Njagi v Council of Legal Education & another (Petition E411 of 2022)
[2023] KEHC 21366 (KLR) (Constitutional and Human Rights) (15 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21366 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E411 OF 2022

HI ONG'UDI, J

AUGUST 15, 2023

BETWEEN

EDGAR MUNENE NJAGI ..... PETITIONER

AND

COUNCIL OF LEGAL EDUCATION ..... 1ST RESPONDENT

ATTORNEY GENERAL ..... 2ND RESPONDENT

JUDGMENT

1. The petition dated August 11, 2022 was filed under various articles of the *Constitution*. The petitioner seeks the following orders:

    i. A Declaration be issued that the rejection of the petitioner's request to re-sit ATP examination contravenes and violates Articles 10, 20(1), 25 (c), 27(1), 43, 47 and 50 of the *Constitution* as read together with Section 4, 5 and 6 of the *Fair Administrative Action Act*; Section 8(1)(a) & (f) *Legal Education Act* and section 13(1) & (2) *Advocates Act* and the decision and action thereto are invalid, null and void ab initio.

    ii. An Order of certiorari be issued calling into this court and quashing the decisions of the 1st respondent rejecting the petitioner's application contained in the letter dated June 16, 2022 Reference No CLE/EXAMS/GEN VOL.8 (78) reneging the applicant's application to sit for a ATP examination and contending that he should register afresh for ATP programme at Kenya school of law if he meets the requirements.

    iii. An Order of mandamus compelling the 1st respondent's council to exercise its powers under Section 13 of the *Advocates Act* and grant the petitioner exemption as having duly qualified for admission as an Advocate.

iv. An Order of mandamus compelling the 1st respondent's council to register the petitioner for the company Law paper or an equivalent of the same respectively offered in October 2022 examinations series.

v. Any other relief and/or orders the Honorable Court deems appropriate, just and/or fit to grant.

vi. The cost of the petition be provided for.

The Petitioner's case

2. The petitioner's case is supported by his supporting affidavit of even date and a further affidavit dated October 18, 2022. The petitioner commenced by stating that he enrolled at the Kenya School of Law in the year 2007 for the Advocates Training Programme (herein referred to as ATP) after successfully completing his Bachelors of Law Degree LL. B at Keele University and thereafter satisfying the requirements for admission.

3. He made known that the 1st respondent and Kenya School of Law at that time offered a minimum of 6 course units to students who undertook undergraduate studies in Kenyan Universities and for graduates from foreign universities it was, 7 to 20 course units. After the 1st respondent assessed his transcripts, it was decided that he be offered 13 course units inclusive of company law (Law of Business Association).

4. He averred that after completing the entire course work, he sat for the ATP exams as offered by the 1st respondent. Out of the 13 units offered he passed 12 save for the company law unit. He subsequently proceeded to undertake his pupilage program under his Pupil Master, Senior Counsel Pherozee Nowrojee.

5. It is deposed that the Council of Legal Education on February 3, 2021 vide General Notice No. 2 of 2021, called upon all candidates barred by the 5 year Rule as provided under Regulation 9(5) of the Council of Legal Education (Kenya School of Law) Regulations, 2009 to make applications to take the ATP examination which he did.

6. He deposed that on August 23, 2021 the 1st respondent on its website www.cle.or.ke published General Notice No. 16 of 2021 announcing that it had allowed all the candidates who applied to sit for the examination to do so within one year. The 1st respondent further clarified that the time would start running from the registration date for the November 2021 exams.

7. He further deposed that the 1st respondent on September 15, 2021 published General Notice No.19 of 2021 and in reference to General Notice No. 16 of 2021 listed the names of the 239 candidates who had applied for the exam. In this list he was No.4 under Registration No. 2007383. In the said Notice the 1st respondent, sought information from 47 candidates to enable it facilitate their registration for the November 2021 examination series. The data form in its possession did not contain the said information. In compliance the petitioner downloaded the CLE/EX.05 bio-data, filled it and sent it to the 1st respondent's Directorate of Examinations department.

8. On October 7, 2021, the petitioner enquired from the 1st respondent whether he could be allowed to sit for an alternative unit to the company law unit since the curriculum had been revised. On October 8, 2021, the 1st respondent through an email from Sharon Mwadime stated that he would be informed in due course after the board deliberates on the matter. The petitioner made a follow up on the subject, vide an email dated December 6, 2021 which was not responded to.

9. On March 6, 2022 the 1st respondent published General Notice No. 6 of 2022 which stated as follows: 'Please further note that the Council has rejected applications from persons who previously attempted examinations under retired ATP curricula and therefore the unsuccessful applicants are advised to seek fresh registration for admission to the ATP at the Kenya School of Law and fulfill all requirements for registration of examinations under the current curriculum. This went back on its word as communicated on February 3, 2021 through General Notice No. 2 of 2021.

10. The petitioner soon after on March 29, 2022 wrote a Letter to the 1st respondent requesting to be allowed to sit for an alternative to company law. This is on the basis that the current curriculum provides a unit that is the same in substance and the only difference is the name. In response, the 1st respondent through its letter dated June 16, 2022 rejected the application on the premise that the thirteen units could not be equated in the current curriculum.

11. The petitioner was aggrieved and hence brought this petition against the 1st respondent for its actions, which were alleged to be unconstitutional and unlawful in light of the principle of legitimate expectation and Articles 21(1), 27(1), 43(f), 47 and 50(1) of the *Constitution*. By the same token, its claimed actions are prejudicial to the management and conduct of legal training in Kenya.

12. In his further affidavit, the petitioner deposed that on October 6, 2022, upon issuance of this court's order dated September 22, 2022, the 1st respondent partially allowed his registration for the examination and received examination fees of Kshs.5000/=. He asserted that unknown to him, the 1st respondent's actions were in contempt of the Court order for failing to allow complete registration with an intention to lodge an application dated October 5, 2022 to vacate the said orders.

13. The petitioner further asserted that the 1st respondent acted in a discriminatory manner since despite its denial to allow the petitioner to register for the exam, it applied the Regulation 9(5) selectively since it allowed candidates who took 9 units from the previous curriculum and also those that came before the petitioner to apply for registration for the examination. The 1st respondent in the end published the results of these candidates who re-sat the ATP exam such as 15M/2005/06, 2008276 among others.

14. Equally, in the examination conducted in October 2022 the 1st respondent allowed candidates from as far as 2008 who undertook the old curricula and were also barred by the 5year Rule to register and sit for the examinations.

The 1st Respondent's case

15. The 1st respondent, in answer and opposition filed its replying affidavit dated October 11, 2022 through the Chief Executive Officer, Dr. Emmanuel Wambua Kituku. He informed that the 1st respondent's mandate as captured under Section 8 of the *Legal Education Act* No.27 of 2012 is to regulate legal education and training in Kenya and administer professional examinations as prescribed under Section 13 of the *Advocates Act*.

16. Referring to General Notice No. 2 of 2021 as discussed by the petitioner, the 1st respondent averred that it advised candidates likely to be affected by the 5 year bar under Regulation 9(5) of the Council of Legal Education (Kenya School of Law) Regulations, 2009 and desired to undertake the ATP examination to make fresh applications while attaching all the relevant documentation by 26th February 2021. He stressed that the Notice clearly indicated that the Council would consider all the requests on a case by case basis hence an application was not an automatic guarantee of acceptance.

17. In its General Notice No.16 of 2021 dated August 20, 2021, the 1st respondent informed that it had allowed all the 239 applicants who had applied, to sit for the examination within one year. (See also:

General Notice No.19 of 2021 which listed the applicants names). Considering this notice, these candidates would only be eligible to sit for the November 2021 and June 2022 examination series.

18. He deposed that vide General Notice No.22 of 2021 the 1st respondent requested 47 of these candidates which included the petitioner to fill the CLE/EX.05 bio data form and send the same to the Director of Examination on examination@Cle.or.ke by September 30, 2021 to enable registration of the November 2021 examination.

19. He deposed that after receiving the bio – data form, the Board vide its resolution advised the petitioner vide a letter dated June 16, 2022 to register afresh for the programme if he met the requirements. This is since the 13 units could not be equated to the current curriculum. He as well averred that the Company Law Unit done by the petitioner could not be equated to the Commercial transactions unit.

20. It was noted further that since 2007 the curriculum had undergone significant changes as seen under the Second Schedule Part III of the *Legal Education Act*, 2012 which provides the courses at Post Graduate (Professional) Diploma to be: Civil litigation, Criminal litigation, Probate and Administration, Legal writing and drafting, Trial Advocacy, professional ethics, Legal Practice Management, Conveyancing, Commercial transactions and Pupillage.

21. He asserted that it would not be proper for the petitioner who has been away for 14 years to sit for the commercial transaction examination without attending the lectures to gain the knowledge and skills. In view of this, he stressed that the 1st respondent could not be faulted for adhering to the law and in the public interest. He in addition stated that the 1st respondent's decision to advise the petitioner to register afresh is in conformity with the doctrine of legality. In closing he averred that the instant petition was made in bad faith and an abuse of the Court.

The 2nd Respondent's case

22. The 2nd respondent did not file a response or submissions in this matter.

The Parties Submissions

The Petitioner's submissions

23. The petitioner through the firm of Otwal and Manwa Associate Advocates filed written submissions and a list of authorities dated May 15, 2023. The submissions were highlighted in court on June 13, 2023. Counsel identified the issues for determination as follows:

    i. Whether the petitioner's constitutional rights have been denied, threatened, violated and infringed with reference to:

        a. Right to Fair Administrative Action

        b. Right to access of information.

    ii. Whether the petitioner is entitled to damages.

24. Counsel on a preliminary note, submitted that the petition had met the constitutional threshold as it had not only specified the violated constitutional provisions but also demonstrated the manner in which the provisions had been violated as required in the principle established in the Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154, and the Court of Appeal case of Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR.

25. Counsel on the first issue relying on the averments in the petitioner's petition submitted that the 1st respondent illegitimately reneged and revoked the petitioner's application which it had already accepted and processed. Secondly that the 1st respondent failed to expeditiously, efficiently, reasonably and procedurally communicate directly to the petitioner its decision and was only informed when the 1st respondent published General Notice No. 6 of 2022.This Notice was moreover published after the deadline of registration for the November 2021 and June 2022 series examinations.

26. Similarly Counsel argued that the 1st respondent applied the edicts of Regulation 9(5) of the Council of Legal Education (Kenya School of Law Regulations), 2009) selectively. First was when the 1st respondent partially revoked General Notice No. 16 and 19 of 2021 by allowing candidates from previous ATP to sit exams in November 2021 and June 2022 yet failed to give written reasons or a hearing for the same.

27. Secondly, the 1st respondent allowed other candidates from the previous curriculum inclusive of the year 2002 to sit for the exam yet found it fit to deny the petitioner the same opportunity which is discriminatory. Thirdly whereas the petitioner had been denied the opportunity to sit for the ATP examinations, the 1st respondent on its own motion extended an olive branch to the retired lawyers to make requests to sit for ATP examinations for consideration which was allowed and it went further to suspend Regulation 9(5) indefinably until new regulations are developed.

28. Counsel as well faulted the 1st respondent's failure to outline a clear transitional procedure for candidates from the previous curriculum to the present one. He thus submitted that the 1st respondent had continually infringed upon the petitioner's rights under articles 27, 28, 31, 43(f), 47 (1) & (2)and 50(1) of the *Constitution*.

29. Counsel equally submitted that the 1st respondent's actions of calling for applications, allowing the applications and then revoking the same created a legitimate expectation, which was reasonably relied upon by the petitioner who awaited to sit for the ATP examinations. To expound on this point, Counsel cited the case of Masai Mara (SOPA) Limited vs Narok County Government [2016] eKLR where it was held that the doctrine of legitimate expectation clearly protects the procedural expectation to be accorded a hearing as well as the substantive expectation that a regular practice giving some benefits, privileges or advantages would be continued or be retained. On this point Counsel as well relied on the cases of Communications Commissions of Kenya & 5 others vs Royal Media Services Ltd and 5 others Petition No. 14 of 2014 and Oindi Zarppeline & 39 others vs Karatina University & another [2015] eKLR.

30. On the right to a fair administrative action, counsel submitted that the decision by the council on the petitioner's application was an administrative action and as such had to be in tandem with the directives under Article 47(1) of the *Constitution* and section 4(1) of the Fair Administrative Act, 2015, which the 1st respondent failed to adhere to.

31. In support reliance was placed on the case of Moses Kiarie Kuria & 4 Others v. Attorney General & 3 others (2014) eKLR where it was held that the constitutional guarantee of the right to fair administrative action is aimed at instilling discipline to administrative action so that the values and principles of the *Constitution* are infused in matters of public administration.

32. On the right to access information, Counsel referred to the petitioner's averments and submitted that the 1st respondent's actions and failure to communicate its decision violated Articles 10, 22 and 35 of the *Constitution* and Sections 4, 9 and 21 of the *Access to Information Act*. To buttress this point reliance was placed on the case of Katiba Institute v Presidents Delivery Unit & 3 others (2017)eKLR where it was held that the *Constitution* is therefore clear that information held by the state is accessible

by citizens and that information is available on request. To him this means that once a citizen places a request to access information, the information should be availed to him/her without delay. Related reliance was placed on the case of Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission [2016] eKLR, Article 19 of the Universal Declaration of Human Rights and Article 19(2) of International Convention on Civil and Political Rights.

33. On the second issue, Counsel submitted that article 23(3) of the *Constitution* gives the court authority to grant appropriate relief in any proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed, or is threatened. The petitioner therefore sought aggravated, exemplary and general damages for violation of his rights by the respondents.

34. To support the claim for aggravated damages Counsel relied on the case of M W K v another v Attorney General & 3 others [2017] eKLR where it was held that aggravated damages are the special and highly exceptional damages awarded on a defendant by a court, when his/her conduct amounts to conduct subjecting the plaintiff to humiliating and malicious circumstances. Additional damages are also awarded in situations where a plaintiff is subjected to distress, embarrassment, or humiliation.

35. To this end, counsel relying on Section 27 (1) of the *Civil Procedure Act* submitted that costs follow the event. He as well submitted that in prosecuting the suit there had not been any misconduct on the part of the petitioner, no omission or neglect, and no vexatious or oppressive conduct to lead this court to deprive him of costs.

36. To buttress this point reliance was placed on the case of Karuru Ngayu v Barclays Bank of Kenya & another [2016] eKLR where it was held that the law of costs as it is understood by courts in Kenya, is this, that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part-no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs-the court has no discretion and cannot take away the plaintiffs right to costs. If the defendant, however innocently, has infringed a legal right of the plaintiff, the plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course. Additional reliance was placed on the case of Republic v Independent Electoral and Boundaries Commission Ex-Parte Mohamed Ibrahim Abdi & others [2017] eKLR.

The 1st Respondent's submissions

37. Counsel, Victoria Wahu on behalf of the 1st respondent filed written submissions and a list of authorities dated June 12, 2023 which were also highlighted in court on June 13, 2023. Counsel underscored the issues for discussion as follows:

i. Whether the 1st respondent's decision of not allowing the petitioner to re-sit commercial transactions examination as a substitute for company law was discriminatory.

ii. Whether the 1st respondent violated the petitioner's right to legitimate expectation.

iii. Whether the 1st respondent violated the petitioner's right to fair administrative action under Article 47 of the *Constitution* and the right of access to information.

iv. Whether the petitioner is entitled to damages.

38. On the first issue and while relying on the 1st respondent's averments and dictates of Regulation 9(5) of the Council of Legal Education (Kenya School of Law) Regulations 2009, counsel submitted that the petitioner was outside the stipulated 5 year period. She informed that this Regulation only applied to persons who had not completed their examinations within 5 calendar years.

39. She further stated that the 1st respondent in making its decision on the applications considered the revised syllabus and the setting of the bar examinations. She noted that this standard was applied to all who applied. In the petitioner's case it was found that the company law unit could not be equated to the commercial transactions unit. Further that no candidate among those who applied had done commercial transactions as a re-sit paper in place of company law.

40. Counsel as such stated that the 1st respondent's decision was within the law as it complied with the provisions of the Regulations. Equally, that the application of the law was not discriminatory since it is not unlawful to accord different treatment to different categories of persons. In support reliance was placed on the case of M M O N v Council of Legal Education [2017] eKLR where it was observed that despite the revocation of Council of Legal Education (Kenya School of Law) Regulations, 2009, any act, thing or decision pending under the Council of Legal Education (Kenya School of Law) Regulations, 2009, shall be continued or concluded as if the act or thing was done or decision made under these Regulations.

41. Additional reliance was placed on the case of Gabriel Nyabola v Attorney General & 2 others (2014) eKLR and Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others (Interested Parties) (2020) eKLR, among others.

42. Turning to the second issue, counsel submitted that, the Second Schedule, Part III – core courses Post Graduate (Professional)Diploma Level of the *Legal Education Act ,2012* which lists the core units does not include company law as one of its recognized units. That in view of this, the 1st respondent could not be expected to issue an examination to a candidate who has not undergone the necessary training in that particular unit.

43. Counsel argued that an expectation can only be legitimate where an authority has power to make such representation that certain actions will be done in a particular way. Furthermore relying on the case of Jane Kiongo & 15 others v Laikipia University & 6 others (2019) eKLR She contended that a legitimate expectation must be clear and devoid of relevant qualification; reasonable; lawful and indicated by the decision maker. These elements were also stated by the Supreme Court in the cases of Communications Commission of Kenya V Royal Media Services Ltd & 5 others (2014) eKLR; Republic v Principle Secretary, Ministry of Transport, Housing and Urban Development Ex parte Soweto Residents Forum CBO (2019) eKLR. On account of this, counsel submitted that General Notice No.2 of 2012 did not make any representation to the candidates but only invited those caught up in the 5 year bar to make fresh requests for consideration.

44. It was further submitted that the court ought to take notice of the 1st respondent's mandate under Section 8 of the *Legal Education Act , 2012* and refrain from compelling the 1st respondent to exercise its discretion in a particular manner. To buttress this argument reliance was placed on the case of Republic v Public Procurement Administrative Review Board & 2 others ex parte Pelt Security Services Limited (2018) eKLR where it was observed that once it is shown that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the decision is shown to be so unreasonable that it defies logic, the court cannot intervene.

45. On the third issue, Counsel submitted that the 1st respondent went out of its way to ensure that due process was followed. It was to be noted that the 1st respondent responded to the petitioner's concerns in a letter dated 16th June 2022. It could therefore not be stated that the 1st respondent violated the petitioner's right under Article 47 of the *Constitution* when action was taken on each of the petitioner's complaints and reasons given as appreciated in the cases of Linus Simiyu Wamalwa v Univeristy of

Nairobi & another (2015) eKLR; Kenya Revenue Authority v Menginya Salim Murgani (2010) eKLR among others.

46. Counsel further argued that the petitioner despite alleging violation of his rights had failed to demonstrate the manner in which the rights were violated as established in the case of Anarita Karimi Njeru No.1 of (1979) 1 KLR. Further that before a declaration can be granted there must be a real and not theoretical question as held in the case of Matalinga & others v Attorney General (1972) EA 518.

47. On whether the petitioner is entitled to the reliefs sought, counsel urged the court to exercise its discretion in awarding any damages to the petitioner. This is because, a constitutional remedy is not compensatory or punitive but awarded to vindicate the rights violated to deter future infringements. On this point reliance was placed on the case of Gitobu Imanyara & 2 others v Attorney General (2016) eKLR.

48. Lastly on the issue of costs, Counsel submitted that the discretion granted under Section 27 of the *Civil Procedure Act* should not be geared towards penalizing the losing party as held in the case of R v Rosemary Wairimu Munene, Ex parte applicant v Ihururu Dairy Farmers Co-operative Society JR No.6 of 2014. Analogous reliance was placed on the case of Scherer v Counting Instruments Ltd (1986)1 WLR 615.

Analysis and Determination

49. Having carefully considered the parties' pleadings and submissions, I find the issues that arise for determination to be as follows:

    i. Whether the 1st respondent violated the petitioner's rights under Articles 27, 28, 31, 43(f) and 47(1)& (2) and 50(1) of the *Constitution*;

    ii. Whether the 1st respondent violated the petitioner's legitimate expectation; and

    iii. Whether the petitioner is entitled to the reliefs sought.

Whether the 1st respondent violated the petitioner's rights under article 27, 28, 43(f) and 47(1)& (2) and 50(1) of the *Constitution*

50. The petitioner's key grievance revolves around the 1st respondent's decision to reject his application to re-sit the ATP examination in the company law unit. This grievance is premised on a series of General Notices which were issued by the 1st respondent, with reference to all candidates who were affected by Regulation 9(5) Council of Legal Education (Kenya School of Law) Regulations 2009. The petitioner responded to the General Notices and the 1st respondent made a final decision which the petitioner alleges violated his constitutional rights as cited above.

51. The 1st respondent in its arguments stressed that the petitioner's allegations were based on a misapprehension of the General Notices and the law. First that General Notice No 2 of 2011 dated February 3, 2021 was not an automatic acceptance to the prospective candidates but a call to consider their applications. Secondly, that the petitioner was outside the 5 year period under Regulation 9(5). Further that owing to the change of the ATP curriculum, the petitioner's request to re-sit an alternative unit in the current curriculum was not sustainable as company law was no longer one of the course units in the program. In light of this, it was argued that the 1st respondent had only acted within the law in the whole process.

Right to freedom from discrimination

52. The petitioner alleged that the 1st respondent violated his right under Article 27 of the *Constitution* since it acted in a discriminatory manner in the way it allowed some candidates to re-sit the ATP examination while denying him the same opportunity. He gave an example of the 1st respondent allowing candidates who took 9 units from the retired curriculum and those who came before the petitioner to apply for registration for the examination. He relied on his annexture 'EMN-4 (the Re-sit examination results) as attached in his further affidavit dated 18th October 2022 and 'EMN-3' (the 1st respondent's General Notice No 17 of 2022 dated May 18, 2022).

53. The 1st respondent refuted this allegation by stating that in making its decision on the applications it considered the revised syllabus and the setting of the Bar examinations. It was stressed that this standard was applied to all who applied. In the petitioner's case it was found that the company law unit could not be equated to the commercial transactions unit. Further that no candidate among those who applied had done commercial transactions as a re-sit paper in place of company law.

54. The right to freedom from discrimination as envisaged under article 27 of the *Constitution* provides as follows in the relevant sub-articles:

    1. Every person is equal before the law and has the right to equal protection and equal benefit of the law.

    2. Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

55. The Supreme Court in the case of Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019) [2021] KESC 12 (KLR) (Civ) (22 October 2021) (Judgment) discussing this right observed as follows:

> "(51) From the above definitions, it is clear that discrimination can be said to have occurred where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex disability etc or due to unfair practice and without any objective and reasonable justification."

56. The Court correspondingly under Paragraph 47 opined as follows:

> " This court had occasion to lay emphasis on the burden of proof in cases of discrimination in the case of Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others [2020] eKLR where the Supreme Court applied Section 108 of the *Evidence Act* in requiring the claimant to prove his claim in a matter involving discrimination."

57. In my view, the test for determining whether the petitioner's claim on discrimination will be successful constitutes showing that there was a nexus between rejection of his application to re-sit the ATP examination and the other candidates admitted to undertake the re-sit examination. Further that the discrimination was without any objective and reasonable justification.

58. As per the 1st respondent, it adhered to the dictates of the law in considering the submitted applications. The differentiation between those allowed and those disallowed was the fact that the re-sit exam did not consider applications made from students who undertook the retired curriculum and further no candidate was allowed to re-sit the commercial transactions exam as an alternative to company law. Likewise, that the petitioner was outside the 5 year period.

59. While differentiation in and of itself does not amount to actual discrimination, the differentiation must be tested in view of its reasonable justification. A look at annextures EMN 3 and EMN 4 tell a different story. The listed names indicate that the 1st respondent allowed candidates from the retired ATP curriculum to re-sit the examination while rejecting the petitioner's application.

60. Likewise, the 1st respondent in the test that defies reasonable justification argued that the petitioner was excluded from re-siting the impugned unit as it forms part of the retired curriculum. I take this view for two reasons. First the argument invokes the principle of retroactive application of the law which is offensive in the context of this case as it deprives the petitioner's vested rights following his enrollment, attendance and completion of the ATP program under the retired curriculum. I find guidance in the case of Khaemba Patrick Wanyonyi V Teachers Service Commission [2013] eKLR where this principle was explained as follows:

> "
>
> "(11) The concept of retroactive or retrospective law developed over time in the 1700s to cure the grave injustices occasioned by what was called the bill of attainder (1300-1600) on a person (attainder) who had been sentenced to death or declared an outlaw. Literally, all civil rights of the attainder were extinguished whether past, present and future, and could not perform any of the legal functions that he performed before the attainder. According to the Black's Law Dictionary, 7th Edition, retroactive/retrospective is:
>
> A legislative act that looks backward or contemplates the past, affecting acts or facts that existed before the act came into effect. The retroactive law is not unconstitutional unless it: 1) is in the nature of an ex post facto law or a bill of attainder, 2) impairs the obligation of contracts, 3) divests vested rights, or 4) is constitutionally forbidden...Also termed retrospective law."

61. On the other hand, the 1st respondent which is legally mandated to regulate legal education and training in Kenya as per its Act, failed to show the legal process set in place to deal with transitional requirements as between the retired curriculum and new curriculum and how the same was to be regularized in cases such as this one. This in essence was their mandate not the candidates. This would then have formed the basis for the former and current candidates' applications to be considered for the re-sit examinations. In my view therefore, the 1st respondent's assertion for the retired curriculum not to be considered is also discriminatory to the students who duly completed the retired program and would like to be considered for pending examinations.

62. It is reasonable to state that the petitioner discharged his burden of proof to the effect that the 1st respondent violated his right against discrimination under Article 27 of *the Constitution*. The respondent had the responsibility of rebutting this allegation by establishing the justification of its actions which it failed to do.

Right to dignity

63. Article 28 of *the Constitution* provides as follows:

> Every person has inherent dignity and the right to have that dignity respected and protected.

64. In order for a petition to qualify as a constitutional petition according to the case of Anarita Karimi Njeru vs. Republic [1979] eKLR, the petitioner must specify which specific provisions of *the*

Constitution have been or are threatened to be infringed or violated and the manner in which the respondent has infringed the subject rights.

65. In this case, while the petitioner outlines this right, he stops at that. No explanation or discussion of the right is done or underscored. Equally, a demonstration of the manner in which this right is violated or threatened is not discussed. In essence without discharge of this burden the petitioner failed to show how this right was violated by the 1st respondent.

Right to education

66. This right falls under the economic and social rights accorded under the *Constitution* in Article 43.The specific provision provides as follows:

    1. Every person has the right--

        (f) to education.

67. In analyzing this right as envisaged under Article 43(1) (f) of the *Constitution*, the Court in the case of Joseph Njuguna & 28 others v George Gitau T/A Emmaus School & another [2016] eKLR adopted the following view:

    39. It is key to observe that this right is placed on the State such that, where the State does not have resources to implement a right under Article 43, the State has to either show that it does not have the resources or it will give priority to ensuring the widest possible enjoyment of the right to prevailing circumstances, including the vulnerability of particular groups or individuals. The provision under the Bill of Rights applies to all law and binds all State organs and all persons. To ensure this right, the *Basic Education Act* (supra) enjoins the Cabinet Secretary to implement the right to basic education as enshrined under Article 53.

    .....

    41. Mumbi Ngugi J., while addressing the right to education and the place of private schools in the case of J.K (Suing on Behalf of CK) v Board of Directors of R School & another [2014] e KLR, observed that:

        > "It is indeed correct that Article 43 guarantees to everyone the right to education. The constitutional responsibility is placed on the state to achieve the progressive realization of the rights set out in Article However, there is no obligation placed on a private entity such as the respondent school to provide such right;"

    .....

    43. I further wish to state that, the services offered by a private entity are akin to a contract, where each of the parties has an obligation. The private school in fulfilling its obligation has to ensure that it provides proper and a conducive learning environment. The parents or guardians have to ensure that they pay the requisite fee so that the child is offered the services rendered in the private school. A private school cannot be equated to a public school, where free tuition is offered and charges can only be imposed with the approval of the Cabinet Secretary."

68. I find that the petitioner other than citing this provision failed to demonstrate how the 1st respondent violated this right. Further, taking into consideration the pronouncement in the cited case and the context of the alleged violation, it was impossible for the 1st respondent to violate the petitioner's right under this Article since availability of this right is borne by the State not learning institutions such as

Kenya School of Law or regulatory bodies such as the 1st respondent. Accordingly, the 1st respondent did not violate the petitioner's right under Article 43(1)(f) of the *Constitution*.

Right to a fair administrative action and fair hearing

69. The petitioner asserted that the 1st respondent's decisions were administrative in nature yet failed to adhere to the principles set out under Article 47(1) of the *Constitution* and Section 4(1) of the Fair Administrative Act, 2015. This arises from the way it handled the issue. The 1st respondent refuted this claim noting that it had taken on each of the petitioner's complaints and granted reasons for its decisions.

70. Article 47 of the *Constitution* of Kenya provides as follows:

    1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

    2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

71. This Article is read in tandem with Article 50(1) of the *Constitution* which provides as follows:

    1. Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

72. Additionally the *Fair Administrative Action Act , 2015* under section 4 provides that:

    Administrative action to be taken expeditiously, efficiently, lawfully etc

    1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

    2. Every person has the right to be given written reasons for any administrative action that is taken against him.

73. The prominence of fair administrative action as a constitutional right was appreciated by the South African Constitutional Court in the case of President of the Republic of South Africa and others vs. South African Rugby Football Union and others (CCT16/98) 2000 (1) SA 1, at paragraphs135 -136 where it was held as follows:

    > "Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades..."

74. My interpretation of the above is that this court is only required to conduct a procedural review of the 1st respondent's administrative decision in accordance with the set principles.

75. A perusal of the pleadings and material before this Court indicates that it is true as asserted by the 1st respondent that General Notice No 2 of 2021 was not an automatic acceptance of the filed applications. The Notice was clear that the Council would consider the same first before making a decision.

76. The 1st respondent subsequently made the decision to allow all the candidates who had applied to re-sit the examination. Following the 1st respondent's notice to the 239 candidates to register and complete the ATP programme within one year starting November 2021(See: General Notice No 19 of 2021), the 1st respondent vide General Notice No 22 of 2021 noted that it did not have the records of 47 of those candidates hence required them to fill out the bio data form provided on the website by September 30, 2021 to enable registration of the November 2021 examination before the deadline. The petitioner filled the bio data form (See: Annexture 'EMN 4') and sent the same to the Directorate of Examinations department.

77. The petitioner while making a follow up on the matter requested to be allowed to re –sit an alternative unit to the company law unit owing to the revised curriculum. A response by the 1st respondent was made on October 8, 2021 indicating that he would be informed in due time once the Board deliberates on the issue. With no further communication, the petitioner did a follow up email on December 6, 2021 and in addition visited its offices. All are said to have been fruitless.

78. The petitioner was finally notified of the Board's decision vide General Notice No. 6 of 2022 dated March 6, 2022 which informed that the Council had rejected applications from persons under the retired ATP curricula and as such the candidates ought to seek fresh registration for the ATP program at the Kenya School of Law. He yet again in view of the June 2022 examinations wrote to the 1st respondent seeking to sit for an alternative unit to company law. The 1st respondent made a response to this letter on June 6, 2022 rejecting his request owing to the fact that the 13 Units he had done in the retired curriculum could not be equated in the current curriculum.

79. It is discernible that the 1st respondent's communication in view of General Notice No. 22 of 2021 was not expeditious. I say so because the intent of the Notice was to ensure that all the 239 candidates including the 47 were registered for the November 2021 examinations. Being that the 1st respondent's decision would have adverse effects on the candidates' rights to sit for this exam, Article 47(2) of the *Constitution* requires that written reasons for the action be issued to the person. Likewise Section 4(3) of the Fair Administrative Actions Act provides that:

> Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–
>
> a. prior and adequate notice of the nature and reasons for the proposed administrative action;
>
> b. an opportunity to be heard and to make representations in that regard;
>
> c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
>
> d. a statement of reasons pursuant to section 6;
>
> e. notice of the right to legal representation, where applicable;
>
> f. notice of the right to cross-examine or where applicable; or

g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

80. A perusal of the correspondence makes it clear that there was lack of a timely response as the same was communicated past the deadline for registration of the November 2021 examinations, and no written reasons were issued at the time. When the 1st respondent finally responded, the petitioner was also not granted an opportunity to be heard and make representations on the issue as required by law.

81. On the other hand, Section 7 (2) of the *Fair Administrative Action Act* provides for the grounds upon which a court may review an administrative decision and this include: bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power.

82. I observe that the information contained in the General Notice No.6 of 2022 dated March 6, 2022 contradicted the 1st respondent's initial directive to the candidates. It is apparent from General Notice No. 16 of 2021 dated August 23, 2021 that the 1st respondent stated that it had allowed all the candidates who had applied to sit for the examinations, to do so within one year. This Court is minded of the fact that the 1st respondent throughout had not set out any disclaimer or qualifications in its call, which in essence would bar a specific group of persons such as candidates in the retired curriculum as alleged later on. Reasonably the candidates who heeded the call relied on this communication in making their applications. To thus turn around and communicate a different direction on March 6, 2022 was unreasonable on the part of the 1st respondent, given the timelines.

83. It is essential to note is that the 1st respondent is the one charged with the obligation to ensure that the legal education in Kenya is in line with the required standards and regularization of the system. Most importantly, regularization of the retired curriculum and the current ATP curriculum was not the petitioner's or candidates' mandate but the 1st respondent's. As such the 1st respondent's retiring of the former curriculum could not turn and extinguish the petitioner's vested rights in the said curriculum by asking them to apply afresh for the ATP program. It was the 1st respondent's duty to try as much as possible to accommodate as many students of the retired curriculum into the new one. This decision in my view failed to take into account relevant matters, was unreasonable and essentially violated the petitioner's legitimate expectation in the system.

84. In light of the elements of a fair administrative action the 1st respondent was under the obligation to make a decision that was reasonable and procedurally fair. In addition it had to be mindful not to invoke the grounds set out under Section 7 (2) of the *Fair Administrative Action Act*. I am convinced accordingly that the manner in which the 1st respondent took out the administrative action with regard to the petitioner did not meet the standards of fairness as guaranteed under Article 47 of the *Constitution* in effect violating his right under this Article and Article 50 of the *Constitution*.

Whether the 1st respondent violated the petitioner's legitimate expectation

85. The petitioner on this point argued that the 1st respondent's actions of calling for applications, allowing the applications and then revoking the same created a legitimate expectation, which was reasonably relied upon by the petitioner who awaited to sit the ATP examinations. The 1st respondent on the flipside opposed this assertion stating that an expectation can only be legitimate where an authority has power to make such representation that certain actions will be done in a particular way. In this regard it was pointed out that the Second Schedule, Part III of the *Legal Education Act*, 2012 does not list company law as one of its recognized units and so it could not be expected to issue such an examination.

86. The Supreme Court of Kenya in defining legitimate expectation in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR stated that:

> " (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.
>
> [266] Wade and Forsyth in their work, Administrative Law, 10th ed (pages 446-448), discuss the relevant legal principles on legitimacy of an expectation. For an expectation to be legitimate, it must be founded upon a promise or practice by the public authority, that is said to be bound to fulfil the expectation..."

87. The Court went on to state the principles of legitimate expectation as follows:

> (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*."

88. In addition the Court in the case of Republic v Kenya Revenue Authority Ex-parte KSC International Limited (In Receivership) [2016] eKLR speaking to this held as follows:

> " My view on this issue is informed by the need to achieve certainty in economic sphere. As was appreciated by Nyamu, J in Keroche Industries Limited vs. Kenya Revenue Authority & 5 others HCMA No. 743 of 2006 [2007] KLR 240 at 295:
>
> "...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Certainty of law is a major requirement to business and investment...certainty of law is an important pillar in the concept of the rule of law."

89. In the circumstances of this case and as discussed in the preceding issue, I find that the 1st respondent's action of calling for applications for candidates affected by Regulation 9(5) of the Council of Legal Education (Kenya School of Law)Regulations 2009 and allowing all the candidates who applied to

sit for the examinations created a legitimate expectation that upon the successful registration for the examination within one year they would sit for the examination and in the event of success be admitted to the bar. This expectation was founded in law as the 1st respondent is the legal body mandated to regulate legal education in Kenya and such its directives are to be adhered to.

90. In light of the foregoing discussion, it is clear that the petitioner's expectation towards the 1st respondent was legitimate. I therefore find that the 1st respondent breached the petitioner's right of legitimate expectation when after allowing the candidates to sit for the examination retracted the approval and instructed the petitioner and candidates in the retired ATP curriculum to apply afresh for the ATP program. The 1st respondent cannot thus disassociate itself with its obligation in this regard.

Whether the petitioner is entitled to the reliefs sought

91. Having found that the petitioner's rights were violated, the next issue for determination is whether the reliefs sought in the petition should be granted. It is set in law that there is no wrong without a remedy.

92. The Court of Appeal addressing the question of the nature of constitutional damages in the case of Gitobu Imanyara & 2 others(supra) pronounced as follows:

> " ...the South African Case of Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:
>
> "...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.
>
> "...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."

93. In the same way, the Court in the case of Peter Mauki Kaijenja & 9 others vs Chief of the Defence Forces & another [2019] eKLR held that:

> 96. Award of damages entails exercise of judicial discretion, which should be exercised judicially. The discretion must be exercised upon reason and principle and not upon caprice or personal opinion..."

94. The Court went on further to note that:

> 97. Arriving at the award of damages is not an exact science. No monetary sum can really erase the scarring of the soul and the deprivation of dignity that some of these violations of rights entailed. When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right, which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. However, this measure is no more than a guide, because the award of compensation is discretionary and, moreover, the violation of the constitutional right will not always be coterminous with the cause of action in law."

95. From the foregoing, and bearing in mind the violation of the petitioner's rights, and while it is plausible to award general damages for violation of constitutional rights, I take the view that this court ought to decline this invitation in exercising its discretion. Nothing in the circumstances of this case demonstrated that the petitioner suffered loss that would entail a monetary award to recompense and no such loss was pleaded or proved. In my view a declaration of violation of the petitioner's rights and grant of the sought prayers under ii, iv and vi will sufficiently and fully vindicate the petitioner's rights for the violations suffered. Prayer no. (iii) cannot be granted since the petitioner is yet to qualify as an advocate for purposes of admission.

96. On the flipside, I find that the claim for exemplary and aggravated damages ought to fail. The same were not pleaded nor explained. In this regard I find guidance in the case of Michael Rubia v Attorney-General [2020] eKLR where it was observed that:

> 170. I need not cite any other authority to show that the general trend in this jurisdiction is to avoid award of exemplary or punitive damages in public law claims. This principle is grounded on two reasons namely that the State has improved in its respect of human rights and that the taxpayer should not be burdened with heavy awards in claims touching on the public purse. I therefore decline to award the estate of the deceased exemplary or aggravated damages. In my view, general damages and special damages shall suffice to right the wrongs suffered by the deceased."

97. The upshot of the foregoing and for the reasons set out herein above, I conclude that the petition dated August 11, 2022 has merit and partially succeeds. I therefore order as follows:

    i. Prayers No. (i)& (iii) - disallowed

    ii. Prayers No. (ii) & (iv) allowed

    iii. Costs of the petition to be paid by the respondents.

98. Orders accordingly.

Delivered virtually, dated and signed this 15th day of August 2023 in open Court at Milimani, Nairobi.

H. I. Ong'udi

Judge of the High Court

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