



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MILIMANI (NAIROBI)

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.485 OF 2017

IN THE MATTER OF ARTICLES 22(1) (2), 24(1), 26, 27, 43(F), 118 & 262 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ALLEGED VIOLATION OF RIGHTS GUARANTEED UNDER ARTICLES 24(1), 26, 27 & 43(F) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF LEGAL EDUCATION ACT NO. 27 OF 2012, STATUTORY INSTRUMENTS ACT NO. 23 OF 2013, KENYA SCHOOL OF LAW ACT & REGULATION 9(5) OF THE COUNCIL OF LEGAL EDUCATION (KENYA SCHOOL OF LAW REGULATIONS) 2009

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION

AND

IN THE MATTER OF THE PETITIONER SIMON MWANGI KAMAU & MARTHA KOECH

BEWEEN

SIMON MWANGI KAMAU.....1ST PETITIONER

KOECH MARTHA CHEPKOECH.....2ND PETITIONER

AND

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

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Petitioners Case

1. The Petitioners in their amended petition dated 27th June 2018 sued the 1st and 2nd Respondents seeking the following reliefs:-

- a. A declaration that the respondents refusal to register the petitioners for the November 2017 examinations violates their rights to education, livelihood and legitimate expectation as guaranteed under Article 43(1) f and 26 of the constitution thus null and void.
- b. A declaration that Regulation 9(5) Council of Legal Education (Kenya School of Law Regulations) 2009 as amended violates the petitioners freedom against discrimination as guaranteed under Article 27 of the Constitution and also is in contravention of Article 24(1) of the Constitution thus null and void.
- c. A declaration that Regulation 9(5) Council of Legal Education (Kenya School of Law Regulations) 2009 as amended are inconsistent with Article 118 and Article 262 and Schedule 6 paragraph 7(1) of the constitution thus null and void.
- d. An order that the 1st Respondent's council of do register the 1st petitioner and the 2nd petitioner for the conveyancing paper ATP107 and Criminal litigation paper respectively offered in the November 2017 examinations after the deadline of 29th September 2017.
- e. An order that the respondents do compensate the petitioner for the violation of his rights.

2. The petitioners case is that the 1st Respondent relied on Regulation 9(5) of The Council of Legal Education (*Kenya School of Law Regulations*) 2009 to deny the petitioners an opportunity to resit for an examination that will lead them into admission into the bar. The petitioners had been admitted at Kenya School of Law in December 2011 for 2012/2013 academic year. The 1st petitioner did his examinations but did not succeed in all the papers, he resited the examination but failed in, the conveying **ATP 107**. He paid for the examination, sought to defer the papers and in 2016 he wrote to the Respondent council requesting that he defers the papers to November 2017. That the council responded to his request through a letter dated 3rd November 2016 advising him he was not eligible to defer the papers and that he could do the papers in 2017 as he was still within the 5 years statutory timeline.

3. The 2nd petitioner's case is that she did not sit for the examination on medical grounds and deferred sitting her examination in 2013 and that due to deferment her 5 year timeline commenced in 2013 and terminate in November 2017. The 2nd petitioner admit sitting for her examination in 2013 but was not successful in all her papers, as she failed in criminal litigation paper, which paper she continued attempting till October 2017 when she sought to apply to resit for the same but the Respondent council declined her application on ground that her 5 years timeline had exhausted.

4. The petitioners' case is further, that the regulations relied upon by the 1st respondent are unconstitutional, as they were amended without public participation thus in violation of **Article 118 of the Constitution**, that the regulations violated their rights to livelihood and by extension their rights to life, that the regulations are discriminatory as they treat the petitioners differently from other candidates admitted in different years, that the manner of application of the regulations by the 1st respondent is inconsistent with the provisions of **Article 262 of the constitution** which requires, that all the existing registration enacted prior the constitution of Kenya 2010 be applied with the necessary modification and adoption so as to conform with the provisions of the constitution.

5. It is also the 1st petitioner's case, that the 1st respondent is estopped from denying, that the 1st petitioner is within the statutory timeline, as the 1st respondent had vide a letter dated 3rd November 2016, advised the 1st petitioner that he was within the statutory timeline and that the 1st respondent action violates the petitioner's legitimate expectations.

6. It is further petitioners case, that this petition is distinct from previous petitions brought before this Honourable Court on the questions touching on **Regulation 9(5) of The Council of Legal Education (Kenya School of Law Regulations), 2009** for reasons that this petition impugns the actions of the respondent as being unconstitutional for reliance on unconstitutional regulations, and as such this petition challenges the regulation 9(5) of the council of legal education as being inconsistent with the constitution thus null and void, further the 1st petitioner issue of estoppel arising from the 1st respondent's letter dated 3rd November 2016 is novel.

1ST Respondent's Case

7. The Council of Legal Education case, is as per its grounds of objection dated 28th May 2018 being as follows:-

1. The first Respondent's decision implemented the substance of Regulation 9(5) of the Council of Legal Education (Kenya School of Law) Regulations 2009, applying through section 29(3) (a) of the Kenya School of Law Act, 2012, as it is bound to do by the tenor and substance of the Legal Education Act, 2012;
2. Regulation 9(5) of the Council of Legal Education (Kenya School of Law) Regulations 2009, is still law, and provided it remains law, the First Respondent is enjoined to strictly adhere to it;
3. Regulation 9(5) of the Council of Legal Education (Kenya School of Law) Regulations 2009 is a necessary instrument of law to facilitate legal education and training in Kenya and passes the Constitutional threshold of valid statutory claw back at Article 24 of the Constitution;
4. The five (5) year tenure for Applicants at the Kenya School of Law and sitting of the Bar examinations, is from the date of registration and is calendar years, not academic years; a student once admitted becomes admittee in an academic year, when such student resits the Bar examinations, it is not counted as an academic year but a Bar examination writing session. A student is admitted to one academic year with the right to write the Bar examinations to a maximum of five (5) times, in a maximum period of five (5) calendar years;

5. The Petitioner is outside the five (5) year tenure limited by Regulation 9(5) of the Council of Legal Education (Kenya School of Law) Regulations 2009, the five (5) years expired in 2016;

6. Regulation 9(5) of the Council of Legal Education (Kenya School of Law) Regulations 2009 is an enactment of 2009, and presently applies through invitation of section 29 (3) (a) of the Legal Education Act, 2012. All these processes were operational before enactment of the Statutory Instruments Act, which is an enactment of 2013. Accordingly the Statutory Instruments Act, could not be applied to Regulation 9(5) of the Council of Legal Education (Kenya School of Law) Regulations 2009;

7. Regulation 9(5) of the Council of Legal Education (Kenya School of Law) Regulations 2009 is an enactment of 2009, which predates the Constitution of Kenya 2010, accordingly Article 10(2) and 118 of the Constitution 2010, could not have been applied to Regulation 9(5) of the Council of Legal Education (Kenya School of Law) Regulations 2009, because Article 10(2) and 118 of the Constitution 2010 were nonexistent at the time of enactment of Regulation 9(5) of the Council of Legal Education (Kenya School of Law) Regulations 2009.

8. The Petitioners have not demonstrated a justiciable violation of fundamental rights, under Articles 26, 27 and 43(1) & 47 of the Constitution.

9. It is the public interest that the Honourable Court respects the law, and enforces it to ensure constituency in implementation of legal education policy in Kenya, instead of holding otherwise and therefore opening a precedent of violation of the law.

2nd Respondent's Case

8. The 2nd Respondent herein, the Honourable Attorney General did not participate in these proceedings and as such did not file any response.

Analysis and Determination

9. I have very carefully perused the petition, grounds of objection, counsel rival submissions and from the above the issues arising thereto for consideration can be summed up as follows:-

a. Whether the 1st Respondent's conduct constitutes a violation of the Constitution of Kenya 2010?

b. Whether the petitioners are entitled to the orders prayed for?

A. Whether the 1st Respondent's conduct constitutes a violation of the Constitution of Kenya 2010?

10. Regulation 9(5) of Council of Legal Education (Kenya School of Law Regulations) 2009 provides as follows:-

"Unless stated in the specific programme of study, a candidate shall be allowed a maximum of five examination sittings in each course of study, which shall be undertaken within a maximum period of three years."

11. The Regulation 9(5) of the Council of Legal Education (*Kenya School of Law Regulations*), 2009 is unequivocal that the Advocates training Programme (ATP) a candidate shall be allowed maximum of five years within which to complete the entire course of study. The net effect of the regulation is clear that all candidates were allowed five (5) years within which to qualify from the programme beginning 18th November 2011 as per Council of Legal Education. That implies that the five (5) year rule commenced as at the November examination series of the year in which the candidate is registered for the Bar examinations. The clock of time starts ticking on registration and commencement of the course of study. The petitioners in this case having been admitted in December 2011, the time starting running in 2012 and lapsed in November 2016 Bar examination.

12. The petitioners were admitted to the Kenya School of Law in December 2011 and by November 2016 had not completed their Bar examination. Their attempt to defer the papers which they had not passed to November 2017 were rejected by the 1st Respondent for being not within the five (5) year statutory timeline as per **Regulation 9(5) of Council of Legal Education (Kenya School of Law Regulations), 2009**.

13. In constitutional petitions, it is trite as established in **Anarita Karimi Njeri vs R(1976-1980), KLR 1272**, that the petitioner must state and identify his rights which have been violated with precision and how the same have been or will be infringed in respect to him.

14. The petitioners in their amended petition dated 27th June 2018 have failed to identify how their rights have been infringed. The Kenya School of Law through their letter dated 6th February 2013 opposed the petitioners application for deferral and informed the petitioners that the petitioners will not be exempted from the stipulated five (5) years school tenure from the date of registration. The letter the petitioners seek to rely on clearly underlined the fact that **Regulation 9(5) of Council of Legal Education (Kenya School of Law Regulations), 2009**; concerned with programme as opposed to the Bar examination. The Regulation is mandatory for candidates to complete the bar examination and pupillage within five (5) years of commencement. I find in view of the contents of the Regulation the petitioners are barred from pleading legitimate expectation as the petitioners were duly informed of the meaning of **Regulation 9(5) of Council of Legal Education (Kenya School of Law Regulations) 2009** well in advance.

15. The court expanded on the doctrine of legitimate expectation in the case of **Masai Mara (SOPA) Limited vs Narok County**

Government [2016] eKLR where the court held as follows:-

"110. The doctrine of legitimate expectation clearly protects the procedural expectation to be accorded a hearing as well as the substantive expectation that a regular practice giving some benefits, privilege or advantage would be continued or be retained. As was stated by De Smith, Woolf and Jowell in *Judicial Review of Administrative Action* 5th Ed, legitimate expectation;-

"Arises where a person responsible for taking a decision had induced in someone who may be affected by the decision, a reasonable expectation that he will receive or attain a benefit or that he will be granted a hearing before the decision is taken."

16. Locally, the doctrine has been adopted and applied by the courts in various cases. The requirements for successful reliance on the doctrine were, however, well articulated by the Court of Appeal in the case of **Oindi Zarpeline & 39 others vs Karatina University & another [2015] eKLR** and even more clearly by the Supreme Court in **Communications Commissions of Kenya & 5 others vs Royal Media Services Ltd and 5 others Petition No. 14 of 2014**. In the Royal Media Services' case the court stated as follows at paragraph 269 that the emerging principles on legitimate expectation may be succinctly set out as follows:-

"a) There must be an express, clear and unambiguous promise given by a public authority;

a. The expectation itself must be reasonable;

b. The representation must be one which was competent and lawful for the decision-maker to make; and

c. There cannot be a legitimate expectation against clear provisions of the law or the Constitution."

17. Upon considering the above authorities and the petitioners submissions I find in applying the legitimate expectation as pleaded by the petitioners will be contrary to clear provision of the **Regulation 9(5) of the Council of Legal Education (Kenya School of Law Regulations) 2009**. The said Regulation has not been applied discriminatory to the candidates but has been applied to all candidates in similar circumstances with the petitioners. It is Respondent's position, that the only persons who have been exempted from the said provisions were the candidates who had outstanding units by 18th November 2011 when the Regulations became operational as per General Notice No. 17 of 2011. I find in this case the petitioners applied for deferment after 2012 when Regulations were in operation. Consequently I find that they cannot enjoy the exemption in the General Notice No.17 of 2016.

18. The courts have determined whether unequal treatment is discrimination in the case of **Federation of Women Lawyers Fida Kenya & 5 others vs. Attorney General & another (2011) eKLR**, where the court held that unequal treatment is not discrimination in the following words:

"In our view, mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislative had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases."

19. Having carefully considered impugned Regulation and the petitioners petition, I find that the petitioners have not been discriminated against nor have they been able to demonstrate in their petition how their rights have been infringed by the Respondent. The Respondent has acted faithfully in executing their statutory duty and their duty in upholding the law and ensuring due compliance with the law and Regulations governing the examination. The council of Legal Education is mandated to supervise and control legal education in Kenya and is expected in doing so, to apply the Regulations to all candidates who take their studies at School of Law as required and should not act contrary to the provisions conferred upon it by law.

20. I find, that it is important in dealing with petitions of this nature for court to avoid making decision or interpretation of statutory provision, rule or by-law which would bring about a result of rendering the system unworkable in practice or create a situation that will go against clear provisions of the law governing the subject matter in issue. The law and Regulations in question and are designed at maintaining, ensuring and assuring high professional standards and competence. I find the impugned regulation to have good intentions and purposes of ensuring professionalism and the same is reasonable and valid. It is logically related to legitimate public expectations and concerns of maintaining high professional standards and ensuring competency in the legal profession. The Regulation does give serious and committed candidate sufficient opportunity to pursue their course and should not be relaxed to allow anybody to pursue their career at their own pace or whim.

21. I have considered the petitioners petition and I find that the petitioners were given equal opportunity with other candidates, they were aware of what was expected of them since day one of their admission to Kenya School of Law. The Regulation did not come to their knowledge as a surprise. I find therefore the petitioners have failed to demonstrate, that the impugned Regulations are unconstitutional. The petitioners have not demonstrated how Article 24, 26, 27, 43 and 47 of the Constitution of Kenya 2010 has been violated by the impugned Regulation. Further Regulation 9(5) of the Council of Legal Education (*Kenya School of Law Regulations*) 2009 was enacted in 2009, which predates the constitution of Kenya 2010, accordingly **Article 10(2) and 118 of the Constitution of Kenya 2010**, could not have been applied to Regulation 9(5) of the Council of Legal Education (Kenya School of Law) 2009 since **Article 10(2) and 118 of the Constitution of Kenya 2010** were non-existent at the time of enactment of Regulation 9(5) of the Council of Legal Education (Kenya School of Law Regulations) 2009. Further the Regulation was generated before enactment of Statutory Instrument Act, enacted in 2013 and as such that Act, could not be applied to Regulation 9(5) of Council of Legal Education (Kenya School of Law) 2009.

22. In view of the above I find the petitioners have failed to demonstrate a justifiable violation of their fundamental rights under Article 26,

of the constitution which deals with rights to life; Article 27 of the constitution, which deals with equality and freedom from discrimination, Article 43(1) of the constitution on Economic and social rights, and Article 47 of the constitution which deals with fair administrative action.

23. In view of the foregoing I find the petitioners have failed to demonstrate that the 1st Respondent's conduct constitutes a violation and contravention of the constitution of Kenya 2010.

B. Whether the petitioners are entitled to the orders prayed for?

24. The petitioners contentions are is that five (5) years' timeline ran from the time they sat for their examination and not the time of their admission, as the purpose of Regulations is not to regulate an admission, but on period of study and administration of examination, as such any deferral that has been approved ought to halting the time line for the period of deferment.

25. Regulation 9(5) of the Council of Legal Education (Kenya School of Law) Regulation is necessary instrument of law to facilitate legal education and training in Kenya and passes the constitutional threshold of valid statutory claw back of Article 24 of the constitution, which Article provides:-

"(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

(a) The nature of the right or fundamental freedom;

(b) The importance of the purpose of the limitation;

(c) The nature and extent of the limitation;

(d) The need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) The relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose."

26. The impugned Regulation provides five (5) year tenure for Applicants at Kenya School of Law and sitting of the examination and is from the date of Registration and in calendar years and, not academic years. The Regulation timelines are from the date a student is admitted as once a student is admitted he becomes admittee in an academic year, and where such a student resits the Bar examination, it is not counted as an academic year but a Bar examination writing session. A student who is admitted to one academic year has right to write the Bar examination to maximum of five (5) times, in a maximum period of five (5) calendar years. The petitioners were admitted in December 2011. The petitioners sat the examination and in 2017 were not allowed to register for 2017 examination. The five (5) years for petitioners expired in 2016 which meant they could not be eligible to sit 2017 examination. I have considered the provisions of the impugned Regulation, and find that petitioners are outside the five (5) year tenure limited by Regulation 9(5) of Council of Legal Education (Kenya School of Law) Regulation 2009; as the petition was filed on 29th September 2017.

27. In view of the above and upon the finding that no violation of rights have been established by the petitioners; I find that there is no justification for granting any orders in favour of the petitioners. The petitioners have failed to prove that their fundamental freedoms and rights have been denied, violated, infringed or threatened by the Respondent. I have been unable to be convinced the petition has basis and justification to warrant issuance of the orders sought.

28. The upshot is that the petition is devoid of merit. It is dismissed. Each party to bear its own costs.

Dated, signed and delivered at Nairobi this 26th day of September, 2019.

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J .A. MAKAU

JUDGE