



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 405 OF 2018

JOAN WAMBUI KIMANI.....PETITIONER

VERSUS

KENYA SCHOOL OF LAW.....1ST RESPONDENT

COUNCIL FOR LEGAL EDUCATION.....2ND RESPONDENT

THE HON. ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

1. Joan Wambui Kimani, the Petitioner, is a holder of a Law degree (LL B) from the Catholic University of East African. She filed this petition against the Kenya School of Law, Council of Legal Education and The Attorney General, the respondents,

2. The Petitioner's case is that on 7th December, 2017, she was admitted to Advocates Training Programme at the Kenya School of Law, upon submitting her original documents. She was thus registered as a student in January 2018 and undertook the training programme. She then registered for the Bar examination to be taken in November 2018. This was after she submitted all her documents except the original KCSE certificate which had been misplaced.

3. When the 2nd respondent's officers informed her that she needed the original KCSE certificate to register for the bar examination She applied for a certified copy from the Kenya National Examination Council (KNEC) and gave the 2nd respondent a receipt to confirm that the certificate would be sent through their postal address.

4. On the 19th October, 2018, the petitioner received an email from the 2nd respondent confirming that she had been registered for the bar examination. However, on 7th November, 2018, the petitioner received another email from the 2nd Respondent stating that they had not received a statement of her examination results from the KNEC although the same had in fact been sent to the 2nd respondent's postal address.

5. The petitioner avers that the 2nd Respondent informed her that they would contact her to go for her exam card which did not happen. On 13th November, 2018, the 2nd respondent informed the Petitioner that she would not be sitting for her bar examination due on 15th November 2018.

6. The Petitioner contends, therefore, that the 2nd Respondent's decision to bar her from sitting for the examination was irrational, unreasonable, capricious, discriminatory and unfair and violated her constitutional rights including the right to be heard among other rights and fundamental freedoms She therefore relies on various Article namely; 2(1), 3(1), 10, 19, 20, 22, 23, 24, 25, 27, 28, 29, 47, 48, 258 and 259 of the Constitutions as the legal foundation of this petition. The petitioner sought the following reliefs;

a) A declaration that the acts of the Respondents contravened the Petitioner's fundamental rights and freedom under Articles 2(1), 3(1), 10(1) & (2), 19(2), 20(2), 22, 23, 24, 27(1), 28 and 47 of the Constitution of Kenya 2010 and therefore such violation and/or infringement was unconstitutional, unlawful, illegal, null and void in consequence the Honourable Court intervenes to quash, set aside and/or put a stop to the same forthwith.

b) A conservatory order to issue pending the hearing and determination of the petition restraining the Respondents from de-registering the Petitioner from sitting her ATP exams.

c) An order directing the respondents pending the hearing and determination of this petition to issue an exam card to the petitioner to allow her to sit for her ATP exams that is scheduled for 15th November 2018

d) An order requiring the 1st and 2nd respondents to compensate the petitioner for the violation for her constitutional rights to be treated with inherent dignity, freedom from discrimination, violations of the right to education and unfair treatment in such sum and or amount that shall be assessed by the court.

e) Exemplary and aggravated damages for the malicious, oppressive and undignified conduct of the 1st and 2nd respondents

f) costs of the petition

7. The 1st Respondent filed grounds of opposition dated 26th November, 2018 and filed in court on the 27th November, 2018 opposing the petition. The 1st respondent contends that under the provisions of the Kenya School of Law Act, 2012 it is her mandate to admit those to undertake ATP. It is the 1st respondent's case that the 2nd Respondent's mandate pursuant to Section 8 of the Legal Education Act, 2012 is not to assess eligibility but that of conducting bar examinations. According to the 1st respondent, it is wrongly enjoined as a party to the petition since it has not done anything offensive to the petitioner.

8. The 2nd Respondent also filed grounds of opposition dated 27th November, 2018 and filed in court on 29th November, 2018. It contends that they strictly followed the law in making the impugned decision as a regulator and in line with her objectives under the Legal Education Act, 2012 set out under Section 3 of promoting the maintenance of the highest possible standards in legal education. It the 2nd respondent's further contention that the Petition does not disclosed violation of any fundamental rights and freedoms of the petitioner.

Petitioner's submissions

9. Mr. Arusei, counsel for the Petitioner, submitted that the Petitioner had met all the requirements but was unlawfully prevented from sitting for the bar examination only two days to the date of the examination. He submitted that the 2nd respondent's conduct violated the rules of natural justice since the Petitioner was not given a reason why she would not sit for those examinations having successfully completed ATP at the 1st Respondent. He argued that although the Petitioner received an email on 19th October 2018 from the 2nd Respondent notifying her that she had been registered to sit for the bar examination and that she would be advised to collect her examination card when ready she instead received verbal communication that she would not sit for the bar examination.

10. Counsel submitted that were not questioning the mandate of the 2nd Respondent but its conduct. In counsel's view, the Petitioner had a legitimate expectation that having registered to sit for her bar examination she would do so. He therefore urged to court to allow the petition though prayers (b) and (c) had been overtaken by events.

1st Respondent's submissions

11. Mr. Simiyu learned counsel for the 1st respondent, submitted that they were not opposing the Petition. He stated that the 1st respondent discharged her statutory mandate by admitting, training and administering 40% of the bar examination to the Petitioner as an agent of the 2nd respondent. Counsel however submitted that it was not the 2nd respondent's mandate to second guess the admission process because by doing so, would be encroaching on the 1st respondent's mandate.

12. Counsel further submitted that the 2nd respondent's responsibility under Section 8 of the Legal Education Act is to administer bar examination and not to verify admission of students to ATP at the 1st respondent. He therefore conceded to the petition save for the issue of costs.

2nd Respondent's submissions

13. Mr. Oduor, learned counsel for the 2nd respondent submitted that it is not in dispute that the Petitioner was a student at the 1st respondent and that she applied to sit for the bar examination. According to counsel, by an email dated 19th October, 2018, the Petitioner was informed that she had been registered to sit for the bar examinations. However, on 7th November, 2018, the Petitioner was informed that the 2nd Respondent had not received her KCSE examination results from KNEC and that should the 2nd respondent not receive the statement of the results from KNEC, she would be deregistered.

14. According to Mr. Oduor, the document was to enable the 2nd respondent determine the Petitioner's eligibility to sit for the bar examinations. He contended that section 8 (1) (f) of the Legal Education Act, outlines the functions of the 2nd Respondent; that the 2nd respondent did not receive a statement of examination results from KNEC and that the document having not been supplied the Petitioner was ineligible to sit for the bar examination. He denied that the Petitioner's rights were violated and relied on the case of *Eric Maema Mwikali v Council of Legal Education* (2013) eKLR on the submission that the 2nd respondent is the regulator of bar examinations. Counsel contended that the action the 2nd respondent took was lawful and within its mandate.

Analysis and Determination

15. I have considered this petition; the responses, submissions and authorities relied on. The issue that arises for determination is whether the 2nd respondent violated the petitioner's rights in refusing her to sit for the Bar examination despite having being admitted and gone through

the ATP.

16. The facts of this petition are not in dispute. The petitioner was admitted to the 1st respondent for her ATP. She completed her training and enrolled for the Bar examination scheduled for November 2018. She was subsequently informed by the 2nd respondent that she would sit for the scheduled examination. The 2nd respondent, however, informed the petitioner that she needed to produce her original KCSE certificate. She on her part informed the 2nd respondent that she had requested for it from KNEC who would send it directly to them. Although the petitioner received an email from the 2nd respondent 19th October 2018 informing her that she had been registered for the Bar examination, she was later informed that her statement from KNEC had not been received. She was told that she would be contacted to go for her examination card. As it would later turn out, on 13th November 2018, she was told verbally that she would not sit for the examinations.

17. The petitioner holds LLB degree from Catholic University of Eastern Africa issued on 20th May 2017. She also holds a Diploma in Law from Inoorero University issued on 17th November 2012. She sat for her KCSE in the year 2007 and obtained a mean grade of C with a B in English language. After her university studies, she applied and was admitted to KSL where she finalized her ATP, enrolled for Bar Examination and was about to sit for the examination when she was denied the opportunity by the 2nd respondent to do so. The petitioner has faulted this action arguing that it is a violation of her rights and fundamental freedoms. The 1st respondent agrees with the petitioner while the 2nd respondent contends that it was right in the action it took.

18. It is important to note here that the 1st respondent does not oppose the petitioner. According to Mr. Simiyu, the 1st respondent applied its statute admitted to ATP and trained her, a programme that covers 40% of the Bar examination administered by the 2nd respondent. Counsel contended that it is not the 2nd respondent's mandate to second guess admission process to ATP. In their view, the 2nd respondent is encroaching on the statutory mandate of the 1st respondent.

19. The same view is shared by the 3rd respondent. Miss Robi, learned counsel for the 3rd respondent contends that the petitioner having being admitted and trained, she is eligible to sit for the Bar examination in absence of any other provision to the contrary. She maintains that the 2nd respondent cannot dig into the evidence of eligibility at this stage when the petitioner seeks to sit for the Bar examination.

20. There is no denial that the 1st respondent is the only institution mandate by law to admit students to the ATP. In this regard, the 1st respondent admitted the petitioner to ATP by letter dated 7th December 2017 and given her admission No. 2018439. The petitioner's name also appears in the list of those who did oral examination conducted by the 1st respondent and which was subject however to ratification by the 2nd respondent. The petitioner's name is also in the provisional coursework results a clear testimony that the petitioner was admitted to the ATP and indeed went through the coursework and was now due to sit for the Bar examination administered by the 2nd respondent as the final course to admission as an advocate.

21. According to the record, the petitioner was registered for the Bar examination and the 2nd respondent does not deny this fact. Its only contention is that she did not produce her original KCSE Certificate and that KNEC did not send a statement of the petitioner's results to the 2nd respondent.

22. The 2nd respondent does not admit students to ATP. That is the mandate of the 1st respondent and the 1st respondent discharged this mandate when it admitted and trained the petitioner. The 2nd respondent's mandate is to administer Bar examination to those trained by the 1st respondent. Students admitted to ATP and trained as required by the 1st respondent's statute, are eligible to register and sit Bar examination administered by the 2nd respondent

23. Although the 2nd respondent had registered the petitioner for the Bar examination it only informed the petitioner orally that she would not sit for the examination two days to the due date. As argued by the petitioner, the 1st and 3rd respondents, and correctly in my view, the 2nd respondent has no mandate when it comes to determining eligibility for admission to ATP at the 1st respondent. This is so because admission to ATP is determined on the basis of the 1st respondent's statute. Any attempt by the 2nd respondent to seek to determine eligibility to do ATP and sit for the Bar examination by students already admitted to the programme is to second guess the 1st respondent and is *ultra vires* the 2nd respondent's mandate and invalid.

24. Furthermore, the 2nd having registered the petitioner for the examination could not keep her out of that examination without lawful cause and a hearing. Article 47(1) of the Constitution guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. This is now the constitutional standard against which all administrative actions must be gauged.

25. In the case of *Judicial Service Commission v Mbalu Mutava Musyimi*[2015] eKLR the Court of Appeal stated thus;

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

26. In the case of *Dry Associates Limited v Capital Markets Authority & another* [2012] eKLR, the court also observed that **Article 47** is intended to subject administrative processes to constitutional discipline. The 2nd respondent did not formally communicate to the petitioner

its decision to lock her out of the examination. No formal reason was also given to the petitioner as required by the constitution. The 2nd respondent simply acted whimsically and capriciously with little regard to the constitution and the law rendering its decision unconstitutional and unlawful.

27. It is also worth of note that the petitioner, though entitled to a hearing, she was not subjected to any. The 2nd respondent made a decision without reference to the petitioner who, in any case, had made arrangements to have the document sent directly to the 2nd respondent. It was the 2nd respondent's duty to check in its postal address for the document. It could not push that responsibility to the petitioner. The 2nd respondent's action to deny the petitioner the opportunity to sit for the examination was, therefore, in violation of Article 50(1) of the Constitution.

28. As the court stated in ***Kenya Anti-corruption Commission v Lands Limited and Others [2008] eKLR***, the right to hearing is of fundamental importance in our system of justice and even when this is not expressed specifically in any law, the supreme position of the Constitution must be implied in every act, especially the right to due process. This right cannot be taken away without due process.

29. Taking into account the above position and considering the facts and circumstances of this petition, it is clear to me, and I am persuaded, that the 2nd respondent did not have mandate to exercise in so far as the petitioner's eligibility to sit the Bar examination was concerned. The 2nd respondent further violated the petitioner's right to fair administrative action and fair hearing.

30. The mandate to admit students to ATP is reposed on the 1st respondent while the 2nd respondent's mandate is to administer the Bar examination to those who have completed ATP. Any doubts regarding one's eligibility for admission to ATP can only be challenged in court but certainly not to be determined by the 2nd respondent in the manner it purported to do.

31. The petitioner had paid registration fee for the examination and prepared herself for it. She was even assured that she would sit for the examination only to be made to skip that examination cycle because of the 2nd respondent's misinterpretation and misapplication of the law. This resulted into violation of the petitioner's rights, causing her emotional anguish, humiliation and embarrassment.

32. For this violation, the petitioner is entitled to compensation. As to the award, I am of the view that **Kshs, 200, 000/=** is fair and reasonable compensation in the circumstances of this case.

33. The upshot, therefore, is that the petition dated 14th November 2018 is allowed as follows;

a) A declaration is hereby issued that the 1st Respondent's acts contravened the Petitioner's rights to fair administrative action and fair hearing guaranteed under Articles 47(1) and 50(1) of the Constitution and is, therefore, unconstitutional, unlawful, illegal, null and void.

b) A declaration is hereby issued that the 2nd respondent has no mandate to determine eligibility of admission to Advocate Training Programme at the 1st respondent and therefore cannot second guess the 1st respondent's mandate in admitting persons to that Programme.

c) An order is hereby issued directing the 2nd respondent to register and allow the petitioner to sit the Bar examination in the next cycle without any other conditions.

d) The petitioner is hereby awarded Kshs. 200,000 damages for violation of her rights and fundamental freedoms to be paid by the 2nd respondent

e) The petitioner shall have interest on (d) above from the date of this judgment.

f) Costs of the petition to the petitioner also to be borne by the 2ⁿ respondent.

Dated Signed and Delivered at Nairobi this 14th Day of March 2019

E C MWITA

JUDGE