



**Kenya Human Rights Commission & 3 others v Attorney General & 4 others (Constitutional Petition E412 of 2023) [2025] KEHC 1595 (KLR) (Constitutional and Human Rights) (24 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1595 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E412 OF 2023**

**EC MWITA, J**

**FEBRUARY 24, 2025**

**BETWEEN**

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

**AND**

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

**RULING**

1. This is a ruling on the application dated 27<sup>th</sup> January 2025 seeking suspension and or stay of execution of this Court's judgment delivered on 20<sup>th</sup> December 2024. The 5th respondent (the applicant) wants the judgment suspended or stayed for a limited period as the Court may deem fit pending regularisation of the Variable Scholarship and Loan Funding Model (new funding model) to ensure that it complies with [the Constitution](#) and the law, where necessary.



2. The application was brought under rules 19 and 32 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules.) The application is premised on the grounds on its face, the affidavit sworn of Agnes Mercy Wahome (DR) and submissions. The basis of the application is that this Court's judgement nullifying the new funding model which replaced the Differential Unit Cost (the old funding model) continues to create a crisis and uncertainty in the funding of students' education in public universities.
3. The applicant stated that its mandate under section 56(1) of the Universities Act is to disseminate information to students on the available higher education programmes, their costs and areas of studies prioritised by the government. The exercise of this mandate is crucial in the realisation of the right to education guaranteed under Article 43(1)(f) of the Constitution by providing information to students as they transit to higher education.
4. The applicant argued that while it is delinked from the issue of allocation of funds, it is mandated to give information on the cost of available programmes. According to the applicant, since the new funding model came into force in August 2024, government sponsored students have been placed to universities and colleges and informed of the cost of programmes as determined using the new funding model.
5. The applicant asserted that KSCE results were released on 9th February 2025 thereby triggering its mandate on university placement. Moreover, first-year students placed in various institutions were informed of the cost of their courses using the new funding model and are now in a state of uncertainty regarding funding of their second semester which started on 6th January 2025. An emergency has arisen now necessitating this Court to grant stay of execution or suspend the declaration of invalidity of the new funding model for a minimum period to avert harm that would arise due to that invalidation.
6. According to the applicant, a crisis is looming in universities and colleges since the funding of government sponsored students had already shifted from the Higher Education Loans Board (the 3rd respondent) to the new funding model effective August 2024. It is therefore in the public interest; interest of the Constitution and the rule of law that the prohibition of implementation of the new funding model be suspended for a limited period to prevent and avert the deprivation of the right to education for the first-year students.
7. The applicant relied on the decisions in *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR and *The National Assembly & another v Okiya Omtatah Okoiti & 58 others* [2023] eKLR.
8. The applicant maintained that it has not filed an application for stay in the Court of Appeal and that it is only participating in the matters before that Court as a respondent.
9. The 1st and 2nd respondents did not file any responses to the application, but supported the position taken by the applicant. Mr. Marwa who appeared on their behalf, informed the Court that the 1st and 2nd respondents had moved to the Court of Appeal but the application before the COA is different from the present application. He supported this application and associated himself with the applicant's submissions.
10. Mr. Marwa submitted that the decision of this Court has caused a lot of problems and it is necessary that this Court should consider staying it to allow compliance. According to counsel, a lot of adjustments need to be done so that "we can go back to the old funding model."
11. The 3rd and 4th respondents filed submissions in support of the application. Mr. Mbogo who appeared for the 3rd and 4th respondents associated himself with the applicant's position. He added



- that this Court has jurisdiction to hear this application and has unfettered discretion to grant the orders sought on grounds of public interest to allow compliance.
12. The 3rd and 4th respondent relied on the decisions in *Manase Caleb Ananda t/a Ananda & Co Advocates v Bandari Savings and Credit Society Ltd* [2021] eKLR; *Ngitibe Hudson Nyanumba v Thomas Ongondo* [2018] eKLR; *Uam v Moa* [2021] KEHC 15405(KLR); *Broadway Enterprise Limited v Ministry of Housing & Urban Development & 3 others* [2018] eKLR and *Butt v Rent Restriction Tribunal* [1979] eKLR on grant of stay of execution.
  13. The petitioners opposed the application through a replying affidavit and written submissions. They argued that the 1st and 2nd respondents have filed an application for stay of execution in the Court of Appeal (E 006 of 2025) which was certified urgent. The 3rd and 4th respondents have also filed a similar application in the Court of Appeal (E008 of 2025) which was also certified urgent and directions issued. The application before this Court is therefore a forum shopping and an abuse of the court process.
  14. The petitioners argued that this Court having determined the petition it lacks jurisdiction to grant orders staying the judgment otherwise it would contravene the provisions of Article 2(4) of *the Constitution*. Further, that sections 53 and 56 of the *Universities Act* are in force and empower the applicant and State agencies to apportion funds for course programmes in accordance with the old funding model. Granting stay would mean students accessing higher education would be subjected to the whims and caprice of the applicant.
  15. Mr. Mitula counsel for the petitioners added that this Court had already determined an application for stay under rule 32(2) of the Mutunga Rules immediately after delivery of the judgment thus, the Court is functus officio. Counsel maintained that public interest tilts in favour of complying with the law as it exists.
  16. The petitioners relied on the decisions in *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited* [1989] eKLR and *Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others* [2014] eKLR on jurisdiction.
  17. The petitioners added that the application is res judicata since the Court heard and determined an oral application hence the present application is an abuse of the Court process. Reliance was placed on the decision in *Shitanda v County Speaker of Kajiado County & 2 others (petition E004 of 2023)* [2023] KEHC 17822(KLR).
  18. Reliance was again placed on *Patricia Njeri & others v National Museum of Kenya* [2004] eKLR, that the order sought is discretionary and *Cabinet Secretary, Ministry of Health v Aura & 13 others* (Application E 565 OF 2024) on the purpose of suspending a declaration of invalidity, as the one sought.
  19. I have considered the application and arguments for the parties for and against the application. The applicant has asked this Court to suspend the judgment delivered on 20th December 2024 nullifying the new university funding model to enable compliance. In that judgment, the Court held that the new funding model violated aspects of *the Constitution* and the law and was therefore unconstitutional. The Court suspended its implementation until *the Constitution* and the law were complied with.
  20. Immediately after delivery of the judgment, the respondents, including the present applicant before this Court, applied for stay of that judgment for 45 days to allow compliance. The Court declined that request. The Court has been told that the 1st and 2nd respondents filed an application (E006 of 2025) for stay in the Court of Appeal. The 3rd and 4th respondents also filed a similar application (E008 of 2025) in the same Court and the two applications were certified urgent. The two applications seek



stay of execution of this Court's judgment pending appeal challenging the merits of that judgment. That means they were not satisfied with this Court's decision and want to test its correctness at the Court of Appeal.

21. Rule 32 (1) of the Mutunga Rules states that an appeal or second appeal does not operate as stay of execution. Subrule (2) allows a party to make an informal application for stay of execution immediately after the judgment or ruling and the court may make such orders as it deems fit and just. Subrule (3) provides for a formal application which may be made within 14 days of the decision appealed from or within such time as the court may direct.
22. Rule 32 is clearly on stay pending appeal. The application before this Court is not on stay pending appeal but for suspension of the declaration nullifying the new funding model pending compliance. It is not clear to this Court whether the 5th respondent agreed with that decision; wants it implemented and that is why it seeks a little time to have it implemented. On the other hand, although the 1st, 2nd, 3rd and 4th respondents have moved to the Court of Appeal to challenge that decision, they nevertheless support the application to suspend the declaration pending implementation of the decision.
23. This Court declined the informal application made by all the respondents immediately after delivery of the judgment. That informed the decision taken by the 1st to 4th respondents to file applications in the Court of Appeal seeking stay of execution pending appeal. They cannot come back to this Court to support an application seeking suspension of the declarations pending implementation when they are challenging the correctness of the same decision in the Court of Appeal. Common decency would demand that this Court defers to the Court of Appeal to deal with the applications parties have placed before it.
24. This Court is aware of the circumstances under which a declaration of invalidity may be suspended to give parties against whom the declaration of invalidity has been made an opportunity to correct the offending actions that led to the declaration. This was aptly stated in *National Assembly others v Okiya Omtatah Okoiti & others* (Civil Application No. E577 of 2023, citing *Law Society of Kenya v Kenya Revenue Authority* [2017] eKLR and *Schachter v Canada* [1992] 2 SCR 679 that "Temporarily suspending the declaration of invalidity to give Parliament an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option if striking down the legislation without enacting something in its place would pose a danger to the public; striking down the legislation without enacting something in its place would threaten the rule of law; or, the legislation was deemed unconstitutional because of under inclusiveness rather than overbreadth and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.
25. I must, however, point out here, that the above decisions were dealing with situations where declaration(s) of invalidity involved a statute, which is not the case here. It is also not every declaration of invalidity that may be suspended and a structural interdict issued. The Court must examine the consequences or effect of suspending the declaration(s) of invalidity on the Constitution, the rule of law and rights and fundamental freedoms.
26. In this case, the Court did not declare any statute or provision constitutionally invalid. And as it pointed out in its brief ruling on the informal application made immediately after delivering the judgment, as the trial Court, Article 165(3) requires it to determine specific questions, including (b) whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed, or threatened and (d) the question of interpreting the Constitution, including (i) whether any law is



- inconsistent with, or in contravention of the Constitution, or (ii) anything said to be done under the authority of the Constitution, or any law is inconsistent with, or in contravention of, the Constitution.
27. That is; the remit of the trial Court is to determine any violations of rights and fundamental freedoms in the Bill of Rights, interpret the Constitution and determine whether a law is inconsistent with the Constitution and whether whatever was said to be done on the behest and authority of the Constitution or any law, is inconsistent with, or in contravention of, the Constitution.
28. The Article 165(3)(b) and (d) set the trial Court on investigative mode. If the Court makes a determination in the affirmative, then Article 2(4) kicks in automatically and renders the law that is inconsistent with the Constitution void and any act or omission in contravention of the Constitution, or the law, invalid. In other words, it is not the Court that invalidates the law or the act or omission, but the Constitution itself-Article 2(4) of the Constitution.
29. This Court having found that the new funding model violated the existing law, was inconsistent with the Constitution and violated rights and fundamental freedoms, the declaration of invalidity was issued in compliance with Article 2(4) of the Constitution.
30. Being the trial Court, and Article 2(4) having kicked in; I do not think this is the proper forum to suspend the declaration nullifying the new funding model. What would be the effect of suspending the declaration nullifying the new funding model, would it mean suspending the operations of Article 2(4) of the Constitution? Is the operation of Article 2(4) dependent on further orders after the Court has determined in the affirmative the questions it has been asked to determine under Article 165(3)(b) and (d)? Answers to these questions are critical otherwise any suspension of this Court's declaration would allow the applicant and by extension, the 1st, 2nd, 3rd and 4th respondents to continue acting outside the law as is clear from the applicant's argument that since August 2024, the funding of government sponsored students had already shifted from the Higher Education Loans Board (the 3rd respondent) to the new funding model.
31. I also find a contradiction in the positions taken by the 1st, 2nd 3rd and 4th respondent and the applicant. The 1st to 4th respondents cannot approach the Court of Appeal challenging the correctness of this Court's decision, while at the same time supporting the applicant's application seeking suspension of the declaration pending compliance. The argument that the decision has caused problems cannot, in my view, be the basis for this Court to suspend its decision since it did not nullify any law. It only nullified actions taken outside the law.
32. In the circumstances, I am not persuaded that there is merit in granting the application. Public interest, in my respectful view, is better served when everyone acts within the law.
33. Consequently, and for the above reasons, the application dated 27th January 2025 is declined and dismissed. I make no order on costs.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY 2025**

**E C MWITA**

**JUDGE**

