REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 32 OF 2019

IN THE MATTER OF AN APPLICATION BY VICTOR MBEVE MUSINGA FOR ORDERS OF CERTIORARI, PROHIBITION & MANDAMUS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010; ARTICLES 10, 23 (3), 43 (1)(F) & 47

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE DECISION BY KENYA SCHOOL OF LAW COMMUNICATED IN THE LETTER DATED 6TH DECEMBER 2018 DENYING THE APPLICANT, VICTOR MBEVE MUSINGA ADMISSION INTO THE ADVOCATES TRAINING PROGRAMME (ATP) AT THE KENYA SCHOOL OF LAW.

BETWEEN

REPUBLIC.....APPLICANT

AND

KENYA SCHOOL OF LAW….....RESPONDENT

JUDGMENT

The Parties.

1. The applicant, Victor Mbeve Musinga is an adult of sound mind residing in Nairobi.

2. The Respondent, the Kenya School of Law (herein after referred to as the KSL) is a body corporate with perpetual succession and a common seal established under section 3 of the Kenya School of Law Act[1] (herein after referred to as the KSL Act). In its corporate name it is capable of suing and being sued, taking, purchasing or otherwise acquiring, holding or disposing of movable and immovable property, entering into contracts and doing or performing such other things or acts necessary for the proper performance of its functions under the Act. KSL is the successor of the Kenya School of Law established under the Council of Legal Education Act.[2]

3. Pursuant to section 4 of the KSL Act, the School is a public legal education provider responsible for the provision of professional legal training as an agent of the Government. Without the generality of the forgoing, it trains persons to be advocates under the Advocates Act;[3] it ensures continuing professional development for all cadres of the legal profession; it provides para-legal training and other specialized training in the legal sector; it develops curricular, training manuals, conduct examinations and confer academic awards; and undertakes projects, research and consultancies.

Factual Matrix.

4. The uncontested facts are that the applicant attended St. Christopher's Secondary School, Karen. In 2010, he attained International General Certificate of Secondary Education (IGCSE) from the said institution. He holds a Bachelors of Arts Degree in Peace and conflict Transformation from Daystar University obtained in June 2014. He holds a Bachelor of Laws Degree from the University of Nairobi obtained on 21st December 2018.

5. It is uncontested that vide a letter dated 22nd January 2019, the University of Nairobi, School of Law wrote confirming that the applicant studied at the University from September 2014, and, that, at the time of admission, he met the admission requirements for the said degree. It also confirmed that the applicant undertook studies leading to the award of Bachelor of Laws degree and graduated on 21stDecember 2014.

6. It is also common ground that the applicant applied for admission to ATP at the KSL and submitted all his academic credentials among them his IGSE Certificate, Bachelor's Degree in Peace and Conflict Transformation and Bachelor's in Law degree certificates including academic transcripts from the universities.

7. By a letter, dated 6th December 2018 the KSL's Director informed the applicant that his application for admission to the ATP was not successful because he did not attach his secondary school clearance from Kenya National Qualifications Authority (KNQA) for consideration. The KNQA wrote to him on 23rd January 2019 stating that in accordance with the Kenya National Qualifications Framework Act,[4] his qualifications was not equated within the Kenya National Qualifications Framework at Level 2, hence, he was required to take a remedial qualification of two years at advanced level secondary education for the qualification to be recognized.

8. The applicant's position is that he has fulfilled all the requirements for admission to the ATP and that based on his first degree from Daystar University, he enrolled for Master's Degree in International Relations at the United States International University.

Legal foundation of the application.

9. The applicant maintains that he attained the admission requirements stipulated in section 16 of the KSL Act as set out in the Second schedule to the Act, and, in particular, the criteria set out in paragraph 1 (a) of the said schedule.

10. He also states that the impugned decision violates his right to education guaranteed under Articles 43(1) (f) and it is a violation of his right to legitimate expectation and rights guaranteed under Article 47 of the Constitution. He also assaults the impugned decision on grounds that it is unlawful, unreasonable, procedurally unfair, and, that, it was materially influenced by an error of law.

11. He also states that KSL acted in excess of its jurisdiction or power conferred upon it by the enabling act, that it is patently unreasonable to expect a Masters Student who has two Bachelor's degrees to sit for an "A" level examination in order to qualify for admission at the KSL.

The Reliefs sought.

12. The *ex parte* applicant seeks the following orders:-

> *a. An order of **Certiorari** to quash the Respondent's decision contained in the letter dated 6th December 2018 declining to admit him into the Advocates Training Programe (ATP) at the Kenya School of Law.*
>
> *b. An order of prohibition prohibiting the Respondent from enforcing, implementing or in any other manner whatsoever from effecting its decision contained in the letter dated 6th December 2018.*
>
> *c. An order of **Mandamus** compelling the Respondent to admit the applicant into the Advocates Training Programme (ATP) at the Kenya School of Law in accordance with the law.*
>
> *d. The costs this application be provided for.*

Respondent's grounds of opposition

13. KSL filed grounds of opposition on 9th May 2018 stating that it acted within its statutory powers; that the applicant does not meet the requirements for admission to the ATP set out in the Second Schedule to the KSL Act, and, lastly, that the applicant's application is misconstrued, frivolous, vexatious and an abuse pf the court process.

Issues for determination

14. Upon analyzing the facts presented by the parties, I find that the following issues distill themselves for determination:-

> *a. What is the correct interpretation of Paragraph 1(a) and (b) of the Second Schedule to the KSL Act?*
>
> *b. Whether the doctrine of implied repeal applies in the circumstances of this case.*
>
> *c. Whether the provisions of Legal Education (Accreditation and Quality Assurance) Regulations, 2016 can override express*

statutory provisions.

d. Whether the impugned decision is tainted with illegality.

e. Whether the impugned decision violates the Applicant's Right to legitimate expectation and the Right to education guaranteed under Article 43 (1) (f) of the Constitution.

a. What is the correct interpretation of Paragraph 1 of the Second Schedule to the KSL act?

15. The applicant's counsel submitted that this case turns on the correct legal interpretation and construction of paragraph 1 of the Second Schedule to the KSL Act, which in his view creates two distinct categories. The first category, he argued, relates to LLB degree holders from "any recognized university in Kenya." He submitted that this category has an automatic right of admission by virtue of holding a Bachelor of Laws degree or having become eligible for conferment of a Bachelors of Laws (LLB) degree. He argued that those falling under this category do not require any other qualification to be eligible for admission to the ATP.

16. He submitted that the second category relates to holders of LLB degrees from any other university not recognized in Kenya, or other institutions prescribed by the Council of Legal Education. In his view, this category does not have an automatic right of admission, but must in addition, possess the qualifications set out under paragraph 1 (b) (i), (ii) & (iii) of the Second Schedule to the KSL Act.

17. Counsel submitted that the use of the word *"or"* in paragraph 1 (a) of the Second Schedule is disjunctive in the context in which it is used and not conjunctive as opposed to the use of the word *"and."* He urged that if Parliament intended all persons seeking admission to the ATP to possess the qualifications set out in paragraph 1(b) of the second schedule, nothing would have been easier than to use the word *"and"* after paragraph "1(a)."

18. To buttress his argument, he cited *Adrian Kamotho Njenga v Kenya School of Law*[5] where the court held that:-

41. This is so because paragraph 1(a) does not prescribe any university entry requirements for the simple reason that entry requirements for LLB programmes in local universities are known and no one can be admitted to undertake this degree without meeting the basic KCSE grades required for this course. Furthermore, paragraph 1(a) contains the disjunctive ward ***"or"*** *at the end of the paragraph just before the beginning of paragraph 1(b). That means qualifications under paragraph 1(a) are distinct from those under paragraph 1(b). That can only mean one thing- that the two sub-paragraphs apply to two different and distinct categories of applicants.*

42. This interpretation is supported by the ***Supreme Court's*** *interpretation of section 83 of the Election Act, 2012, a provision with the disjunctive word "or". The* ***Supreme Court*** *stated that "****the use of the word "or" clearly makes the two limbs disjunctive under our law. It is, therefore, important that, while interpreting Section 83 of our Elections Act, this distinction is borne in mind****."- (see* ***Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another,*** *petition No 1 of 2017)*

*43. This interpretation is further buttressed by the fact that prior to the 2014 amendment, the Second Schedule contained paragraph 2, which made pre Bar examination optional. The removal of paragraph 2 and, in place thereof, the introduction of clause (iii) in paragraph 1(b), with the conjunctive word "****and"****at the end of paragraph 1(b)(ii) and just before the beginning of clause 1(b) (iii), means pre Bar examination is now mandatory for category 1(b) applicants as opposed to those in paragraph 1(a). Any other interpretation of paragraph 1(a) that would make pre Bar examination compulsory for applicants falling under paragraph 1(a) would result into an absurdity because the word* ***"or"*** *cannot, by stretch any of imagination, be read to mean* ***"and"****.*

44. …However as stated above, a plain reading of paragraph 1(a) and 1(b) is clear that these are two distinct qualification requirements and the legislature must have intended them to be so.

48. …In the absence of any other provision, I therefore find and hold that applicants under paragraph 1(a) that is; those who obtained LLB degrees from universities in Kenya, having attained required grades to pursue LLB degree locally, do not have to sit and pass pre-Bar examination as a pre-condition to their joining ATP at the respondent school.

19. To further fortify his position, he placed reliance on the Supreme Court decision in *Raila Amolo Odinga v Independent Electoral and boundaries Commission and 42 Others*[6] in which Kenya's apex court interpreting the word *"or"* as used in a statutory provision stated that the the use of the word *"or"* clearly makes the two limbs *disjunctive* under our law. He also cited *Bernard Ndeda & 6 Others v Magistrates and Judges Vetting Board & 2 Others,*[7] *Wilson Kaberia Nkuja v Magistrates and Judges Vetting Board & another****[8]*** and *Edward Njoroge Mwangi v Francis Muriuki Muraguri & Anther*[9] for the same proposition that the word *"or"* is normally disjunctive and it is used to introduce another alternative.

20. Counsel drew the court's attention to the existence of conflicting decisions rendered by the High Court interpreting the same provisions. The decisions are- *Peter Githaiga Munyeki v Kenya School of Law*[10] which contradicts the interpretation rendered by the same court in *Adrian Kamotho Njenga v Kenya School of Law.*[11] In the *Peter Githaiga Munyeki* the court expressed itself as follows:-

25. According to the Schedule, there are two categories of persons who can be admitted to the ATP. First are those who attended local universities who fall under paragraph 1(a). The other is persons who attended universities outside Kenya who fall under paragraph 1(b) of the Schedule. Paragraph 1(a) of the Schedule does not specifically state the KCSE grades one should hav, but a reading of paragraph 1(b) shows that persons who obtained LLB degrees from outside Kenya should have KCSE grades that would have enabled them join LLB programmes in universities in Kenya, and goes ahead to state those grades as a mean grade of C+ (plus),in KCSE, with B(plain) in either English or Kiswahili languages.

26. In that regard, therefore, applying the principle a holistic reading of a statute persons falling under paragraph 1(a) of the Schedule to KSL Act, must have obtained a mean grade of C+(plus) with B(plain) in English or Kiswahili languages to have qualified to join LLB programme in local universities. That is why there is reference of this requirement in paragraph 1(b)(ii) of the Schedule. (See ***Adrian Kamotho Njenga v Kenya School of Law*** *(petition No 398 of 2017).*

40. Allowing people to join ATP at KSL on the basis that they had a degree prior to joining LLB degree programme would be to circumvent clear provisions of a statute and would result into discrimination and application of double standards. The upshot is that the petitioner was not qualified for admission to ATP hence, the respondent was right in declining to admit him.

21. He submitted that decision in *Peter Githaiga Munyeki* not only contradicts the position taken in *Adrian Kamoths's* case but also ignored the above-cited Supreme Court decision. He argued that holistic interpretation of a statute is not to be embraced to subvert, distort and ignore the intention of Parliament.

22. The Respondent's counsel did not address his mind on the correct interpretation of the above provisions and particularly the meaning of the word *"or"* in the provision in question. The crux of his submission as I understood it was that the impugned decision was taken pursuant to paragraph 1 (a) which is qualified under paragraph 1 (b), hence, where an applicant does not possess a Kenya Certificate of Secondary Education, he has to have an equivalent. He argued that the applicant's IGCSE certificate is not an equivalent to a Kenya Certificate of Secondary Education. He relied on *Peter Gaithaiga Munyeki v Kenya School of Law*[12] which held that persons failing under paragraphs 1 (a) of the Schedule to the KSL Act must have obtained a mean grade **"C"** with **"B"** plain in English or Kiswahili languages and have qualified to join LLB program in local universities. (This is the decision the appellant's counsel faults for ignoring a Supreme Court decision. I will address my mind to this decision later).

23. Section 16 of the KSL Act bears the short title "admission requirements." It provides that a person shall not qualify for admission to a course of study at the School, unless that person has met the admission requirements, set out in Section 1 of the Second Schedule to the KSL Act which provides that 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.

24. Words, spoken or written, are the means of communication. Where they are possible of giving one and only one meaning there is no problem. However, where there is a possibility of two meanings, a problem arises and the real intention is to be sorted out. The Legislature, after enacting statutes becomes *functus officio* as far as those statutes are concerned. It is not their function to interpret the statutes. Legislature enacts and the Judges interpret. The difficulty with Judges is that they cannot say that they do not understand a particular provision of an enactment. They have to interpret in one way or another. They cannot remand or refer back the matter to the Legislature for interpretation. That situation led to the birth of principles of interpretation to find out the real intent of the Legislature. Consequently, the Superior Courts had to give the rules of interpretation to ease ambiguities, inconsistencies, contradictions or lacunas. The rules of interpretation come into play only where clarity or precision in the provisions of the statute are found missing.[13]

25. Therefore, a court must try to determine how a statute should be enforced. There are numerous rules of interpreting a statute, but, without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. [14]

26. Perhaps I should add that it is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it, which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The court of course adopts a construction, which will carry out the obvious intention of the legislature but cannot legislate itself.[15]

27. In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the court has to see at the very outset is what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. Nevertheless, the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning, which cannot be warranted by the words employed by the Legislature.[16]

28. In interpreting the provisions of a statute, the court should apply the golden rule of construction. The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction, the words of a statute

must be given their ordinary, literal and grammatical meaning. If by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless, it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction. Examples include where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.[17] As the Supreme Court of India in *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others*[18] stated:-

> *"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."*

29. It is correct to say that the touchstone of interpretation is the intention of the legislature. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[19] Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[20] If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.

30. While the object is to determine the meaning to be given to the words used, it remains the primary function of the court to gather the intention of the legislature by reference to those words. This can only occur if the object and purpose of the legislation (in which case it would include the mischief sought to be remedied) are brought into consideration when examining the words used in the context of both the document as a whole and the context or factual matrix in which the document came to be produced.

31. At the center of this determination is the meaning of the word *"or"* in legal parlance. In searching for its meaning, it is inevitable that I will consult dictionaries and judicial pronouncements. The practice of appealing to dictionaries simply as memory aids was deemed a function of judicial notice.[21] Words must receive their ordinary meaning. Of that meaning the court is bound to take judicial notice, as it does in regard to all words in our own tongue; and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court.[22]

32. Dictionaries may also serve an instantiating function, that is, they may be used by the court to confirm that a contested meaning has been employed in either speech or literature, and has thus been recognized as a valid meaning by lexicographers. Of this instantiating function, Professors Hart and Sacks said, "Unabridged dictionaries are historical records (as reliable as the judgment and industry of the editors) of the meanings with which words have in fact been used by writers of good repute. They are often useful in answering hard questions of whether, in an appropriate context, a particular meaning is linguistically permissible."[23]

33. In using a dictionary to instantiate a contested meaning, a judge searches the dictionary to determine what meanings have attained currency in the language at large and are thus linguistically permissible in a given context.[24]

34. The word "or" is defined in *dictionary.com*[25] *as a word used to connect words, phrases, clauses representing alternatives, it's used in correlation such as* ***either or.*** The *Longman Dictionary of Contemporary English*[26] defines *"or"* as - *"Conjunction used between two things or before the last in a list of possibilities, things that people can choose from, either… or…* "The *New Choice English Dictionary*[27] defines **"or"** as- *'Conjunction denoting an alternative, the last in a series of choices' Conjunction* is defined in the same dictionary as *"a word connecting words, clauses or sentences…"* The *Oxford Advanced Learner's Dictionary of Current English*[28] defines ***'or'*** as a word *"used to introduce another possibility".* The *Concise Oxford English Dictionary defines*[29] **"or"** as a *'conjunction used to link alternatives.'* The same dictionary defines the word *'conjunction'* as *a word used to connect clauses or sentences or to coordinate words in the same clause.*

35. The use of the word *"or"* in a statutory provision has also received judicial construction. The Supreme Court of India[30] expressed the view that "the word *'or'* is normally disjunctive and the word *'and'* is normally conjunctive. However, at times they are read as *vice-versa* to give effect to the manifest intent of the legislature as disclosed from the context. It is permissible to read *'or'* as '*and'* and *vice-versa* if some other part of the same statute, or the legislative intent clearly spelled out, require that to be done."[31]

36. In *Natarajan K.R. vs Personnel Manager, Syndicate Bank, Industrial Relation Division*[32] the apex Court of India construed the word **"or"** as follows:-

> *"In ordinary use the word 'or' is a disjunctive that makes an alternative which generally correspondents to the word 'either'. In face of this meaning, however, the word 'or' and the word 'and' are often used interchangeably. As a result of this common and careless use of the two words in legislation, there are occasions when the Court, through construction, may change one to the other. This cannot be done if the statute's meaning is clear, or if, the alteration operates to change the meaning of the law..."*

37. Further, the Supreme Court of *India in J. Jayalalitha vs Union of India*[33] held that the term *"or"* which is a conjunction, is normally used for the purpose of joining alternatives and also to join rephrasing of the same thing but at times to mean "and" also. It stated:-

> *"The dictionary meaning of the word `or' is : "a particle used to connect words, phrases, or classes representing alternatives". The word `or', which is a conjunction, is normally used for the purpose of joining alternatives and also to join rephrasing of the same thing but at times to mean `and' also. Alternatives need not always be mutually exclusive. Moreover, the word "or' does not stand in isolation and, therefore, it will not be proper to ascribe to it the meaning which is not consistent with the context.... It is a matter of common knowledge that the word `or' is at times used to join terms when either one or the other or both are indicated…. In our opinion, the word `or' as used… would mean that the … the power to do either or both the things…"*

38. Back at home, a Bench of five Judges in High Court in *Bernard Ndeda & 6 Others v Magistrates and Judges Vetting Board & 2 Others*[34]and *Wilson Kaberia Nkuja v Magistrates and Judges Vetting Board & another* ***[35]*** cited by the applicant's counsel adopted a similar construction. In addition, the High Court differently constituted in *Edward Njoroge Mwangi v Francis Muriuki Muraguri & Anther*[36] also relied upon by the applicant's counsel arrived at the same reasoning.

39. This position was appreciated by the Supreme Court of Kenya in *Raila Amolo Odinga v Independent Electoral and boundaries Commission and 42 Others*[37] cited by the applicant's counsel. The apex court construed the word *"or"* as used in a statutory provision as being disjunctive and making two limps. This reasoning is well enunciated in *Crawford on Statutory Construction* ***[38]*** where it is stated at page 322 thus:-

> *"In ordinary use the word 'or' is a disjunctive that marks and alternative which generally corresponds to the word 'either.' In face of this meaning however, the word 'or' and the word 'and' are often used interchangeably…"*

40. In its elementary sense the word *'or'* is a disjunctive particle that marks an alternative, generally corresponding to *'either,'* as 'either this or that.[39] But there are also some exceptions, situations "in which the conjunction *'or'* is held equivalent in meaning to the copulative conjunction *'and*.'[40] Normally, of course, *"or"* is to be accepted for its disjunctive connotation, and not as a word interchangeable with *"and."* However, this canon is not inexorable, for sometimes a strict grammatical construction will frustrate legislative intent. In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings.[41]

41. This contextual approach is the rule of lenity. It remains that the intention of a statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted for courts to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute. The implied intention of Parliament is adequate to overcome the express words of the statute. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, but the words should be taken in such a sense as will best manifest the legislative intent.

42. Lenity does not always require the "narrowest" construction. Decided cases have recognized that a broader construction may be permissible on the basis of contextual factors that make clear the legislative intent where it is within the fair meaning of the statutory language.[42]

43. Since no legislature ever intends to give two simultaneous inconsistent commands, every statute must if possible be reduced to a single, sensible meaning before it is applied to any case. When Lord Brougham said that we must ascertain the ". . . intention from the words of the statute and not from any general inferences to be drawn from the nature of the objects dealt with by the statute ...." he must have been referring to statutes susceptible of but one sensible meaning that is plain and explicit. But, if a statute is susceptible of another interpretation-a contextual or implied meaning-which is derived from the whole text itself with or without the use of extrinsic aids and if such contextual meaning is a fair one in that it accords with the ordinary use of language and with the object and purpose of the statute, it is clearly superior to any obvious or literal meaning which does not fulfil these demands.[43]

44. From the dictionary and judicial precedents discussed above, it is clear that the word *"or"* is ordinarily used to *introduce another possibility or alternative*, that is *either or*. Depending on context, it can also be used interchangeably with the word *"and."* It follows that in construing statutory provisions, the context is important so as to get the real intention of the legislature. Guided by the authorities cited above and the ordinary meaning of the word *"or"* in the context of the provision under consideration, it is my view that the use of the word *"or"* immediately after paragraph 1(a) introduces another possibility, the first possibility being the category referred to in paragraph (a). The second possibility is the category provided in paragraph 1 (b).

45. Further, guided by the dictionary meaning and judicial precedents, it is my conclusion that the use of the word "*and"* signifies that both conditions are required while *'or'* signifies that only one condition must be met. Differently stated, *'and*' corresponds to a simple addition, meaning, condition "**A"** and condition **"B"** must be reached to achieve the required standard. *'Or'* on the other hand means that only one of the conditions must be reached: condition "**A"** or condition **"B"** must be reached to activate the required standard.

46. *"And"* provides inclusiveness. By saying "A and B", it means BOTH "A" and "B." In addition, *"and"* can be used in positive and negative sentences. On the contrary, 'or' provides exclusiveness between choices. By saying "A or B", it means ONLY ONE between "A" and "B" can be considered. If you choose "A", then it is not "B" and *vice versa*. One may use 'or' in positive and negative sentences. It is now clear that *inclusive* OR allows both possibilities as well as either of them. Thus, if Parliament in its wisdom intended both possibilities to apply, then, nothing prevented it from using the word *"and"* immediately after the end of paragraph 1 (a) instead of the word *"or."*

47. I am convinced beyond doubt that the above conclusion represents the correct interpretation of the provision under consideration, a position best captured by the following passage:-

> *"And the law may be resembled to a nut, which has a shell and a kernel within; the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter."* ***[44]***

48. Before exiting the discussion on the paragraphs under consideration, I find it appropriate to comment of the High Court decision rendered in *Peter Gaithaiga Munyeki v Kenya School of Law*[45] relied upon by the Respondent's counsel. On his part, the applicant's counsel submitted that the said decision contradicted the position adopted by the same court in *Adrian Kamotho Njenga v Kenya School of Law*[46] and ignored the Supreme Court decision referred to above. in which the apex court construed the meaning of the word *"or"* in a statutory provision.

49. It is true the two High Court decisions apparently contradict each other. However, a decision of a court of co-ordinate jurisdiction is not binding.[47] *Second,* while decisions of co-ordinate courts are not binding, these decisions are highly persuasive. This is because of the concept of judicial comity, which is the respect one court holds for the decisions of another. As a concept, it is closely related to *stare decisis*. In the case of *R.* v. *Nor. Elec. Co.*,[48] McRuer C.J.H.C. stated:-

> *"...The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock, in his First Book of Jurisprudence, 6th ed., p. 321: "The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary…". (Emphasis added).*

50. In my opinion, I think that *"strong reason to the contrary"* does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was "*given without consideration of a statute or some authority that ought to have been followed*." I do not think *"strong reason to the contrary"* is to be construed according to the flexibility of the mind of the particular judge.

51. Talking about consideration of a statute and authority or authorities that ought to have been followed, what comes into mind is the Supreme Court decision cited by the applicant's counsel in which the apex court construed the use of the word *"or"* in a statutory provision. I have also referred to numerous highly persuasive court decisions interpreting the meaning of the word "or" in a statutory provision and leading dictionaries defining the meaning of the word "or."

52. While the persuasive decision cited above may not be binding, Supreme Court decisions are binding on the High Court by virtue of Article **163 (7)** of the Constitution.[49] I must emphasize that under Article **163 (7)** of the Constitution, the binding nature of Supreme Court decisions is absolute. Article **163 (7)** is an edict firmly addressed to all courts in Kenya, that they are bound by the authoritative pronouncements of the Supreme Court and that where the issues before the court were determined by the Supreme Court, it is not open to that court to examine the same with a view to arriving at a different decision.[50]

b. Whether the doctrine of implied repeal applies in the circumstances of this case.

53. The applicant's counsel pointed out that Regulation 5 of Part 11 of the Third Schedule to the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 provides for the requirements for admission to a Bachelor of Laws Degree. The said provision provides that the requirements are - possession of a degree from a recognized University; or a Diploma in law with a credit pass; or three principal passes in the Kenya Advanced Certificate of Education examination.

54. He also referred to Regulation 6 of Part 11 of the said Regulations, which stipulates the minimum admission requirements to the ATP. Under this provision, the the minimum requirements for admission to the ATP are — (a) a Bachelor of Laws (LLB) degree from a recognised university; (b) where applicable, a certificate of completion of a remedial programme; (c) proof of academic progression in accordance with paragraphs 3 and 4 of this Schedule; and (d) a certificate of completion of the Pre-Bar Examination.

55. The applicant's counsel pointed out that there is a variance between the KSL Act and the Legal Education Act [51] on the admission requirements provided in the KSL Act and the above Regulations. To resolve this conflict, the applicant's counsel urged that since the Legal Education Act[52] commencement date was 28thSeptember 2012 and the KSL Act commencement act was 29thJanuary 2013, the provisions of the later statute prevail.

56. The Respondents counsel did not address the question of the conflict between the two statutes. He only maintained that the impugned decision was taken pursuant to paragraph 1 (a) of the Second Schedule to the KSL Act which is qualified under paragraph 1 (b) of the same paragraph. It was his submission that an applicant must possess a Kenya Certificate of Secondary Education or an equivalent certificate. He argued that the applicant's IGCSE certificate is not an equivalent to a Kenya Certificate of Secondary Education. He placed heavy reliance on the *Peter Gaithaiga Munyeki v Kenya School of Law*[53] referred to above which held that persons falling under paragraphs 1 (a) of the Second Schedule to the KSL Act must have obtained a mean grade C with B plain in English or Kiswahili languages and have qualified to join LLB program in local universities. I have already taken the position that the said decision ignored a Supreme Court interpretation of the word *"or"* and that it is not binding to this court. I propose to say no more. Instead, I will address the doctrine of implied repeal.

57. The doctrine of **implied repeal** is a concept in constitutional theory which states that where an Act of Parliament (or of some other legislature) conflicts with an earlier one, the later Act takes precedence and the conflicting parts of the earlier Act becomes legally inoperable. This doctrine is expressed in the Latin phrase *"leges posteriores priores contrarias abrogant"*.

58. When Parliaments repeals legislation, it generally makes its intentions both express and clear. Sometimes, however, Parliament enacts laws that are inconsistent with existing statutes. A. L. Smith J set out the courts' traditional response in cases of this nature in *Kutner v Philips.**[54]*** He said that "if … the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later." That is, the later statute impliedly repeals the earlier one to the extent of the inconsistency.

59. For a court to hold that Parliament has repealed one of its own statutes without expressly, saying so is a drastic step. For this reason, courts faced with apparently conflicting statutes should strive to reconcile them, only holding that there has been an implied repeal as a last resort.[55] There are a number of ways in which courts may avoid an implied repeal or at least may reduce an implied repeal's effect. For example, where the earlier statute is specific in application and the later one is general, the courts may conclude that Parliament has not intended that the later Act should apply to the circumstances to which the earlier one relates.[56] Conversely, where a later specific rule is inconsistent with an earlier general one, implied repeal operates only *"pro tanto"*, that is, only to the extent that the Acts are inconsistent, with the general rule preserved as much as possible.[57]

60. Regulation 5 of Part 11 of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 provide that (1) The minimum admission requirements for an undergraduate degree programme in law as follows:-

> *(a) a mean grade of C+ (Plus) in the Kenya Certificate of Secondary Education examination or its equivalent with a minimum grade of B Plain in English or Kiswahili;*
>
> *(b) at least three Principal Passes in the Kenya Advanced Certificate of Education examination; (c) a degree from a recognised university; or*
>
> *(d) a Credit Pass in a diploma in law examination from an accredited institution.*

61. Regulation 6 referred to above on the admission requirements to the ATP provides:-

(1) The minimum requirements for admission to the Advocates' Training Programme shall be —

> *a) a Bachelor of Laws (LLB) degree from a recognised university;*
>
> *b) where applicable, a certificate of completion of a remedial programme;*
>
> *c) proof of academic progression in accordance with paragraphs 3 and 4 of this Schedule; and*
>
> *d) a certificate of completion of the Pre-Bar Examination.*

62. It is evident that the above Regulation creates different qualifications from those provided in paragraph 1(a) and (b) of the Second Schedule to the KSL Act. It is evident that the two provisions are at variance. Under the above Regulation, an applicant must possess the requirements in paragraphs (a) to (d) above. On the contrary, paragraph 1 (a) and (b) creates two distinct categories by using the word *"or"* instead of *and."*

63. Bennion on Statutory interpretation[58] states that the classic statement of the test for implied repeal was set out by A L Smith J in *West Ham (Churchwardens, etc) v Fourth City Mutual Building Society**[59]*** as follows:-

> *"The test of whether there has been a repeal by implication by subsequent legislation is this: are the provisions of a later Act are so inconsistent with, or repugnant to, the provisions of an earlier act that the two cannot stand together?"*

64. In *A O O & 6 others v Attorney General & another**[60]*** the High Court observed that "aaccording to principles of construction if the provisions of a later act are so inconsistent with or repugnant to those of an earlier act that the two cannot stand together, the earlier act stands impliedly repealed by the latter Act. It is immaterial whether both Acts are Penal Acts or both refer to Civil Rights. The former must be taken to be repealed by implication." This principle was adopted in *Martin Wanderi & 19 others vs. Engineers Registration Board of Kenya & 5 Others,**[61]*** where the court, rendered itself as follows:-

> *"… Where provisions of one Act of Parliament are inconsistent or repugnant to the provisions of an earlier Act, the later Act abrogates the inconsistency in the earlier one…."*

65. The requirement for a positive repugnancy between the conflicting statutes was explained in *United States vs. Borden Co*[62] where the court rendered itself as follows:-

> *"…There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy'…"*

66. What emerges from decisional law is that the two statutes must be inconsistent to the extent that they cannot stand together. ***[63]*** In *Nzioka & 2 Others vs. Tiomin Kenya Ltd,**[64]*** it was that the more recent act must be construed as repealing the old Act where there is inconsistency, *or* where the provisions of one statute are so inconsistent with the provisions of a similar but later one, which does not expressly repeal the earlier Act. A five-judge bench in *FIDA-Kenya & Others v Attorney General & Others*[65] held a similar position.

67. On the same principle, it correct to say that laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject. Thus, by enacting the later statute, which created the two categories and by carefully using the word *"or"* as opposed to *"and"* Parliament was aware of the other provisions, but expressed its clear intention in the later provisions. It is my finding that the doctrine of implied repeal applies in the circumstances of this case.

c. Whether the provisions of Legal Education (Accreditation and Quality Assurance) Regulations, 2016 can override express statutory provisions.

68. A fundamental question warrants consideration. This is whether the provisions of Legal Education (Accreditation and Quality Assurance) Regulations, 2016 can override express statutory provisions. These Regulations were promulgated by the Council of Legal Education pursuant to powers conferred upon it by section 46(1) of the Legal Education Act, with the approval of the Cabinet Secretary. The Regulations provide for the admission requirements to the ATP which as explained earlier differ from the requirements provided under section 16 of the KSL Act contained in paragraphs 1 (a) (b) of the said Second Schedule.

69. Despite the importance and relevancy of this issue, which clearly flows from the material presented to the court, none of the parties addressed it.

70. By subjecting the applicant to the requirements under the Regulations as opposed to the category expressly provided under paragraph 1(a) under which his qualifications fell, the Respondent not only ignored the express provisions of section 16, but also elevated the Regulations above the provisions of the act.

71. In *Republic vs Kenya School of Law & Council of Legal Education ex parte Daniel Mwaura Marai*[66]it was held that the provisions of a subsidiary legislation can under no circumstances override or be inconsistent with any act of Parliament be it the one under which they are made or otherwise. A similar position was held in *Republic v Council of Legal Education & another Ex parte Sabiha Kassamia & another**[67]*** and *Republic v Council of Legal Education & another Ex-Parte Mount Kenya University.**[68]*** Also relevant is Section 31 (b) of the *Interpretation and General Provisions Act*[69] which provides that no subsidiary legislation shall be inconsistent with the provisions of an Act of Parliament.

72. Guided by the above clear statements of the law, I find no difficulty concluding that the provisions of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 cannot override the express provisions of section 16 of the KSL Act, which prescribe the admissions requirements to the ATP as those stipulated in the Second Schedule to the Act. Had Parliament desired any other qualifications to apply, it would have expressly provided so in section 16 of the KSL Act.

d. Whether the impugned decision is tainted with illegality

73. The applicant's counsel assaulted the decision for violating the applicant's rights under Article 47 of the Constitution and the right to legitimate expectation. He argued that the decision was taken in excess of jurisdiction, was based on irrelevant considerations, and is unfair, unreasonable, irrational and illegal.

74. The Respondent's counsel's position was that the Respondent acted within its statutory powers.

75. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring statutory or administrative bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[70]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

76. Safeguarding legality is the most important purpose for the judicial review of administrative actions. Thus, in most administrative law systems, a person seeking judicial review of an administrative decision must be able to persuade the court that there are grounds for review in order for the legality of the administrative decision to be judicially challenged. In one sense, there must always be the premise of "want of legality."

77. An administrative decision or a decision rendered by a statutory body is flawed if it is illegal. A decision is illegal if it: - ***(a)*** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* ***(b)*** *pursues an objective other than that for which the power to make the decision was conferred;* ***(c)*** *is not authorized by any power;* ***(d)*** *contravenes or fails to implement a public duty.*

78. Statutes do not exist in a vacuum.[71] They are located in the context of our contemporary democracy. The rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the rule of law and other democratic fundamentals which Parliament has no power to exclude.[72] The courts should therefore strive to interpret powers in accordance with these principles.

79. In response to a challenge to the legality of administrative action, courts generally need to consider the compliance of administrators with both substantive and procedural legal rules. This is because any administrative decision-making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures.

80. The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as administrators comply with these two rules, their decisions are safe. From the perspective of administrators and statutory bodies, this fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision or decisions rendered by statutory bodies can be judicially challenged on grounds that the administrative decision does not comply with the above-mentioned basic requirements of legality.

81. The most obvious example of illegality is where a body acts beyond the powers, which are prescribed for it. In other words, it acts *ultra vires*. Decisions taken for improper purposes may also be illegal. Illegality also extends to circumstances where the decision-maker misdirects itself in law. When exercising a discretionary power, a decision-maker may take into account a range of lawful considerations. If the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court will normally find that the power had been exercised illegally.

82. The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second issue that can be argued under illegality is fettering discretion. This heading for judicial review entails considering whether an administrative body actually exercised the power it has, or whether because of some policy it has adopted, it has in effect failed to exercise its powers as

required. In general, terms the courts accept that it is legitimate for public authorities to formulate policies that are 'legally relevant to their powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust. An illegality can also occur where a body exercised a power, which was within its functions but exceeded the scope of power that is legally conferred to it.

83. The exercise of discretionary powers, as the rule of law requires, must be consistent with a variety of legal requirements and subject to judicial control. Consequently, the legality of an administrative decision or a decision of a statutory functionary can be challenged on the grounds that discretion is abused or improperly exercised by administrator or the Tribunal.

84. Also relevant is the concept 'error of law' which is mainly concerned with the erroneous applications of the law.

85. Two critical issues flow from the foregoing. *First,* whether the impugned decision can be read in a manner consistent with the provisions of law conferring the power to the Respondent. In particular, can the impugned decision be read in a manner that is consistent with paragraph 1 (a) or paragraph 1 (b). I have already construed paragraphs 1 (a) and 1 (b) as creating two distinct categories, with the applicant falling under the first category since he holds a law degree from a recognized university. I have also held that the doctrine of implied repeal applies in the circumstances of this case. In addition, it was my finding that provisions of subsidiary legislation cannot override express provisions of a statute. On these grounds, I find and hold that the Respondent failed to appreciate the law governing the applicants case or misdirected itself or took into account irrelevant considerations, hence the decision is tainted by an error of the law. Alternatively, the Respondent acted outside its powers; hence, the decision is *ultra vires*, hence, tainted with illegality.

86. *Second,* judicial oversight is necessary to ensure that decisions are taken in a manner, which is lawful, reasonable, rational and procedurally fair.[73] What matters is to establish whether the decision was taken in a manner, which is lawful, reasonable, rational and procedurally fair.

87. Unreasonableness and irrationality are grounds for Judicial Review. Rationality, as a ground for the Review of an administrative action is dealt with in Section **7(2) (i)** of Fair Administrative Action.[74] It provides that:-" *A court or tribunal under subsection (1) may review an administrative action or decision, if- (i) the administrative action or decision is not rationally connected to- a) the purpose for which it was taken; (b) the purpose of the empowering provision;(c) the information before the administrator; or (d) the reasons given for it by the administrator*."

88. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the Fair Administrative Action Act.[75] A court has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout was whether the decision in question was one, which a reasonable authority could reach. The converse was described by Lord Diplock[76] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.'

89. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *"objectively so devoid of any plausible justification that no reasonable body of persons could have reached it**[77]*** and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[78]This stringent test has been applied in Australia[79] where the Court held that in order for invalidity to be determined, the decision must be one, which no reasonable person could have reached, and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt and when "looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them." Given the facts of this case and the express provisions of paragraph 1 (a) (b), I am not persuaded that a different body properly addressing its mind to the same facts, circumstances and the law could have arrived at the same conclusion.

90. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes, which are defensible with respect to the facts and the law. Put differently, no argument was advanced before me that the decision falls within the range of possible acceptable outcomes applying the same set of facts and the law.

91. The following propositions can offer guidance on what constitutes unreasonableness. *First, wednesbury* unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably. Talking about reasonableness, Parliaments was clear when it provided two categories in paragraphs 1 (a) and (b). The applicant holds a Bachelor of Laws Degree as provided in the said provision. The University wrote to confirm that he was qualified for admission and that he passed the examinations and graduated. It was unreadable to require him to sit for an A level examination in total disregard of paragraph 1 (a).

92. *Second,* this ground of review will be made out when the court concludes that the decision fell outside the area of decisional freedom, which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ. Confronted with express provisions of the law, any reasonable decision maker would have no difficulty concluding that the applicant's case fell under the first category.

93. *Third,* the test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it. Differently put, on the face of the provisions of paragraph 1(a), in my view, no reasonable could maker could have arrived at the same decision.

94. If a statute, which confers a decision-making power, is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

95. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[80] In the circumstances of this case, the Respondent failed to give weight to the fact that the applicant met the basic requirements for admission into a Bachelor's of Law Degree and had graduated with a LLB degree. Also, ignored is the fact that by dint of paragraph 1 (a), he met the qualifications for admission into the ATP. In addition, it is blatantly unreasonable to require a person with two Bachelor's degrees and a master's student to sit for "A" level examinations. It was also legal unreasonableness for Respondent to fail to appreciate that the Regulations made under the Legal Education Act cannot pass the test of reasonableness since they purport to disqualify holders of Bachelors of Law Degree contrary to paragraph 1(a) nor can the Regulations override express statutory provisions.

96. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano*[81] the court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature. These are:-

> *a.* ***Illegality****- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be* ***"illegal".*** *Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.*
>
> *b.* ***Fairness****- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.*
>
> *c.* ***Irrationality and proportionality****- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute* ***'irrationality"*** *or* ***'perversity'*** *on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of* ***Lord Green*** *in Associated Provincial Picture Houses Ltd vs Wednesbury Corporation*[82]*:-*
>
> *"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."*

97. The provisions conferring mandate upon the Respondent must be read in the context of three different imperatives. The *first* is to enable the Respondent to effectively carry out its specially identified statutory mandate. The Constitution and the applicable statutes clearly envisages an important and active decisional role for the Respondent to perform its functions through the application of the law. *Second,* the Constitution declares that everyone is entitled to a Fair Administrative Action. In as much as the Respondents decisions affects the *ex parte* Applicant, the Respondent is obliged **not** to act unfairly. A *third* dimension must also be borne in mind. It could not have been the intention of the legislature to contemplate a situation whereby the Respondent would act in such a manner as to violate or trump or trivialize citizens' constitutional rights.

e. Whether the impugned decision violates the Applicant's Right to legitimate expectation and the Right to education guaranteed under Article 43 (1) (f) of the Constitution.

98. The applicant's counsel submitted that the impugned decision violated the Applicant's Right to legitimate expectation and the Right to education guaranteed under Article 43 (1) (f) of the and argued that the limitation does not meet the Article 24 analysis test.

99. Counsel for the Respondent did not address this particular issue, except maintaining that the Respondent acted with the confines of the law.

100. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others*[83] where it was held as follows with regard to similar provisions on just administrative action in Section 33 of the South African Constitution:-

> *"…The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"*

101. In adjudicating legitimate expectation claims, the court follows a two-step approach. First, it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation that is enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. It is first asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation.

102. With regard to the first test, the applicant was admitted to a Bachelors of Law Degree having attained the required qualifications for the study. He studied and successfully completed and graduated with a Bachelor's in Law Degree. Armed with a letter from the University of Nairobi confirming that he qualified to study law, and fully conscious of the provisions of section 16 of the KSL Act, and the second

Schedule to the act, he had a reasonable legitimate expectation that the Respondent will comply with the law and admit him to the ATP. In addition, he has a legitimate expectation that the Respondent will understand the law and correctly apply it. Differently put, the applicant's expectation was legitimate.

103. Addressing the subject of legitimate expectation, *H. W. R. Wade & C. F. Forsyth*[84] at pages 449 to 450, thus:-

> *"It is not enough that an expectation should exist; it must in addition be legitimate….* ***First*** *of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation….. **Second**, clear statutory words, of course, override an expectation howsoever founded….. **Third,** the notification of a relevant change of policy destroys any expectation founded upon the earlier policy…."*

> *"An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."* (Emphasis added)

104. First, the applicant obtained a Bachelors Law Degree. The University confirmed that as the point of admission, he met the admission requirements, and, that, the received instructions, satisfied the examiners, passed the examinations and was awarded the Degree. The provisions of paragraph 1 (a) cited earlier are explicit. He falls under the category contemplated under the said provision. His expectation is not only legal. It is supported by the law. He had a legitimate expectation that he would be admitted into the ATP. Such a legitimate expectation cannot be taken away by a fiat grounded on Regulations which are subsidiary legislation which are against clear provisions of a statute. Even if I were to hold otherwise, the doctrine of implied repeal discussed earlier applies.

105. As for the alleged violation of Article 43 (1) (f) rights, aside from guaranteeing the rights set out in the Bill of Rights, the Constitution provides that the Bill of Rights binds all State and state organs. Thus, the Respondent has an obligation to respect the Bill of Rights. Article 19 provides that:-

> *(1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.*
>
> *(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.*
>
> *(3) The rights and fundamental freedoms in the Bill of Rights—*
>
> *(a) belong to each individual and are not granted by the State;*
>
> *(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and*
>
> *(c) are subject only to the limitations contemplated in this Constitution.*

106. Article 21 places provides that:-

> *(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.*
>
> *(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.*

107. It is thus evident that the applicant has a constitutionally guaranteed right to education under Article 43 (1) (f) the Constitution. Any action that limits or diminishes this right is a violation of the Constitution, unless it can pass the tests provided in Article 24 of the Constitution. There was no argument before me that the limitation of the applicant's rights meets an Article 24 Analysis test nor do I find any in the circumstances of this case.

Conclusion.

108. The applicant prays for an order of *Certiorari.* *Certiorari* is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test of legality, it is quashed – that is to say, it is declared invalid. The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds.

109. The applicant prays for an order of *Mandamus.* An order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.[85] *Mandamus* is a judicial command requiring the performance of a specified duty, which has **not been** performed. Originally, a common law writ, *Mandamus* has been used by courts to review administrative action.[86]

110. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. vs. Canada* (*Attorney General*),[87] and, was also discussed in *Dragan vs. Canada* (*Minister of Citizenship and Immigration*).[88] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. *The Applicants have satisfied all conditions precedent; and*

b. There must have been:

I. A prior demand for performance;

II. A reasonable time to comply with the demand, unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv*) No other adequate remedy is available to the Applicants;*

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

111. The applicants also seek an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation.

112. I find that the impugned decision is amenable for review on grounds discussed earlier and that the writs of *Certiorari*, *Mandamus* and *Prohibition* are warranted. Judicial Review is concerned with testing the legality of a decision. A decision does not 'involve' an error of law unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different.[89]

113. Perhaps I should add that court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a *constitutional supervision* of public authorities involving a challenge to the legal validity of the decision.[90] Time has come for our Courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Differently put, Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

114. In view of my analysis and determinations of the issues discussed above, the conclusion becomes irresistible that the applicant has established grounds to warrant the judicial review orders sought. Consequently, I allow the applicant's Notice of Motion dated **13th** March 2018 and make the following orders:-

a) An order of Certiorari be and is hereby issued quashing the Respondent's decision contained in the letter dated 6th December 2018 declining to admit the applicant into the Advocates Training Programe (ATP) at the Kenya School of Law.

b) An order of prohibition be and is hereby issued prohibiting the Respondent from enforcing, implementing or in any other manner whatsoever from effecting its decision contained in the letter dated 6th December 2018.

c) An order of Mandamus be and is hereby issued compelling the Respondent to forthwith admit the applicant into the Advocates Training Programme (ATP) at the Kenya School of Law in accordance with the provisions of paragraph 1 (a) of the Second Schedule of the KSL Act.

d) No orders as to costs.

Signed, Dated and Delivered at Nairobi this **19th day of June 2019**

John M. Mativo

Judge