REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 393 OF 2018

STEVE ISAAC KAWAI.....1ST PETITIONER

MANGOK JACKLINE AKUOT.....2ND PETITIONER

MIJI MARVELLA JIMMY WONGO.....3RD PETITIONER

-VERSUS-

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

KENYA SCHOOL OF LAW.....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGEMENT

1. The three petitioners, Steve Isaac Kawai, Mangok Jackline Akuot, and Miji Marvella Jimmy Wongo are citizens of the Republic of South Sudan. Steve Isaac Kawai and Mangok Jackline Akuot are also registered refugees in Kenya. All the petitioners studied in Kenya from primary school to university level as evidenced by the exhibited school certificates, admission letters and passports.

2. At the time of lodging the petition the petitioners were pursuing the Advocates Training Program (ATP) at the Kenya School of Law (2nd Respondent) having been admitted on 7th December, 2017. Upon completing the Program, they registered for the final examination and were issued with examination cards. However, the petitioners were precluded from sitting the examination on the basis that they were South Sudan citizens.

3. The petitioners subsequently filed the petition dated 9th November, 2018 under a certificate of urgency. They additionally filed a notice of motion through which they sought and obtained a conservatory order staying the decision of the Council of Legal Education (1st Respondent) denying them an opportunity to sit the final examination.

4. Pursuant to the conservatory order issued by the Court, the petitioners were allowed to sit the bar examination. Upon the release of the results, the petitioners were denied their results. They again moved the Court. On 5th April, 2019 an order was issued directing the release of their examination results.

5. During the hearing of the petition this Court was informed from the bar by counsel for the petitioners that the 1st Petitioner had since been admitted as an advocate of the High Court of Kenya.

6. The petitioners' case is premised on two grounds. First, that Section 12(a) of the Advocates Act, Cap. 16 is unconstitutional for limiting the eligibility for admission to the Roll of Advocates to citizens of Kenya, Rwanda, Burundi, Uganda and Tanzania. According to the petitioners the citizens of South Sudan are entitled to equal treatment with the citizens of the stated countries because South Sudan joined the East African Community ("Community") in April 2016 and Article 126 of the Treaty for the Establishment of the East African Community ("Treaty") requires the harmonization of legal training.

7. Secondly, the petitioners contend that the decision of the 1st Respondent violates Article 22 of the 1951 Refugees Convention, Article 4 of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and Section 16 of the Refugees Act, 2006 which

gives them the right to education to the same extent as to the citizens of the host country.

8. It is therefore the petitioners' case that the actions of the respondents violate Articles 19, 22, 27, 43 and 47 of the Constitution.

9. The 1st Respondent opposed the petition by way of grounds of objection dated 13th November, 2018. The 1st Respondent's case is that Section 12(a) of the Advocates Act clearly excludes citizens of South Sudan and this Court has no power to amend the laws of this country. It is the 1st Respondent's position that the petitioners have not demonstrated violation of fundamental rights under Articles 27, 43, 47 and 50 of the Constitution as read together with the Fair Administrative Action Act, 2015. The Court is therefore urged to dismiss the petition with costs.

10. The 2nd Respondent replied to the petition by way of an affidavit sworn on 2nd April, 2019 by its Academics Manager, Fredrick Muhia. Through the affidavit, the 2nd Respondent concede that it indeed admitted the petitioners who were, however, barred by the 1st Respondent from sitting the bar examinations. It is therefore the 2nd Respondent's position that it has no role to play in this case as the administration of bar examinations in Kenya belong solely to the 1st Respondent.

11. The Attorney General (3rd Respondent) opposed the petition through grounds of opposition dated 13th December, 2018. In summary the 3rd Respondent contends that the petitioners have not demonstrated violation of any constitutional right; that the issues raised herein are similar to those raised in the pending **Civil Appeal No. 242 of 2017, Council of Legal Education v Jonnah Tusasirwe & 13 others**; that Section 12(a) of the Advocates Act does not confer upon the citizens of Uganda, Rwanda, Burundi and Tanzania the right of direct admission to the Roll of Advocates just like Kenyan citizens; and, that the respondents have acted in accordance with the law. The Court is therefore urged to dismiss the petition with costs for being frivolous, vexatious, incompetent and an abuse of the court process.

12. The petitioners filed submissions dated 29th March, 2019 and urged that Section 12(a) of the Advocates Act is inconsistent with Article 126 of the Treaty as it excludes admission to the Kenyan bar of citizens of South Sudan despite its membership of the Community. It is the petitioners' submission that this amounts to contravention of Articles 2(5) and (6), 25, 27,43(f) and 47 of the Constitution of Kenya. It is thus the petitioners' case that Section 12(a) of the Advocates Act should be interpreted to include South Sudan among the countries whose citizens can be admitted as advocates in Kenya as any other interpretation is inconsistent with the Treaty.

13. The petitioners submit that the decision of the 1st Respondent violates Article 22 of the 1951 of the Refugees Convention and Article 4 of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and Section 16 of the Refugees Act, 2006 which provides that refugees should not be discriminated on account of their nationality.

14. It is additionally the petitioners' argument that the legitimate expectation which they had that they would sit the bar examination after undertaking the necessary training and projects was violated by the respondents.

15. The petitioners submit that Section 12(a) of the Advocates Act is unconstitutional as it fails to include citizens of South Sudan despite the country becoming a member of the Community in 2016. They contend that the only reason South Sudan is not listed in Section 12(a) is because of its late membership of the Community and the failure of the Kenyan Parliament to make the necessary amendments.

16. The petitioners submit that by virtue of Article 2(6) of the Constitution, the Treaty is part and parcel of Kenyan law and it is therefore lawful for Kenya to establish common standards for licensing of advocates from the Community as per Article 126(2)(a) of the Treaty.

17. It is the petitioners' case that in order to make Section 12(a) of the Advocates Act constitutionally compliant, South Sudan should be read into the provision. Reliance is placed on the decisions in **Mary Wanjuhi Muigai v Attorney General & others [2015] eKLR** and **Kenya Magistrates & Judges Association v Judges & Magistrates Vetting Board & another [2014] eKLR** where the remedy of reading words into an unconstitutional statutory provision in order to make it constitutional was validated.

18. Relying on the decision in **Rotich Samuel Kimutai v Ezekiel Lenyongopeta & 2 others [2005] eKLR,** the petitioners submit that the Court should adopt a purposive interpretation of the law and avoid absurdities that come about when statutes are interpreted strictly.

19. As to how the decision of the 1st Respondent violated the Constitution, the petitioners contend that Article 27 was violated in so far as it discriminated them on account of their nationality. It is also submitted that the decision violated Article 43 of the Constitution in so far as it was tailored to obstruct their right to education by hindering them from sitting the bar examination.

20. On the importance of the right to education, the petitioners relied on the case of **Nabulime Miriam & others v Council of Legal Education & 5 others [2016] eKLR** in support of the proposal that once students are admitted to school they acquire all rights which appertain to their status and the rights can only be taken away through the due process of law.

21. On its part, the 1st Respondent fused its grounds of opposition together with skeletal submissions. The 1st Respondent submits that by virtue of Section 8(1) of the Legal Education Act, 2012 it is bound to administer professional examinations for advocates as prescribed under Section 13 of the Advocates Act. It is the 1st Respondent's position that it can only examine candidates who are eligible, as per sections 12 and 13 of the Advocates Act, to be admitted to the Kenyan bar. The 1st Respondent additionally submit that the training offered by the Kenya School of Law is offered for the purpose of an individual becoming an advocate as per Section 4 of the Kenya School of Law Act, 2012.

22. The 1st Respondent assert that the petitioners are excluded by Section 12(a) of the Advocates Act because South Sudan is not listed as one of the countries whose citizens are eligible for admission to the Roll of Advocates in Kenya. According to the 1st Respondent, Section

12(a) of the Advocates Act cannot be interpreted to include what is expressly excluded by the lawmaker. The 1st Respondent submits that it was not the intention of the Kenyan Parliament to include South Sudan in Section 12(a) of the Advocates Act and the courts ought to respect the doctrine of separation of powers.

23. The petitioners' assertion that the impugned decision was discriminative is rejected by the 1st Respondent. It is submitted that the petitioners have not discharged the burden of proving unfair discrimination as per the criteria laid down in **Council of Governors v Salaries & Remuneration Commission [2018] eKLR.** The 1st Respondent's case is that, the petitioners were not unfairly discriminated as Section 12(a) of the Advocates Act did not grant admission to the Roll of Advocates for East Africans generally but specified the countries whose citizens are eligible, and this amounted to differentiation which is permissible as held in **Mohammed Abduba Dida v Debate Media Limited & another [2017] eKLR.**

24. According to the 1st Respondent, as held in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR,** legitimate expectation cannot override clear statutory provisions hence its compliance with the provisions of Section 8(1) of the Legal Education Act, sections 12 and 13 of the Advocates Act, and Section 4 of the Kenya School of Law Act, 2012 cannot be said to have violated the petitioners' legitimate expectation.

25. The 1st Respondent refer to the decision of the Court of Appeal in the case of **Law Society of Kenya v Attorney General & 2 others, Civil Appeal No. 96 of 2014; [2019] eKLR** as having found that the inclusion of Rwanda and Burundi in Section 12(a) of the Advocates Act was unconstitutional. It is the 1st Respondent's submission that reading South Sudan into Section 12(a) of the Advocates Act would be tantamount to the Court engaging in legislative business and that would amount to derogation from the doctrine of separation of powers.

26. The 2nd Respondent did not file any submissions.

27. The 3rd Respondent filed submissions dated 1st July, 2019. The 3rd Respondent's starting point is that as was held in **Were Samwel & 14 others v Attorney General & 2 others [2017] eKLR,** all statutes are presumed to be constitutional and it is upon he who alleges unconstitutionality to rebut that presumption. It is the 3rd Respondent's assertion that the petitioners have not established that Section 12(a) of the Advocates Act is unconstitutional.

28. According to the 3rd Respondent, as was held in **Mugambi Imanyara & another v Attorney General & 5 others [2017] eKLR,** courts ought not to belabour in examining the other rules of statutory interpretation where the language used is clear. Further, that courts must assume that what a legislature states in a statute is what it means**.**

29. The 3rd Respondent contends that the petitioners ought to have petitioned Parliament for relief under Article 119 of the Constitution. It is additionally the 3rd Respondent's case that the question of the alleged contravention of the Treaty by Section 12(a) of the of Advocates Act can only be heard by the East African Court of Justice and not the Kenyan courts.

30. Upon considering the pleadings and submissions of the parties, I form the opinion that the issues raised in this petition are: the constitutionality of Section 12(a) of the Advocates Act; the law on the admission of citizens of the Community as advocates in Kenya; whether the 1st Respondent's impugned decision violated the petitioners' legitimate expectation; and, the right to education of the 1st and 2nd petitioners in view of their refugee status. I do not intend to address the issues in any particular order.

31. My understanding of the petitioners' case as regard Section 12(a) of the Advocates Act is that the provision is unconstitutional for not making the citizens of the Republic of South Sudan the beneficiaries of that provision. They want this Court to make the provision constitutional by including South Sudan among the States listed therein.

32. Section 12 of the Advocates Act provides the qualifications for admission to the Roll of Advocates in Kenya as follows:

> **Qualification for admission as advocate**
>
> **Subject to this Act, no person shall be admitted as an advocate unless—**
>
> **(a) he is a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania; and**
>
> **(b) he is duly qualified in accordance with section 13.**

33. In **Law Society of Kenya v Attorney General & 2 others [2013] eKLR,** one of the issues that was placed before the Court was whether the amendment of Section 12(a) of the Advocates Act to include Rwanda and Burundi in the list of countries whose citizens can be admitted to the bar in Kenya violated the Constitution for being enacted without public participation. This Court (Majanja, J) held that there was no violation of the Constitution.

34. On appeal, the Court of Appeal in **Law Society of Kenya v Attorney General & 2 others, Civil Appeal No. 96 of 2014; [2019] eKLR** overturned the decision holding that the principle of public participation was not complied with in the amendment of the law. The amendment was thus found unconstitutional meaning that only the citizens of Kenya, Uganda and Tanzania qualify for admission so long as they meet the other qualifications in the Act.

35. I have carefully read the decision of the Court of Appeal in **Law Society of Kenya v Attorney General & 2 others, Civil Appeal No. 96 of 2014; [2019] eKLR.** Firstly, it must be appreciated that this petition was filed before the Court of Appeal made the decision. Secondly,

the inclusion of Burundi and Rwanda in Section 12(a) of the Advocates Act, among countries whose citizens can be admitted as advocates in Kenya, was challenged by the Law Society of Kenya on the ground that the amendment which led to that inclusion was unconstitutional for lack of public participation. The Law Society of Kenya's appeal largely succeeded on that argument.

36. The petitioners have, however, raised different issues before this Court. First, they assert that failure to include the Republic of South Sudan in the list of countries whose citizens are eligible to be admitted as advocates in Kenya violate Article 126 of the Treaty. Second, that the non-inclusion of South Sudan among the countries whose citizens can be admitted as advocates in Kenya is discriminatory and violates Article 27 of the Kenyan Constitution since South Sudan is a member of the Community like Rwanda, Burundi, Uganda and Tanzania whose citizens can be admitted as advocates in Kenya. As already stated, the amendment that included the citizens of Burundi and Rwanda in that list has since been declared unconstitutional by the Court of Appeal.

37. In my view, the above statement takes care of the respondents' assertion that the issues raised herein are similar to those addressed in **Law Society of Kenya v Attorney General & 2 others, Civil Appeal No. 96 of 2014; [2019] eKLR,** and those pending determination in **Civil Appeal No. 242 of 2017, Council of Legal Education v Jonnah Tusasirwe & 13 others.**

38. Article 126 of the Treaty states:

> **LEGAL AND JUDICIAL AFFAIRS**
>
> **ARTICLE 126**
>
> **Scope of Co-operation**
>
> **1. In order to promote the achievement of the objectives of the Community as set out in Article 5 of this Treaty, the Partner States shall take steps to harmonise their legal training and certification; and shall encourage the standardisation of the judgements of courts within the Community.**
>
> **2. For purposes of paragraph 1 of this Article, the Partner States shall through their appropriate national institutions take all necessary steps to:**
>
> > **(a) establish a common syllabus for the training of lawyers and a common standard to be attained in examinations in order to qualify and to be licensed to practice as an advocate in their respective superior courts;**
> >
> > **(b) harmonise all their national laws appertaining to the Community; and**
> >
> > **(c) revive the publication of the East African Law Reports or publish similar law reports and such law journals as will promote the exchange of legal and judicial knowledge and enhance the approximation and harmonisation of legal learning and the standardisation of judgements of courts within the Community.**
>
> **3. For purposes of paragraph 1 of this Article, the Partner States may take such other additional steps as the Council may determine.**

39. I was told by the petitioners to resort to Article 2(5) & (6) of the Constitution and apply Article 126 of the Treaty as the law of Kenya. However, a reading of Article 126 of the Treaty shows that the same is only directive in nature. The laws and the policies that are necessary for the implementation of Article 126 of the Treaty are to be enacted by the Partner States. Some of the laws enacted by Kenya in a bid to comply with Article 146 of the Treaty are sections 12(a) and 13(1)(d) of the Advocates Act. In my view, Article 126 of the Treaty is not implementable directly. It can only be enforced through enactment of legislation by a Partner State.

40. In light of what I have already said in this judgement, it follows that the petitioners' claim that the 1st Respondent's decision violated their legitimate expectation that they would be allowed to sit for their bar examination cannot stand. Section 12(a) of the Advocates Act is clear that only citizens of the countries stated therein can be admitted to practise law in Kenya.

41. I turn to the issue as to whether the decision of the 1st Respondent should be quashed for violating the 1st and 2nd petitioners' rights as refugees. Even though one of the grounds in support of the petition is that the refugee status of the 1st and 2nd petitioners require that they receive education that is of the same standard with that accorded to Kenyan citizens, the parties did make any useful submission on this very crucial issue. Nevertheless, this Court has a duty to make a decision on the issue.

42. The *Convention Relating to the Status of Refugees* (Refugee Convention) of 1951 is the principal legal instrument on the protection of refugee rights. The Refugee Convention sets forth the general obligations of Member States, and Kenya is one of them, regarding the refugee population within the host State.

43. Article 22 of the Refugee Convention provides for the right to education as follows:

> **Article 22 Public education**
>
> **1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.**

> **2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.**

44. The Refugee Convention does not place an obligation upon Partner States to guarantee higher education to refugees, however, Member States are urged to ensure that refugees can access secondary and higher studies. My interpretation of this provision is that although the Government of Kenya is not under any obligation to ensure that every refugee is granted access to studies other than elementary education, refugees should be afforded as much of an opportunity as any other alien to acquire secondary and post-secondary education.

45. The above statement is in line with the provisions of the *Universal Declaration of Human Rights ("UDHR")*, and in particular Article 2 which states that:

> **Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.**

46. According to the above instrument, everyone is entitled to the rights envisaged under the UDHR including the right to education under Article 26. The State cannot discriminate against refugees based on their status by infringing upon or withholding the rights available to them under the UDHR. Partner States are also under an obligation to protect refugees from discrimination by non-State actors in the host State. Article 26 of the Declaration is clear that **"technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit."**

47. Although the Refugee Convention does not expressly guarantee the right to professional education for refugees, it calls upon States to provide them equal access to professional education as citizens or other migrants.

48. The right to education is further recognised and protected under Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and Article 17 of the African Charter on Human and People's Rights (Banjul Charter).

49. The right of refugees to access education in the host country cannot be considered in isolation of other human rights. As already pointed out, Article 26 of the UDHR guarantees the right to education. Through Article 13 of the International Convention on Economic, Social and Cultural Rights (ICESCR) the State Parties agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. The right of a child to education is protected by Article 13 of the Convention on the Rights of the Child.

50. The right to education is also protected by the Convention on the Elimination of All Forms of Discrimination against Women which at Article 10 requires State Parties to take appropriate measures to eliminate discrimination against women in order to ensure them equal rights with men in the field of education.

51. Lastly, Article 1 of UNESCO Convention against Discrimination in Education is opposed to discrimination that deprives any person or group of persons of access to education of any type or at any level, or which limits any person or group of persons to education of an inferior standard.

52. In a paper titled **"Rights of Refugees in the Context of Integration: Legal Standards and Recommendations"** published in June 2006 by the United Nations High Commissioner for Refugees under the Legal and Protection Policy Research Series, the right to education for refugees is discussed at length. With respect to higher education it is stated that:

> **"Thus, higher education benefits from the same guarantees with respect to access as secondary education – they are both based on the principle of non-discrimination. The important distinction however, is that equal access to higher education is further qualified in that it is based on capacity or merit. Other potentially relevant provisions relating to higher education in other international instruments include for example, article 6(1)(a)(i) in the ILO 1949 Convention concerning Migration for Employment (No. 97) which grants migrant workers national treatment in apprenticeship and vocational training, and article 10(a) in CEDAW which strives to guarantee women equal access (as men) to higher education such as professional and higher technical education."**

53. Refugees are a special category of aliens. They enter the host country not by choice but because of persecution in their country of origin. Their stay in the host country is indeterminate and it would be beneficial for both the host State and the refugee if the refugee can be engaged in some gainful employment. There is therefore need for refugees to gain primary, secondary and post-secondary education so that they can obtain skills that they can later deploy in order to earn a living.

54. The vulnerability of refugees was confirmed in the case of **Refugee Consortium of Kenya & another v Attorney General & 2 others [2015] eKLR** where it was held that:

> **"45. In determining this case, it is crucial to consider the vulnerable position of refugee children. I say so because in Petition No.19 & 115 of 2013 Kituo cha Sheria and Others vs Attorney General [2013] eKLR (Kituo case) this Court held that refugees fall within the category of vulnerable persons recognized by Article 20(3) of the Constitution since they have been forced to flee their homes as a result of persecution, human rights violations and conflict. The Court also held that refugees or those close to them have been victims of violence on the basis of very personal attributes such as ethnicity or religion and**

that they are "vulnerable due to lack of means, support systems of family and friends and by the very fact of being in a foreign land where hostility is never very far"."

55. The 1951 Refugee Convention recognizes that refugees may eventually be integrated into the host population. It is therefore important that even as the situation in the refugee's home country is monitored, with a view to confirming that the conditions that forced him or her to flee to exile have been reversed and he or she can safely return home, the possibility that the refugee may have to spend the rest of his or her life in the host country or a third country should be kept in mind. One way of preparing refugees for integration into a society away from home is to ensure that they attain the highest standard of education that their brains and pockets can accommodate. In any case, education is a necessity whether a refugee is integrated into the host society or goes back to the home country.

56. In view of the cited international conventions and the local laws applicable to refugees, I am of the view that the actions of the 1st Respondent in denying the 1st and 2nd petitioners an opportunity to pursue their studies to conclusion at the Kenya School of Law violated Kenya's international obligations in respect to the treatment of refugees. Indeed, Section 16(1)(a) of the Refugees Act, 2006 provides that a refugee and every member of his family in Kenya shall be entitled to the rights and be subject to the obligations contained in the international conventions to which Kenya is party.

57. On account of the 1st and 2nd petitioners' refugee status I find that the decision of the Council of Legal Education to bar them from sitting the Advocates Training Program examination violates Kenya's obligations under international instruments.

58. The remaining issue is whether Section 12(a) of the Advocates Act violates Article 27 of the Constitution by discriminating against the citizens of South Sudan vis-à-vis citizens of other Partner States of the Community in regard to admission to the Roll of Advocates in Kenya. The test to be applied in order to determine whether discrimination has occurred was established in the decision of the Constitutional Court of South African in **Harksen v Lane NO and Others (CCT9/97) [1997] ZACC 12** as follows:

"At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(b)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(b)(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)."

59. The petitioners claim that Section 12(a) of the Advocates Act is discriminatory against the citizens of South Sudan for not including them among those who can be admitted to practise law in Kenyan courts. The respondents insist that the law is clear that it is only citizens of the countries named in that provision who can be admitted to the Roll of Advocates.

60. The respondents proceed to submit that any attempt by this Court to include the Republic of South Sudan among the listed countries will amount to the Court exercising legislative powers hence contravening the doctrine of separation of powers as the mandate to make laws is reposed in Parliament by the Constitution. In my view, this argument does not answer the pertinent question as to whether Article 27 of the Constitution, which provides for the right to equality and freedom from discrimination, was violated by the 1st Respondent's decision.

61. The respondents are indeed correct that not all differentiations are unconstitutional. This principle of law was aptly explained by the Supreme Court of Canada in the case of **Andrews v Law Society of British Columbia [1989] 1 S.C.R. 143** thus:

"It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s.15 of the Charter. It is, of course, obvious that legislatures may -- and to govern effectively -- must treat different individuals and groups in different ways. Indeed, such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society. As noted above, for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions."

62. The Court went ahead to describe the discrimination that offends the Constitution as follows:

> **"Discrimination is a distinction which, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."**

63. Section 12(a) of the Advocates Act is clear that on top of academic qualifications, one is required to be a citizen of Kenya, Rwanda, Burundi, Uganda and Tanzania in order to be admitted as an advocate in Kenya. The 2012 amendment which included the citizens of Rwanda and Burundi in Section 12(a) was subsequently declared unconstitutional by the Court of Appeal in 2019 in the case of **Law Society of Kenya v Attorney General & 2 others, Civil Appeal No. 96 of 2014; [2019] eKLR** leaving Kenya, Uganda and Tanzania as the only countries whose citizens can be admitted as advocates in Kenya.

64. The petitioners' argument is that the listing in Section 12(a) is based on membership of the Community and it is discriminatory for the citizens of South Sudan, which joined the Community in 2016, to be excluded from the list. The respondents did not dispute the petitioners' assertion that the listing is indeed premised on the membership of the Community and that South Sudan became a member of the Community in 2016. There is therefore no reason why South Sudan has not been included in the list found in Section 12(a) of the Advocates Act. It appears the National Assembly has not gotten time to attend to the issue. This has created a situation where the citizens of Member States of the Community are not treated equally.

65. When it comes to prioritizing enactment or amendment of legislation, the interests of the petitioners rank at the bottom of the pile as they have no voting powers and cannot therefore hold lawmakers to account. Unlike Kenyans, who are presumed to wield some power over the lawmakers through the vote, the petitioners have no such hold over the political fate of Kenyan legislators. They can therefore be termed as the wretched of the earth and it is only courts that can come to their aid where they believe they have been treated unfairly. That aliens suffer because of their status is not unique to our jurisdiction. In **Andrews (supra)** it was observed that:

> **"Relative to citizens, non-citizens are a group lacking in political power and as such vulnerable to having their interests overlooked and their rights to equal concern and respect violated. They are among "those groups in society to whose needs and wishes elected officials have no apparent interest in attending": see J. H. Ely, *Democracy and Distrust* (1980), at p. 151. Non-citizens, to take only the most obvious example, do not have the right to vote. Their vulnerability to becoming a disadvantaged group in our society is captured by John Stuart Mill's observation in Book III of *Considerations on Representative Government* that "in the absence of its natural defenders, the interests of the excluded is always in danger of being overlooked . . . ." I would conclude therefore that non-citizens fall into an analogous category to those specifically enumerated in s. 15. I emphasize, moreover, that this is a determination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others."**

66. Due to their peripheral position in the host society, the interests of foreigners tend to be overlooked leaving them at the mercy of discriminatory laws similar to Section 12(a) of the Advocates Act. It is clear that the provision was meant to bring on board the citizens of the Partner States of the Community in respect of the provision of legal services in line with Article 126 of the Treaty but the legislature overlooked the fact that the membership of the Community was not closed. It would have been easier, at the time the provision was first introduced, to have simply provided that citizens of Kenya and Partner States of the Community are eligible for admission as advocates in Kenya.

67. The position the petitioners find themselves in is that as citizens of a Partner State of the Community they have been denied a benefit that is available to citizens of other Partner States without any justification. Citizens of South Sudan find themselves in this unenviable position simply because their country joined the Community after the other States. In my view, once South Sudan signed the Treaty, the membership benefits ought to be enjoyed by its citizens. South Sudan should not be left salivating over the goodies enjoyed by members of the Community as if it is not a signatory of the Treaty.

68. At this point I need to dismiss without much ado the suggestion by the respondents that the interpretation of the Treaty should be left to the East African Court of Justice. The petitioners have only asked me to interpret the provisions of the Advocates Act and the Kenyan Constitution. The interpretation of Article 126 of the Treaty is not the subject of this judgement. It is therefore my finding and holding that the issues raised in this petition squarely fall within the jurisdiction of this Court.

69. Having found that the decision of the Council of Legal Education violated the rights of the 1st and 2nd petitioners on account of their refugee status and the rights of all the petitioners as protected by Article 27 of the Constitution, it follows that the petitioners' case should to be answered in the affirmative.

70. In their petition dated 9th November, 2018, the petitioners seek orders as follows:

> **(a) An order of judicial review by way of *certiorari* be and is hereby issued to bring into this Court and quash the entire decision made by the 1st Respondent on 2nd November, 2018 precluding the Petitioners from presenting themselves for and sitting bar examinations scheduled to start on 15th November, 2018.**
>
> **(b) An order of judicial review by way of *mandamus* be and is hereby issued compelling the 1st Respondent to allow the**

Petitioners to sit for the bar examinations scheduled to start on 15th November, 2018.

(c) A declaration do issue that section 12(a) of the Advocates Act Cap 16 of the Laws of Kenya limiting eligibility for admission to the Roll of Advocates to citizens of Kenya, Rwanda, Burundi, Uganda or Tanzania and excluding citizens of South Sudan is inconsistent with Article 126 of the Treaty of the Establishment of the East African Community is invalid and contravenes Articles 2(5) and (6), 25, 27, 43(f) and 47 of the Constitution is irrational, unreasonable, unlawful and unconstitutional as it discriminates against citizens of South Sudan and the said section be and is hereby declared invalid and unconstitutional.

(d) A Conservatory Order be and is hereby issued staying the entire decision made by the 1st Respondent on 7th November, 2018 precluding the Petitioners from presenting themselves for and sitting bar examinations scheduled to start on 15th November, 2018.

(e) Costs of the Petition be borne by the Respondents.

(f) Or that such other Order(s) as this Honourable Court shall deem fit.

71. Some of the prayers sought by the petitioners were issued at the interlocutory stage and the correct thing to do is to affirm and confirm the interim orders issued in line with prayers (a), (b) and (d) of the petition, which I hereby do. The only additional substantive order, which I issue is a declaration that Section 12(a) of the Advocates Act is inconsistent with Article 27 of the Constitution in so far as it does not mention South Sudan, as one of the countries, whose citizens can be admitted to the Roll of Advocates in Kenya.

72. In my view, the petitioners' prayer to invalidate Section 12(a) of the Advocates Act will prejudice the citizens of Uganda and Tanzania who are not party to these proceedings. Moreover, an invalidation of the law will do away with a key provision that seeks to implement Article 126 of the Treaty. This will harm the Community's vision to harmonize the provision of legal services.

73. In the circumstances of this case, it is sufficient to make a finding on the violation of the petitioners' rights. Such a remedy is sufficient to allow the petitioners to enjoy the benefits of the provisions of Section 12(a) of the Advocates Act as the legislature find ways of aligning the provision to the vision of the Treaty and making it compliant with the Kenyan Constitution.

74. On the issue of costs, I find that this petition is in the nature of public interest litigation. The parties are therefore directed to meet their own costs of the proceedings.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 20TH DAY OF MAY, 2021.

W. KORIR,

JUDGE OF THE HIGH COURT