REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 29 OF 2019

VICTORIA MODONG TABAN.....PETITIONER

VERSUS

ATTORNEY GENERAL.....1ST RESPONDENT

COUNCIL OF LEGAL EDUCATION.....2ND RESPONDENT

LAW SOCIETY OF KENYA.....3RD RESPONDENT

JUDGMENT

1. The Petitioner, Victoria Modong Taban, is a citizen of the Republic of South Sudan who has resided in Kenya since 1994. As per the exhibited certificates, she obtained her education certificates in Kenya from nursery to university level.

2. Upon successfully completing her bar examination she applied for gazettement by the 2nd Respondent, the Council of Legal Education, in order to be admitted to the Roll of Advocates in Kenya. However, the 2nd Respondent in a letter dated 12th December, 2018 declined her request informing her that she could not be admitted as an advocate because she was not a citizen of a Partner State of the East African Community ("Community").

3. Through this case, the Petitioner contends that the letter is unconstitutional and unlawful. In the petition dated 23rd January, 2019 she prays for the following reliefs:

> **a) A declaration that the 2nd Respondent's letter to the Petitioner dated 12th December 2018 to the effect that the Petitioner shall not be admitted as an Advocate of the High Court of Kenya is contrary to the law *null and* void *ab initio.***
>
> **b) In the alternative to (a) above, a declaration that sections 12 and 13 of the Advocates Act perpetuate discrimination and is contrary to Article 27 of the Constitution.**
>
> **c) A judicial review order of certiorari quashing the letter dated 12th December 2018**
>
> **d) A judicial review order of mandamus compelling the 2nd Respondent to gazette the Petitioner for admission as an Advocate of the High Court of Kenya.**
>
> **e) General damages for violation of rights.**
>
> **f) Any other order that this Honourable Court will be pleased to issue.**
>
> **g) Cost of Petition.**

4. The Petitioner's case is premised on the grounds that the impugned decision of the 2nd Respondent violates the Constitution for failure to comply with the decision in **Petition No. 509 of 2016 Victoria Taban Modong v Kenya School of Law** and this violates the principle of the rule of law under Article 10 of the Constitution; that the impugned decision is discriminatory of the Petitioner and non-Kenyans on the basis of nationality, social origin and birth which violates Articles 10 and 27 of the Constitution; that the questioned decision violates the Petitioner's legitimate expectation; that the impugned decision violates the Petitioner's right to fair administrative action under Article 47 of the Constitution; and that the challenged directive erodes the gains made under Article 126 of the Treaty for the Establishment of the East

African Community ("Treaty") which seeks to harmonize and standardize legal training and practice among the members of the Community.

5. The 1st Respondent, the Attorney General, opposed the petition through grounds of opposition dated 3rd March, 2020. A summary of those grounds are that all statutes enjoy presumption of constitutionality; that the Petitioner ought to petition Parliament for the necessary legislation as legislative power lies with it and not courts; that legitimate expectation cannot apply as the Petitioner knew from the beginning that she could not be admitted to practice law as she is a non-citizen; that Article 24 of the Constitution envisages that fundamental rights and freedoms can be limited and in this case lack of citizenship is a justifiable and reasonable limitation; that the Petitioner has not demonstrated the manner in which the 1st Respondent has violated her constitutional rights; and that the petition is frivolous, vexatious, incompetent improperly before court and an abuse of the court process. The Court is therefore urged to dismiss the petition with costs.

6. The 2nd Respondent through a document dated 4th February, 2020 titled "Second Respondent's Statement of Grounds of Opposition & Skeletal Arguments" opposed the petition on the grounds that sections 12(a) and 13 of the Advocates Act, Cap. 16 expressly restricts admission of advocates to the citizens of Kenya, Burundi, Uganda and Tanzania; that Article 27 of the Constitution does not prohibit discrimination and the burden of proving unfair discrimination lies wholly on the person alleging discrimination, which burden has not been discharged by the Petitioner in this case; that legitimate expectation cannot override the clear provisions of statute; and that the Petitioner has not demonstrated violation of her right to fair administrative action. The 2nd Respondent therefore prays for the dismissal of the petition with costs.

7. The 3rd Respondent, Law Society of Kenya, did not file any pleadings or submissions.

8. I have carefully considered the pleadings and submissions of the parties in this matter and I reach the conclusion that although the 2nd Respondent's impugned letter dated 12th December, 2018 was issued after the delivery of the judgement in the case of **Jonnah Tusasirwe & 10 others v Council of Legal Education & 3 others [2017] eKLR; Nairobi High Court Petition No. 505 & 509 (Consolidated)** on 20th February, 2017, this litigation is a sequel to the dispute in the said matter.

9. A perusal of the judgement in the stated case confirms that the Petitioner herein was the 1st Petitioner in Petition No. 509 of 2016. The petitioners in the consolidated petitions had sued the Council of Legal Education and Kenya School of Law for rejecting their applications to join the Advocates Training Program on the ground that they were not Kenyan citizens.

10. The petitioners were successful and among the orders issued in their favour was an order compelling Kenya School of Law to admit them to the Advocates Training Program. This petition challenges the Council of Legal Education's subsequent decision that the Petitioner cannot be admitted to the Roll of Advocates in Kenya because she is not a citizen of a Partner State of the Community. In my view, this is the same issue that was in **Jonnah Tusasirwe (supra).**

11. The fact that the Petitioner was a party in **Jonnah Tusasirwe (supra)** is acknowledged by the Petitioner who submits that one of the issues for the determination of the Court in the instant matter is whether the failure by the Council of Legal Education to obey the decision in **Jonnah Tusasirwe (supra)** violates the principle of law enshrined under Article 10 of the Constitution.

12. I have been made aware through **Nairobi HC Petition No. 393 of 2018 Steve Kawai, Mangok Jackline Akuot & Miji Marvella Jimmy Wongo v Council of Legal Education, Kenya School of Law & Attorney General**, which was heard alongside this petition, that the respondents in **Jonnah Tusasirwe (supra)** appealed against the decision to the Court of Appeal through **Civil Appeal No. 242 of 2017, Council of Legal Education v Jonnah Tusasirwe & 13 others** which is yet to be determined. It would thus be remiss of me to try and second guess the Court of Appeal by making a determination in this matter. The question whether the Petitioner can be admitted as an advocate in Kenya will be determined once and for all by the Court of Appeal.

13. It is my view that determining the issues raised by the Petitioner in this petition will go against the counsel of the Supreme Court in **Law Society of Kenya v Attorney General & another [2019] eKLR** that:

> **"We are greatly dismayed that the learned Judge *did not take judicial notice* of the pendency of this Appeal although he was aware of it. As a matter of fact, he stated so in his judgment that an appeal had been preferred to us against the decision of the Court of Appeal to the apex court on matters whose determination may well have been binding on him. The learned judge ought to have *held his horses* and acknowledge the *hierarchy of the courts* and await for this court to pronounce itself before rendering himself, if at all. As we perceive it, his judgment has created unnecessary confusion in the application of WIBA and cannot be allowed to stand as it may [may or is]" also be contrary to this Judgement."**

14. Furthermore, considering that this Court (Mativo, J) in **Jonnah Tusasirwe (supra)** had determined that the Petitioner was entitled to pursue legal studies in Kenya, the Petitioner ought to have sought the enforcement of that judgement instead of opening a new battle front. At the end of the day, this petition falls into the category of matters which amount to abuse of the process of the court. That is not to say that the petition was not filed in good faith. As such, the appropriate order is to strike out the petition.

15. Nevertheless, had I found it appropriate to determine the issue of discrimination, being what I perceive to be the key issue in this petition, I would have found in favour of the Petitioner by holding that Section 12(a) of the Advocates Act is discriminatory for excluding the citizens of South Sudan from the list of the Partner States of the Community whose citizens can be admitted as advocates in Kenya. This holding would be in line with my holding in the judgment delivered on 20th May, 2021 in **Nairobi HC Petition No. 393 of 2018 Steve Kawai, Mangok Jackline Akuot & Miji Marvella Jimmy Wongo v Council of Legal Education, Kenya School of Law & Attorney General.**

16. I note that this petition provides evidence of the frustrations the Council of Legal Education visit on students of law in this country. It would therefore be unjust for me to order the Petitioner to meet the costs of the proceedings. The order that commends itself to me on the

issue of costs is to direct each party to meet own costs of the proceedings.

17. In summary, the petition is struck out with each party being directed to meet 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