had detected concerns raised by the industry concerning the quality of some of the graduates from local universities.

[226] It is not in dispute that some of the undergraduate degree programmes offered by the universities had issues or deficiencies. It is in the record that the University of

Nairobi, Moi University and JKUAT all had accreditation issues but resolved their issues with the Board.

[227] For instance, JKUAT, in its letter to the Board, Ref: JKU/ACA/9G dated 7th June 2011 accepted to address the inadequacies and gaps by recalling their engineering graduates to cover the uncovered units.

[228] It is also pertinent to note that the Board notified the Ministry, by letter dated 28th February 2012, that Egerton University vide letter Ref: EUVC/87VOL3(8) of 6th February, 2012 had proposed to invite affected graduates to bridge the deficit in engineering programmes. So too, did MMUST vide letter Ref: MMU/ADM.3/74/VOL.1 (33) on 3rd November, 2011.

[229] It is obvious to me, that some issues that could only have been raised by an external quality assurance body, in this case the Board. Such issues included: unqualified lecturers, insufficient infrastructure, inadequate staff and inadequate programmes.

[230] This is exactly what the Board was addressing by accrediting these universities. According to the evidence on record, the universities had not demonstrated competence to manage those issues.

[231] The Board's role was to ensure professional recognition which, as earlier stated, is a form of a*ccreditation*. Besides, it is illogical, in my humble opinion, to infer that the universities could *accredit* or approve their programmes themselves, with all the danger this poses, as illustrated, with the regulator of the profession not having any input in the matter.

[232] It does not also escape my mind that students enroll for undergraduate engineering programmes for a myriad of reasons. Some may do so just to attain degree with no intention of ever joining the profession, some may study for purposes of seeking postgraduate admission and there are those who actually wish to be registered engineers.

[233]Universities may offer core subjects essential for registration as an engineer but there might be no express requirement that a student undertaking the degree programme at such institution must necessarily take those units.

[234] Under such circumstances, it is my opinion that the Board is best placed to determine the curriculum and ensure that the undergraduate programmes do not compromise on core subjects relevant to registered engineers in their practice of the profession.

[235] It is also relevant to note that the Ministry had all the while deemed the Board, in its capacity as the professional regulatory body, capable of accrediting the engineering programmes of the universities.

[236] In his deposition in the trial court, sworn on 30th April 2012, Prof. Harry Kaane, in his capacity as the Secretary of Higher Education, Science and Technology, deposed that the universities were expected to seek recognition from the Board before launching new programmes leading to professional engineering qualifications.

[237] Further, the Permanent Secretary of the Ministry, Crispus Kiamba wrote to Egerton University and JKUAT on 28th July 2009 and advised them to consult with the Board before launching new degree programmes.

[238] I am of the view that as a regulatory body, the Board, even as at that time, bore the brunt of ensuring that recognized universities offered quality engineering training with the aim of safeguarding the public interest.

[239] As a regulatory body, the Board had the responsibility of ensuring that its registered practitioners benefited society by being skillful, competent and capable in the performance of their work. It had to maintain high standards of the profession.

[240] In this regard, the Board had to put in place measures and criteria to ensure that the quality of engineering education and degree programmes were sufficient and adequate. This could only be done by *accreditation*.

[241] Bearing all these in mind, the petitioners cannot therefore claim that the Board had no power to *accredit* the universities and with tremendous respect, I fault the majority for finding so. To my mind, such claims are not in the best interests of the university students and the engineering profession at large.

[242] Universities must always strive to ensure that their students are sufficiently and competently equipped for the job market. The crème de la crème so to speak. Thus, they are able to utilize these skills proficiently and this invariably safeguards the public interest.

Judicial restraint

[243] I must stress at this point, the necessity of *judicial restraint*; Courts cannot play expert and determine the professional standards to be set in various disciplines by the regulatory bodies of various professions. The Courts are just not best placed to do so. Authorities on this are legion.

[244] ***In Republic v Council for Legal Education ex parte James Njuguna & Others,*** **Nairobi High Court Misc. Civil Case No. 137 of 2004**, Law graduates from international universities were contesting the refusal of the Council of Legal Education to allow them to sit further examinations set by the Council.

[245]The students sat for the requisite eight exams but failed two. They re-sat the exams more that four times but still failed. On the strength of the existing Council regulations, the Council communicated to them that there were no longer eligible to sit for those exams.

[246] In dismissing this application, J.*G. Nyamu J* expressed himself:

> ***"The other reason why this court has declined to intervene is one of principle in that 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….

In my view the effect of the decision is not out of proportion with the objectives - of the Council of Legal Education Act. The purpose the Council of Legal Education is seeking to achieve is maintaining high standards of qualifications in the legal profession. Even from this standpoint the decision can neither be said to be unfair or unreasonable or out of proportion as explained above.

In the matter before the court the relevant body, namely the Council of Legal Education has correctly addressed its mandate and also correctly addressed the relevant law and for this reason the challenged decision must command deference from the court by upholding it.

It is for the Council of Legal Education to set educational standards for those to be admitted as advocates. In this, the law has given the Council of Legal Education discretion to set those standards. No other body has that function including the court. A mandamus cannot lie to enforce discretionary power."

[247] In ***Daniel Ingida Aluvaala & another v Council of Legal Education & another, Petition No. 254 of 2017*** **[2017] eKLR,** the petitioners failed their bar exams. Their attempts to register to re-sit for the said papers were rejected on the basis that they sought to register out of time. The petitioners challenged the Council's decision.

[248] The relevant council regulation stipulated that students had a five-year tenure at the Kenya School of Law which ran from the date of registration. There were no regulations concerning extension of time. *Mativo J* dismissed this Petition. He stated as follows:

> "***23. I am also alive to the fact that truly academic decisions are to be distinguished from the administrative decisions of the academic bodies. This is because administrative decisions are subject to judicial review. Purely academic decisions are treated as beyond the courts reach though, on facts, in several cases the courts can interfere. Therefore, as demonstrated by the authorities cited below, the guiding principle and the proposition of law in so far as judicial review of academic decisions is concerned stands as at to-day undisturbed is that the court should be slow to interfere and should only seldom interfere in academic decisions of academic bodies."…***

[249] The learned judge proceeded to cite the The Indian case of ***Maharashtra State Board -VS- Kurmarsheth & Others***, **[1985] CLR 1083** which stated as follows:

> ***So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations……"***

[250] The Indian Court also emphasised on the need:

> ***"……to be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formatted by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and departments controlling them."***

[251] Mativo J further expressed himself thus:

> ***"31. Self-restraint adopted by the judiciary in exercising the power of review in academic matters has left certain academic decisions or regulations governing training and qualifications of professionals untouched. These areas are not disturbed by the courts unless the decisions under challenge are constitutionally so fragile and unsustainable. Academic decisions of the universities and other educational institutions requiring expertise and experience belong to this category. If the decision is legal and lawful, the reasonableness and propriety of the same may not be questioned by the courts. In other words, among the Wednesbury principles of 'illegality', 'irrationality' and 'impropriety', if the decision can get over the first test, it may withstand the other two tests, unless it is shockingly unreasonable, perverse or improper."***

[252] I find these authorities persuasive and would adopt them as the proper position in law. I am of the view that is is imperative for this Court to as far as possible, avoid any decision or interpretation of a statutory provision or rule which render the system of registration of engineers unworkable in practice or create a situation that will water down a system designed at maintaining and ensuring high professional standards and competence.

Disposition

[253]Having made similar findings with the Court of Appeal that the Board was well within its rights to recognize or accredit the undergraduate degree programmes of the universities, I would have found that the question of the Board's violation of any of the alleged rights is mute.

[254]I am in agreement with the Majority that the Court of Appeal did err in its award of costs as against the universities and would have made a similar finding.

[255]With regards to whether this Court can and should order that the petitioners be awarded with Moi University degrees, and on that basis the Board be ordered to register them as engineers, I am wholly in agreement with the majority. I would also add that this issue was not adequately canvassed before this Court and there is simply not enough evidence on record to justify this finding.

[256] Having said that, I am of the view that the Petitioners are not to blame for the predicament they find themselves in. If this had been the decision of the majority, the consequent orders would have directed that the universities, at their cost, (of which cost include any requisite fees, transport, accommodation and meals), immediately recall the petitioners, - for a specific specially designed curriculum to be covered within a limited time frame of not more than one year, - to cover the gaps needed to bridge the deficit in engineering programmes undertaken by the Petitioners such as to comply with the requirements raised by the Board.

[257]Such orders would also have directed that as soon as the graduates are registration compliant, the current Board **MUST** on a priority basis, register them.

[258] Accordingly, and for all the reasons advanced, and with utmost respect, I am unable to agree with the outcome of the Majority. However, as my learned sister and brothers Judges are of a different opinion, theirs must be the decision of this court.

VII. FINAL ORDERS

[259] In the premises, Petition No. 4 of 2016 dated 22nd April, 2016 and Petition No. 19 of 2015 dated 30th November, 2015 are hereby allowed and the High Court Judgment reinstated to the extent of our orders below:

(a) The Judgment of the Court of Appeal dated 12th June, 2015 is hereby set aside in toto.

(b) The decision of the High Court issued on 15th October, 2012 is hereby affirmed in the following specific terms:

(1) A declaration hereby do issue that the power of the Engineers Registration Board under the provisions of section 11(1)(b) of the Engineers Registration Act (now repealed) to register graduate engineers did not include the power to accredit and approve engineering courses offered by public universities incorporated under the Laws of Kenya.

(2) A declaration hereby do issue that in refusing to register the applicants, the Board violated the petitioners' right to fair administrative action under Article 47(1) of the Constitution and the petitioners' right to human dignity under Article 28 of the Constitution as read with Article 55 (a) and (c) of the Constitution.

(3) An order of mandamus do hereby issue directing the Engineers Registration Board to register the Petitioners and 2nd Interested Parties in Petition No.19 of 2015, as Engineers under the Engineers Registration Act within the NEXT TWENTY-ONE DAYS (21) and in default the said Petitioners and 2nd Interested Parties be at liberty to apply to this Court for any appropriate Orders for enforcement of the Orders herein.

(4) The Engineers Registration Board shall pay general damages assessed at Kshs.200,000/- to each of the

Petitioners and 2nd Interested Parties. The sum shall carry interest at a rate of 12% per annum from the date of the High Court judgment.

(c) The Engineers Registration Board, shall bear the costs of the Petitioners and 2nd Interested Parties in Petition No. 19 of 2015, in the High Court, Court of Appeal and in this Court. The said costs shall carry interest at a rate of 12% per annum respectively from the date of judgment in each respective judgment until payment in full.

(d) All other parties shall bear their own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of July 2018.

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P. M. MWILU DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT	M. K. IBRAHIM JUSTICE OF THE SUPREME COURT
.....	.....
J. B. OJWANG JUSTICE OF THE SUPREME COURT	S. C. WANJALA JUSTICE OF THE SUPREME COURT

.....
N. S. NDUNGU
JUSTICE OF THE SUPREME COURT