**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**MISCELLANEOUS APPLICATION NO. 108 OF 2019**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS**

**AND**

**IN THE MATTER OF AN APPLICATION BY JACOB OMONDI OBILLO FOR JUDICIAL REVIEW OF CERTIORARI, MANDAMUS AND PROHIBITION**

**IN THE MATTER OF ARTICLES 3(1), 10 (2) (A) (B) (C), ARTICLES 23 (1) (3), 27(1) (2) (4) (5), 47 (1) AND 43 (1) OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF SECTION 7(2) AND 11 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

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

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

**AND**

**ATTORNEY GENERAL.....INTERESTED PARTY**

**AND**

**JACOB OMONDI OBILLO.....EX PARTE APPLICANT**

**JUDGMENT**

**The Parties**

1. The *ex parte* applicant Jacob Omondi Obillo is a male adult of sound mind residing and working for gain at Machakos in the Republic of Kenya.

2. The first 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 KSL 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.

4. The second Respondent, the Council of Legal Education (herein after referred to as the council) is a body corporate with perpetual succession and a common seal established under section 4 of the Legal Education Act.[4] 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. The council is the successor of the Council of Legal Education established under the Repealed Council of the Legal Education Act (herein after referred to as the Repealed Act).

5. As provided under section 8 of the Legal Education Act, the functions of the Council include regulating legal education and training in Kenya offered by legal education providers. It also licences legal education providers; supervises legal education providers; advises the Government on matters relating to legal education and training; recognizes and approves qualifications obtained outside Kenya for purposes of admission to the Roll and administers such professional examinations as may be prescribed under section 13 of the Advocates Act.[5]

6. The Interested Party is the Hon. Attorney General. Under Article **156(4)** of the Constitution, the Attorney General is the principal legal adviser to the Government. He represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. He performs any other functions conferred on the office by an Act of Parliament or by the President.

**Factual Matrix**

7. The *ex parte* applicant states that he completed his KCSE in 1995 and studied law in India at Dr. Babashaheb Ambedkar Marathwada University where he graduated with a Bachelor of Laws Degree (LLB) in 2000. He applied to KSL for admission to the Advocates Training Program (ATP). However, he was informed that he had to pass a pre-admission English examination because he did not attain the required pass mark of B grade in English in KCSE. He states that he sat and passed the said examination after which he was admitted to the KSL for the ATP.

8. He states that he failed in some examination papers at the KSL, and after his fourth attempt, he was asked to re-apply for re-admission to the School. He states that he was subsequently re-admitted for the academic year 2013/2014. However, he was unable to raise the required fees until December 2018 when he applied for re-admission, but the KSL declined his application stating that he did not obtain grade D+ in English language in his KCSE. He states that despite a written appeal and stating that he re-sat and passed the pre-bar English Examinations, the Respondents maintained their refusal.

**Legal foundation of the application**

9. The *ex parte* applicant states that the decision is *ultra vires* the KSL Act, the Legal Education Act,[6] the Fair Administrative Action Act[7] (herein after referred to as the FAA Act) and the Constitution. He also states that the decision is unfair because he is being required to do the same examinations, which he sat for and passed.

10. He also states that the impugned decision is bad on grounds of unlawfulness, procedural impropriety, and, that, it is unjustifiable and erroneous and that it seeks to deny him his livelihood.

**The Reliefs sought.**

11. The *ex parte* applicant seeks orders of *Certiorari* to quash the first Respondent's letters dated 1st December 2008 and 18th February 2019 denying him admission to the Kenya School of Law. He also seeks an order of *Mandamus* directed at the first and second Respondents to admit him to the Kenya School of Law for purposes of pursuing the Advocates Training Programme. As for costs, he prays that they be in the cause and also asks the court do issue any other or further orders as the circumstances of the case may demand.

**The first Respondent**

12. Despite filing an appearance through Dr. Henry Mutai, Advocate, the first Respondent did not file any pleadings in this case. However, at the hearing its counsel Mr. Omondi adopted the pleadings and submissions filed by the second Respondent.

**The second Respondent's Replying Affidavit**

13. Dr. J. K. Gakeri, an advocate of the high court of Kenya, and the Chief Executive Officer and Secretary to the Board of the Council of Legal Education swore the Replying Affidavit dated 20th June 2019 in opposition to the application. He reiterated the statutory mandate of the second Respondent including the power to make Regulations.

14. He averred that section 16 of the KSL Act provides that a person shall not qualify for admission to a course of study at the KSL, unless that person has met the admission requirements set out in the second schedule to the KSL Act. He further averred that the law requires an applicant to have an LLB Degree from a recognized University and a mean grade C+ with B plain in English or Kiswahili language in KCSE or its equivalent. He added that for those who attend University education outside Kenya, they must also sit and pass pre-bar examinations set by the School. He said that this requirement came into operation in 2013. He deposed that prior to the above position; the applicable law was the Council of Legal Education Act[8] and the Kenya School of Law Regulations, 2009.

15. He averred that the applicant had failed in English language in that he had obtained a D+, which falls short of the requirements provided for by the law. In addition, he averred that the applicant's re-admission was pegged on specific conditions, among them, the applicant was required to complete the programme within one year and he was entitled to one set of re-sits where applicable. Further, he averred that the applicant was required to register between 14thJanuary 2013 and 28thJanuary 2013. He deposed that in a letter dated 1stDecember 2012, the applicant was notified that if he does not register within the prescribed period, the offer for admission would automatically lapse unless deferment is sought within the stipulated period.

16. Mr. Gakeri deposed that the applicant did not either register or defer his registration as advised, hence, the offer to re-admit him automatically lapsed, and thus, he lost his chance for re-admission to the KSL. Lastly, he averred that the applicant is guilty of latches in that he applied for re-admission five years after he was given the opportunity to do so.

**Issues for determination**

17. Upon carefully analyzing the diametrically opposed facts presented by the parties, I find that the following issues distil themselves for determination.

> *a. Whether the ex parte applicant satisfied the legal requirements for admission to the ATP under the Repealed Act and the 2009 Regulations.*
>
> *b. Whether the ex parte applicants satisfies the legal requirements for admission to the ATP under the KSL Act.*
>
> *c. Whether the impugned decision is tainted with illegality.*
>
> *d. 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. Whether the ex parte applicant satisfied the legal requirements for admission to the ATP under the Repealed Act and the 2009 Regulations.***

18. The *ex parte* applicant's counsel submitted that prior 2012, the applicable law provided different requirements for admission to the ATP, and, that the law cannot operate retrospectively. He argued that the impugned decision is *ultra vires* the KSL Act, the Legal Education Act, [9] the FAA Act & the Constitution. He relied on *Kevin Mwiti & Others v Kenya School of Law*,[10] *Laura Makungu Lumbasio v Kenya School of Law*,[11] *Kyalo Kennedy Maweu v Kenya School of Law & Another*[12] and *Moses Nthurima v Coucil of Legal Education.*[13]

19. The Respondent's counsel submitted that the applicable law in the circumstances of this case is the Repealed Act and the the council of Legal Education (Kenya School of Law) Regulations, 2009, particularly Regulations 4 & 5. He argued that the applicant did not attain the required grade in English in his KCSE since he obtained a grade D, which falls short of the minimum requirements, provided for under the law, which is a mean grade C+ with B plain in English or Kiswahili language in KCSE or its equivalent.

20. It is common ground that the legal regime governing the to the KSL at the material time was The Council of Legal Education Act (Repealed) and The council of Legal Education (Kenya School of Law) Regulations, 2009 made under the said Act. Part II of the said Regulations provided for Admission Requirements and Registration of Students as follows:-

> *4. 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 the First Schedule to these Regulations for that course.*
>
> *5. (1)Any person who wishes to be admitted to any course of study at the School, shall make an application to the School in Form KSL No. 1 set out in the Third Schedule and pay the fees set out in the Fourth Schedule to these Regulations.*
>
> *(2) The application under paragraph (1) shall be accompanied by– (a) academic transcripts for the relevant qualifying examinations; (b) academic certificate or any other academic award; (c) a copy of the National identification card; (d) two passport photographs, of the applicant and any other document the School may from time to time require.*
>
> *(3) The School shall consider an application submitted under paragraph (2) and if it is satisfied that the applicant meets the admission requirements, admit the applicant to the School.*

21. Part II of the first Schedule to the said Regulations provides for aadmission requirements into the Advocates Training Programme as follows:-

> *5. A person shall not be eligible for admission for the Post Graduate Diploma (Advocate Training Programme) unless that person has–*
>
> *a) passed the relevant examination of any recognized university in Kenya, he holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) of that university;*
>
> *b) passed the relevant examinations of a university, university college or other institutions prescribed by the Council, he holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) in the grant of that university, university college or other institution, had prior to enrolling a that university, university college or other institution–*

*i. attained a minimum entry requirements for admission to a university in Kenya; and*

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

*c) a Bachelor of Laws Degree (LL.B) from a recognized university and attained a minimum grade of C+ (C plus) in English and a minimum aggregate grade of C (plain) in the Kenya Certificate of Secondary Examination, holds a higher qualification e.g. "A" levels, "IB", relevant "Diploma", other "undergraduate degree" or has attained a higher degree in Law after the undergraduate studies in the Bachelor of Laws Programme; or*

*d) a Bachelor of Laws Degree (LL.B) from recognized university and attained a minimum grade of C- (C minus) in English and a minimum of an aggregate grade of C- (C minus) in the Kenya Certificate of Secondary Examination sits and passes the Pre-Bar Examination set by the Council of Legal Education as a precondition for admission*

22. It is not in dispute that the *ex parte* applicant holds a Bachelor of Laws degree from a recognized Universality. It is common ground that after he applied for admission to ATP, consistent with the above Regulations, he was required to sit for a pre-bar examination in English language for him to satisfy the requirements. He sat for the Pre-Bar Examination as a precondition for admission and passed the English test after which he was admitted to the ATP.

23. I have carefully considered the admission requirements under the Repealed Act and the 2009 Regulations. I have also considered the *ex parte* applicant's qualifications. It is not contested that he passed the pre-bar English Examination set by the KSL. I find that he met the admission requirements to the ATP under the Repealed Act and the Regulations made thereunder.

24. Based on his qualifications, the KSL admitted him to the ATP. However, as fate would have it, he failed to pass some units, dropped out of school. He was re-admitted for the 2013-2014 academic year, but again he did not register within the time allowed. The school argues that since he did not register or defer his studies, the offer for admission lapsed. On his part, the *ex parte* applicant states that owing to personal challenges including financial constraints, he was unable to register within the time stipulated. This failure to register within the time stipulated in the re-admission letter or defer his studies led to the rejection of his subsequent application for re-admission. The legal validity of the said rejection and the alleged failure to defer the studies will be addressed below under separate issues.

***b. Whether the ex parte applicant satisfies the legal requirements for admission to the ATP under the KSL Act.***

25. Even though the Respondents Advocates did not address this issue directly in their submissions, the crux of the rejecting the *ex parte* applicant's application for re-admission is visible in the averments in the second Respondent's Replying Affidavit. Relevant to this issue is Mr. Gakeri's averment that section 16 of the KSL Act provides that a person shall not qualify for admission to a course of study at the KSL, unless that person has met the admission requirements set out in the second schedule to the KSL Act. He further averred that the law requires an applicant to have an LLB Degree from a recognized University and a mean grade C+ with B plain in English or Kiswahili language in KCSE or its equivalent. He added that for those who attend University education outside Kenya, they must also sit and pass pre-bar examinations set by the School. He said that this requirement came into operation in 2013. He deposed that prior to the above position; the applicable law was the Council of Legal Education Act[14] and the Regulations made thereunder.

26. My understanding of Mr. Gakeri's averment is that the *ex parte* applicant does not qualify under the KSL Act.

27. Section 16 of the KSL Act 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.*

28. This court has severally stated that the language of the text of the statute should serve as the starting point for any inquiry into its meaning.[15] Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[16] 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.

29. 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.

30. Central to the issue under consideration is the meaning of the word *"or"* in legal parlance. The word "or" appears immediately after the semi-colon at the end of section 1 of the Second Schedule to the KSL Act reproduced above. In searching for its meaning, it may be useful to consult dictionaries and judicial pronouncements. The practice of appealing to dictionaries as memory aids was deemed a function of judicial notice.[17] 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.[18]

31. Dictionaries also serve an instantiating function. 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."[19]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.[20]

32. The word "or" is defined in *dictionary.com*[21] *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*[22] 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*[23] 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*[24] defines ***'or'*** as a word *"used to introduce another possibility".* The *Concise Oxford English Dictionary defines*[25]**"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.*

33. The use of the word *"or"* in a statutory provision has also received judicial interpretation. The Supreme Court of India[26] stated 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."[27]

34. In *Natarajan K.R. vs Personnel Manager, Syndicate Bank, Industrial Relation Division*[28] 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..."*

35. Further, the Supreme Court of *India in J. Jayalalitha vs Union of India*[29] 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…"*

36. In Kenya, the High Court in *Bernard Ndeda & 6 Others v Magistrates and Judges Vetting Board & 2 Others*[30]and *Wilson Kaberia Nkuja v Magistrates and Judges Vetting Board & another*[31] adopted a similar interpretation. In addition, the High Court differently constituted in *Edward Njoroge Mwangi v Francis Muriuki Muraguri & Another*[32] adopted the same reasoning.

37. The Supreme Court of Kenya in *Raila Amolo Odinga v Independent Electoral and boundaries Commission and 42 Others*[33] put is better when it construed the word *"or"* as used in a statutory provision as being disjunctive and making two limps. This reasoning is also captured in *Crawford on Statutory Construction*[34] 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…"*

38. From the above jurisprudence and dictionary definitions, the following principles can be discerned. One, in its elementary sense the word *'or'* is a disjunctive particle that marks an alternative, generally corresponding to *'either,'* as 'either this or that.'[35] Two, there are also some exceptions, situations "in which the conjunction *'or'* is held equivalent in meaning to the copulative conjunction *'and*.'[36] Three, 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.

39. 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.[37]

40. Perhaps I should add that 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. Courts are not permitted 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 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.

41. Lenity does not always require the "narrowest" construction. Decided cases have recognized that a broader construction may be permissible based on contextual factors that make clear the legislative intent where it is within the fair meaning of the statutory language.[38]

42. 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. 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.[39]

43. It is beyond doubt that 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 to get the real intention of the legislature.

44. I find that the wisdom flowing from the judicial pronouncements discussed above and the ordinary meaning of the word *"or"* in the context of the provision under consideration is convincing. It is my view that the use of the word *"or"* immediately after the semi-colon at the end of the sentence in section 1(a) of the second schedule introduces another possibility, the first possibility being the category referred to in paragraph (a), that is:-

> *"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."*

45. The *ex parte* applicants hold Bachelor of Laws degrees from a recognized University. By dint of the above provision, he qualifies for admission to the ATP. To suggest otherwise, is in my view an insult to the above provision, which is framed in a simple and clear language. A contrary interpretation is misguided and an assault on the clear meaning of the provision. It follows that any decision emanating from such a misguided interpretation cannot be read in a manner that is consistent with the enabling provision.

46. The second possibility is the category provided in section 1 (b) which provides:-

> *"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—*
>
> *iv. attained a minimum entry requirement for admission to a university in Kenya; and*
>
> *v. 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*
>
> *vi. has sat and passed the pre-Bar examination set by the school."*

47. It is already on record that the *ex parte* applicant was subjected to a Pre-bar Examination set by the KSL and he passed the English language. It follows that he qualified under section 1 (b) above. A reading of this provision renders the rejection of his admission legally impotent.

48. Parliament in its wisdom provided for the second category. A reading of the second category shows clearly that it applies to those who meet the conditions stipulated therein. These are having attained a minimum entry requirement for admission to a university in Kenya; and 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 has sat and passed the pre-Bar examination set by the school.

49. The second category uses the word "and" unlike in the first category which uses ""or." Borrowing from 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.

50. I have had the occasion to address similar issues as in this case in cases involving the same provisions and circumstance. In the said decisions, illustrated the meaning of “and” which I argued 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. 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.”*

51. The above construction 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.”* ***[40]***

52. As stated earlier, Kenya’s apex court pronounced itself on the interpretation of the word “or” in a statute. I need not say that Supreme Court decisions are binding on the High Court by virtue of Article **163 (7)** of the Constitution.[41] 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.[42]

53. Here is a case where an applicant was subjected to a Pre-bar Examination. He sat for the said examination and passed. He was admitted to the ATP. Later he dropped out. He applied for re-admission. He was re-admitted. He did not take up the position. Upon applying again, he was told that he does not qualify. This leads me to the next issue, namely, the legality of the decision.

***c. Whether the impugned decision is tainted with illegality.***

54. The *ex parte* applicant’s counsel submitted that the decision is unfair and it amounts to condemning the applicant twice for the same reason because he was subjected to sit for the same pre-bar examinations, which he passed. He argued that the decision violates the *ex parte* applicant’s the rights under Article 47 of the Constitution. Further, he argued that the decision is unfair because the KSL is the only institution offering pre-bar examinations in the country. Lastly, he argued that the decision denies the applicant his right to a livelihood.

55. The Respondent’s counsel argued that the applicant failed to utilize the re-admission given by the first Respondent. He submitted that the re-admission was pegged on specific conditions among them, that the applicant was required to complete the programme within one year and that he was entitled to re-sit where applicable. He also stated that the applicant was required to register between Monday 14 $^{th}$January 2013 and 28$^{th}$January 2013, after which the offer for re-admission would lapse. Counsel argued that the admission was discretionary and conditional.

56. Citing *Republic v Attorney General & 4 Others ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji,*[43] the Respondent’s counsel submitted that judicial review is about the decision making process and not the decision itself. He cited *Republic v National Water Conservation & Pipeline Corporation & 11 Others*[44] for the holding that once a judicial review court fails to sniff any illegality, irrationality or procedural impropriety, it should down its tools forthwith.

57. In addition, he cited *Benjamin Morara v Kenya School of Law & Another*[45] in support of the proposition that *Certiorari* is a discretionary remedy and the court can decline to grant it even where it is deserved in certain circumstances such as where the applicant’s conduct is to blame. He also argued that the court should be reluctant to substitute its views to those of the decision maker especially in academic decisions.

58. 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 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.[46]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.

59. 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.”

60. It is basic to administrative law that decision makers may exercise only those powers, which are conferred on them by law. 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.

61. 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.

62. 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.

63. 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 can be challenged because discretion is abused or improperly exercised by administrator or the Tribunal. Also relevant is the concept 'error of law' which is mainly concerned with the erroneous applications of the law.

64. 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 Respondents. In particular, can the impugned decision be read in a manner that is consistent with section 1 (a) & (b) of the second Schedule to the Act. I have already construed the said provisions as creating two distinct categories. I have already held and concluded that the *ex parte* applicant qualifies under both categories. On this ground, I find and hold that the Respondent failed to appreciate the law or misdirected themselves or took into account irrelevant considerations; hence, the impugned decision is tainted by an error of the law. Alternatively, the Respondent acted outside their powers; hence, the decision is *ultra vires*, thus, it is tainted with illegality.

65. Judicial oversight is necessary to ensure that decisions are taken in a manner, which is lawful, reasonable, rational and procedurally fair. [47] The question that follows is whether the Respondent's decision that the *ex parte* applicant failed to utilize the re-admission given to him is reasonable and rationally connected to the purposes of the statute. A further question arises, that is, whether, it was reasonable to peg the re-admission on specific conditions among them, that the applicant was required to complete the programme within one year. In addition, the reasonableness or otherwise of the decision requiring the *ex parte* applicant to register between Monday 14thJanuary 2013 and 28thJanuary 2013, after which the offer for re-admission would lapse also warrants consideration. Lastly, it was submitted that the admission was discretionary and conditional. The reasonableness of this proposition needs to be considered. The question here is whether the discretion was used to advance the purpose of the statute or whether it was arbitrary and capricious. Put differently, these reasons will stand or fall on whether they are legally valid, and whether they can be read in a manner consistent with the enabling statute and Regulations.

66. I now address the legal validity of the above reasons cited by the Respondents. First, it is argued that the offer for re-admission lapsed after the *ex parte* applicant failed to register within the given period. It has not been stated whether this express condition was contained in the letter of offer or whether a Notice to that effect was served.

67. Our constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order or a decision is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[48]Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.[49]

68. Section **4** of the FAA Act echoes Article **47** of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

69. There are five mandatory procedures that must be followed when performing an administrative action that has a particular impact on a person or persons. These are that the affected person must be given, before the decision is taken, Adequate notice of the nature and purpose of the proposed administrative action, A reasonable opportunity to make representations; After the decision is taken, A clear statement of the administrative action; Adequate notice of any right of review or internal appeal; and Adequate notice of the right to request reasons.[50]

70. "Adequate notice" means more than just informing a person that an administrative action is being proposed. The person must be given enough time to respond to the planned administrative action. The person also needs to know enough information about the proposed administrative action to be able to work out how to respond to the proposed action. They need to know the nature of the action (what is being proposed) and the purpose (why is the action being proposed).

71. A reasonable opportunity to make representations is a key requirement. The length of time a person should be given to make representations will be different in different circumstances. This should include an opportunity to raise objections, provide new information, or answer charges. A "reasonable opportunity to make representations" can sometimes mean that a person affected by administrative action must be given a hearing where that person can make a verbal input. At other times, it may only mean that a person should be allowed to submit written representations to an administrator who must read and think about them.

72. An administrator must clearly state what the administrative action is that will be taken. A person affected by the administrative action must understand what is likely to happen. This will assist the person affected to respond to the action. Using plain and straightforward language will help people to understand exactly what is being planned. Consistent with the foregoing, in the circumstances of this case, it

would have been prudent to include a clause in the letter of offer warning the applicant the consequences of failing to register or serve a notice sufficiently in time prior to the expiry of the offer period warning an applicant of the impeding decision.

73. It was argued that the offer was subject to conditions and or it was discretionary. Again, it has not been established that these conditions were brought to the attention of the applicant nor has it been show that the discretion was properly exercised.

74. Discretion vested in statutory body is dependent upon various circumstances, which the court has to consider among them the need to do real and substantial justice. Discretion must be exercised in accordance with sound and reasonable judicial principles. The King's Bench in *Rookey's Case*[51] stated as follows:-

> *"Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others or allays the rigour of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this Court. That is a discretionary power, which neither this nor any other Court, not even the highest, acting in a judicial capacity is by the constitution entrusted with."*

75. Talking about the need for discretion to be exercised guided by the rules of the law and equity, one would have expected the Respondent to explain the rationale for their decision. First, the applicant possessed the requisite qualifications. Delay in registering was explained as financial constraints. The delay was not shown to be wilful. The Respondents had a legal and moral duty to consider the reasons for the delay. Failure to do so was improper use of their discretion. The decision was unfair, arbitrary and capricious.

76. Next is the question of rationality. As a ground for the Review of an administrative action, rationality is provided in Section **7(2) (i)** of FAA Act. 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*."

77. A reading of the above provision leaves me with no doubt that the empowering provision does not contemplate a scenario where such an adverse decisions affecting a person's right can me made arbitrary without affording the affected person a hearing. Properly construed, the above provision means that the reasons given for the decision must pass rationality test.

78. In addition, reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the FAA Act. 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[52] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.'

79. 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*[53] and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[54]This stringent test has been applied in Australia[55] 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."

80. 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.

81. 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. 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.

82. 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.

83. 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.

84. 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.[56]

85. Article **47** (1) of the Constitution provides that *"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."* Briefly, this means that every citizen has a right to fair and reasonable administrative action that is

allowed by the law; and to be given reasons for administrative action that affects them in a negative way.

86. Lawful means that administrators must obey the law and must be authorized by law for the decisions they make. Reasonable means that the decision taken must be justifiable - there must be a good reason for the decision. Fair procedures means that decisions should not be taken that have a negative effect on people without consulting them first. In addition, administrators must make decisions impartially. To ensure fairness, the Fair Administrative Action Act[57] sets out procedures that administrators must follow before they make decisions.

87. The FAA Act was enacted to give effect to the right to just administrative action guaranteed under Article **47** Constitution. The Act defines Administrative Action to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body, or authority that affects the legal rights or interests of any person to whom such action relates. [58] To be an administrative action, the decision taken must adversely affect rights. What does this mean? Adversely means that the decision must impose a burden or have a negative effect. This includes decisions that; Require someone to do something, to tolerate something or not to do something; Limit or remove someone's rights; or decide someone does not have a right to something. This is called an "adverse determination of a person's rights. It is not in dispute that the impugned decision fits the above definitions. What is in dispute is whether it was arrived at in a manner that is consistent with the dictates of Article **47** of the Constitution.

88. As the Supreme Court of Appeal of South Africa observed[59] *"All statutes must be interpreted through the prism of the Bill of Rights."* This statement is true of decisions made by statutory bodies. The governing statute and the resultant decision must be interpreted through the prism of Article **47** of the Constitution. It is beyond argument that Article **47** codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. These are the elements an applicant is required to establish. In fact, absence of one would be sufficient to invalidate the decision. Further, there is a right to be given reasons to any person who has been or is likely to be adversely affected by administrative action.[60]

89. Section **7 (2)** of the FAA Act provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power. Thus, for the Court to review an administrative decision, an applicant must demonstrate the above grounds. In fact, not all of them must be proved. Even prove of one of the above is sufficient to invalidate the decision.

90. As stated above, the decision complained of must affect a person's rights. There are two ways that a decision can affect a person's rights:- (i)The decision could deprive a person of their existing rights, or (ii) It could affect a person's right by determining what those rights are. In other words, decisions that deprive someone of rights, and those that determine what that person's rights will be, are both "administrative action." Rights are understood in law as when one person has a right to claim something against another person and that other person has a duty to do something. Rights can be the rights granted by the Bill of Rights, by contract or by legislation. Rights can even be created by a promise of an administrator.

91. The impugned decision must have a legal effect, the effect must be direct. This is another way of saying that to qualify as administrative action, decisions must have a real impact on a person's rights. Legal effect means that a decision must be a legally binding determination of someone's rights or obligations. In other words, a decision must establish what someone's rights or obligations are, or must change or withdraw them.

92. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano*[61] 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*[62]*:-*
>
> *"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..."*

93. The provisions conferring mandate upon the Respondents must be read in the context of three different imperatives. The *first* is to enable the Respondents to effectively carry out their specially identified statutory mandate. The Constitution and the applicable statutes clearly envisages an important and active decisional role for the Respondents to perform their 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, trump, or trivialize citizens' constitutional rights.

94. As stated earlier, the *ex parte* applicant satisfies the requirements laid down in the Repealed Act and the 2009 Regulations and the KSL Act. Thus, it was patently unreasonable to require the *ex parte* applicant to sit for the same Pre-bar Examination, which he sat and passed.

95. Second, the governing statute and the Regulations are silent on the requirements for re-admission after a student drops out as the applicant did. The *ex parte* applicant was admitted to the ATP after the Respondents were satisfied, he met the admission criteria. Subjecting him to sit for the same examination he had passed was unreasonable.

96. Regulation 6(4) of the 2009 Regulations provided that the School may, upon a formal request, allow a person who cannot take up an offer for admission to defer registration for twelve months after which the offer for admission shall lapse. This is the core ground cited by the Respondents for the refusal to re-admit the *ex parte* applicant.

97. What emerges from the foregoing is that whereas the Regulations provide for consequences of failing to register upon admission to the ATP, the KSL does not seem to have a deferment policy, and if it exists, no evidence to that effect was presented to the court. Deferment applies were a student is admitted to a course or programme, but circumstances have since occurred making it impossible for the student to start or continue as happened in this case. In such circumstances, academic institutions world over have clear deferment policies which permit students to defer their studies so as to begin their studies at a later time. It is not enough for the Respondents to state that the *ex parte* applicant did not defer his admission. They were under n obligation to provide details of the deferment policy (if any), and whether it is usually communicated to students on admission.

98. Ordinarily, students are informed at the earliest opportunity possible that the institution considers requests from students for course deferment on compassionate grounds. Deferment refers to the situation in which the student delays or postpones the course (or unit) or is unable to take up the offer after admission.

99. The deferment policy must state examples of the reasons deemed acceptable for deferring studies. The course must be on-going such that by the time the student returns at the end of the deferment period, he is still able to study all the required units and successfully complete the requirements for graduation. It is not possible to provide a closed list of acceptable reasons to qualify for deferment. However, examples include sickness of a family member which necessitates presence of the student at home, death in the family, traumatic family circumstances where the family needs to be together to support each other or poor health where the student needs to have an extended period of rest and financial constraints.

100. Upon receiving a deferment request, the institution is obligated to assess and reply to the student's deferment request within a reasonable period. Where a deferment is allowed, all supervisory processes are suspended. The student does not undertake any academic work and is considered 'inactive.' No course fees will be charged during the deferment period. The length of time of the deferment is not included in the period for completion of the program and any deadlines will be adjusted accordingly.

101. I am constrained to make the above observations deeply conscious of the financial constraints many Kenyan students find themselves in, and, in many cases, either miss examination or are forced to drop out of studies. Time has come for the KSL and other Kenyan institutions of Higher learning to wake up to the hash economic realities facing many Kenyans, develop, and adopt such policies, otherwise, education risks remaining the preserve of the rich. In the event of death, or prolonged illness of a family member or relatives, many students are forced to drop out of school. Differently put, it not enough for the Respondents to casually mention deferment and fail to disclose to the court the details of the deferment policy, if at all it exists and whether the students are made aware of its existence.

102. The objective of the Admissions and deferment Policy is to ensure that the institution seeks at all times to admit students on merit and qualification by giving equality of opportunity for all applicants regardless of their economic status, orientation or any other similarly relevant factor.

103. Put differently, failing to appreciate that the *ex parte* applicant was forced to drop out of school due to financial constraints cannot be read in a manner that is consistent with the provisions of Article 47 of the Constitution and the provisions of the FAA Act. Such a decision seriously erodes the core content of the constitutionally guaranteed right to education, which is the subject of consideration in the next issue.

***c. Whether the impugned decision violates the ex parte Applicants' Right to legitimate expectation and the Right to education guaranteed under Article 43 (1) (f) of the Constitution.***

104. The *ex parte* applicant's position is that the impugned decision violates his right to education guaranteed under Article 43 (1) (f) of the Constitution, Article 47 of the Constitution and the right to legitimate expectation.

105. The Respondent's counsel did not specifically address this issue.

106. While appreciating the importance of fair administrative action as a Constitutional right, the South African court in *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others*[63] held that:-

> *"…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…"*

107. 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.

108. With regard to the first test, the *ex parte* applicant was admitted to the ATP. Prior to the admission, was required to sit for the Pre-bar examination in English language. He passed the examination. He was registered and commenced his studies. He had a legitimate expectation that he will not be asked to re-sit the same examination again.

109. As fate would have it, he dropped out of school due to financial constraints. Upon re-applying he was re-admitted, but, again, he was not able to register due to financial challenges. Subsequently, he applied for re-admission. It is at this stage when he was treated like a first time applicant. He was asked to re-sit the pre-bar examination, in violation of his right to legitimate expectation that having sat and passed the said paper, he would not be compelled to re-do the same paper again.

110. Again, treating him as a completely first time applicant, when he had applied for re-admission to finalize his studies is not only unfair, but a violation of his right to legitimate expectation. In addition, as stated above, absence of a clear deferment policy is not only unreasonable but also great failure to appreciate the harsh realities of life such as sickness, accidents or financial challenges. It is also a violation of the right to legitimate expectation.

111. The *ex parte* applicant had a reasonable legitimate expectation that the Respondents will comply with the law and let them complete the training. He had legitimate expectation that he would at all material times be treated fairly, lawfully and in a procedurally fair manner. He had a legitimate expectation that the Respondents will understand the law and correctly apply it. He had a legitimate expectation that his rights would not be violated. Differently put, the applicant's expectations were legitimate.

112. Addressing the subject of legitimate expectation, *H. W. R. Wade & C. F. Forsyth*[64] at pages 449 to 450, thus:-

> *"….**First…**, 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…."*

113. Regarding the 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 had an obligation to respect the Bill of Rights as required by Article 21 of the Constitution which 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.*

114. It is thus evident that the *ex parte* applicant has a constitutionally guaranteed right to education under Article 43 (1) (f) of 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 *ex parte* applicant's rights meets an Article 24 Analysis test nor do I find any in the circumstances of this case.

**Conclusion**

115. The *ex parte* 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. As stated earlier, the impugned decision does not fall within the legal boundaries assigned to the Respondents by the enabling statutes nor can it pass the test of reasonableness or rationality.

116. The applicants also seek an order of *Mandamus*. It is common ground that 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.[65] *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.[66]

117. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either.[67]

118. *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*),[68] and, was also discussed in *Dragan vs. Canada* (*Minister of Citizenship and Immigration*).[69] 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.*

119. *First,* in the instant case, there is no doubt that the Respondents have a statutory duty to act in accordance with the law. This duty is owed to the *ex parte* applicant. There is a clear right to the exercise of that duty. It is clear that the applicant has satisfied all the conditions precedent for the said duty to be exercised. There is no contest that there has been a demand and a notice of intention to sue, and, an unreasonable refusal to comply. There is no other remedy available. The KSL is the only institution offering the ATP programme in Kenya. The order of *Mandamus* is of great practical value in the circumstances of this case. I find no equitable bar to the remedy sought. Lastly, on a balance of convenience, this is a proper case for the order of *Mandamus* to issue.

120. I find that the impugned decision is amenable for review on grounds discussed herein above and that the writs of *Certiorari* and *Mandamus* prayed in this case 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.[70]

121. Judicial review is now a *constitutional supervision* of public authorities involving a challenge to the legal validity of decisions.[71] 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.

122. I find and hold that the *ex parte* applicant has established grounds to warrant the judicial review orders sought. Consequently, I allow the applicant's Notice of Motion dated **15th** May 2019 and make the following orders:-

*a) An order of **Certiorari** be and is hereby issued quashing the first Respondent's letters dated 1st December 2008 and 18th February 2019 denying the ex parte applicant admission to the Kenya School of Law for the Advocates Training Programme.*

*b) An order of Mandamus be and is hereby issued directed at the first and second Respondents compelling them jointly and severally to admit the applicant to the Kenya School of Law for purposes of pursuing the Advocates Training Programme.*

*c) No orders as to costs.*

**Signed, Dated and Delivered at Nairobi this 30th day of September 2019**

**John M. Mativo**

**Judge**

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[1] Act No. 26 of 2012.

[2] Act No. 9 of 1995.

[3] Cap 16, Laws of Kenya.

[4] Act No. 27 of 2012.

[5] Cap 16, Laws of Kenya.

[6] Act no. 27 of 2012.

[7] Act No. 4 of 2015.

[8] Cap 16A, Laws of Kenya-Repealed.

[9] Act No. 27 of 2012.

[10] Pet Nos. 377, 395 & JR 295 of 2015.

[11] {2018} e KLR.

[12] {2017} e KLR

[13]{2017}e KLR

[14] Cap 16A, Laws of Kenya.

[15] Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, "A guide to reading, interpreting and applying statutes" https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf.

[16] Plain meaning should not be confused with the “literal meaning” of a statute or the “strict construction” of a statute both of which imply a “narrow” understanding of the words used as opposed to their common, everyday meaning.

[17] See Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court’s Use of Dictionaries*, 47 BUFF. L. REV. 227, 270–71 (1999).

[18] Ibid.

[19] Henry M. Hart, JR. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1375–76 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994).

[20] Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 13 (1998).

[21] Therasus.com.

[22] Third Edition, Longman, www.longmam.com

[23] Published by Peter Haddock Limited, Bridlington, England, 1997.

[24] 6th Edition, Oxford University Press.

[25] Eleventh Edition, Oxford University Press.

[26]See *Fakir Mohd vs Sitam* {2002}1 SCC 741 at 747.

[27]See Statutory Interpretation by Justice G.P. Singh, 8th Edition, 2001, p.370.

[28] {2003-I-LLJ-384, 387

[29] {1999} (3) SC 573, 583

[30] {2018} e KLR.

[31] {2018} e KLR.

[32]{2017} e KLR.

[33] {2017} e KLR.

[34] {1940} Edition

[35] See *Pompano Horse Club v. State*, 111 So. 801, 805 (Fla. 1927).

[36] Ibid.

[37] *U.S. v. Hartwell*, 73 U.S. 385, 395 (1868) (analyzing whether the statute's language of "any banker, broker, or other persons not an authorized depository of the public moneys" includes a clerk in the office of the U.S. assistant treasurer so that the clerk is subject to the penalties prescribed in the statute for misconduct by officers).

[38] 503 U.S. 291 (1992) (analyzing whether Congress intended courts to treat upper limit of penalty as "authorized" in case involving juveniles convicted as adults when proper application of mandated sentencing guideline in adult case would bar imposition up to the limit).

[39] Frederick J. De Sloovere, *Contextual Interpretation of Statutes*, 5 Fordham L. Rev. 219 (1936).

[40] *Eyston v. Studd*, 2 Pl. Com. 459, 465 n, 75 Eng. Reprints 688 (C. B. 1574).

[41] See *Woods Manufacturing Co. vs The King* {1951} S.C.R. 504 at page 515 and Youngsam R (oN THE Application of) vs The Parole Board {2017}EWHC 729

[42] See *Justice Jeane W Gacheche & 5 Others vs Judges and Magistrates Vetting Board & 2 Others* {2015}eKLR citing Sir Charles Newbold, P in *Dodhia vs National & Grindlays Bank Ltd & Another* {1970} E.A. 195

[43] {2018} e KLR.

[44] {2018} e KLR.

[45] {2018} e KLR.

[46] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[47] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others* {2011} JOL 28061 (ECG) para 11

[48] Kioa v West (1985), Mason J

[49]See *Onyango v. Attorney General, {1986-1989} EA 456,* ***Nyarangi, JA*** asserted at *page 459 that:-"I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly."* At *page 460* the learned judge added:-*"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at."*

[50] Section 6 of the Act

[51] [77 ER 209; (1597) 5 Co.Rep.99].

[52] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

[53] See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821].

[54] *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.

[55] In *Prasad v Minister for Immigration* {1985} 6 FCR 155.

[56] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.

[57] Act No.4 of 2015

[58] Ibid, Section 2

[59]Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and [2000]

[60] Article 47(2) of the Constitution of Kenya, 201

[61] JR No 17 B of 2015.

[62] {1948} 1 K. B. 223, H.L.

**[63](CCT16/98) 2000 (1) SA 1,** at paragraphs135 -136.

**[64] Administrative Law, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000.**

[65] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[66]W. G. & C. Byse, *Administrative & Review Law, Cases and comments* 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[67] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review, 53 GEO. IJ. 19, 25-26 (1964).

[68] 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

[69] 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233).

[70] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 353 per Mason CJ. See also comments by Toohey and Gaudron JJ at 384.

[71] See *Republic vs Commissioner of Customs Services Ex parte Imperial Bank Limited* {2015} eKLR.