REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO.4. OF 2020.

JAVAN KICHE OTIENO.....PETITIONER

VERSUS

CHIEF JUSTICE

AND PRESIDENT OF THE SUPREME COURT OF KENYA.....RESPONDENT

AND

LAW SOCIETY OF KENYA.....1ST INTERESTED PARTY

THE COUNCIL OF LEGAL EDUCATION.....2ND INTERESTED PARTY

JUDGEMENT

1. The petitioner who is a Kenyan national was admitted as an advocate of the High Court of Rwanda on **12th January 2017**. On 19th August 2019 he petitioned the respondent to be admitted as an advocate of the High Court of Kenya. Contemporaneously he petitioned both the interested parties as required under **Section 15 of the Advocates Act.**

2. The 1st interested party vide a letter dated **30th August 2019** requested the petitioner to confirm his academic qualifications from the second interested party as per **Section 13(1)(b) of the Advocates Act.**

3. Pursuant to the Court of Appeals decision in **Case No. 96 of 2014**, between **LAW SOCIETY OF KENYA VERSES THE ATTORNEY GENERAL & 2 OTHERS, Sections 12 and 13(1) (d) of the Advocates Act** which had provided for admission of advocates of the High Courts of Rwanda and Burundi were nullified.

4. Consequently, and in line with the said judgement, the respondent on 3rd December 2019 decided that the advocates from the two East African countries above were not eligible to be admitted as advocates of the High Court of Kenya. The petitioner's efforts to have the respondent review his position was not acceded to hence this petition.

5. Being aggrieved by the action of the respondent, the petitioner filed this petition seeking the following orders;

(a) A declaration that the respondent has violated the constitutional rights of the petitioner guaranteed and protected under Articles 27 ,41,43, 47 and 55 of the Constitution 2010.

(b) A declaration that the respondent's decision contained in a letter dated 3rd December 2019 is contrary to and inconsistent with the provisions of Articles 6,7,8 and 104 of the Treaty for the Establishment of the East African Community and Articles 2(4) ,13,16 and 23 of the Protocol for Establishment of the East African Community Common Market.

(c) An order of certiorari to remove into this court for the purpose of quashing forthwith and to quash the decision of the respondent contained in a letter dated 3rd December 2019.

(d) An order of *mandamus* compelling the respondent to consider the petitioner's application on merit in accordance with the applicable law forthwith and admit the petitioner as an advocate of the High Court of Kenya.

(e) An order for compensation under Article 23(3) (e) of the Constitution.

(f) Costs of the petition.

6. The respondent filed grounds of opposition dated **18th May 2020** while there were no responses from the interested parties.

7. When the matter came up for hearing the court directed the same to be determined by way of written submissions and both the petitioner and the respondent have complied. The court has perused the same as well as the attached legal authorities.

PETITIONER'S SUBMISSIONS.

8. The petitioner's lengthy submissions faulted the respondent for breaching the rules of natural justice and by extension the various Articles of the Constitution. He faulted the respondent from relying on the decision of the **Court of Appeal No. 96 of 2014** which nullified **sections 12 and 13(1) (d) of** the Advocates Act. He said that the respondent in a nutshell should have given a chance to the petitioner to be heard as he was not a party to the above case.

9. He further submitted that the petitioner's application was pending for consideration even before the Court of Appeal rendered its verdict on the above impugned sections of the Advocates Act.

10. The Court of Appeal, the petitioner submitted, did not pronounce itself on the eligibility of the nationals and advocates of the High Courts of Burundi and Rwanda. In other words, the court did not find that admissions of advocates from the two countries were unconstitutional.

11. The petitioner has also submitted on other raft of Articles of the Constitution in particular **Article 27, 41, 43, 47 and 55** which he deems violated by the respondent. He said that the petitioner has been discriminated against by the respondent and has not been treated equally. As a result of the said discrimination the petitioner has been denied income as he cannot get his daily bread and as such he has been pushed into destitute as he cannot fend for himself.

12. The petitioner submitted further that the respondent has violated Article 47 of the Constitution and specifically a right to a fair administrative action. The respondent failed to give him a chance to explain himself and thus he was condemned unheard. The petitioner cited the case among others of **KALPANA H. RAWAL VERSES JSC& 4 OTHERS (2015) eKLR**, where the court rendered itself exhaustively on the question of natural justice or what is commonly called in Latin *audi alteram partem.*

13. The petitioner finally relied on several Articles of the Treaty for the Establishment of the East African Community in which Kenya is a signatory. In essence the said Articles namely 1, 7, 8 and 104 *inter alia* were applicable in the current matter and the respondent ought to have taken into consideration. The said Articles gave equal rights to the membership just like the municipal laws and thus the respondent could not shy away from them.

14. Further the Articles as well permits the citizens of the community to work in any of the countries without any let or hindrances. Any obstacles for instance the ruling by the Court of Appeal *(supra)* were in contravention of the said Articles and by virtue of this the Articles establishing the Community ought to take precedents.

15. The petitioner as well submitted that there were some of his classmates who were admitted the same day as advocates of the High Court of Rwanda whom the petitioner had already admitted. By refusing to admit him the respondent was acting in a bias manner having admitted his colleagues without any objection.

16. The petitioner submitted that failure to file a replying affidavit by the respondent was an admission that all that is contained in the affidavit in support of the petition were factual and truthful.

17. The petitioner in the premises prayed that the petition for the above reasons be allowed and the respondent be compelled to admit him as an advocate of the High Court of Kenya.

RESPONDENT'S SUBMISSIONS.

18. As indicated above the respondent was content with the grounds of opposition and did not file any replying affidavit. He submitted that the petition was unmeritorious for the reason that the respondent did not violate any rights of the petitioner.

19. He said that the respondent indeed received the petitioners petition to be admitted as an advocate of the High Court of Kenya but while the same was pending consideration there was an ongoing litigation at the Court of Appeal cited above. The said court rendered its verdict in which it nullified the provisions of Section 12 and 13 of the Advocates Act which the petitioner had anchored his application.

20. He went on to submit that the petitioner's classmates were admitted based on the fact that the Court of Appeal had not rendered its verdict.

21. On the Articles of the Constitution allegedly violated by the respondent he submitted that there was no evidence of discrimination as for instance **Article 41** was to do with a fair labour practice which does not benefit the petitioner as there was no employer /employee relationship with the respondent.

22. On the question of violation of the rules of natural justice the respondent submitted that all that he did was to comply with what the Court of Appeal had ruled and that there was no requirement that the respondent be heard since in any case the 1st interested party had raised its objection which was found worthy by the Court of Appeal.

23. The respondent submitted that he did not violate the provisions of **Article 55** of the Constitution as the petitioner had applied to be admitted as an advocate of the High Court of Kenya which had nothing to do with affirmative action or participation in any enterprise for instance employment.

24. On the issue of violation of the Treaty for the Establishment of East African Community and Common Market Protocol, the respondent contented that the same does not lie since the petitioner's application to be admitted as an advocate had nothing to do with the same and it was not premised on any of its Articles. He went on to state that there was no evidence to indicate that the petitioner is qualified to be admitted as an advocate of the High Court of Kenya and at any rate nothing stops him from practicing as such in the High Court of Rwanda.

25. The respondent prayed that the petition be dismissed for lack of merit and that this court cannot compel the respondent to admit the petitioner as an advocate of the High Court of Kenya since **Sections 12 and 13 of the Advocates Act** were nullified by the Court of Appeal.

ANALYSIS AND DETERMINATION.

26. The court having gone through the pleadings herein is of the considered view that the evidence of the petitioner's academic credentials is clear and not in dispute. He graduated with a Bachelor's of Laws from Uganda Pentecostal University on 15th February 2013. He thereafter obtained a post graduate diploma in legal practice from the Institute of Legal Practice and Development (ILPD) on 4th April 2015.

27. He thereafter petitioned the 1st interested party who wrote to him on 30th August 2019 advising that he should obtain a confirmation of his academic qualifications from the **2nd interested party in line with Section 13(1) (b) of the Advocates Act.**

28. While the petition was pending the Court of Appeal on 27th September 2019 made a ruling in the above stated case in which it **nullified Section 12 and 13 of the Advocates Act** which had been contested by the 1st interested party. The said section in a nutshell had opened the doors for admissions as advocates of the High Court of Kenya graduates from Rwanda, Burundi, Uganda and Tanzania as long as they had qualified under **Section 13 of the Advocates Act.**

29. Pursuant to the said nullification the respondent in a letter dated 3rd December 2019 wrote to the petitioner and 11 others inter alia that;

> ***"...Having considered your petition, the LSK's said objection and your reply thereto and authorities cited, I find that;***
>
> ***(a) Your petitions for admission to the role of advocates of the High Court of Kenya are based on the fact that you are advocates of the High Court of Rwanda and or Burundi and are therefore qualified under paragraphs 12(a) and 13(d) of the Advocates Act.***
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> ***(b) The Court of Appeal has found that the inclusion of Rwanda and Burundi in Sections 12 (a) and 13(d) of the Act vide the Statute law (miscellaneous amendment) Act 2012 was unconstitutional and has struck down that miscellaneous amendment.***
>
> ***(c) The judgement of the Court of Appeal took effect from the date of its delivery.***
>
> ***(d) In terms of Section 15(3) of the Advocates Act, your qualification for admission, service and moral fitness ought to be satisfactory, not just at the time of lodging your petition but also at the time when your petition is being heard.***
>
> ***(e) The law that included Rwanda and Burundi within Sections 12(a) and 13(d) of the Advocates Act having been struck down, you do not qualify for admission in the Roll of Advocates of the High Court of Kenya.***
>
> ***(f) I am therefore unable to allow your petition"***

30. What followed then were series of correspondences from the petitioner's counsel seeking explanation from the respondent and a review of his decision vide the above letter. The respondent replied vide his letter dated 18th of December 2019 explaining to the petitioner's counsel that his decision was premised on reasons earlier given and in particular that;

> ***"The issue for determination was a pure point of law: whether an advocate of the High Court of Rwanda and or Burundi can be admitted as an advocate of the High Court of Kenya after the Court of Appeals decision in question. Once i made a decision on the issue, it outrightly followed that the decision was to apply to all applications in which a similar issue was live. Indeed, it is common practice in the commonwealth jurisdictions for courts to select and determine a test case and apply the decision to other cases with similar issue. It is for this reason that all petitions by applicants who are advocates of the High Court of Rwanda were dismissed even though some were not mentioned by the Law Society of Kenya in its objection."***

31. The said letter went ahead to explain that by dint of **Section 15(3) of the Advocates Act** the Chief Justice is not obliged to review his decision.

32. This then compelled the petitioner to seek redress from this court. There are three issues which must be determined in this petition

namely; **whether the petitioner qualified to be admitted as an advocate of the High Court of Kenya; whether or not in view of the back and forth correspondences between him and the respondent his rights to be heard were trampled and whether the respondent breached any laws governing the petitioner's rights to be admitted as an advocate.**

33. The first issue is not very difficult to determine. The petitioner qualified and indeed was admitted as an advocate of the High Court of Rwanda. His applications credential to be admitted as advocate of the High Court of Kenya contained his academic *resume.*

34. Pursuant to the said application the only problem which faced the petitioner was the decision by the Court of Appeal mentioned above. In the said case the learned judges struck out the said Sections 12 and 13 of the Advocates Act by virtue of the fact that parliament overreached itself when they failed to undertake a public participation before enacting the law. The judges said in part;

> ***"From the finding above, the learned judge ought to have found in favour of the appellant based on the claim made on the lack of public participation. It was an error for the learned judge to require the appellant to prove the negative, for once it states there was no public participation, the burden shifted to the respondents to show that there was. Much weight has been placed on public participation because it is the only way to ensure that the Legislature will make laws that are beneficial to the mwananchi, not those that adversely affect them.***
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> ***Additionally, the onus is on the Parliament to take the initiative to make appropriate consultations with the affected people. It is therefore a misdirection for the learned judge to hold that the appellant had the responsibility to prove that the consultations did not happen. We believe that the principle behind the amendments is what must be interrogated. The 1st respondent is not possessed of an unfettered or carte blanche leeway to table legislation that is detrimental to the people of Kenya or a section of the citizenry. It must follow due process which includes consultation with stakeholders. The Constitution establishes that mechanism to enable the Legislature make laws that are reasonable, having sought and obtained the views of the people. That is the essence of an accountable limited Government and the shift from the supremacy of Parliament to the Sovereignty of the people birthed by the 2010 Constitution***."

35. Having struck down the section which parliament had intended that advocates of the High Courts of Rwanda and Burundi were qualified to be admitted as advocates of the High Court of Kenya, there was nothing the respondent was left to do. There was no basis, substratum or law to anchor his authority to admit the petitioner and by extension other applicants from the two East African countries to be admitted as advocates of the High Court of Kenya. This court finds the above cited correspondences instructive and without any ambiguity.

36. Had the respondent admitted the petitioner, he would have breached the law as the same would have run counter the Court of Appeal decision. Although the petitioner's application was pending for consideration while the matter at the Court of Appeal was pending as well, the decision was arrived at before he could be considered. That in my view explains why some of the petitioner's classmates were admitted before the above judgement which nullified the said law.

37. The other issue is whether the petitioner's rights to be heard were infringed. There is no doubt that the petitioner's application to be admitted was done in the proper prescribed forms and the same were received by the respondent. The only issue came when the 1st interested party requested concurrence from the 2nd interested party which was the normal procedure. As they await the concurrence from the interested parties, boom, came the Court of Appeal decision.

38. What followed were the correspondences between the respondent, the petitioner and the petitioner's advocates. Clearly this court does not find any reason to conclude that there was any violation of the petitioner's rights. There was nothing to indicate that he was supposed to be called for a meeting or such other protocol requiring his presence. All that was there were flurry of correspondences between themselves.

39. There are no laws governing admissions of advocates under the Advocates Act which presupposes a face to face meeting between the respondent and an applicant. Once the statutory forms are properly filled it is incumbent upon the respondent and the interested parties who are legally mandated to satisfy themselves that an applicant is legally qualified to be so admitted.

40. In this case the parties save for the decision by the Court of Appeal did not indicate anywhere that there was any impediment to the petitioner's application. More significantly there was nothing to suggest that they discriminated against the petitioner. This conclusion is premised on an example where a petitioner called **Eliakim Bunde Okayo** had been admitted. The said person must have been admitted just like all the others because there was nothing that barred the respondent from doing so.

41. What of the petitioner's allegations that the respondent violated the various Articles of the Treaty for the Establishment of the East African Community as well as the Protocol for the Establishment of the East African Common Market? The same in my view are moot for the reason that the application to be admitted as an advocate of the High Court of Kenya is only premised on the **Advocates Act Cap 16 of the Laws of Kenya.** The rest of the laws governing the East African Treaties does not envisage such and there would have been nothing difficult for the drafters to have included.

42. There were also submissions by the petitioner that his rights under various Articles of our constitution were violated. This includes **Articles 27** dealing generally with discrimination, 41 dealing with unfair labour practices, 47 on fair administration of justice and 55 on the issue of affirmative action.

43. This court humbly disagrees with the petitioner on all the above alleged breaches. How for instance was he discriminated against when all that the respondent did was to follow what the Court of Appeal had said.? The admission of Mr Bunde who was the petitioner's classmate was a clear testimony that if **Sections 12 and 13** above had not been impugned then the petitioner would have been admitted. The petitioner would have had a right to claim discrimination if the respondent in the presence of the said law refused to have him admitted.

44. On the issue of unfair labour practices, the respondent did not breach Article 41 of the Constitution as claimed by the applicant. It is also not lost that the petitioner can still practice within the jurisdiction he is accepted as an advocate.

45. **Article 47** on the Fair administrative action was again not violated as the respondent did not fail to accord him any hearing. All the correspondences including the letter from the 1st interested party were delivered to the petitioner and there is nothing to suggest that he was denied any audience whether physically or otherwise.

46. This court reaches same conclusion on the question of Affirmative action under **Article 55.** Nothing is far from reality. The petitioner would enjoy the provisions of the said Article if he is qualified. To suggest that he needs to enjoy the same without evidence of qualification clearly negates the principles of the Article. Young and youthful does not on its own make one qualified to be admitted as an advocate of the High Court of Kenya. He must meet the other thresholds which in my view he does except that there is no law permitting advocates who qualified from Rwanda and Burundi to be admitted.

47. It must also be emphasised that the above requirements were not based on nationality but on academic jurisdiction. Although the petitioner vainly submitted that he was discriminated on yet he was a Kenyan citizen by birth, this court does not find that argument tenable. In fact, had that been the case this court would have clearly pronounced itself. Even the impugned Sections 12 and 13 above never envisaged qualification based on nationality but on academic line.

48. There was also an argument by the petitioner that there was no affidavit from the respondent and by extension the interested parties to counteract what he stated in his supporting affidavits. The issues raised by the respondent in his grounds of opposition were basically legal and the documents and correspondences relied on by the petitioner were similar in nature. This court does not find the absence of an affidavit from the Honourable Chief Justice necessary or prejudiced the proceedings herein in any way. In other words, its absence does not aid the petitioner.

49. Finally, the respondent's action was not without basis in my view. The Court of Appeal pronounced itself and struck out the said sections of the law which had given the petitioner and others a chance to be admitted as advocates of the High Court of Kenya. There was nothing he would have done since granting the petitioner's application would have been unlawful.

50. The court in **MAPIS INVESTMENT (K) LTD VS. KENYA RAILWAYS CORPORATION (2005) eKLR** while quoting the case of ***Scott v. Brown, Doering, McNab & Co (3), [1892] 2 QB 724 Lindley LJ at p.728: -*** stated that;

51. "***Ex turpi causa non oritur action. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."***

52. For the foregoing reasons the court does not find merit in the petition. The only option as things stand now is for the petitioner and his many other friends to petition parliament to reinstate the impugned section by following the guidance and directions of the Court of Appeal.

53. The petition is otherwise dismissed with no orders as to costs.

Dated signed and delivered electronically at Nakuru this 25th day of February 2021.

H. K. CHEMITEI

JUDGE