



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.400 OF 2018

AND

**IN THE MATTER OF CONTRAVENTION OF ARTICLES 10, 19, 22, 27, 43, 47, 48, 50(1), 159,165 AND 258 OF THE
CONSTITUTION OF KENYA, 2010**

RAAFIA SALIM VAYANI.....PETITIONER

VERSUS

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

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

JUDGMENT

Petitioner's Case

1. The petitioner through a petition brought pursuant to Articles 10,19,22,27,43,47,48,50(1), 159, 165 and 258 of the Constitution of Kenya 2010 seek the following reliefs:-

- 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 7th November, 2018 precluding the Petitioner from presenting herself 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 Petitioner to sit for the Bar Examinations scheduled to start on 15th November, 2018;
- c) A conservatory order be and is hereby issued staying the entire decision made by the 2nd Respondent on 7th November, 2018 precluding the Petitioner from presenting herself for and sitting the Bar Examinations scheduled to start on 15th November, 2018;
- d) Costs of the Petition be borne by the Respondents;
- e) Or that such other Order(s) as this Honourable Court shall deem fit.

2. The petitioners case is that she graduated with Bachelor of law in law with international Relations Degree from University of Portsmouth on 7th August 2015. That having so qualified, pursuant to section 8(10) (e) of the Legal Education Act No.27 of 2012, she sought for recognition and approval of the Degree from the 1st Respondent for purposes of admission to the Advocates Training Programme at the 2nd Respondent. The 1st Respondent through its letter of 12th January 2016 directed the petitioner to undertake a remedial programme in six units to enable compliance with the second schedule of the Legal Education Act. The petitioner's appeal against the 1st Respondent's direction was rejected through its letter dated 15th May 2017.

3. As a result of rejection of the petitioner's appeal, she enrolled at Riara University and successfully undertook the remedial programme as directed by the 1st Respondent and the University communicated to 1st Respondent on 18th September 2017 through its letter dated 18th September 2017 attaching petitioner's transcripts. That inspite of that, on 2nd November 2017, the 1st Respondent again rejected the petitioner's request for admission to the Advocates training Programme (**ATP**) on the claim that the university of Portsmouth had represented to it that the petitioner's Degree certificate was not a qualifying Degree for purposes of accreditation; which information the

basis of this decision was never disclosed to the petitioner either by the 1st Respondent or the University of Portsmouth.

4. The petitioner contends that after several pleas to the 1st and 2nd Respondents, the 2nd Respondent issued the petitioner with an admission letter to attend the Advocates Training Programme (**ATP**) at the Kenya School of Law in accordance with section 17 of the Kenya School of Law Act of Kenya, No. 26 of 2012. The petitioner duly paid the requisite fee for the **ATP** in the sum of Kshs.145, 000/-. The petitioner thereafter attended classes, set for oral examinations and undertook project work administered by the 2nd Respondent and qualified in all examined units as exhibited by the true copies of the results for oral examinations and project work exhibited by the supporting affidavit.

5. On 27th September 2018, the petitioner applied for Registration for Bar Examinations upon payment of the requisite fee of Kshs.45, 000/- as exhibited in application and receipt in the supporting affidavit. She was subsequently informed on 28th September 2018 her application for Registration for the Bar Examination had been declined for the reason that the 1st Respondent had declined to recognize and approve her Bachelor of Law in law with international Relations Degree, for the purpose of ATP. The petitioner made several follow ups on the issue as a result of which on 19th October 2018 the 1st Respondent notified her that her application for Registration for the Bar Examinations had been approved as per exhibit in her supporting affidavit. The petitioner subsequently collected her examination card issued by the 1st Respondent on 31st October 2018 as per exhibit to the supporting affidavit of the petitioner.

6. That on 7th November 2018, however, less than a week to the commencement of the Bar Examinations, the 1st Respondent notified the petitioner that her "provisional" registration for the November 2018 Bar Examination had been reviewed and found wanting. The 1st Respondent therefore directed the petitioner not to present herself for the Bar Examination until the relevant committee of council had deliberated the issue and made a determination.

7. The petitioner contends that she contacted the University of Portsmouth about the issue, who on 12th November 2018 responded notifying the petitioner that contrary to that, her Degree certificate was sufficient for accreditation as per email and letter exhibited in her supporting affidavit.

8. The petitioner's case is that the decision of the 1st Respondent of 7th November 2018 precluding the petitioner from presenting herself for and sitting the Bar Examination scheduled to start on 15th November 2018 was unconstitutionally made in breach of the Rules of natural justice, is ultra-vires, irregular, null or void *ab initio* and ought to be removed for purposes of being quashed as the same is a nullity and void of Legal effect.

Respondents Case

9. The Respondents filed a Notice of Preliminary Objection setting out two main grounds of objection being thus:-

a) The present application offends the provisions of Article 159(2) (c) of the Constitution of Kenya, 2010, section 9(2) of the Fair Administrative Action Act No. 4 of 2015, section 31(1) of the Legal Education Act No.27 of 2012 and largely the legal doctrine of exhaustion;

b) The present petition is ripe for the exercise of the doctrine of constitutional avoidance by the Honourable Court.

10. The Respondents did not file any Replying affidavit nor submissions to the petition.

Analysis and Determination

11. I have carefully considered the petitioner's petition, supporting affidavit and annexures to the supporting affidavit; the Respondents Notice of preliminary objection and from the above the issues arising for consideration can be summed up as follows:-

a) Whether the Respondents Notice of Preliminaries objection is meritorious and whether the same should be granted?

b) Whether the petitioner has demonstrated violation and infringement of her constitutional rights?

c) What relief can the petitioner be granted?

A) Whether the Respondents Notice of Preliminaries objection is meritorious and whether the same should be granted?

12. The Respondents through the Notice of Preliminary Objection seeks to challenge this court jurisdiction to hear and determine this matter. The Respondents urge the orders sought under prayer No. 1 of the petition seek to quash the entire decision made by the 1st Respondent on 7th November 2018 precluding the petitioner from presenting herself for and sitting bar examination which was scheduled to start on 15th November 2018. It is Respondents contention that the Tribunal established under **section 35(a) of the Legal Education Act** has power to set aside and/or vary the order or the decision of the 1st Respondent which the petitioner is seeking the court to quash. It is averred by the Respondents that the petitioner should have exhausted the other process before filing the present petition and by virtue of Doctrine of exhaustion under **section 9(2) of the Fair Administration Action Act** which provides:-

"(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted."

13. This petition is alleged to be premature as the petitioner has been granted alternative to seek an exception but did not.

14. The Respondents further argue that under **section 31 of the Legal Education Act** it is provided thus:-

"(1) The Tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the Council or by any committee or officer of the Council, on any matter relating to this Act, inquire into the matter and make a finding thereupon, and notify the parties concerned.

(2) For the purposes of hearing an appeal, the Tribunal shall have all the powers of the High Court to summon witnesses, to take evidence on oath or affirmation and to call for the production of books and other documents.

(3) Where the Tribunal considers it desirable for the purposes of avoiding expenses, delay or for any other special reasons, it may receive evidence by affidavit and administer interrogatories within the time specified by the Tribunal.

(4) When determining any matter before it, the Tribunal may take into consideration any evidence, which it considers relevant to the subject of an appeal before it, notwithstanding that such evidence, would not otherwise be admissible under the law relating to evidence."

15. It is contended by the Respondents that the Tribunal can issue constitutional order as it can issue declaratory orders and further under section 35 of the Legal Education Act, it is urged the tribunal can give other orders. The Respondents further proceeded to assert that under **Article 23(2) of the Constitution** the Tribunal has powers to hear matters of constitutional nature; urging further under **Article 169(a)** the tribunal is described as a court; therefore the tribunal can hear and determine the matters before this court. The Respondents thereafter urged this court to refer this matter to the tribunal for determination as this matter is not constitutional proper and that it is not a petition. The Respondent argued that the doctrine of constitutional avoidance should apply.

16. The petitioner urges otherwise and asserts the facts of this matter speak for themselves. It is contended that since the matter started, the Respondents have been involved in applying delaying tactics and have taken very long without referring the matter to tribunal, but continued to violate on petitioners rights to the education under Article 43(1) (f) of the Constitution. The petitioner referred to Article 159(2) (b) of the constitution which provides that justice shall not be delayed. The petitioner avers that her petition has not been denied and that referring this matter to a tribunal after some reliefs had been conceded to, would amount to delay of justice.

17. From clear reading of the Respondents Notice of preliminary objection, the Respondents do not state that this court lacks jurisdiction but it is only alleged that someone-else sitting somewhere-else can do what this court is doing. **Article 165(3)(b) of the constitution** clearly states that subject to clause (5) the High Court shall have jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. The tribunal referred to by the Respondents do not have constitutional mandate to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened as provided by the constitution. **Article 169 of the Constitution of Kenya 2010**, referred to by the Respondents defines subordinate courts and in the definition it includes any other court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2); this however do not mean any court or tribunal can purport to have jurisdiction to deal with constitutional issues unless it is clearly stated so in the constitution or by an Act of Parliament. In view of the foregoing I find the tribunal referred to under the Legal Education Act has no jurisdiction to deal with the petition herein, which deals with question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

18. In view of the above I find that the petition do not offend **Article 159(2) (c) of the constitution** taking into account that the Respondents did not seek at any one time to have this matter referred to alternative forms of dispute resolution and the request refused. I further find that **section 9(2) of the Fair Administrative Action Act No. 4 of 2015, section 31 of the Legal Education Act No. 27 of 2012** on the legal exhaustion cannot be applied at this stage when parties have reached a point in which they are unable to reach any further decision and settlement. I find by allowing this matter to be referred to a Tribunal at this stage would be in breach of **Article 159(2) (b) of the constitution** which provides that justice shall not be delayed. I find that referring this matter to the tribunal would delay justice and justice won't be done nor seen to be done. I further do not find any justification as urged by the respondents that this petition is ripe for the exercise of the doctrine of constitutional avoidance by the Honourable court. From the above I find no merits in the Respondents notice of preliminary objection. The same is rejected as it has no merits.

B) Whether the petitioner has demonstrated violation and infringement of her constitutional rights?

19. The petitioner urges that the 1st Respondents decision precluding her from presenting herself for and sitting the Bar Examination was discriminatory. The petitioner alleges the 1st and 2nd Respondents violated her rights to equality and freedom from discrimination contrary to Article 27 of the Constitution of Kenya, 2010.

20. That unlike the rights and fundamental freedoms protected under **Article 25 of the constitution**, rights such as rights to education may be limited; especially in a society where there are inadequate resources, such rights may be limited, in order that all may have reasonable access to these resources for the benefit of society as a whole. **Article 24 of the constitution** recognizes the need for such limitations and permits them. For Kenya School of Law (ATP) such limitations include imposition of conditions, such denial presenting oneself for sitting the bar examinations and investing on payment of fees. Limitation to the rights to an education exists world-over.

21. In the case of **John Mnai & 3 others vs Kenya National Examination Council & 2 others (2011) eKLR**, the court held:-

"It should be noted that discrimination which is forbidden by the constitution is unfair or prejudicial of a person or group of person based on certain characteristic. The element of what is unfair or prejudicial treatment has to be determined in the light of the facts of each case."

22. The petitioner herein has shown that like her fellow classmates, she got admitted to Kenya School of Law for **ATP**, paid the requisite fees thereof; attended classes, sat for the oral examination and undertook project work administered by the 2nd Respondent, qualified in all examined units, duly applied for Registration for the Bar examination upon payment of the requisite fees and was issued with examination card to that effect, but instead the 1st Respondent through its decision of 7th November 2018 precluded the petitioner from presenting herself for and sitting the Bar examination scheduled to start on 15th November 2018 for no legal or reasonable basis. The petitioner urges the 1st Respondent violated the petitioner's rights to education contrary to **Article 43(1) of the constitution** in so far as it sought to preclude the petitioner from presenting herself for and sitting the Bar Examination scheduled to start on 15th November 2018 despite having been duly trained or the same.

23. In the instant petition the petitioner has shown that other students were not precluded from presenting themselves for and sitting the Bar Examination scheduled to start on 15th November 2018. That out of all other students she was singled out for discriminatory treatment. It was not shown the groups she compared herself with hard characteristics that she did not have. The allegation of discrimination is therefore substantiated by facts. It is also noted that the petitioner herein complied with all conditions set by the Respondents for her to qualify to present herself for and sitting the Bar examination.

24. The petitioner has demonstrated that the 1st and 2nd Respondents violated her rights to fair administrative action and fair hearing contrary to **Articles 47 and 50(1) of the Constitution of Kenya 2010**. It is not disputed that the petitioner was denied a chance to be heard before the Respondents came up with the adverse decision on 7th November 2018, precluding her from presenting herself for and sitting the Bar Examination, was made. This was contrary to **Section 4(3) of the Fair Administrative Action Act 2015** thus:-

"(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—

(a) Prior and adequate notice of the nature and reasons for the proposed administrative action;

b) An opportunity to be heard and to make representations in that regard;

(c) Notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) A statement of reasons pursuant to section 6;

(e) Notice of the right to legal representation, where applicable;

(f) Notice of the right to cross-examine or where applicable; or

(g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action."

25. The petitioner has been able to demonstrate in her affidavit and through the annexed exhibits that the 1st Respondent acted unfairly and unreasonably in arriving at its adverse decision, notwithstanding that the 2nd Respondent, had with approval of the 1st Respondent, admitted the petitioner for **ATP**, administered the necessary legal training to the petitioner, having qualified in her oral examination and project work and petitioner having been issued with an examination card upon payment of all the requisite fees but in the end the 1st Respondent denied the petitioner to sit for the Bar Examination purportedly for lack of recognition of her Degree for purpose of **ATP**. I find the Respondents acts to be unjust and contrary to **Article 48 of the Constitution of Kenya 2010** in regard to access to justice.

26. In the case of **Republic vs Kenya School of Law & 2 others Ex-parte Juliet Wanjiru Njoroge & 5 others (2014) eKLR** Hon. Justice Odunga questioning the decision of 1st Respondent thereon invoking the ex-parte applicants admission in Kenya School of law, stated thus:-

"...In this case, the applicants had already been admitted whether rightly or wrongly. In my view, the rules of natural justice mandated that the applicants be notified of the intention to revoke their admission to the School and the reasons thereof disclosed before the decision was taken..."

27. In the instant petition there is no dispute that the petitioner had been admitted to Kenya School of Law but her admission was unceremoniously revoked without being notified of any intention to do so, meaning her revocation was carried out without any reasons having been given to her and being given an opportunity to be heard. I find by her admission to the school whether that was erroneous or not and upon accepting her paying the requisite fees and having been issued with an examination card, the petitioner had acquired some rights and was therefore entitled to be treated fairly before a decision adverse to her interest could be made. It would not be justified for the Respondents to have made such decision whether upon hearing her they would have come to the same decision or not. Justice must not only be done but must be seen to be done. Here justice was not done in my view and petitioner's constitutional rights were accordingly violated.

28. The petitioner further contend that the 1st and 2nd Respondents violated **Article 10(1) of the Constitution of Kenya 2010** which required of them to adhere to the national values and principles of governance identified under Article 10(2) of the constitution, which values and principles include the rule of law, human dignity, equity, social justice, equality, human rights and non-discrimination, good governance, integrity, transparency and accountability and applying **section 8(1) (e) of the Legal Education Act no. 27 of 2012** and second schedule of the Legal Education Act, that provides for the function of the 1st Respondent of recognizing and approving qualifications obtained outside Kenya for purposes of admission to the Roll. From the averments of the petitioner's supporting affidavit and annexures thereto, which the Respondents have not controverted, I find that the petitioner has demonstrated that the Respondents violated the above Articles in the manner

contended by petitioner herein above.

29. From the petitioners averments in the supporting affidavit and attached annexures thereto, and considering that no challenge has been put forward on the contents of the supporting affidavit, I find that the petitioner has shown that the 1st and 2nd Respondents violated **Article 19 of the Constitution of Kenya 2010** requiring them to recognize and protect human rights and freedoms, to preserve the dignity of the petitioner and to promote social justice and realization of potential of all human beings. The Respondents according to the aforesaid provisions and contrary to their actions, they could only limit the petitioners rights and fundamental freedoms in the Bill of Rights as contemplated in the constitution and not otherwise.

30. It is petitioner's contention that when she was admitted at the 2nd Respondents school for the **ATP**, offered the project work and the oral examination by the school constituting 40% of the total mark during the course of her studies and on complying with all other incidental requirements thereto for the purpose of enabling her sit for her final Bar Examination slated for 15/11/2018 consisting of 60% of the final mark thereof, she avers that she had legitimate expectation that her application for registration to sit for the said examination would not be unilaterally rejected premised on the facts of her case. In **Nabulime Miriam & others vs Council of Legal Education & 5 others (2016) eKLR** Hon. Justice Odunga held as follows:-

"However, once a student is admitted to the school the student acquires all the rights which appertains to his or her status and those rights can only be taken away through the due process of the law. In other words the rights of a duly admitted student cannot be abrogated, restricted or altogether taken away arbitrarily or whimsically. Such rights can no longer be enjoyed at the discretion of the Council hence the Council is no longer empowered to unilaterally make a decision whose effect would be to stultify the enjoyment of the same...."

....Moreover to subject a student as happened in this case to return to the same institution that had given her a clean bill of health earlier on is prima facie irrational unless circumstances have changed and the said changes have been brought home to the particular student concerned and the student has been heard thereon...

...Having enjoyed the status of being students at the School it is my view that they had enjoyed some benefits or advantages could only be withdrawn or restricted on some rational grounds which they had been given an opportunity to comment on."

31. I have considered the above-mentioned authority and I am in agreement with the same that once a student is admitted to the school as a student he/she acquires new status and rights which cannot be taken away arbitrary but only through the due process of law. Such rights is not enjoyed at the discretion of the council and as such the council cannot wake up one morning to terminate the student's education or unilaterally make a decision which is adverse of a student even without student having been informed of the intention and given opportunity to be heard. I have perused the relevant legislation relied upon by the Respondents; thus the **Legal Education Act 2012** and regulations thereto, for the council to conduct a *post hoc* review of whether a candidate met the minimum requires for admission to the 2nd Respondent school as stipulated in the second schedule of the Kenya School of Law Act or second schedule of the Legal Education Act, as pre-condition to sitting Bar examination but found that there is no requirement in any of the relevant legislation. That whenever the 1st Respondent purports to exercise such powers it acts ultra-vires and its action is null and void and contrary to the law.

32. I am satisfied that the petitioner has demonstrated that the decision of 7th November 2018 precluding her from presenting herself for and sitting the Bar Examination scheduled on 15th November 2018 by the 1st Respondent was unconstitutional, amounted to breach of the rules of natural justice, was ultra-vires, irregular, null and *void ab initio* and ought to be removed for the purpose of being quashed.

33. I accordingly allow the petition dated 13th November 2018 in its entirety and order 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 7th November, 2018 precluding the Petitioner from presenting herself for and sitting bar examinations scheduled to start on 15th November 2018 or as soon as the same is scheduled to take place.

b) An order of judicial review by way of mandamus be and is hereby issued compelling the 1st Respondent to allow the Petitioner to sit for the Bar Examinations scheduled to start on a date or to start as soon as the same is scheduled to take place from the date of this judgment and at the earliest.

c) A conservatory order be and is hereby issued staying the entire decision made by the 2nd Respondent on 7th November, 2018 precluding the Petitioner from presenting herself for and sitting the Bar Examinations scheduled to start on a date to be scheduled or any time at the earliest this year or as soon as the same is scheduled to take place.

d) Costs of the petition be borne by the Respondents.

Dated, signed and delivered at Nairobi this 27th day of February, 2020.

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J .A. MAKAU

JUDGE