



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.283 OF 2019

AND

**IN THE MATTER OF THE ARTICLE 1(1),2, 3(1), 10,19,20,21,22,23(1) & (3), 27, 29(d), 43(1) (f),
47, 50(1), 159, 162, 165(3) (b), 258 AND 259(1) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTIONS OF FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 27(1) & (2), 29(d),
43(1) (f), 47(1) OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF LEGAL EDUCATION ACT, 2012

AND

IN THE MATTER OF KENYA SCHOOL OF LAW ACT, 2012

AND

IN THE MATTER OF COUNCIL OF LEGAL EDUCATION (KENYA SCHOOL OF LAW REGULATIONS, 2009)

AND

IN THE MATTER OF LEGAL EDUCATION (ACCREDITATION AND QUALITY ASSURANCE) REGULATIONS, 2016

BETWEEN

LEONARD KIPKURUI SANG.....PETITIONER

AND

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

THE BOARD OF MANAGEMENT, KENYA SCHOOL OF LAW....2ND RESPONDENT

JUDGMENT

1. The petitioner through a petition dated 16th July 2019 brought pursuant to Articles (1), 2, 3(1), 10,19,20,21,22,23(1), 27; 29(d), 43(1)(f), 47,50(1) 159,162,165(3) (b), 258 and 259(1) of the Constitution of Kenya 2010 seeks the following reliefs:-

- a) That this Application and the Petition herewith be certified as urgent and therefore deserving to be heard forthwith on a priority basis.
- b) That service of this application be dispensed with in the first instance.
- c) That the Honourable Court be pleased to make such other or further orders as it may deem just, fit and expedient in the circumstances.
- d) That costs for this application be provided for.

2. The petitioners petition is supported by supporting affidavit of Leonard Kipkurui Sang sworn on 16th July 2010 and annexures thereto **LKS-001 – lks-016**.

The petitioner further filed submissions in support of the petition dated 18th October 2019.

The 1st Respondent's Case

3. The 1st Respondent is opposed to the petition and in doing so filed a Replying affidavit by Dr. J.K. Gakeri sworn on 29th November 2019 to which he attached annexures **JKG-1 – JKG-6**.

4. The 1st Respondent further relies on 1st Respondents statement of grounds of grounds opposition and skeletal arguments dated 26th November 2019 and filed on 27th November 2019.

The 2nd Respondent's Case

5. The 2nd Respondent did not file any response to the petition.

Factual Background

6. Sometimes during the month of September 2018, the 2nd Respondent placed advertisements both on its website and in newspapers with national circulation calling for applications from qualified prospective students for admission into the Advocates Training Programme (**ATP**) for the Academic Year 2019/2020. The said Programme was scheduled to commence from 4th February 2019.

7. The advert laid down two eligibility criteria for the prospective applicants. The first criterion applied to persons who had been admitted into the Bachelor of Laws degree Programme after 8th December 2014, whereas the second one applied to those who were admitted into the **LL.B** programme before 8th December 2014. Having been admitted into the **LL.B** degree programme at Busoga University during the 2007/2008 Academic Year, the Petitioner therefore fell within the second eligibility criterion.

8. Sometime in November 2018, the 2nd Respondent in its website published a list of the first batch of successful applicants who qualified for admission into the **ATP** Class of 2019. The Petitioner's application was successful as his name appeared at **Number 497** within the list published by the 2nd Respondent. Specific admission letters were to be subsequently sent to the applicants' individual email addresses. On the 6th of December 2018, the Petitioner received an email from the 2nd Respondent with an attachment of his admission letter into the **ATP**.

9. Having paid the requisite fees, the Petitioner then awaited for the registration window to open so that he could register with the 2nd Respondent for the **ATP** Class of 2019. For purposes of the registration process, the applicant was required by the admission letter to present the following original documents: the Admission Letter; Kenya Certificate of Secondary Education (**KCSE**) Certificate; Final Academic Transcript; Bachelor of Laws Degree Certificate; National Identity Card; and proof of fees payment.

10. On the 14th of January 2019, the Petitioner proceeded to the 2nd Respondent Institution to begin the registration process. He was issued with a registration form to fill and he was taken through an elaborate registration process. At the first step, the Petitioner was required to provide evidence of payment of fees. He discharged this obligation by presenting the bank deposit slip and this was acknowledged by issuance of an **official Receipt Number 0262**. The final stage of the registration process involved the verification of the Petitioner's certificates. The inspection officer however declined to process the Petitioner on the basis that he did not have a clearance letter from the 1st Respondent given that he earned his **LL.B.** degree from a foreign university.

11. The Petitioner pointed out to the officer that the clearance letter from the 1st Respondent was not among the requirements for registration as had been stated in the admission letter. The inspection officer however remained adamant that the Petitioner could not proceed and complete the registration exercise without the said letter and he thus declined to process the Petitioner's registration process any further without the clearance letter from the 1st Respondent.

12. On the 4th February 2019, the 1st Respondent responded to the Petitioner's letter and informed him that his application was being held in abeyance pending his submission of certain additional documents. The additional necessary documents required by the 1st Respondent included: a certified copy of his **KCSE** certificate; the **LL.B** curriculum of Busoga University covering the period during when the Petitioner had enrolled for his studies at the University; evidence of payment for the recognition and approval for the foreign qualification; certification of the Petitioner's **KCSE** certificate by the Kenya National Examinations Council; a duly completed form for recognition and approval of foreign qualifications as prescribed by the 1st Respondent; and application fee of Kenya Shillings Ten Thousand.

13. Having fully complied with the requirements, the Petitioner wrote back to the 1st Respondent on the **7th February 2019**, and furnished the 1st Respondent with all the requested documentation and therefore sought to be cleared for registration by the 2nd Respondent institution. Further, the Petitioner brought to the attention of the 1st Respondent the fact that time for registration at the 2nd Respondent Institution had lapsed but that he had sought and obtained an extension which was due to lapse on **14th February 2019**. The Petitioner therefore beseeched the 1st Respondent to expedite his application for the clearance to enable him be able to comply with the registration timelines as set out by the 2nd Respondent Institution.

14. Despite the Petitioner making numerous visits to the 1st Respondent offices, he did not get a formal response from the 1st Respondent until the **4th of March 2019** when the 1st Respondent wrote to him informing him that his application for clearance had been declined.

15. The 1st Respondent's refusal to clear the Petitioner was based on two major reasons. The first reason was that the Petitioner had, in the first place, not met the threshold for entry into the **LL.B** Degree Programme. This adverse finding was made by the 1st Respondent without giving the Petitioner an opportunity to justify how he had enrolled for the **LL.B** Programme in the first place. The 1st Respondent also made this finding while being fully aware that the 2nd Respondent, being the institution with the exclusive mandate to determine a person's admissibility or otherwise into the **ATP** Programme, had already admitted the Petitioner into the Programme after it had satisfied itself that the Petitioner had met the minimum admission requirements for the Programme.

Analysis and Determination

16. I have carefully considered the petition; the affidavit in support and annexure thereto; the Replying affidavit and annexures thereto as well as grounds of opposition; the parties rival submissions and issues arising for determination are as follows:-

a) Whether the petitioner had met the threshold to pursue LL.B programme and subsequently ATP programme?

b) Whether or not the 1st Respondent's decision of refusal to grant clearance to the petitioner constituted an unlawful discrimination against the petitioner?

c) Whether or not the Respondents infringed on the petitioners legitimate expeditions?

A) Whether the petitioner had met the threshold to pursue LL.B programme and subsequently ATP programme?

17. The 1st Respondent herein is established under **section 4 of the Legal Education Act No. 27 of 2012**, its function being enumerated under **section 8 of the Act** being as follows:-

"(1) The functions of the Council shall be to—

(a) Regulate legal education and training in Kenya offered by legal education providers;

(b) Licence legal education providers;

(c) Supervise legal education providers; and

(d) Advise the Government on matters relating to legal education and training;

(e) Recognize and approve qualifications obtained outside Kenya for purposes of admission to the Roll;

(f) Administer such professional examinations as may be prescribed under section 13 of the Advocates Act.

18. It is 1st Respondent contention that in arriving at its decision affecting the petitioner herein; it was implementing the substance of section 16 as read with the second schedule to Kenya School of Law Act No. 26 of 2012 and Regulation 7 of the Legal Education (*Accreditation and Quality Assurance*) Regulation 2016 as it is bound to do by tenor and substance of **section 8(1) (c) and (e) of the Legal Education Act No. 27 of 2012**.

19. The admissibility of a prospective student to a university to pursue any programme offered by a particular university may lie with the particular university based on its admission rules and regulation but as regards students taking law the 1st Respondent as provided for in its functions as a supervisor of all legal education provides in Kenya in accordance with section 8(1) (c) of the Legal Education Act No. 27 of 2012 it cannot be overlooked as it has a role of ensuring that all legal education provides provide including the university and 2nd Respondent adheres with all applicable laws when it comes to admission of candidates in their institutions of learning or training. In view of this the 1st

Respondent can veto the decision of the 2nd Respondent if it does not adhere to the applicable laws.

20. The petitioner herein was admitted to Busoga University in 2007 to pursue a Bachelor of laws degree. That prior to his admission into the **LL.B** programme, the petitioner had earned a Diploma in law qualification from the Kenya school of Professional studies (**KSPS**). He successfully completed his Bachelor of laws degree and awarded the degree on 30th September 2011, but owing to financial constraints he did not apply for admission into the **ATP** Training Programme immediately.

21. The Admission requirements to the 2nd Respondent's institution are provided for under section 16 as read together with the second schedule to the **Kenya School of Law Act, 2012** which stipulates as follows:-

"1) A person shall be admitted to the School if—

(a) having passed the relevant examination of any recognized university in Kenya, or of any university, university college or any other institution prescribed by the Council, holds or becomes eligible for the conferment of the Bachelor of Laws (LLB) degree of that university, university college or institution; or

(b) Having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) in the grant of that university, university college or other institution— (i) attained a minimum entry requirement for admission to a university in Kenya; and (ii) obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent; and (iii) has sat and passed the pre-Bar examination set by the school."

22. The 1st Respondent contend that the petitioner made an application to join the second Respondent institution in 2019 and must therefore be subjected to prevailing laws at the moment which is the law exempted herein above. I however, do not find that to be the position as the law to which the applicant should be subjected to is the law applicable at the time he joined the University. In this case the law application to petitioner is the law that was in force in 2007; the Council of Legal Education (*Admission*) Regulations 2007; under **Regulation 8 part III Admission requirements**.

"(1) A person shall be admitted to the School if—

(a) Having passed the relevant examinations of any recognized university in Kenya he holds, or has become eligible for the conferment of a degree in law of that university; or

(b) Having passed the relevant examinations of a university, university college or other institutions prescribed by the Council, he holds or has become eligible for the conferment of a degree in law in the grant of that university, university college or other institution, and had prior to enrolling at that university, university college or other institution—

(i) the minimum entry requirements for admission to a university in Kenya; and

(ii) Obtained a minimum of grade B plain in English Language and a mean grade of C plus in the Kenya Certificate of Secondary Examination or its equivalent;

(c) He possesses any other qualifications which are acceptable to and recognized by the Council.

(2) Notwithstanding subsection (1), the Council may, at its discretion, require a person to pass an English language test or any other test approved by the Council as a pre-condition to admission."

23. In the instant petition the petitioner urges that the 2nd Respondent carried out an advertisement in the Daily Newspaper as well as its website inviting qualified persons to apply for admission into the 2nd Respondent's Advocates Training Programme (**ATP**) course for 2019/2020 Academic year as per petitioners **LKS-001**.

24. The 2nd Respondent considered the petitioners application and made a decision admitting the petitioner to **ATP** training. The 1st Respondent however usurped the 2nd Respondent decision by reversing the admission made by the 2nd Respondent when the 2nd Respondent had issued the petitioner with Admission letter.

25. The minimum requirements and categories for purposes of admission to the **ATP** course offered by the 2nd Respondent are set out in the **Kenya School of Law Act, 2012 Laws of Kenya at Regulation 5 of the Second Schedule** which provides that:

"A person shall not be eligible for admission for the Post Graduate Diploma (*Advocates Training Programme*) unless that person has:-

a)

b)

c) A Bachelor of Laws Degree LLB from a recognized university and attained a minimum grade of C+ (C Plus) in English and a minimum aggregate grade of C (Plain) in the Kenya Certificate of Secondary Education, holds a higher qualification e.g. "A" levels, "IB", relevant "Diploma, other "Undergraduate degree" or has attained a higher degree in law after the undergraduate studies in the Bachelor of laws Programme; or

d) ...

26. It is clear from the petitioners LSK-001 the above requirements were the same requirements reproduced by 2nd Respondent in its advert calling for eligible applicants to apply for the ATP course for the 2019/2020 Academic Year. The Petitioner herein after confirming that he met all the requirements stipulated in category "C" hereinabove stated, submitted his application. The 2nd Respondent upon appraising the Petitioner's application, were satisfied with the Petitioner's qualifications and, therefore, admitted him.

27. From the above there is no doubt the 2nd Respondent duly executed its lawful mandate to admit the Petitioner into its ATP training. Given that there was no illegality committed by the 2nd Respondent in its discharge of the said mandate, the Petitioner's admission into the ATP therefore remains lawful and unimpeachable.

28. The 1st Respondent even in its letter to the petitioner dated 12th April 2019, i.e. Annexure LKS 013, the 1st Respondent recognises the legal position that the 2nd Respondent has the exclusive mandate over the admission process into the ATP training by stating thus;

"As you are aware, Council has pronounced itself on your matter unambiguously. Kindly note that the Kenya School of Law has the exclusive mandate to determine your admissibility or otherwise to the Advocates Training Programme (ATP) and you are at liberty to consult the School"

29. It is surprising to note that though the 1st Respondent duly acknowledged in its letter to the Petitioner dated 12th April 2019, that the 2nd Respondent has the exclusive mandate to determine an applicant's admissibility, or otherwise, into the ATP, it is intriguing that at paragraph 2 of its earlier letter to the Petitioner dated 4th March 2019 to the Petitioner, i.e. Annexure LKS 010, the 1st Respondent could purport to question the Petitioner's admissibility into the ATP. The 1st Respondent, in its misapprehension of the law, makes the following illegal assertion:-

"A review of the documentation availed reveals that you did not meet the threshold for entry into the LL.B Programme. The law requires at least a mean grade of C+ (plus) and at least B (plain) in English or Kiswahili. You attained a mean grade of C (plain) with B- (minus) in English and C+ (plus) in Kiswahili."

30. In the instant petition it has been demonstrated that he petitioner had been admitted to 2nd Respondent's institution whether rightly or wrongly. I find that by virtue of his admission he was a student of the Kenya School of Law provisionally or otherwise. By his admission to the school, I am of the view that he had acquired some rights and was therefore entitled to be treated fairly before a decision and adverse to his interest was made. The rules of natural justice mandated that the petitioner be notified of intention to revoke his admission to school and the reasons thereof be disclosed before the decision was taken.

31. In the case of Nabulime Miriam & others vs Council of Legal Education & 5 others [2016] eKLR, Hon. Justice Odunga stated:-

"However, once a student is admitted to the school the student acquires all the rights in which appertain 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 arbitrary 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."

I find from the above the doctrine of estoppel applies in that the council cannot go back and reverse its already made decision for if allowed it would be used to subject a student to untold hardship and violate the students Bill of Rights. This would amount to an act of taking away already acquired rights and would defeat the privilege and holder's legitimate expectation that will continue for the rest of one's life time.

32. From the above it is clear by the 1st Respondents action of purporting to overrule the 2nd Respondent's lawful decision to admit the petitioner to ATP, the 1st Respondent acted *ultra vires* since it lacks any lawful basis to, in any way, question the 2nd Respondent's decision to determine an applicant's admissibility, or otherwise, into the ATP training.

33. The question of an applicant's admissibility, or otherwise, into the ATP training is, by law, an exclusive mandate for the 2nd Respondent with the 1st Respondent having no role to play at all. By basing its decision to deny the Petitioner the necessary clearance on the erroneous basis that the Petitioner lacked the requisite admissibility qualification for the LL.B is unlawful and *ultra vires* since the 1st Respondent relied on powers that it does not have at all.

34. The petitioner had demonstrated how he had progressed to the LL.B programme by attaching his Diploma in law certificate obtained from Kenya School of Professional Studies in the year 2005. I find that the assertion by 1st Respondent that petitioner had not illustrated his progression to the LL.B was not only erroneous but without any basis. The petitioner furnished the 2nd Respondent with all his education progression demonstrating his qualification to join ATP.

35. In Monica Wamboi Ng'ang'a & Others vs. Council of Legal Education & 4 Others(2017) eKLR, the court stated thus:

“.....the Council and the School must appreciate that being statutory bodies, they must exercise their powers within the four corners of the statutory instrument which donates the said powers to them and they must resist the temptation that often bedevils executive authorities of expanding such powers through administrative craft or innovation”.

B) Whether or not the 1st Respondent’s decision of refusal to grant clearance to the petitioner constituted an unlawful discrimination against the petitioner?

36. *"Discrimination"* is defined in the **Black’s Law Dictionary, Tenth Edition** as follows:-

“The effect of a law or established practice that confers privileges on a certain class because of race, sex, nationality, religion or hardship”;

“Differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured”.

37. **Article 27(1) of the Constitution of Kenya 2010** entitles everyone to equal protection and benefit of the law, while Article 27(5) emphatically prescribes direct and indirect discrimination on any grounds as it provides:

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

38. It is clear from a letter (**Ref. No. CLE/RA/08 Vol X (36)**) to the petitioner dated 4/3/2019 (**annexture LKS-10**) the 1st Respondent gave two reasons as to why it declined to issue the petitioner with the clearance letter in order for the petitioner to be cleared to enroll into the 2nd Respondent’s **ATP** training; first it is claimed the petitioner had registered and undertaken the Bachelor of Law (**LL.B**) degree course without having met the minimum entry requirements for the **LL.B** degree programme. Secondly it is asserted by the 1st Respondent that when the petitioner studied at Busoga University, the said University lacked accreditation and urges that the university only received full accreditation on 22nd January 2015. It is therefore urged by the 1st Respondent, given that the petitioner studied at the university between 2007 and 2011, when university lacked the said accreditation, the petitioner’s application for clearance had to fail as the university lacked the requisite mandate to offer the Bachelor of Laws (**LL.B**) degree course in the first place.

39. In the instant suit, no full evidence has been adduced to demonstrate how Busoga University was able to offer Bachelor of Laws (**LL.B**) degree course between 2007 and 2011 before being granted full accreditation on the date alleged by the 1st Respondent. It remains a mere speculation or lack of accreditation. I find for the purpose of this petition the issue of when the university was fully accredited is not really that material. The petitioner in his petition has identified upto six (6) former colleagues with whom he not only studied at Busoga University during the said period, but also graduated with at the University’s 10th Graduation ceremony on 30th September 2011. The six colleagues are listed at page 25 of annexture **LLS-014 A** and include **Rakewa Francis Otieno; Okanda Leonard Otieno, Okolla Hellen Ngeessa; Musembi Purity Mbatha; Mwalimu Charles Mathura and Kasyoka Stephen Syano.**

40. Whereas the 1st Respondent as demonstrated by the petitioner herein; relied on Busoga University’s alleged lack of accreditation as the basis for rejection of the petitioner’s application for clearance to pursue the **ATP** training; it is as demonstrated by the petitioner, baffling to note that the petitioners’ college mates, from the same university who graduated with him at the same day, who he has named, have all been previously cleared and admitted into the 2nd Respondent’s **ATP** training. This has not been denied nor challenged at all by the 2nd Respondent who has the records and from which the 2nd Respondent would have checked and rebutted the same. The failure to controvert the same indeed confirms what the petitioner has averred did occur. It is further contended by the petitioner that as a result of the training, each of the six former colleagues of the petitioner have been since been admitted into the bar as Advocates of the High Court of Kenya through the following 2011 numbers:-

"39. Rakewa Francis Otieno-P.105/9439/12;

40. Okanda Leonard Otieno-P.105/9470/12;

41. Okolla Hellen Ngeessa-P105.9422/12;

42. Musembi Purity Mbatha-P.105/10033/13;

43. Mwalimu Charles Mathuva-P.105/10985/14;

44. Kasyoka Stephen Syano-P.105/10585/14."

41. It should be noted the petitioner herein gave full names of his colleagues at Busoga University and their particulars now as Advocates of the High Court of Kenya and their 2011 numbers; which the Respondents would have conducted out search and responded but have decided not to challenge the petitioner’s affidavit. I find in absence of any affidavit challenging the petitioner’s affidavit as regards the six students of his college mates and having graduated on the same day, the same have been admitted at the 2nd Respondent institution for **ATP** and the same have been admitted into the bar.

42. I find that it cannot factually therefore be possible that the application for clearance to pursue the **ATP** training at the 2nd Respondent

institution could not be denied on the basis of Busoga University alleged lack of accreditation during the period when the petitioner pursued his Bachelor of Laws (**LL.B**) degree course, at the said university, yet his former colleagues with whom he not only studied at the same time; but also graduated with on the same date could not have been denied the same clearance on the same basis. I find that if the 1st Respondent intended to rely on the grounds that Busoga University lacked the said accreditation hence was without capacity to offer the Bachelor of Laws (**LL.B**) degree course, the 1st Respondent should have applied the law equally to every person who graduated from the said university with a Bachelor of Laws (**LL.B**) degree during the period when the university is alleged not to have the requisite accreditation.

43. The petitioner contend further that the 1st Respondent had even prior to granting clearance to petitioner's cohorts with whom he graduated together from Busoga University, previously granted clearance to other students who enrolled and graduated from the same university much earlier than the petitioner from the same university, who were also cleared by the 1st Respondent without the issue of the university's alleged lack of accreditation ever arising. The petitioner alluded to the fact that some of the students in this category who have since long been admitted to the **Bar as Advocates of the High Court of Kenya** include:-

a) **Rakewa Francis Otieno – P.105/9439/12;**

b) **Okanda Leonard Otieno – P.105/9470/12;**

c) **Okolla Hellen Ngessa – P.105/9422/12;**

d) **Musembi Purity Mbata – P.105/10033/13;**

44. From the aforesaid, it is my view that the 1st Respondent having granted clearance to the petitioner's former six (6) colleagues as well as the four others who all graduated from Busoga University either at the same time with the petitioner or earlier than the petitioner, while denying the same treatment to the petitioner, the 1st Respondent's action is tantamount to deferential treatment being afforded to one group of people against another when there is practically no reasonable distinction which can be demonstrated between those who are favoured vis-a-vis those who are not favoured. I find as in this case such differential treatment, no doubt, constitutes an unfair discrimination by the 1st Respondent against the petitioner. I further find by having subjected the petitioner to an unfair discrimination, the 1st Respondent's action constituted clear affront to the express requirements of Article 27(1) of the Constitution of Kenya 2010.

45. It is my further view that the differential treatment that the 1st Respondent made against the petitioner served to disentitle him to equal protection and benefit of the law in complete violation of the express obligations of Article 27(1) of the Constitution of Kenya 2010.

46. In the case of **John Harun Mwau vs. Independent Electoral and Boundaries Commission & Another [2013] eKLR**, the Court, while interpreting Article 27(1) of the Constitution, stated that it must be clear that a person alleging a violation of Article 27 of the Constitution has to establish that because of the distinction made between the claimant and the others, the claimant has been denied equal protection or benefit of the law. In the instant Petition, the 1st Respondent created a distinction between the Petitioner and his former colleagues and, as a result, the Petitioner has been denied the equal protection and equal benefit of the law.

47. In **Council of Governors vs. Salaries & Remuneration Commission(2018) eKLR**, the court, while citing the South African case of **Mbona vs. Shepstone and Wylie (2015) ZACC11**, where the South African Constitutional Court laid down the test to be applied when determining whether the conduct complained of amounts to discrimination, stated thus:

“The first step is to establish whether the respondent's policy differentiates between people. The second step entails establishing whether that differentiation amounts to discrimination. The third step involves determining whether the discrimination is unfair. If the discrimination is based on any of the listed grounds in section 9 of the Constitution, it is presumed to be unfair...Where discrimination is alleged on an arbitrary ground, the burden is on the complainant to prove that the conduct complained of is not rational, that it amounts to discrimination and that the discrimination is unfair”

48. In applying the above test it is clear the 1st Respondent created a distinction between the petitioner and his former colleagues, resulting to the petitioner being denied equal protection and equal benefit of the law. I find that no reasonable, objective and acceptable justification for differential treatment has been given.

49. In **Monica Wambui Ng'ang'a & Others vs. Council of Legal Education & 4 Others (2017) eKLR**, the court, at paragraph 93 of its judgement, associated itself with the ruling in **Nabulime Miriam & Others vs. Council of Legal Education & 5 Others, Judicial Review Application No 377 of 2016** where the court castigated the 1st Respondent herein for actions similar to what it has meted out on the Petitioner herein thus:-

“...the Council's decision was clearly irrational, particularly in light of the treatment given to Kampala International University, The University of Nairobi, the Catholic University of Eastern and Central Africa among others which offer the Law of Agency and Hire Purchase under the Law of Sale of Goods just like Uganda Christian University but whose students were not denied the opportunity to apply to join the ATP for the academic year 2017/2018 offered at the Kenya School of Law.”

50. I find that, the petitioner having the requisite minimum qualification for university entrance, as demonstrated in this petition and the petitioner having demonstrated he was discriminated against by the 1st Respondent, I find the 1st Respondents refusal to issue the petitioner herein with clearance to allow him to enroll for the **ATP** training at the 2nd Respondent institution that constituted a negation of the constitutional principles and obligations embedded under Articles 10 and 27 of the Constitution of Kenya 2010 as well as the Rules of

Natural Justice since the 1st Respondent's action discriminated against the petitioner.

C) Whether or not the Respondents infringed on the petitioner's legitimate expectations?

51. In the case of **Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others (2015) eKLR**, the court cited with approval the definition of legitimate expectation as stated in **De Smith, Woolf & Jowell**, in "Judicial Review of Administrative Action", 6th Edition, **Sweet & Maxwell page 609**, which states thus:-

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law which requires predictability and certainty in government's dealing with the public"

52. The petitioner submission is that he had legitimate expectations, that upon completion of the Bachelor of Laws (**LL.B**) degree studies from Busoga University, he would have had the chance and opportunity to proceed for his **ATP** studies at the 2nd Respondent institution herein, the Kenya School of Law. The legitimate expectation arose from the fact that all his Kenyan colleague students who proceeded him and graduated ahead of him from Busoga University were granted clearance by the 1st Respondent herein and were subsequently admitted to the 2nd Respondent institution to pursue the **ATP** training. Among the student names given by the petitioner include his college mates who had graduated with him on the same day and others who had graduated before him whose details the petitioner has given and who were cleared by the 1st Respondent and admitted to **ATP** studies.

53. I find the 1st Respondent having granted clearance to all students who enrolled and graduated with Bachelor of Laws (**LL.B**) degrees from Busoga University earlier than the petitioner, the Respondents by their own conduct, no doubt, made the petitioner have legitimate expectations that he, would upon conclusion of his Bachelor of Laws degree from Busoga University, be granted clearance by the Respondent to enable him pursue his **ATP** studies from the 2nd Respondent institution like those who had graduated earlier than him from Busoga University. I am of the view that where there are valid grounds for legitimate expectations, such expectations have to be met unless the party with the obligation to meet the same procedurally withdraws the same.

54. In the case of **Kevin K. Mwiti & others vs Kenya School of Law & 2 others (2015) eKLR**, the court held that in order to validly withdraw an existing legitimate expectation, the Respondents ought to have adhered to certain guidelines. In this regard, the court cited with approval the guidelines set out in the case of **Republic vs Devon County Council ex parte P Baker (1955) 1 ALL ER**, where the court stated thus:-

"...expectations arise not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognizes that the interest cannot properly be withdrawn or denied without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision."

55. Further in the case of **Monica Wambui Ng'ang'a & Others vs. Council of Legal Education & 4 Others (2017) eKLR**, it was stated that where legitimate expectation is found to apply, if a public authority is to depart from it, then such an authority must demonstrate that there exists good reason for that departure. The court then cited with approval Lord Diplock holding in **CCSU vs. Minister for the Civil Service(1984)3 All ER,935** where it was stated in page 949 thus:-

"To qualify as a subject of Judicial Review, the decision must have consequences which affect some person other than the decision maker, although it may affect him too. It must affect such other person either;

a) by altering rights or obligations of that person which are enforceable by or against him in private law or

b) by depriving him of some benefit or advantage which either;

i. He has in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment; or,

ii. He has received assurance from the decision maker that it will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn".

56. In the instant petition, it is further my view that the 1st Respondent having granted clearance to students who had enrolled for Bachelor of Laws Studies and graduated ahead of the petitioner, the Respondent made the petitioner to have legitimate expectations that he would have been entitled to a similar treatment like those other students who had graduated with Bachelor of Laws (**LL.B**) degree from Busoga University earlier than him. I find the 1st Respondent by declining to give the petitioner the clearance, it amounted to withdrawal of the petitioners legitimate expectations. The 1st Respondent in doing so neither gave the petitioner an opportunity to comment nor did it communicate to the petitioner any rational grounds for the adverse decision. I find infact the 1st Respondent did not communicate to the petitioner at all to explain why it was withdrawing his legitimate expectations. The 1st Respondent's action was against **Article 50 of the Constitution of Kenya 2010** and the Rules of natural justice. The petitioner was clearly condemned unheard. I have no doubt that in light of the treatment accorded to the past students from Busoga University, those who were before the petitioner and those who were his classmates; the petitioner had legitimate expectation that he would be accorded similar treatment.

57. Upon considering the casual manner in which the 1st Respondent treated the petitioner's application for clearance, I find that the 1st Respondent not only violated the legitimate expectations of the petitioner but it also violated the express provisions of **Article 47(1) of the Constitution of Kenya**, giving the petitioner the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. **Section 4(3) of the Administrative Action Act 2015** requires that 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 an opportunity to be heard and to make representation in that regard; and notice of a right to a review or internal appeal against an administrative decision where applicable among other rights.

58. I have considered the parties affidavits and submissions and no doubt, the 1st Respondent knew or ought to have known that its decision would have adversely impacted upon the fundamental rights and freedoms of the petitioner, including the right to non-discrimination; right to education and the appurtenant social and economic rights but the 1st Respondent never bothered to give the petitioner an opportunity to be heard and make representations. It further failed to inform the petitioner of the right to review or internal appeal despite clear provisions of **section 29 of the Legal Education Act, 2012** providing for an internal appeal mechanism against decision made by the 1st Respondent but instead it dismissed summarily the petitioner's application even after he appealed and sought for a review.

59. Further **Regulation 7(5) of the Legal Education (Accreditation and Quality Assurance) Regulation 2016** provides thus:-

"The Council shall recommend to a person who has applied for the recognition and approval of his or her qualifications from a foreign legal provider that has not been recognized or approved by the Council to undertake a remedial programme at a legal education provider in Kenya."

60. From the above-mentioned provision, I am of the view that the law does not complete a situation where an applicant for clearance and approval by 1st Respondent is left without a remedy. I find that even in the instances where an applicant possess qualifications from a foreign institution that has not been approved or recognized by the 1st Respondent, at the very minimum, the 1st Respondent is obligated to recommend remedial programme at a local legal education provider. It is in public domain that the 1st Respondent has recommended to some other applicants with qualification from foreign universities to pursue remedial courses within local universities especially in Riara University. I believe **Regulation 7(5) of the Legal Education (Accreditation and Quality Assurance) Regulation 2015** is not accidental but is there for a good purpose, thus to give 1st Respondent powers to recommend a remedial programme in respect of students from foreign universities who do not meet the requirement for admission to ATP training at the 2nd Respondents institution. In the petitioner's case the 1st Respondent chose the option of shutting the door on him thus leaving him an option of the law or rather an illegitimate child of the law. This should not have been opted for in view of **Regulation 7(5) of the Legal Education (Accreditation and Quality Assurance) Regulation 2016** which obligates the 1st Respondent to make use of it.

61. From the above, I find the 1st Respondent's actions in respect of this petition to be unreasonable, and completely irrational. Nothing could be illustrative of this assertion than the fact that when the petitioner first applied for clearance, the 1st Respondent, while knowing the petitioner was a graduate of Busoga University, rather than rejecting his application at the spot; instead it directed him to provide further documentation and to make payments for the exercise; upon receipt of additional documents, the 1st Respondent turned around and declined to grant clearance. This seems like the 1st Respondent was after payment which it had asked the petitioner to pay and upon receipt of the money the 1st Respondent refused to grant clearance and gave an excuse that the clearance was not available as the petitioner had graduated from Busoga University.

62. On prayer for damages the Respondent did not submit on the same. The petitioner on the other end submits that he is entitled to general damages for violation of his constitution Rights by the Respondents; urging further that his economic pursuits have been put on hold by conduct of the Respondents. It is noted the petitioner had paid tuition fees to the 2nd Respondent which amount remain unutilized. It should on the issue of damages be noted the petitioner completed his Bachelor of Law (LL.B) degree in 2011 and did not immediately make any application to join the 2nd Respondent institution until 2019. From 2011 – 2019 the Respondents were not responsible for petitioner's failure to apply to join the 2nd Respondent institution and if he suffered any damages or loss this has not been shown that it is attributable to the Respondents' action. The petitioner paid tuition fees on 5/12/2019 which he has not utilized nor claimed for a refund. I have considered the petitioner affidavit evidence and I am satisfied that due to delay in admission he has suffered damages. He was delayed in pursuing his education and delayed in completing his studies and getting employment. This has also resulted in loss in his social status and economic benefits. I find an award of Kshs.100,000/- reasonable.

63. I find to the extent of my findings in this petition, I find the petitioner's petition should succeed. I proceed to make the following orders in favour of the petitioner:-

a) A declaration be and is HEREBY issued that the 1st Respondent's decision of denying the petitioner clearance for registration into the 2nd Respondent's ATP course was both unconstitutional and illegal as it offended Articles 10,27(1) (2), 29(d), 47 of the Constitution of Kenya 2010 and section 4(1) (2) (3) of the Fair Administrative Action Act, 2015;

b) An order of certiorari be and is HEREBY issued removing into this Honourable court for purpose of quashing, the decision made by the 1st Respondent contained in the letter addressed to the petitioner on the 4th March 2019 and 12th April 2019, owing to the fact of their unconstitutionality and illegality;

c) A mandatory order be and is HEREBY issued compelling the 1st Respondent to issue the petitioner with clearance letter to enable the petitioner to be registered into the 2nd Respondent's ATP Course.

d) A mandatory order be and is HEREBY issued directing the 2nd Respondent to unconditionally register the petitioner into

the ATP course, in event the 1st Respondent fails and/or ignores to issue the petitioner with the clearance certificate sought.

e) An order be and is **HEREBY** issued directing the council of Legal Education, the 1st Respondent, to refund to the petitioner Kshs.10, 000/- towards the recognition and Approval or clearance certificate paid by the petitioner on 5th February 2019.

f) General damages of Kshs.100, 000/- for losses and inconveniences suffered by the petitioner owing to the Respondents unconstitutional and illegal actions which have derailed the petitioner's educational, social and economic endeavors.

g) Costs of the petition awarded to the petitioner to be borne by the 1st Respondent.

h) Interest on (e) and (f) at court rates until payment in full.

Dated, signed and delivered at Nairobi this 20th day of February, 2020.

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J .A. MAKAU

JUDGE