



REPUBLIC OF KENYA

IN THE HIGH COURT KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO.182 OF 2019

**IN THE MATTER OF: ARTICLES 2(1), 3(1), 10(1) (2), 19(2), 21, 22, 23, 24, 25, 27(1), 28,
43, 47, 48, 55, 56, 165(3), 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLES 2(1), 3(1), 10(1) (2), 19(2), 20(2), 21(1), 22, 23, 24, 27(1),
28, 43, 47, 48, 55, 56, 165(3), 258, 259 & 260 OF THE CONSTITUTION OF KENYA 2010**

AND

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

AND

**IN THE MATTER OF: SECTION 3(1) (A) AND (C), 4(1) (2)
(3) & (11) OF THE FAIR ADMINISTRATIVE ACTION**

AND

IN THE MATTER OF: KENYA SCHOOL OF LAW ACT NO. 26 OF 2012 LAWS OF KENYA

BETWEEN

KIHARA MERCY WAIRIMU.....1ST PETITIONER

MWASHIGADI KEZIAH MBALA.....2ND PETITIONER

ABDI SAMIRA ALLY.....3RD PETITIONER

KANYI ALEX KARINGITHI.....4TH PETITIONER

SOMOW IBRAHIM HAMDIL.....5TH PETITIONER

KHANBHAI SARRAH MUSTANSIR.....6TH PETITIONER

MICHELLE WANJIKU WANYEE.....7TH PETITIONER

SARAH MWHIHAKI MWANGI.....8TH PETITIONER

VERSUS

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

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

KENYA NATIONAL EXAMINATION COUNCIL.....3RD RESPONDENT

KENYA NATIONAL QUALIFICATION AUTHORITY.....4TH RESPONDENT

THE ATTORNEY GENERAL.....5TH RESPONDENT

JUDGMENT

Petitioner's Case

1. The petitioners through a petition dated 14th May 2019 brought pursuant Articles 2(1), 3(1), 10(1), (2), 19(2), 20(2), 21(2), 22, 23, 24, 27(1), 28, 43, 47, 48, 55, 56, 165(3), 258, 259, and 260 of the Constitution of Kenya and Section 3(1) (A) and (c); 4(1) (2), 3 and 11 of The Fair Administrative Actions; seek several prayers being as follows:-

a) A Declaration that the acts of the 1st respondent of rejecting and/or non-admitting the petitioners to the ATP (Advocates Training Programme) despite having qualified in terms of the second Schedule of the Kenya School of Law Act 1(a) and despite having been conferred their Bachelors of Laws(LL.B) degree by a local University, the Riara University contravened the petitioners fundamental rights and freedoms under articles 2(1), 3(1), 10(1) (2), 19(2), 20(2), 22, 23, 24, 27(1), 28, and article 47 of the Constitution of Kenya, 2010, and therefore such violation and/ or infringement was unconstitutional, unlawful, illegal, null and void in consequence the Honourable court intervenes to quash, set aside and/ or put a stop to the same forthwith.

b) A declaration to issue to the effect that the application by the 1st respondent of the provisions of second Schedule 1(b) of the Kenya School of Law Act No. 26 of 2012 to the extent that the same applies dissimilar treatment exclusively to the petitioners is discriminatory, irrational, unreasonable, arbitrary, abuse of discretion, exercise of discretion for improper purposes, unlawful, acting unfairly, unreasonable and amounted to exercising of discretion arbitrarily and had violated the rights and fundamental freedom of the petitioners.

c) A declaration that the 1st respondent conduct above amounted to acting unfairly, acting in violation of Article 47 of the Constitution of Kenya and Section 4 (3) of the fair Administrative Actions Act, 2015 to the extent that the petitioners were not afforded the benefit of the rules of natural justice and were not heard before the decision to bar or reject the applications for admission and therefore the whole process leading to the non-admission to the Kenya School of Law ATP Programme was in expeditious, inefficient, unlawful, unreasonable, procedurally unfair unconstitutional, nullity, null and void ab initio and accordingly quashed and/or set aside in its entirety.

d) An order directing the 1st and 2nd respondents to register and forthwith admit the petitioners herein to undertake Advocate Training Programme (ATP) at the Kenya School of Law without any other conditions.

e) In the alternative an order directed to the 3rd and 4th respondents directing them to issue the petitioners with the equation certificates for the Academic papers.

f) An order requiring the respondents to compensate the petitioners herein for the various violations of their fundamental rights and freedoms as outlined hereinabove, on such sums of money as this Honourable Court will deem appropriate and necessary to award.

g) Costs of the petition and inherent thereon at court rates.

h) Any other orders that this Honourable Court deems fit and just to grant in the circumstance of this petition in the interest of justice.

2. The petitioners also filed a Notice of Motion dated 14th May 2019. The Notice of Motion is spent. The petitioners in support of the petition rely on affidavit by Mwashigad Keziah Mbala sworn on 16th May 2019; her further affidavit sworn on 18th June 2019; her further supplementary affidavit in response to the 1st and 3rd Respondents Replying affidavit; petitioner's 2nd further supplementary affidavit in response to the 4th Respondent's affidavit through Juma Mukhuana filed on the 15th October 2019 sworn on 16th October 2019.

3. The petitioner further filed Notice of documents to be relied upon during the hearing of the petition through a document dated 14/10/2019 being as following:-

a) Documents annexed on the petitioners/applicants Notice of Motion dated 14th May, 2019 call it MKM-1 to MKM-4.

b) Petitioners' further affidavit together with the attachments therein dated 18th June, 2019 and filed on the 19th June, 2019 together with annexure "MKM1" that is the LL.B Degree Certificates.

c) Petitioners Supplementary Affidavit in response to the 1st & 3rd respondents replying affidavit dated 24th September, 2019 and filed in court on the 25th September, 2019.

d) Petitioners/applicants further affidavit dated 18th day of June, 2019 and filed on the 19th day of June, 2019.

e) Petitioners Additional List of Authorities dated 25th September, 2019 and filed the same day.

f) Petitioners written submissions dated 18th June, 2019 together with authorities attached to it filed on the 19th June, 2019.

4. The petitioner further relies on submissions dated 18/6/2019 together with authorities attached thereto. The petitioners in this petition seek that the prayers in the petition be granted.

The 1st Respondent's Case

5. The 1st Respondent filed Replying affidavit sworn on 19th June 2019 and grounds of opposition dated 20th June 2019. The 1st Respondent case is, that it rejected the petitioners' applications on the basis of requisite qualifications for admission into the Advocates Training Programme (ATP) as outlined in second schedule of the Kenya School of Law Act No. 26 of 2012. Thus due to failure of the petitioners to attach their A level certificates and an equation letter (*secondary school qualification clearance letter*) from the Kenya National Qualifications Authority for consideration.

6. It is further the 1st Respondent's case by virtue of the 2nd Respondent being the Regulator of Legal Education in Kenya is mandated under the Legal Education Act, 2013, to ensure the 1st Respondent had to comply with the guidelines provided and the Legal Education Act 2013. The 1st Respondent contend it acted lawfully and did not infringe on the petitioners rights to fair administrative action as they were advised of the decision promptly and provided with reasons for decision and information relied upon in the making of the decision.

7. The 1st Respondent's grounds of opposition are, that it acted within the jurisdiction or powers confined by the Kenya School of Law Act No. 26 of 2012. It is further averred that the petitioners do not meet the statutory requirements for Admission to Advocates Training Programme (ATP) as set out under the second schedule to Kenya School of Law Act No. 26 of 2012 and lastly the petitioners applications are misconceived, frivolous, vexatious and an abuse of the court process and the same should be struck out with cost to the Respondent.

The 2nd Respondent Case

8. The 2nd Respondent is opposed to the petitioners petition and in doing so, filed statement of grounds of opposition together with skeletal arguments urging the contents of the petition in their entirety do not establish any cause of action against the 2nd Respondent; that there is no authority given to the 2nd Respondent by the other petitioners to sue on their behalf; that the present application offends provisions of Article 159(2) (c) of the Constitution of Kenya 2010 and Section 31(1) of the Legal Education Act No. 27 of 2012 and largely the legal doctrine of exhaustion. It is further the 2nd Respondents grounds of opposition, that the 1st and 2nd Respondents are not in a position to properly ascertain whether the petitioners met the minimum entry requirements for the undergraduate programme at Riara University; that qualifications of most of the petitioners cannot be logically equated by the 3rd Respondent since the certificates lack some of the core units prescribed by law; that there is no violation of the rights to administrative action; that the legitimate expectation cannot be weighed against the provision of the law and lastly Article 27 of the Constitution does not prohibit discrimination it prohibits unfair discrimination and the burden of proving unfair discrimination lies wholly with he who alleges.

The 3rd Respondent's Case

9. The 3rd Respondent is opposed to the petitioners' petition and in doing so, proceeded to file a Replying affidavit sworn on 20th June 2019. It is 3rd Respondent's case, that the 3rd Respondent is established under Kenya National Examination Council Act No. 29 of 2012 with its functions *inter-alia* to:-

a) Set and maintain examination standard, conduct public academic technical and other national examinations within Kenya at basic and tertiary levels.

b) Award certificates or diplomas to candidates in such examinations.

10. That in performance of its functions, the 3rd Respondent besides being guided by provisions of the Act, is also empowered to develop rules for the equation of certificates issued by accredited examination bodies with the qualifications awarded by council under section 10(2) (g) of the Act and section 48 of the Act which further stipulates that the 3rd Respondent may make rules for the equation of certificate including prescribing what examination may be equated by the 3rd Respondent. The Rules on equation of certificates were developed and gazetted under Legal Notice No. 130 of 2015, Kenya National Examinations Council of (*Equation of Certificate*) Rule of 2015.

11. The Respondent's case is further, that the petitioners have never applied for equation of their individual certificates with the 3rd Respondent as required under the Legal Notice No. 130 of 2015, which applications are usually received by the 3rd Respondent.

12. It is further contended by the 3rd Respondent, that Rule 6 (a) and (c) of the said Legal Notice No. 130 of 2015 the 3rd respondent is required to equate a certificate for course offered within Kenya and identical or similar to that offered by Council or any other certificate that in the opinion of the council may be non-equitable.

13. The 3rd Respondent in 2017, constituted a panel of subject specialist to re-evaluate the **IGSE** examination done within/outside the country. This was prepared and panel reported key non-conforming areas and the panel concluded that **IGSE** and **GCSE** are two different examinations and **IGSE** was not offered in the **U.K.** Further the Kenya Certificate of Secondary Examination (**KCSE**) was a University entry qualification examination whereas **IGCSE** was not.

14. It is further the 3rd Respondent case, that the prayers sought in this petition as a result of the allegation made thereon are only meant to interfere with the institutional independence of the various independent institution, which is mandated to test and assess the quality of education sector in Kenya in order to achieve, enhance and safeguard, nationally and internationally accepted certification standard.

15. The 3rd Respondent contend, that the petition is misconceived, incompetent and an abuse of the court process.

The 4th Respondent's Case

16. The 4th Respondent filed response to the petition dated 15th October 2019. It is 4th Respondent's response, that this court lacks jurisdiction to hear and determine this petition and avers, that where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of parliament, the procedure must strictly be followed.

17. The 4th Respondent further avers even where the court has jurisdiction, where there is an alternative effective remedy, then the court's jurisdiction would be limited to the extent that the petitioners must first exhaust, that other remedy before resorting to approaching of this honourable court as per Article 159(2) (c) of the Constitution and section 9 of the Fair Administrative Actions Act 2015.

18. It is further the 4th Respondent's contention, that the Legal Education Appeals Tribunal established under the provisions of section 29 of the Legal Education Act is the body vested with the competent jurisdiction to hear and determine this matter in the first instance and as such the petitioner ought to have channeled their grievances to the aforesaid tribunal before approaching the High Court as regards to petitioners applications to 2019/2020 Advocates Training Programme were made to the 1st Respondent on or before 31/10/2018.

19. It is further contended by 4th Respondent, that as at the time of making their application to the 1st Respondent; Some of the petitioners had not complied with section 16 and section 17 of the Kenya School of Law Act No. 26 of 2012 to the extent that some of the petitioner's had not attached their "A" level certificates while others were yet to complete the **LLB** Programme nor had they attached the equation certificate from the 4th Respondent.

20. The 4th Respondent contend, that under section 1 of the schedule 2 of the Kenya School of Law Act, there are two categories of persons who can be admitted to the Advocates Training Programmes namely:-

i) Those who attended local universities who fall under paragraph 1(a) and

ii) Those who attended universities outside Kenya who fall under paragraph 1(b) of schedule.

21. The 4th Respondent contend none of the petitioner's right to education as guaranteed under Article 43(1) of the Constitution has been violated as alleged in the petitioners' petition. It is further contended, that the petition has not raised any single constitutional issue to warrant the court entertain the petition. It is further urged no cause of action has been raised against the 4th Respondent in the instant petition neither is there violation of the petitioners fundamental rights and/or freedoms that can be attributed to the 4th Respondent.

The 5th Respondents Case

22. The 5th Respondent is opposed to the petition. In opposing the petition the 5th Respondent relies on grounds of opposition dated 10th June 2019 and filed on 10th June 2019. The 5th Respondent case is, that the admission to Kenya School of Law is regulated by law. That the decision to admit or not to admit a student to Kenya School of Law belongs to the Respondents and such decision is discretionary guided by the relevant statute and regulations including the Legal Education Act 2012, the Kenya School of Law Act 2012; the Kenya School of Law (*Training Programmes*) Regulations 2013 and the Advocates Act.

23. It is further the 5th Respondent's case, that the law and the regulations in question are designed at maintaining and ensuring high professional standards and competence and court should as far as possible, avoid any decision or interpretation of a statutory provision, rule or by a law which would bring about the result of rendering the system unworkable in practice or create a situation that will go against clear provisions of the law governing the subject in issue.

24. It is the 5th Respondent's case, that the petitioners have failed to demonstrate how the Respondents conduct constitute a violation and/or contravention of their fundamental rights and freedoms and further the petitioners have failed to annex their alleged qualifications from Riara University. It is further contended by the 5th Respondent that inequality treatment is not per se prohibited.

25. The 5th Respondent further contend, that the requirements for successful reliance on the doctrine of legitimate expectation are set out is that:-

- a) **There must be an express, clear and unambiguous promise given by a public authority.**
- b) **The expectation itself must be reasonable.**
- c) **The representation must be one which was competent and lawful for decision-maker to make and**
- d) **There cannot be a legitimate expectation against clear provisions of the law or the constitution (see Communications commissions of Kenya & 5 others vs Royal Media Services Ltd & 5 others, petition No. 14 of 2014).**

26. The 5th Respondent further contend, that the Respondents have acted in accordance with the power conferred upon them by law to bar the petitioners from joining the Kenya School of Law for the Advocates Training Programme; urging further the petition is frivolous, vexatious, incompetent and improperly before court and is an abuse of the court process.

The Interested party's Case

27. The Interested party did not file any response to the petition.

Analysis and Determination

28. I have very carefully considered the petition, all supportive affidavits and annexures, the Respondents replying affidavits and annexures and grounds of opposition; counsel submissions in support and in opposition of the petition and from the aforesaid, several issues arises for consideration; and which can be summarized as follows:-

- a) **Whether this honourable court is vested with competent jurisdiction to entertain this petition?**
- b) **Whether the contents of the petition in their entirety establishes a cause of action against the 2nd Respondent?**
- c) **Whether there is authority given to the 2nd petitioner by the other petitioners to sue on their behalf and whether failure to do so is fatal to other petitioner's case?**
- d) **Whether the petitioners have established that they are qualified to warrant direct admission at Kenya School of Law?**
- e) **Whether the petitioners have demonstrated violation of the right to fair administrative action?**
- f) **Whether the legitimate expectation can be weighed against the provisions of the law?**
- g) **Whether the petitioners have demonstrated that they are discriminated under Article 27 of the Constitution of Kenya 2010?**
- h) **Who is to blame?**

A) Whether this honourable court is vested with competent jurisdiction to entertain this petition?

29. The 4th Respondent in its response to the petitioners' petition contends that this honourable court does not have jurisdiction to hear and determine the petition on the grounds, that where there is a clear procedure for the redress of any particular grievance prescribed by constitution or an Act of parliament, that procedure must strictly be followed. Further the 4th Respondent urges even where the court has jurisdiction, where there is an alternative effective remedy, then the court's jurisdiction would be limited to the extent, that the petitioners must first exhaust, that other remedy before resorting to approaching this honourable court. It is 4th Respondent's contention, that this is the spirit and letter of **Article 159(2) (c) of the Constitution 2010 and section 9 of the Fair Administrative Actions Act 2015.**

30. It should be noted that **Section 9(2) of the Fair Administrative Actions Act, (an act of parliament)** that was enacted to bring into operation **Article 47 of the Constitution 2010)** provides that the High Court or subordinate court under subsection (1) shall not review an administrative actions or decision under the Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

31. It is further contended by the 4th Respondent, that The legal Education Appeals Tribunal established under the provisions of section 29 of the Legal Education Act is the body vested with the competent jurisdiction to hear and determine this matter in the first instance hence the petitioners ought to have channeled their grievances to the aforesaid tribunal before approaching the High Court.

32. The 4th Respondent in support of its preposition relies on the case of **Samuel Kamau (SK) Macharia vs. KCB Ltd & another (2012) eKLR** where Supreme Court stated:-

"A court's jurisdiction flows from either the Constitution, or legislation or both. Thus a court of law can only exercise jurisdiction as conferred on it by law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law- where the Constitution exhaustively provides for the jurisdiction of a court of law, it must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

33. The 4th Respondent urges, that it is not in doubt, that the jurisdiction of this court is unlimited and that even where the court has jurisdiction, where there is an alternative effective remedy, then this court's jurisdiction would be limited to the extent that a party must first exhaust that other remedy before resorting to approaching this honourable court as per the spirit of Article 159(2) (c) of the Constitution and section 9 of the Fair Administrative Action Act, 2015.

34. The 2nd Respondent on the issue of jurisdiction contends, that the court has partial jurisdiction relying on the provision of Article 159(2) (c) of the Constitution of Kenya 2010 and section 31 of the Legal Education Act No. 27 of 2012 and largely the legal doctrine of exhaustion. It is urged for the 2nd Respondent there is established the Legal Education Appeals Tribunal under section 29 of the Legal Education Act whose jurisdiction is found under sections of the Act. That the orders, it is urged sought in the petition, are constitutional in nature as well as orders of mandamus where Judicial Review reliefs, this court can grant. It is further urged the same reliefs sought could be granted by the Legal Education Appeals Tribunal but the petitioners combined and sought the reliefs together some of which could be solved by the tribunal.

35. The petitioners contend in their response that this court is vested with jurisdiction to hear and determine this petition. The petitioners in this petition have invoked the High Court jurisdiction under Article 165(3) (b) of the Constitution of Kenya 2010 which vests in the High Court jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Further Article 23 of the Constitution gives High Court authority to uphold and enforce the Bill of rights by granting appropriate relief including making of declaration of rights, issuing injunction, conservatory orders, declaration of invalidity of any law that denies, violates, infringes or threatened a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; order compensation and issue an order of Judicial Review. On the other hand Article 22 of the Constitution of Kenya 2010, grants every person a right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. I have very carefully weighed the conflicting arguments and also considered the petitioner's petition, and I find that this is the jurisdiction that the petitioners have invoked in their petition before this court.

36. The Respondents contention is, that this court is divested of jurisdiction to hear and determine the matter by dint of the exhaustion doctrine, under provisions of section 9 (2) of the Fair Administrative Actions Act and section 31 and 32 of the Legal Education Act have no basis.

37. In the case of **Kelvin K. Mwiti & others vs Kenya School of Law & 2 others (2015) eKLR** it was held:-

"138. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly..."

"From section 31(1) of the *Legal Education Act*, it is clear that the Tribunal's power is restricted to matters relating to the Act. The powers of the Tribunal are however enumerated under section 35 of the said Act as follows:-

"Upon hearing an appeal the Tribunal may-

a) Confirm, set aside or vary the order or decision in question;

b) Exercise any of the powers which would have been exercise by the Council, in the proceedings in connection with which the appeal is brought; or

c) Make any other order, including an order, for costs, as it may consider just."

38. In the instant petition, the petitioners seek *inter-alia*:-

A declaration that the 1st Respondent acts of rejecting and/or non-admitting of the petitioners to the ATP contravened the petitioners' fundamental rights and freedoms and the violation and/or infringement was unconstitutional, unlawful, illegal, null and void. The petitioners also sought other several orders including orders of mandamus. For the court to determine the several prayers in the petitioners' petition, I find that there is need of interpretation and application of the constitution under Article 165(3) (b) of the Constitution of Kenya 2010. I find that the issue of constitutional interpretation is vested with the High Court and therefore the High Court is the proper forum to hear any question respecting the interpretation of the constitution including determination thereof. I therefore find that the dispute before this court does not fall within the jurisdiction of the Appeals Tribunal as alluded to by the 2nd and 4th Respondents in order to warrant the invocation of section 9 of the Fair Administrative Actions Act. I therefore hold that the 4th Respondent's and 2nd Respondent's preliminary objection that the court has no jurisdiction to hear and determine the petition to be without basis and the same must fall. I find and hold, that this court has jurisdiction to hear and determine the petition herein being the court with mandate to determine the issues raised in the petition.

B) Whether the content of the petition in their entirety establishes a cause of action against 2nd Respondent?

39. The 2nd Respondent contend, that the contents of the petition in their entirety do not establish any cause of action against the said Respondent. It is further the 3rd Respondent contention, that for the constitution petition to be properly so called, it must illustrate the provisions of the constitution, that the petitioners think has been abrogated, indicate how it has been infringed by the said Respondent and the damage that they have suffered or is likely to suffer. In the case of **Anarita Karimi Njeru vs. Republic (1979) KLR 154**. It was stated:-

"If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that

of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

40. It is the 2nd Respondent's contention, that the entire body of the petition reveal, that the petitioners have not set out with reasonable precision the provisions the action by 2nd Respondent that makes them seek the redress from the court, the provision of the constitution; that the 2nd Respondent is alleged to have violated, how the 2nd Respondent has violated the said provision and the damage that they have suffered or are likely to suffer as a result of the violation. I have perused the petitioner's petition dated 14th May 2019 as regards concerns raised by the 2nd Respondent, from the same, it is clear that the petitioners have made allegations of the violation of their rights and fundamental freedoms against the 2nd Respondent and have indicated how and also indicated the relief they seek from the 2nd Respondent. I find from the petition, that it cannot be urged successfully, that there is no cause of action against the 2nd Respondent in this petition.

C) Whether there is authority given to the 2nd petitioner by the other petitioners to sue on their behalf and whether failure to do so is fatal to other petitioner's case?

41. The 2nd Respondent contends, that there is no authority given to the 2nd petitioner by other petitioners to sue. The 2nd petitioner alleges that she does not need to have authority from the other petitioners. I find that under Article 22 of the Constitution of Kenya 2010 she does not require authority to sue on their behalf or other petitioners. It is not correct as the 2nd Respondent submits that under Article 22 a party suing on behalf of others require their written authority and it is further wrong to contend the other petitioners did need to give authority to the 2nd petitioner in this petition. The 2nd petitioner executed her affidavit on her behalf and that of other petitioners.

42. On the 2nd Respondent's objection, the same can well be dealt with by considering the provisions of Article 22(2) of the Constitution. From a reading of **Article 22(1) and (2) of the Constitution of Kenya 2010**, it is provided:-

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under (1) may be instituted by:-

- (a) A person acting on behalf of another person who cannot act in their own name;**
- (b) A person acting as a member of, or in the interest of, a group or class of persons;**
- (c) A person acting in the public interest; or**
- (d) An association acting in the interest of one or more of its members."**

43. From the above it is clear, that our constitution is very liberal and requires a purposive interpretation so as not to deprive or deny a litigant the right to approach the court of justice on account of technicalities. Article 159 of the constitution requires that the constitution be read holistically as under Article 159(2) (a) of the constitution of Kenya 2010 provides "*justice shall be done to all, irrespective of status*". It is clear Article 159 (2) (d) does away with procedural technicalities to ensure justice is done to all irrespective of their status. Further to the above Rule 5 Mutunga Rules do not provide for technicalities but for the purposes of furthering the overriding objectives, which is fairness and justice. This is court of law and should be more concerned with doing substantive justice to the parties to a case rather than applying technicalities to deprive parties justice.

44. **Article 258(2) of the Constitution of Kenya 2010** which deals with enforcement of this constitution is couched in the same manner as Article 23 of the Constitution of Kenya 2010. Under both Articles there is no requirement for person instituting a suit on behalf of another person to have a written authority to swear an affidavit or sue on behalf of such a person. This is therefore clear that whenever any person sues or files a suit on behalf of another need not have authority to swear an affidavit on behalf of another person and not need exhibit a written authority to that effect. I accordingly find no merits in the 2nd Respondents grounds of objection on this point.

D) Whether the petitioners have established that they are qualified to warrant direct admission at Kenya School of Law?

45. The petitioners herein contend that they pursued their Bachelor of Law degree at Riara University in Kenya, the interested party herein. That upon completing their under-graduate studies at Riara University they became eligible for the conferment of the Bachelor of Law **(LL.B)** Degree of that University. That arising from the aforesaid the petitioners contend, that they qualified for admission to Kenya School of Law having satisfied the qualifications required under section 16 and 17 of the Kenya School of Law Act and second schedule of the **Kenya School of Law Act No. 26 of 2012 Revised Edition (2015) (2014)**.

Section 16 of the Kenya School of Law Act, 2012 provides:-

"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 Second Schedule for that course."

Further **section 17 of The Kenya School of Law Act** provides:-

"(1) Any person who wishes to be admitted to any course of study at the School shall apply in the prescribed form and pay the prescribed application fees.

(2) The School shall consider an application submitted under paragraph (1) and if it is satisfied that the applicant meets the admission criteria, admit the applicant to the School."

46. Second schedule of the Kenya School of Law Act as regards the admission requirements provides as follows:-

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

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

(b) Having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) in the grant of that university, university college or other institution— (i) attained a minimum entry requirement for admission to a university in Kenya; and

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

(iii) Has sat and passed the pre-Bar examination set by the school."

47. The petitioners further contend that they passed the relevant examination of Riara University, a recognized University in Kenya, being an institution prescribed by the Council of Legal Education pursuant to section 2, 8 and 19 of the Legal Education Act No. 27 of 2012. In view of the aforesaid it is petitioners averment, that their qualification and admission requirements fall under second schedule of the **Kenya School of Law Act, PAPT(1) (A)**. In view of the foregoing it is their contention, that the decision by the Kenya School of Law to reject the petitioners' application on the ground, that they did not attach their "A" Level certificate and that they were yet to complete **LL.B** programme amounted to an improper exercise of discretion, and this is a case where the 1st Respondent failed to exercise its statutory discretion reasonably. It is further submitted that was a case where the Respondents were irrational and unreasonable as the Respondents required from the petitioners which are not prescribed in law or put differently subjecting the petitioners to the extraneous requirements. It is urged the petitioners studied and qualified at the Riara University in Kenya, University given recognition under the law, that they are not from a foreign country. It is further contended that there is no argument that the quality of Legal Education offered by the Riara University is not at par with the quality being offered by other local University, nor is there argument the quality of legal education being offered by Riara University is not of the same standard to warrant its students not to be admitted to Kenya School of law. The petitioners aver that the Respondents decision warrants interference because they have acted outside the board of reasonableness as this is not a matter for the Respondents free discretion. The petitioners further contend had the respondents acted within the law, done so fairly and subjecting the petitioners to the same standards, they were subjecting other candidates, then the court cannot interfere.

48. The petitioners contend further, that they sat and passed the relevant examination of Riara University in Kenya and became eligible for the conferment of the Bachelor of Laws (**LL.B**) degree of the Riara University in Kenya. That the requirements by 1st Respondent set out in the rejection letters are not only unreasonable but outside the contemplation of the Act. The petitioners submit that they have no question in the legal position that the Kenya School of Law and other institutions are specifically tasked with providing professional training to and examining those which intend to be advocates. Indeed this is not the petitioners' complaint but contend that decision makers did not act fairly and have violated the duty to act fairly towards the petitioners and that the whole exercise was tainted with procedural unfairness. In the case of **Nabulima Miriam & others vs Council of Legal Education & 5 others (2016) eKLR:-**

"It is however important to point out that this position does not mean that the Council is the sole and ultimate judge when it comes to the determination of proper exercise of such discretion since this Court is under a constitutional obligation to ensure that the safeguards provided under Article 47 of the Constitution are not destroyed by being whittled away in purported exercise of discretion. Accordingly the Courts are empowered to and are under a duty to investigate allegations of abuse of power and improper exercise of discretion. I therefore associate myself with the holding in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**, that:

“.....When litigants come to the courts it is the core business of the courts and the courts' role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance.....”

49. The petitioners further referred to decision of Hon. Justice Mativo in **J.R. No. 120 of 2018 R. Vs Kenya School of Law & others;-**

"In the above-cited case, I went to great length to illustrate 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" 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".

50. The 1st Respondent contend that the requirement for admission to the Advocates Training Programme is a Bachelor of Laws (**LL.B**) degree or the eligibility of conferment of that degree provided for by paragraph 1(a) to the second schedule of the Kenya School of Law Act or paragraph 1(b) to the second schedule of the Kenya School of Law Act.

51. The basis for 1st Respondents decision is averred was premised on second schedule of the **Kenya School of Law Act No. 26 of 2012** which provides:-

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

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

b) Having passed the relevant examination 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."

52. In the case of **Peter Githaiga Munyethi vs Kenya School of Law (2017) eKLR** the court stated:-

"It must be clear to everyone that KSL is the institution mandated to train persons to become professional Advocates and that mandate is exercisable pursuant to the KSL Act and regulations made thereunder. The KSL Act in conferring that mandate to KSL does not make reference to any other Act in so far as admission requirements to ATP are concerned. In that regard, section 16 of the KSL Act is clear and unequivocal that qualifications for admission to ATP are those contained in the Second Schedule to the Act."

53. The 2nd Respondent contend, that throughout the entire body of the petition, there is wrongful suggestion to this court and to the general public that for one to join the Advocates Training Programme, the only requirement that one needs is an **LL.B** undergraduate certificate and that no one is supposed to question how the certificate was achieved and whether the minimum requirement for enrolling to that programme were met before the certificate was given to them.

54. It is not in dispute that for one to attain the status of an Advocate of the High Court of Kenya, one must go through a process; a process guided by law. The journey starts mainly from High School and proceeds to undergraduate studies to the **LL.B**, the Advocates Training Programme and finally pupillage. In all those stages there is minimum requirement set by the law which a candidate must achieve at every stage. It is not a walk in the park. There are no short cuts and one cannot move to the next stage without attaining the minimum requirements in the previous stage. It is clear that one cannot surely join the **LL.B** undergraduate programme in law when he/she does not possess the prescribed minimum High School qualification and one cannot join the Advocates Training programme without possessing the minimum qualifications and the **LL.B** undergraduate qualifications.

55. From the aforesaid the question begging for answers, is what are the minimum High school qualification, that one must possession in order to qualify to join the undergraduate programme in law? The answer on the legal prescription is to be found from Regulation 5(1) of third schedule to the Legal Education (*Accreditation and quality Assurance*) Regulation, 2016, which provides as follows:-

"The minimum admission requirements for an undergraduate degree programme in law shall be:-

a) A mean grade of C+(plus) in the Kenya Certificate of Secondary Education examination or its equivalent with a minimum grade of B Plain in English or Kiswahili;

b) At least three Principal Passes in the Kenya Advanced Certificate of Education examination;

c) A degree from recognized university; or

d) A Credit Pass in a diploma in law examination from an accredited institution."

56. The Regulation 5(1) of the Third Schedule to the Legal Education (*Accreditation and quality Assurance*) Regulation 2016 came into force in 2016 and the petitioners' may argue the Regulation does not apply to them since it came into force long after they had joined Riaru University for their undergraduate studies. In that case the alternative is to look at the requirement in the preceding Regulations which in this case would be Regulation 18 as read together with Regulation 2 of the 2nd second schedule to the Council of Legal Education (*Accreditation of Legal Education Institutions*) Regulations 2009, which was in operation before the petitioners began their High School Studies and during their undergraduate studies.

57. From the above relevant provisions of the law it is clear that the qualification for undergraduate in law and for admission to Advocate Training Programme are well set by law. The petitioners in the petition applied for admission for **ATP** at Kenya School of Law. They got a reply from the Kenya School of Law rejecting their application on the ground that they did not attach their A-Level certificates and that they were yet to complete **LL.B** programme. It was upon the petitioners to comply with the requirements set by law for admission for **ATP**. The petitioners having not submitted the required documents by the Respondents are, in no doubt, not in a position to properly ascertain whether

the petitioners met the minimum entry requirements for undergraduate programme at Riara University being one of the minimum requirements under Regulation 5(1) of the Third Schedule to the Legal Education (*Accreditation and Quality Assurance*) Regulation 2016. Upon an applicant satisfying the above requirement for admission to **ATP** as set out under Second Schedule 1(a) or 1(b) of the Kenya School of Law Act, 2012 but not under both due to use of the word "or" and not "and"; and upon one qualifying under any of the two; thus either 1(a) or 1(b) is eligible to admission.

58. The petitioners strongly relied in the decision in **J.R No. 120 of 2018 the Republic vs Kenya School of Law & others**. That case is not distinguishable from the present case as the Applicant thereon had similar qualifications to those of the petitioners before joining Riara University and had met the minimum qualification under Regulation 5(1) of the Third Schedule to Legal Education (*Accreditation and Quality Assurance*) Regulation 2016.

59. In view of the aforesaid and the petitioners having not supplied the 1st Respondent with the documents indicated in the 1st Respondents' rejection letter thus A-Level results, the petitioners have not demonstrated that they had met the minimum entry requirements for undergraduate programme in Riara. It is a legal requirement for one to attain minimum High School qualification to qualify to join undergraduate programme in law as specifically spelt out under Regulation 5(1) of the Third Schedule to the Legal Education (*Accredited and quality Assurance*) Regulation 2016 or as per Regulation 18 read together with Regulation 2 of the Second Schedule to the Council of Legal Education Act (*Accreditation of Legal Education Institutions*) Regulations 2009, whichever is application to a particular case.

60. From the various annexures to the supporting affidavit of the petitioners there are various different qualifications from those contemplated by the law to wit Kenya Certificate of Secondary Education (**KCSE**). Some of the petitioners certificates are under **IGCSE** others **GSCE** and/or **GCE** System. The petitioners having not taken **KCSE** but **IGCSE**, or **GSCE** or **GCE** are yet to make formal application to the 3rd Respondent for equation of their qualifications so that the 1st Respondent can weigh those qualifications against the provisions of the law. The petitioners having not done so and having not furnished any qualifications to the 1st Respondent, it is hard for the 1st Respondent to affirm with certainty that the petitioners High School qualifications have met the minimum requirements as prescribed by the law. It is further difficulty to know how the interested party, who declined to file a response and appear to know how it measured the petitioners qualifications against the standard set by law for it to come to a decision to admit the petitioners for the undergraduate programme as stipulated under Regulation No. 2 of the Second Schedule to the Council of Legal Education (*Accreditation of Legal Education Institutions*) Regulations 2009 with respect to admission into an undergraduate degree programme in which it is provided in the following terms:-

"Regulation 2 of the second schedule completes the provision with respect to admission into an Undergraduate Degree Programme in the following manner:-

A student shall not be eligible for admission into an Undergraduate Degree Programme unless that student has-

- a) A degree from a recognized university;**
- b) At least two principal passes at an advanced level or an equivalent qualifications;**
- c) A mean grade of C+ (C plus) in the Kenya Certificate of Secondary Education (KCSE); or**
- d) A diploma of an institution recognized by the Commission for Higher Education and the applicant shall have obtained at least credit pass."**

61. In view of the aforesaid it is clear that the Regulation 5(1) of the Third Schedule to the Legal Education (*Accreditation and Quality Assurance*) Regulations, 2016 and Regulation 2 of the Second Schedule to the Council of Legal Education (*Accreditation of Legal Education Institutions*) Regulation, 2009 sets out minimum admission requirement for an undergraduate degree programme in law. It is mandatory that a student should attain the minimum qualification to be eligible for admission into an undergraduate degree programme. A qualified student having been admitted for undergraduate degree in law, and having passed the relevant examination of any recognized university in Kenya, holds or has become eligible for conferment of Bachelor of Law Degree (**LL.B**) of that University is qualified for admission. Under the second schedule 1(a) of the Kenya School of Law it is clearly prescribed the admission requirements into the Advocates Training Programme. The schedule does not lock out those who have alternative qualifications from being eligible for admission to the programme. What is clearly required is that whatever qualification an applicant has, it must be equivalent to a mean grade of **C+** in Kenya Certificate of Secondary Education. I find that by applying the standard equivalent to **KCSE** applicants with alternative qualification won't be prejudiced nor locked out. It is however noted that the notification of pre-bar examination seemed not to have factored other equivalent eligibility, for admission as the notification mention **KCSE** qualification but there is no mention of examination equivalent to **KCSE**.

62. I find that to the extent that the 3rd Respondent is mandated amongst other things to set and maintain examination standards; the 3rd Respondent is mandated on an application for equation of qualification to do so. In view of the mandate upon the 3rd Respondent on application for equation of qualifications on application by a candidate who has taken a different examination other than **KCSE**, as is the case for the petitioners herein, I find that by applying for equation of their qualification they won't be prejudiced in anyway nor would they be locked out of admission if they satisfy the requirements for admission as set out in the regulations aforesaid.

E) Whether the petitioners have demonstrated violation of the right to fair administrative action?

63. The 1st Respondent contend in arriving at its decision to reject the petitioners applications for admission it acted within its powers as provided for by the **Kenya School of Law Act No. 26 of 2012** which provides *inter alia* under **section 17(2)** as follows:-

"(2) The School shall consider an application submitted under paragraph (1) and if it is satisfied that the applicant meets the

admission criteria, admit the applicant to the School."

64. The 1st Respondent contend it has not infringed the petitioners right to fair administration action as provided under Article 47 of the Constitution and under Fair Administrative Actions Act, 2015 as every communication clearly indicated the reason for its decision. Through its letters dated 4th December 2018, 5th December 2018, 6th December 2018, 7th December 2018 and 29th January 2019 in which the 1st Respondent communicated to the petitioners that the applications to join the Advocates Training Programme were unsuccessful.

65. In the case of **Kenya Revenue Authority vs. Menginya Salim Margani Civil Appeal No. 108 of 2009**, the Court of Appeal delivered itself as follows:-

"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."

66. The petitioners herein applied for admission without attaching A-Level Certificates. The 1st Respondent considered the written applications and made a decision. It made several replies without delay giving reasons for its decision. **Article 47(1) of the Constitution** provides:-

"(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

67. I find that the petitioners have not demonstrated that the 1st Respondent did not follow proper and lawful procedures and process, that it breached or violated principle of law and that its decision was not in accordance with the provisions of the applicable law. I find that the 1st Respondent having followed the law, and having acted expeditiously, efficiently, lawfully, reasonably and procedurally it did not violate the petitioner's right to fair hearing. The petitioners needed not to be summoned for them to have fair hearing so long as their application were considered and replied to promptly and reasons given for the decision. I find that court has no reason to intervene so as to interfere with the merit of the decision.

F) Whether the legitimate expectation can be weighed against the provisions of the law?

68. The petitioners contend, that the 2nd Respondent having advised them to appeal against the decision to revoke the decision, the said appeals were disregarded and/or ignored thereby leaving the petitioners exposed and their legitimate expectation dashed and in its place, an abuse of power, bad faith, failing to take into account relevant considerations in decision making or taking into account irrelevant considerations or failing to act as per petitioners legitimate expectations.

69. It is petitioner's contention, that the rejection into Kenya School of Law violated the petitioners legitimate expectation. The petitioners urge that they were under legitimate expectation that upon completion of their Bachelors of Laws Degree at University approved and regulated by the 2nd Respondent, they would be enrolled to the Kenya School of Law for **ATP**. It is further the petitioners' case, that the 1st and 2nd Respondents did not demonstrate regularly, predictably and certainty in their dealings, that petitioners would be admitted for **ATP** from Riara University and would have in turn have planned their affairs, lives and business with some measure of regularity, predictability, certainty and confidence.

70. It is further petitioners contention, that when they joined **the LL.B** programme, they knew that their Secondary School Qualifications would enable them join **ATP** and also by the fact, that the 1st Respondent admitted students with such qualification with the same University in the past, they therefore had, that legitimate expectation when they applied for **ATP**, urging further no litigation had gone into this issue. It is further contended, that it is legitimate that public authorities will comply with the constitution and the law and particular constitutional values and principles enumerated under Article 10 of the Constitution of Kenya 2010.

71. The petitioners further averment is, that the 1st Respondent had no reasonable or plausible answer to the petitioner's case and could not explain why it declined the petitioners' application. It is alleged the petitioners having obtained degrees that were required the 1st respondent acted unreasonably and violated the applicants legitimate expectation to join **ATP** Programme.

72. Legitimate expectation doctrine cannot be relied upon where there is failure to comply with a law in force, nor can legitimate expectation be recognized against the law. Legitimate expectation arises where a decision maker had led someone affected by the decision to believe that he will receive and retain a benefit or advantage. The corner stone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner. However for the promise to hold, the same must be made within the confines of the law (see **Republic vs Kenya Revenue Authority ex-part Shake Distributors limited Hc Misc Civil Appl. No. 359 of 2012**).

73. In the instant petition the petitioners have tendered evidence through their affidavit, that the Respondents had been enrolling **LL.B** student from Riara University and that gave the petitioners legitimate expectation, that they would get automatic or direct entry for **ATP** programme to Kenya School of Law. The petitioners have demonstrated, that they had legitimate expectation, that upon taking degree at Riara University the petitioners would be entitled to **ATP** Programme. I find the petitioners allegation of having legitimate expectation to be justified, as the Respondents have a statutory duty to ensure that the qualified candidate enroll for law degree and take **ATP** Programme.

G) Whether the petitioners have demonstrated that they are discriminated under Article 27 of the Constitution of Kenya 2010?

74. The petitioners urge that by dint of the fact that they have been denied admission at the Kenya School of law unlike their predecessors, which are from the same University with some qualifications and who were admitted to **ATP** Programme and some of them are already

advocates of the High Court of Kenya, a matter of judicial notice, the petitioners urge that the Respondents are in fact discriminating against them. It is further submitted the Respondents are acting in a manner that is not compatible with the provisions of the constitution and may be avoiding their obligation to the constitutional obligation placed upon them by the Supreme Law of the land. The Constitution of Kenya bars discrimination under Article 27 of the Constitution of Kenya 2010.

75. The 1st Respondent and 2nd Respondent did not controvert the petitioners' averment on discrimination. The petitioners relies on the case of **J.R. 120 of 2018 Republic vs Kenya School of Law Council for Legal Education and Kithinji Maseka Semo**; who as per the courts judgment under paragraph 6 had the following qualifications:-

"The ex parte applicants undertook International General Certificate of Secondary Education (IGCSE) in Kenya. It is not in dispute that they studied, qualified and obtained Bachelor of Laws Degrees from Riara University."

76. The 2nd Respondent urged that the burden of proof lies with he who alleges unfair discrimination to prove it. In the case of **Governors vs Salaries and Remuneration Commission (2018) eKLR** Hon. Justice E.C. Mwita affirmed the decision of constitutional court of South Africa in **Mbona vs. Stepstone and Wylie (2015) ZACC11 ALL** where the court stated thus:-

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

77. I have considered the petitioners submissions to which the 1st and 2nd Respondents have not challenged or controverted, and I have no doubt in such a scenario the Respondents policy differentiates between the candidates or people they admit; the differentiation amounts to discrimination and lastly I find the discrimination to be unfair and without basis. I find the admission of some students from the same local university with same qualification and denying admission of students from the same university with same qualification to be unfair and contrary to our constitution. I find the petitioners, have the burden to prove the alleged discrimination on arbitrary grounds have discharged the burden of proof by proving the Respondents conduct is not rational, that it amounts to discrimination and that the discrimination is unfair by favouring some students with same qualifications and rejecting others.

78. The interested party in this petition, Riara University were duly served with the petition but choose not to enter appearance of file response to the petition. The interested party knew or ought to have known the provisions of the law before it enrolled the petitioners to join its university to take law degrees. The interested party before enrolling any student knew and ought to have known the minimum admission requirement for an undergraduate degree programme in law as set out under Regulation 5(1) of the Third Schedule to the Legal Education (*Accreditation and Quality Assurance*) Regulation, 2016 or Regulation 2 of the Second Schedule to the Council of Legal Education (*Accreditation of Legal Education Institution*) Regulation, 2009, which sets out the minimum admission requirement for a student to be eligible for admission to a legal education training programme under the Regulations, and which makes it clear what a student should have attained for admission into undergraduate degree programme. The Regulation is couched in a mandatory manner and gives no option to admitting institution.

79. The interested party has not bothered to respond to the petition nor has it clarified on qualifications of the petitioners at the time of their admission for undergraduate course in law. The Respondents are yet to be supplied with the petitioners certificates as the petitioners in their application had not attached their "A" level results; which the 1st Respondent noted had not been supplied and failure whereof resulted in rejecting the petitioners application to be admitted to the 1st Respondent's institution.

80. In the petition there is no claim or orders sought against the Interested party. In view of there being no claim against the Interested party, I do not find its purpose in this petition.

81. It is clearly provided under Regulation 5(1) of the Third Schedule to the Legal Education (*Accreditation and Quality Assurance*) Regulation 2016 that:-

"The minimum admission for an undergraduate degree programme in law shall be:-

- a) A mean grade of C+ (plus) in Kenya Certificate of Secondary Education Examination or its equivalent with minimum grade of B plain in English or Kiswahili.**
- b) At least three principal passes in the Kenya Advanced passes in the Kenya Advanced Certificate of Education examination.**
- c) Degree from recognized university.**
- d) A credit pass in a diploma in law examination from an accredited institution."**

82. On the other end **Regulation 18 as read together with Regulation 2 of the Second Schedule to the Council of Legal Education (*Accreditation of Legal Education Institution*) Regulation 2009** provides, that a student shall not be eligible for admission to a Legal Education training programme under these Regulations, unless that student has attained the required minimum qualifications set out in the second schedule; which Regulation 2 of the second schedule completes the provisions with respect to admission into an undergraduate degree programme in the following manner:-

"A student shall not be eligible for an admission into undergraduate degree programme unless that student has:-

- a) A degree from a recognition university.
- b) At least two principal passes at an advanced level or an equivalent qualification.
- c) A mean grade of C+ (C Plus) in the Kenya certificate of Secondary Education (KCSE) or
- d) A diploma of an institution recognized by the Commission for Higher Education and applicant shall have obtained at least credit pass."

83. From the above stated provision, and the minimum admission requirements for an undergraduate degree programme as set out under **Regulation 5(1) of the Third Schedule to Legal Education (Accreditation and Quality Assurance) Regulation 2016 and Regulation 2 of the Second Schedule**, it is clear that the minimum admission requirement for a student to be eligible for admission into an undergraduate degree programme are at variance. The requirement for a student to be eligible for admission into an undergraduate degree programme seems not to be standard.

84. Under **Regulation 5(1) of the Third Schedule to the Legal Education (Accreditation and Quality Assurance) Regulation 2016**, requirement for admission to a Bachelor of Laws Degrees include those in possession of a degree from a recognized university; or Diploma in law with a credit pass or three principal passes in Kenya Advanced Certificate of Education; or a mean grade **C (plus)** in **KCSE** or its equivalent with minimum grade of **B** plain in English or under Regulation 2 of the Second Schedule with requirements with the following qualifications:-

A degree from a recognized university; or two principal passes at an advanced level or an equivalent qualification or a mean grade of **(C+ Plus)** in **KCSE** or a diploma of an institution recognized by the admission for higher Education and the applicant shall have attained at least credit pass.

85. From the above there is, no doubt, that there is unexplained and unjustified variance between Kenya School of Law Act and the Legal Education Act on the admission requirement provided for in the Kenya School of Law Act and the Regulation set out under the Legal Education Act.

In view of the conflict I find to resolve the conflict, since the Legal Education Act commencement date was 28th September 2012 whereas Kenya School of Law Act was on 29th January 2013, the provisions of the later statute prevails.

86. Having considered, that the petitioners have other qualifications such as **IGCSE GSCE** and **GCE** and have degree in law, I find the petitioners do qualify for admission for **ATP** Programme; under Section 1(a) of the Second schedule to Kenya School of Law Act and the Regulation. One is supposed to qualify either under 1(a) or (b) of the Second Schedule of Kenya School of Law Act but not under both as the provision clearly states 1(a) or 1(b) and it cannot be both at any rate.

87. In the case **Republic vs Kenya School of Law and the Council of Legal Education and Kithinji Semo J.R. No. 120 of 2018** Hon. Justice Mativo faced with suit similar to the present suit stated as follows:-

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

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

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

88. I have considered Regulation 5(1) Part II of the Third Schedule to the Legal Education (*Accreditation and Quality Assurance*) Regulation 2016 which provides minimum admission requirement for undergraduate degree programme. I have also considered Regulation 6 of Part II of the said Regulations on the admission to **ATP** which provides:-

- 1) The minimum requirements for admission to the Advocates' Training Programme shall be-
 - a) A Bachelor of Laws (LLB) degrees from a recognized university;

- b) Where applicable, a certificate of completion of a remedial programme;**
- c) Proof of academic progression in accordance with paragraphs 3 and 4 of this Schedule; and**
- d) A certificate of completion of the Pre-Bar Examination."**

89. My view is, that the above Regulation creates a different qualification from those provided in section 1(a) or 1(b) of the Second Schedule to the Kenya School of Law Act. The two provisions are at variance. Under the above regulation it is clear, an applicant must possess the requirements in paragraph (a) to (d) above. On the other end, section 1(a) or (b) creates two distinct categories by use of the word "or" instead of "and" which to me means is either one of them. This is either 1(a) or 1(b) but not both at the same time.

90. I have to consider whether the provisions of Legal Education (*Accreditation and Quality Assurance*) Regulation 2016 can override express statutory provision. The Regulations were promulgated by the Council of Legal Education pursuant to powers conferred upon it by Section 46(a) of the Legal Education Act No. 27 of 2012 with the approval of the Cabinet Secretary. The Regulation provided for admission requirements to the **ATP** which as explained earlier differs from the requirements provided under section 16 of the Kenya School of Law Act as contained in Section 1(a) or (b) of the Second Schedule.

91. I find by subjecting the petitioners to the requirements under the Regulations which are contrary to express provisions under Section 1(a) of the Second Schedule under which the petitioners' qualifications fall, the Respondents would be acting contrary and/or ignoring express provisions of Section 16 of the Kenya School of Law Act, and would also be wrong in elevating the Regulations above the provisions of the Act. I find the provisions of a subsidiary legislation cannot under any circumstances override express provisions of an Act of Parliament or be inconsistent with any Act of Parliament under which they are made or otherwise. Section 37 (b) of the Interpretation and General Provisions Act, clearly provides that no subsidiary legislation shall be inconsistent with the provisions of the Act of Parliament. I therefore find and hold, that the provisions of Legal Education (*Accreditation and Quality Assurance*) Regulation 2016, cannot override the express provisions of Section 16 of the Kenya School of Law Act which prescribe the admission requirements to the **ATP** as those clearly stipulated in the second schedule of the Act. The Regulations cannot override the provisions of section 1(a) of the Second Schedule. I find that had the Parliament intended any other qualifications to apply over and above the qualifications held by the petitioners, it would have expressly provided so.

92. From the above I am satisfied that the petitioners and the interested parties are not to blame in any way. It is lack of Parliament to have made a legislation, that is not in variance. That failure has caused confusion in admission of students at Kenya School of Law for **ATP** Programme. I find no way, for which the petitioners are to blame and find that they have the requisite qualification for admission for **ATP** Programme.

93. To the extent of my findings in this petition, I make the following orders:-

a) A declaration be and is HEREBY issued that the petitioners submit their A-Level certificates together with an equation letters (Secondary School qualification clearance letter) from the Kenya National Qualification Authority together with LL.B degree certificate from Riara University within 21 days from the date of this judgment.

b) A declaration be and is HEREBY issued that the petitioners were discriminated by the Respondents by dint of the fact that the petitioners have been denied admission at Kenya School of Law unlike their predecessors who are from the same University with same qualifications and who were admitted to ATP Programme.

c) A declaration be and is HEREBY issued that the acts of 1st Respondent of rejecting and/or non-admitting the petitioners to ATP (advocates Training Programme) without a certificate of their A-Level results and despite having qualified in terms of the second Schedule of the Kenya School of Law Act 1(a) and despite having been conferred their Bachelors of Laws (LL.B) degree by a local University, the Riara University, contravened the petitioners' fundamental rights and freedoms under articles 2(1), 3(1), 10(1) (2), 19(2), 20(2), 22, 23, 24, 27(1), 28, and article 47 of the Constitution of Kenya, 2010, and therefore such violation and/ or infringement was unconstitutional, unlawful, illegal, null and void, in consequence this Honourable court intervenes to quash, set aside and/ or put a stop to the same forthwith.

d) A declaration be and is HEREBY issued to the effect that the application by the 1st respondent of the provisions of second Schedule 1(b) of the Kenya School of Law Act No. 26 of 2012 to the extent that the same applies dissimilar treatment exclusively to the petitioners is discriminatory, irrational, unreasonable, arbitrary, abuse of discretion, exercise of discretion for improper purposes, unlawful, acting unfairly, unreasonable and amounted to exercising of discretion arbitrarily and had violated the rights and fundamental freedom of the petitioners.

e) A declaration be and is HEREBY issued that the 1st respondent's conduct above amounted to acting unfairly, acting in violation of Article 47 of the Constitution of Kenya and Section 4 (3) of the Fair Administrative Actions Act, 2015 to the extent that the petitioners were not afforded the benefit of the rules of natural justice and were not heard before the decision to bar or reject the applications for admission and therefore the whole process leading to the non-admission to the Kenya School of Law ATP Programme was in expeditious, inefficient, unlawful, unreasonable, procedurally unfair unconstitutional, nullity, null and void ab initio and is accordingly quashed and/or set aside in its entirety.

f) An order be and is HEREBY issued upon the petitioners complying with order (a) herein above, the 1st and 2nd Respondents do register and forthwith admit the petitioners herein to undertake Advocate Training Programme (ATP) at the Kenya School of Law without any other conditions.

g) In the alternative to (f) above an order be and is HEREBY issued directed upon the 3rd and 4th Respondents to issue the petitioners with equation certificate for respective academic papers upon the petitioners application within the period of 15 days from the date of application.

h) Prayer (f) is declined.

i) As both parties have won and lost in some way I direct each party to bear its own costs.

Dated, signed and delivered at Nairobi this 28th day of November, 2019.

.....

J .A. MAKAU

JUDGE