REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

PETITION NO. 6 OF 2020

IN THE MATTER OF:

ARTICLES 2, 3, 19, 20, 21, 22, 23, 48, 50, 165, 258 AND 259 OF

THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF:

ALLEGED CONTRAVENTION OF ARTICLES 10, 73 AND 232 OF

THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF:

ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 41, 42

AND 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF:

THE FAIR ADMINISTRATIVE ACTION ACT, ACT NO. 4 OF 2015

AND

IN THE MATTER OF:

SECTIONS 9 AND 23 OF THE INTERPRETATION AND GENERAL PROVISIONS

ACT CAP 2 LAWS OF KENYA

AND

IN THE MATTER OF:

ENFORCEMENT OF RIGHTS UNDER CHAPTER 4 OF

THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF:

PETITION FOR ADMISSION TO THE KENYAN ROLL OF ADVOCATES UNDER

THE ADVOCATES ACT, CAP 16 LAWS OF KENYA SECTIONS 12, 13 AND 15

BETWEEN

1. MWAROME HEMPSTONE MWADZUA

2. PATRICK OKELLO KASERA

3. WEKESA RICHARD

4. YEGON KIPKORIR VICTOR

5. MOSES NGUGI GACHUCHA

6. DANCLAUS BRUCE KOKONYA

7. JUMA IAN MASAMBAKA

8. SAMUEL MAINA MWAI.....PETITIONERS

AND

1. LAW SOCIETY OF KENYA

2. THE CHIEF JUSTICE OF KENYA.....RESPONDENTS

JUDGEMENT

1. The eight Petitioners, **Mwarome Hempstone Mwaduzua, Patrick Okello Kasera,Wekesa Richard,Yegon Kipkorir Victor,Moses Ngigi Gachucha, and Danclus Bruce Kokonya,Juma Ian Masambaka and Samuel Maina Mwai** are adult male citizens of the Republic of Kenya. All the Petitioners are advocates of the High Court of Republic of Rwanda having been called to the Bar on 30/01/2019 as evidenced by the exhibited copies of certificates of the High Court of Rwanda, and copies of letters of good standing of East Africa Law Society.

2. The 1st Respondent herein, the **Law Society of Kenya,** is established under the ***Law Society of Kenya Act*** No. 21 of 2014. It is Kenya's premier bar association with membership of all practicing Advocates with the mandate to advise and assist members of the legal profession, the government and the larger public in all matters relating to the administration of justice in Kenya.

3. The 2nd Respondent, the **Chief Justice** and President of the Supreme Court of Kenya, is the Head of the Judiciary with the administrative powers of admitting qualified persons to the roll of Advocates of Kenya.

4. The Petitioners' case is that following the High Court decision in **Petition 69 of 2017** between **Naomi Achieng vs. C.L.E and Anor.** delivered on 29/07/2019, where the Court held that a person who is an Advocate of the High Court of Rwanda at the time of Application is qualified to be admitted to the Kenya Bar under Section 13 (1) of the Advocate Act as it then was, the Petitioners, who between the 6/08/2019 and 20/09/2019, lodged their respective Petitions to the 2nd Respondent for admission as advocates of the High Court of Kenya, are entitled to be admitted as such.

5. The Petitioners aver that their respective petitions were admitted, and thereafter, served upon the 1st Respondent. Unfortunately, their names were not included in the upcoming admission that had been scheduled on 4/09/2019, but the Petitioners were informed that they would have to wait for the next admission that was scheduled for December, 2019.

6. It is averred that on 21/11/2019, the Petitioner were informed by the 2nd Respondent through his office that there was an objection to their respective petitions by the 1st Respondent based on a judgment in Civil Appeal 96 of 2014 delivered on 27/09/2019, wherein, the 1st Respondent had challenged the inclusion of the Republic of Rwanda and Burundi in Section 13(d) of the Advocate. However, the Petitioners aver that at the time of the aforementioned Court of Appeal judgment, they had already been admitted as Advocates of the High Court of Rwanda and they had already petitioned the 2nd Respondent for admission as advocates of the High Court of Kenya.

7. It is the Petitioners' case that the 2nd Respondent retrospectively applied the finding in Civil Appeal 96 of 2014 by allowing 1st Respondent's objections, and thereby finding that the Petitioners were not eligible to be admitted as advocates of the High Court of Kenya. Consequently, the 2nd Respondent contravened Sections 9 and 23 of the Interpretation General Application Act Cap 2 Laws of Kenya and Articles 10, 19, 20, 21, 22, 23, 27, 41, 43, 47, 48, 50, 73, 165, 232, 258, and 259 of the Constitution.

8. It is the Petitioners' case that an amendment cannot be applied retrospectively unless expressly so stated by the law maker, and where a law is amended during pendency of suit, the law applicable to determine merits of the suit is the law as it was at the time of filing suit, save

for procedural laws. Therefore, such an amendment can only apply as a defence in future causes of action.

9. It is also the Petitioners' case that vide the ***Statute Law (Miscellaneous Amendment) Act 2012*** Rwanda and Burundi were included in ***Sections 12 (a) and 13(d) of the Advocate Act*** and pursuant to the said inclusion, some advocates from Rwanda were admitted to the Kenyan Bar on 4/09/2019, and to date they are practicing as advocates in Kenya. Therefore, the Petitioners' legitimately expected that they would be admitted to the Kenyan bar and afforded equal treatment under the law under those qualifications. And that is why they petitioned the 2nd Respondent between 6/08/2019 to 20/09/2019.

10. The Petitioners' case is that there is no warrant under the Advocate Act for depriving persons of property they lawfully held before the repeal came into force by invoking against them a law, which did not exist at the time the right to property vested in them. Therefore, the act of refusing to admit them to the Kenyan bar, while their colleague from Rwanda were admitted to the Kenyan Bar on 4/09/2019 amounts to discrimination against the Petitioners, and a contravention of their fundamental rights and freedoms under Articles 27, 41, 43, and 47 of the Constitution.

11. By this Petition, the Petitioners pray for the following orders:

a) That, the judgment in Civil Appeal 96 of 2014 between Law Society of Kenya vs. AG delivered on 27 September 2019 does not operate retrospectively and or it does not affect the Petitioners' Petitions filed between 6th August 2019 and 20th September 2019.

b) That the Application of the judgment in Civil Appeal 96 of 2014 between Law Society of Kenya vs. AG against the Petitioners' Petition filed between 6th August 2019 in the Chief Justice's office is against the principle of legitimate expression.

c) That the refusal to admit the Petitioners by applying the judgment in Civil Appeal 96 of 2014 between Law Society of Kenya vs. AG against the Petitioners' Petition for admission to the Kenyan Bar amounts to discrimination against the Petitioners.

d) The Petitioners be admitted to the Kenyan Roll of Advocates with immediate effect.

e) Costs of the Petition

f) Any other relief deemed just and fair to grant.

The Response

12. The 1st Respondent opposed the Petition vide Replying Affidavit sworn 13/10/2020 by **Mr. Collins Harrison Odhiambo** the acting Chief Executive Officer to the 1st Respondent. He avers that the functions and objects of the 1st Respondent are stipulated under part II of Law Society Act, and Section 4 of the Law Society Act provides that:

(a) ***assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya;***

(b) uphold the Constitution of Kenya and advance the rule of law and the administration of justice;

(c) ensure that all persons who practise law in Kenya or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide;

(d) protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law;

(e) set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya;

(f) determine, maintain and enhance the standards of professional practice and ethical conduct, and learning for the legal profession in Kenya;

(g) facilitate the acquisition of legal knowledge by members of the Society and ancillary service providers, including paralegals through promotion of high standards of legal education and training;

(h) represent, protect and assist members of the legal profession in Kenya in matters relating to the conditions of practice and welfare;

(i) formulate policies that promote the restructuring of the legal profession in Kenya to embrace the spirit, principles, values and objects the Constitution of Kenya;

(j) facilitate the realization of a transformed legal profession that is cohesive, accountable, efficient and independent;

(k) establish mechanisms necessary for the provision of equal opportunities for all legal practitioners in Kenya;

(l) protect and promote the interests of consumers of legal services and the public interest generally, by providing a fair, effective, efficient and transparent procedure for the resolution of complaints against legal practitioners;

(m) develop and facilitate adequate training programmes for legal practitioners; and

(n) do all such other things as are incidental or to the foregoing functions.

13. The deponent avers that vide S***tatute Law Miscellaneous (Amendment Act) No. 12 of 2012,*** various Sections of the Advocates Act and the Law Society of Kenya Act were amended, and the relevant amendments to this petition include amendment of:

a) Section 12(a) by inserting the word "Rwanda Burundi" immediately after the word "Kenya"

b) Section 13(1) by inserting the word "the High Court of Rwanda, the High Court of Burundi" in paragraph (d) immediately after the word "Uganda"

14. It is averred that aggrieved by the aforementioned amendments, the 1st Respondent opposed the amendments vide **Petition No. 318 of 2012 Law Society of Kenya v Attorney General and 2 Others**. The Petition was heard and judgment delivered on 19/03/2013. Being dissatisfied with the judgment of the High Court, the 1st Respondent appealed to the Court of Appeal in **Civil Appeal 96 of 2014** between **Law Society of Kenya v AG & 2 others** against the Judgment in **Petition No. 318 of 2012**, and in its judgment rendered on 27/09/2019, the Court of Appeal upheld the 1st Respondent's objections to the impugned amendments, set-aside the judgment of the High Court, and struck down the amendments. The effects of the judgment are that a person could no longer rely on the fact that they were advocates for the time being of the High Court of Rwanda or High Court of Burundi as a qualification for seeking admission as an Advocate of the High Court of Kenya.

15. It is the 1st Respondent's case that the Court of Appeal judgment took effect immediately from the date of delivery of judgment and therefore, the position of the affected law reverted to what it was prior to the impugned amendments. Therefore, pursuant to Section 15 of the Advocates Act, the lodging of a Petition for admission to the bar does not confer an automatic right of admission as an Advocate before the Petition is considered and heard. Furthermore, pursuant to Section 15(3) of the Advocates Act, the 2nd Respondent is obliged to consider and to satisfy himself as to the qualification, service and moral fitness of the Petitioners based on the law as is, as it is enacted or as it stands at the time of hearing the petitions and making an order that the Petitioners be admitted, and the 1st Respondent has a right to make any relevant representation concerning or affecting the Petition for admission.

16. The 1st Respondent's case is that the Petitioners' Application for admission have been overtaken by events, by the changes in law, and there can be no estoppel against the operation of law. Therefore, there has not been any discrimination against the Petitioners since those who were admitted before 27/09/2019 qualified on the basis of the law as it was when their applications were considered and an order made that they be admitted as advocates by virtue of the law. Therefore, the Petitioners cannot seek to derive a benefit from a non-existent provision of law and have a different standard applied to them other that what the law currently provides.

17. The 1st Respondent avers that the instant Petition is incompetent and defective since the Petitioners have not particularized how their constitutional rights have been violated under the law.

18. In the interest of full disclosure, the 1st Respondent avers that a similar Petition was lodged before the High Court in Nakuru on the same issue in **Petition No. 4 of 2020**, **Javan Kiche Otieno v Chief Justice and President of the Supreme Court of Kenya; Law Society of Kenya & another (Interested Parties)** where **Chemitei J** held:

"The Court of Appeal had pronounced itself and struck out the impugned Sections of the law which gave the Petitioners and others a chance to be admitted as advocates of the High Court of Kenya. There is nothing he would have done since granting the Petitioner's Application would have been unlawful…The only option as things stand now is for the Petitioner and many other friends to Petition parliament to reinstate the impugned Section by following the guidance and directions of the Court of Appeal."

19. The 2nd Respondent filed Grounds of Opposition dated 19/08/2020 as follows:

a) That the Petition is fatally defective, bad in law, an abuse of the Court process and without merit.

b) That the principle of legitimate expectations cannot be based on the basis of an illegality.

c) The 2nd Respondent cannot be compelled to admit the Petitioners pursuant to a law that has been declared unlawful by a Court of competent jurisdiction.

Submissions

20. The Petition was canvassed through written submissions.

21. **Mr. Khatib** learned counsel for the Petitioners reiterated the contents of the Petitioner's Affidavit. Counsel submitted that courts make mistakes and the mistakes made are corrected on Appeal. In this case, by the time the mistakes were being corrected, the rights of the Petitioners had already crystalized, and therefore, the Chief Justice made a mistake in rejecting the Petitioners' petitions for admission.

Counsel further submitted that the law applicable to existing suits when there is repeal/amendment of law is the law that existed at the time of filing that pleading. Counsel cited the finding in **Wollace Maina Gatundu v Council of Legal Education [2020] eKLR**, where the Court held that the law that is to apply to the Petitioner is the law that existed at the time of his admission and graduation, not the new Act.

22. On the legitimate expectations of the Petitioners, **Mr. Khatib** submitted that the Petitioners pursuit for admission as advocates was influenced by existing law that is Section 13(1) (d) of the Advocates Act as revised in 2012, and on 4/09/2019, the 2nd Respondent admitted four (4) Petitioners who are advocates in Rwanda and were admitted to the Rwanda Bar together with the Petitioners on 30/01/2019. Therefore, the Petitioners legitimately expected that upon admission as advocates of High Court of Rwanda, they would also be admitted to the Kenyan Bar, and considering the Petition had already been received by the 2nd Respondent's office, to refuse to admit them was a clear violation of their legitimate expectations. Counsel cited the finding in **Leonard Kipkurui Sand vs. Council of Legal Education & another (2020) eKLR** where the Court stated that by previously clearing all student who enrolled and graduated with a Bachelor of Laws degree from Busoga University earlier, the Respondent by their own conduct, no doubt made the Petitioner have legitimate expectations.

23. With regard to the issue of alleged discrimination, **Mr. Khatib** submitted that between or about 6/08/2019 and 20/09/2019, the Petitioners filed their petitions for admission to the bar. However, on 4/09/2019, the 2nd Respondent had more than 15 petitions for admission by Kenyan advocates of the High Court of Rwanda, but the 2nd Respondent only selected four (4) Petitioners whom he admitted as advocates of the High Court of Kenya, and the Petitioners herein were told to wait for the next admission which was to happen on 4/12/2019. Therefore, Counsel submitted that the 2nd Respondent's decision to refuse to admit them when they all petitioned around the same month and year 2019 is tantamount to differential treatment being afforded to one group/class as against the Petitioner in utter disregard on Article 27(1) and 47 of the Constitution.

24. **Ms. Soweto** learned counsel for the 1st Respondent reiterated the contents of the 1st Respondent's Affidavit and submitted that it is a fact that the qualifications the Petitioners are relying upon to seek for admission as advocates of the High Court of Kenya were not part of the Advocates Act, since the same were introduced by the Attorney General through a ***Statute Law (Miscellaneous Amendment) Act No.12 of 2012.*** Therefore, the Petitioners cannot contend that they seek admission as advocates as of right. Counsel submitted that the Court of Appeal decision declared that the amendments to the Advocate Act were illegal ab initio and therefore they could not stand. Further, the declaration of unconstitutionality or illegality was not constrained in or limited by time and therefore, the declarations of invalidity or illegality took effect immediately upon pronouncement or delivery.

25. Counsel submitted that the issue is whether this Court could grant an order whose effect would be to suspend the Judgment by the Court of Appeal of invalidity of the amendments. Counsel submitted that the Petitioners' Petition amount to inviting the 2nd Respondent to give effect to and/or legitimize an illegality without seeking for the suspension of the Court of Appeal decision declaring the amendment to the Advocate Act unconstitutional. **Ms. Soweto** cited the finding in **Law Society of Kenya v Kenya Revenue Authority & Another High Court (Nairobi) Petition 39 of 2017 [2017] eKLR** where Mativo J pointed out that… ***an unconstitutional law is not law and actions or decisions taken pursuant to the unconstitutional law would out rightly be illegal***. It follows that once a law has been declared unconstitutional, it has no business remaining in the law books.

26. **Ms. Soweto** further submitted that although the provisions under which the Petitioners colleagues were admitted remain invalid, their admission could not be undone by virtue of the *de facto doctrine.* Therefore, it would lead to absurdity for the Petitioners to be admitted on the basis of the stricken down amendment.

27. With regard to the issue of the Petitioners lodging their Petition before the Court of Appeal decision, Ms. Soweto submitted that the lodging of a Petition for admission under Section 15(1) of the Advocate Act was only the beginning of the process, and by virtue of Section 15 (2) of the Advocate Act, there must be a lapse of at least one month between the filling of the Application before the process under Section 15(3) can occur. Therefore, the filing of the Application was not an automatic right of admission, since the 2nd Respondent had to be satisfied as to the qualifications, service and moral fitness of the Petitioners which in this case had not been done. **Ms. Soweto** further submitted that the retrospective Application of the Judgment in Civil Appeal No. 96 of 2014 does not arise since the Petitioners' Applications for admission had not been considered and conclusively determined, and the Petitioners admitted as advocates of the High Court of Kenya.

28. On whether the Petitioners had legitimate expectation to be admitted to the Kenyan bar, Ms. Soweto submitted that the law does not protect every legitimate expectation. She cited the finding in **Pevans East Africa Limited v Betting Control and Licensing Board & 2 Others; Safaricom Limited & Another (Interested Parties) [2019] eKLR** where the Court stated:

> **"Legal certainty is not, however the only principle at play in legitimate expectation doctrine. The counter value of legality is especially important in the context of the substantive protection of legitimate expectations.[37] The fear in protecting legitimate expectations substantively is that administrators may be forced to act ultra vires. That would be the case where an administrator has created an expectation of some conduct, which is beyond his authority or has become beyond his authority due to a change of law or policy. If the administrator were consequently held to that representation, he would be forced to act contra legem. It is clear that such representations will not be upheld by the court.[38] The value of legality in law has led to the requirement that the expectation must be one of lawful administrative action before it can be either reasonable or legitimate. Legality therefore seems to take precedence over legal certainty in law. As stated above, there can be no reasonable expectation where the representation is of unlawful conduct and hence the question of legitimacy does not arise."**

29. On the issue of discrimination against the Petitioners, Ms. Soweto submitted that the qualifications relied upon by the Petitioners were invalid and therefore, the cases of **John Harun Mwau, Wollace Maina Gatundu, Leonard Kipkurui Sang and Jonnah Tusasirwe & 10 Others,** which the Petitioners cited are distinguishable and the considerations upon which those cases were decided are not the same, since the Petitioners themselves admitted that prior to the Judgment in Civil Appeal 96 of 2014, the 2nd Respondent had admitted persons with similar qualifications to the Petitioners, and it is trite that admissions of successful applicants as advocates of the High Court of Kenya usually occurs in batches due to the sheer numbers and everyone cannot be heard on the same day. Consequently, there is no proof that the

Petitioners had been discriminated against when they were not included in the batch admitted on 4/09/2019.

30. **Mr. Wamasaa** learned counsel for the 2nd Respondent adopted the submission by Ms. Soweto, and submitted that allowing the instant Petition would amount to an illegality.

Rejoinder

31. **Mr. Khatib** in response to Ms. Soweto's submissions brought to the attention of this Court that Korir J on 20/05/2021 in **Petition 393 of 2018, Steve Isaac Kawai & 2 others v Council of Legal Education & 2 others** declared that Section 12 (a) of the Advocate Act, 2012 is inconsistent with Article 27 of the Constitution of Kenya 2010, in light of the Treaty Establishing East African Community.

The Determination

32. I have carefully considered the Petition before the Court and the affidavits and Grounds of opposition to it. I have also considered submissions by counsel and authorities relied on. In my view the following issued arise for determination.

1. Whether the enforcement of the decision of the Court of Appeal in Civil Appeal 96 of 2014 could be suspended.

2. Whether the Judgment in civil Appeal No. 96 of 2014 delivered on 27/09/2019 could apply retrospective against the Petitioners Petition for admission filed on 6th August 2019.

3. Whether the 2nd Respondent's has violated the Petitioners right to legitimate expectation.

4.Whether the 2nd Respondent decision to reject the Petitioners' Application amounted to unlawful discrimination against the Petitioners

1.Whether the enforcement of the decision of the Court of Appeal in Civil Appeal 96 of 2014 could be suspended.

33. Since issues number (1) and (2) are interconnected, I will dispense them together in this Judgment. It is noteworthy Section 15 of the Advocate Act provides for the procedure to be followed before an advocate is admitted as an advocate of the High Court of Kenya. Section 15 provides:

"15(1) Every person who is duly qualified in accordance with this Part may apply for admission as an advocate, and the application shall be made by petition in the prescribed form, verified by oath or statutory declaration addressed to the Chief Justice, and filed with the Registrar together with a notice intimating that the petition has been so filed together with such other documents as may be prescribed and the applicant shall also deliver a copy of the petition and of any document delivered therewith to the secretary of the Council of Legal Education and to the secretary of the Society.

(2) The notice referred to in subsection (1) shall be publicly exhibited by the Registrar for one month before any order shall be made on the petition.

(3) Every petition made under this section shall be heard by the Chief Justice in chambers, and the Council of Legal Education and the Society shall have the right to be heard thereon; and, if the Chief Justice is satisfied as to the qualifications, service and moral fitness of the petitioner, he shall adjourn the hearing into open court and shall order that the petitioner be admitted as an advocate.

(4) On an order being made under subsection (3), and after payment by the petitioner to the Registrar of the prescribed fee, the petitioner shall take an oath or make an affirmation as an officer of the Court before the Chief Justice in such form as he shall require, and shall thereafter sign the Roll in the presence of the Registrar or a Deputy Registrar who shall add his signature as witness.

(5) All reports, records and communications made under or in connection with this section shall be absolutely privileged."

34. It is evident that the Petitioners' Petitions to the 2nd Respondent were filed from the 8/08/2019 to the 25/09/2019. Section 15(2) of the Advocate Act as aforementioned provides that there must be a lapse of at least one month between the filing of the Application before the process under Section 15(3) could occur. The acts contemplated under Section 15(3) in my view only crystalizes upon the expiry or lapse of 30 days from the date of lodging of an Application for admission to the Bar as an advocate of the High Court of Kenya. The Petitioners' Petition for admission to the bar are premised on the grounds that at the time of lodging the Application for admission to the Kenya Bar they are advocates of the High Court of Rwanda and that fact entitles the Petitioners to seek admission as advocates of the High Court of Kenya pursuant to Section 13(d) of the Advocates Act subject to meeting the requirements of Section 15 of the Advocates Act.

35. From the foregoing, the earliest the Petitioners' Petition could be conclusively heard and the Petitioners herein admitted to the Kenyan Bar was on 9/09/2019, which is after the expiry or lapse of the notice period of 30 days from the date of lodging of the Petition for admission as Advocates of the High Court of Kenya. It is clear that the Petitioners herein would not have made it to the 2nd Respondent's list of Petitioners who qualified and were admitted to the Kenyan Bar on 3/09/2019 and 4/09/2019, reason being that by the time the 2nd Respondent was conducting the swearing in ceremony, the notice period that was applicable to the Petitioners herein had not yet lapsed. There is even an admission by the Petitioners that there was a communication to them from the 2nd Respondent's office informing them that

their Applications would be in the next swearing in which was to be scheduled on 4/12/2019.

36. It is a fact that on 27/09/2019, the Court of Appeal in Civil Appeal No. 96 of 2014 struck down the ***Statute Law (Miscellaneous Amendment) Act No. 12 of 2012,*** and held that although the bill was passed in the spirit of cohesion of East Africa Treaty, the bill was passed without the full participation of the 1st Respondent. Thereafter, the 1st Respondent vide letter dated 22/10/2019 informed the 2nd Respondent that the Petitioners did not qualify for admission as advocates on the basis of the law as it stands, which was that advocate of the High Court of Rwanda did not qualify anymore to be admitted as advocates of the High Court of Kenya since the provisions of Section 13(d) of the Advocate Act had been struck out.

37. The question of the effect of a statute that is declared unconstitutional has, for a long time, been the subject of a searing debate. In **Canada (Attorney-General) v. Hislop, [2007] 1 S.C.R. 429, 2007 SCC 10,** the Supreme Court considered the retroactive operation of a declaration of invalidity, and held that subject to Section 52(1):

> ***"…****When a court issues a declaration of invalidity, it declares that, henceforth, the unconstitutional law cannot be enforced. The nullification of a law is thus prospective.* ***However, s. 52(1) may also operate retroactively so far as the parties are concerned, reaching into the past to annul the effects of the unconstitutional law…."***

> ***"…****On this view, s. 52(1) remedies are deemed to be fully retroactive because the legislature never had the authority to enact an unconstitutional law.* *In the words of Professor Hogg, a declaration of constitutional invalidity* ***"involves the nullification of the law from the outset"*** *If the law was invalid from the outset, then any government action taken pursuant to that law is also invalid, and consequently, those affected by it have a right to redress which reaches back into the past."*

38. Similarly, in a persuasive authority in **Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940, Hughes CJ**, in the Supreme Court, expressed the view that whether or not the invalidity of a statute was retrospective or prospective, depended on the facts of the case. In his words:

> ***"The courts below have proceeded on the theory that the Act of Congress, having been found to be unconstitutional, was not a law; that it was inoperative, conferring no rights and imposing no duties, and hence affording no basis for the challenged decree****.... It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact, and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.* ***The effect of the subsequent ruling as to invalidity may have to be considered in various aspects -- with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts, state and federal, and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified"***

39. The Petitioners have argued that the decision made by the Court of Appeal in Civil Appeal 96 of 2014 was applied retrospectively by the 2nd Respondent in rejecting the Petitioners' applications for admission to the Kenyan Bar, thereby undoing the admissions that had been previously allowed under the struck out law. In my view, for the Petitioners to prove that the Court of Appeal decision in Civil Appeal 96 of 2014 was applied retrospectively, the Petitioners had the burden of proving that as at the 27/09/2019, their respective petitions had been considered, heard, and acted upon by the 1st Respondent and a decision to admit the Petitioners had already been arrived at by the 2nd Respondent, before the Court of Appeal Judgment in Civil Appeal 96 of 2014 was delivered. See **A v. The Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88**, (at paragraph 36) where Murray CJ, stated as follows:

> ***"…****a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position"*.

40. From the foregoing, I find and hold that the Petitioners failed to discharge the burden of proof place upon them. Furthermore, it is common ground that 22/10/2019, when the 1st Respondent sent its representations as required under Section 15(3) of the Advocates Act, was way after the Court of Appeal had struck down the amendments to Sections 12 and 13 the Advocates Act vide ***Statute Law (Miscellaneous Amendment) Act No. 12 of 2012.*** Consequently, the question of retrospective Application of the Court of Appeal Judgment in Civil Appeal 96 of 2014 could only arise where the Petitioners had proved that their petitions had been considered and conclusively determined and the Petitioners admitted as advocates of the High Court of Kenya for the argument of retrospective Application of the Court decision to arise which unfortunately is not the case in this instant Petition.

41. The Court of Appeal having struck down amendments to Sections 12 and 13 of the Advocates Act, which Sections had allowed advocates of the High Courts of Rwanda and Burundi be admitted as advocates of the High Court of Kenya, the effect of the Court of Appeal Judgment in Civil Appeal No. 96 of 2014 was that the qualifications of the Petitioners were immediately invalidated and consequently, the hands of the 2nd Respondent became tied, and there was nothing the 2nd Respondent could do without any statutory backing. The only option available to the 2nd Respondent was to reject the Application for admission to the High Court of Kenya by the Petitioners. In **Mapis Investment (K) Limited v Kenya Railways Corporation [2005] eKLR,** the court, while quoting the case of **Scott v. Brown, Doering, McNab & Co (3), [1892] 2 QB 724 Lindley LJ** at p.728: stated that:

> "**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."

2. Whether the 2nd Respondent has violated the Petitioners' right to legitimate expectation.

42. The Supreme Court in **Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others, Petition No. 14 of 2014** stated at paragraph 269 that the emerging principles on legitimate expectation 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 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."

43. Similarly, Mativo J in **Republic v Council of Legal Education & 2 others Ex Parte Mitchelle Njeri Thiongo Nduati [2019] eKLR,** stated:

"It follows that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute."

44. Having found that the Court of Appeal in Civil Appeal 96 of 2014 Judgment delivered on the 27/09/2019 struck down all the amendments to Section 12 and 13 of the Advocates' Act, which then divested the Petitioners of the qualifications they had acquired courtesy of Sections 12(a) and 13(d) of the Advocates Act as advocates of the High Court of Rwanda who had become eligible to be admitted as advocates of the High Court of Kenya upon Application being made to the 2nd Respondent pursuant to Section 15 of the Advocates Act, therefore, the law on admission of advocates reverted to the **pre-*Statute law (Miscellaneous Amendment) Act 2012***. Therefore, there cannot be legitimate expectation against a clear provision of Statute.

3. Whether the 2nd Respondent's decision to reject the Petitioners' Application amounted to unlawful discrimination against the Petitioners

45. The Black's Law Dictionary defines ***"discrimination"*** as follows: -

"The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured …."

46. The Petitioners' Constitutional Right as enshrined at ***Article* 27(1) (4) and (5) of the Constitution**.

Article 27(4) and (5) of the Constitution provides: -

"27. Equality and freedom from discrimination-

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

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

47. In **Nyarangi & 3 Others v Attorney General HCCP No. 298 of 2008 [2008] KLR 688,** Nyamu, J (as he then was) held:

"The law does not prohibit discrimination but rather unfair discrimination… Discrimination which is forbidden by the Constitution involves an element of unfavourable bias. Thus, firstly on unfavourable bias must be shown by a complainant. And secondly, the bias must be based on the grounds set out in the Constitutional definition of the word "discriminatory" in section 82 of the Constitution. Both discrimination by substantive law and by procedural law, is forbidden by the constitution. Similarly, class legislation is forbidden but the Constitution does not forbid classification. Permissible classification which is what has happened in this case through the challenged by laws must satisfy two conditions namely:- (i) it must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (ii) the differentia must have a rational relation to the object sought to be achieved by the law in question; (iii) the differentia and object are different, and it follows that the object by itself cannot be the basis of the

classification…"

48. As I have earlier established in this Judgment, the selection of four (4) of the Petitioners who were admitted with the Petitioners herein as advocates of the High Court of Rwanda on 30/1/2019 was based on the requirements of Section 15 of the Advocates Act, which requires that before the Petition for admission as an advocate of the High Court is considered, a notice has to be exhibited by the Registrar for one month before any order could be made on the petition. It is evidently clear that the earliest the 1st Petitioner's petition would have been considered was on 9/09/2019, which would be exactly after the lapse of 30 days' notice period pursuant to Section 15(2) of the Advocates Act in a perfect situation. Therefore, in this instance, I find and hold that the Petitioners had not qualified to be on the list of applicants who were to be admitted as Advocates of the High Court of Kenya on 3/09/2019 and 4/09/2019. Therefore, the allegation of discrimination by the Petitioners are unfounded and baseless.

49. From the evidence on record, I find that the Petitioners have failed to prove that the 2nd Respondent acted in a discriminatory manner to justify intervention by this Court in the way and manner proposed in this Petition.

50. Finally, I have considered the decision in **Petition 393 of 2018, Steve Isaac Kawai & 2 others v Council of Legal Education & 2 others (supra).** It is evident that this decision is still a work in progress since it will most probably go to Supreme Court. However, what is noteworthy is that this decision is not binding upon this Court. I am more persuaded by the decision of the Court of Appeal in Civil Appeal No. 96 of 2014, which in any event, is binding upon this Court, and which this Court has no option, but to honour.

51. The upshot of the above findings is that the petition before the Court lacks in merit, with the result that the same is hereby dismissed.

52. Parties to bear own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF JUNE, 2021.

E. K. OGOLA

JUDGE

Judgment delivered via MS Teams in the presence of:

Ms. Njoroge holding brief Ms. Soweto for 1st Respondent

Mr. Khatib Jr. for Petitioners

Ms. Munyingi holding brief Wamasaa for 2nd Respondent

Ms. Peris Court Assitant