



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 6 OF 2019

HESBON MATOKE NYAGAKA.....PETITIONER

VERSUS

COUNCIL OF LEGAL EDUCATION.....RESPONDENT

JUDGMENT

1. The Petitioner, Hesbon Matoke Nyagaka, holds a Bachelor of Laws (LL.B.) degree awarded to him on 24th February, 2017 by Uganda Pentecostal University. His application to the Respondent, Council of Legal Education, for recognition and approval of the degree was responded to by the letter dated 22nd January, 2018 as follows:-

“RECOGNITION AND APPROVAL OF FOREIGN QUALIFICATIONS: UGANDA PENTECOSTAL UNIVERSITY

Reference is made to your application for recognition and approval of the LL.B. Degree of Uganda Pentecostal University, Uganda for purposes of admission to the Advocates Training Programme at the Kenya School of Law.

Notwithstanding the accreditation status of Uganda Pentecostal University with the Council of Legal Education, a review of the application and its annexures reveals that it does not meet the threshold prescribed by Part II of the Second Schedule to the Legal Education Act, 2012. Council further notes that you attained a mean grade of C+ (plus) with B-(minus) in English and C+(plus) in Kiswahili and no evidence of progression from Certificate in Law and Diploma in Law to LL.B. was provided.

In view of the foregoing, Council declines to recognize and approve your LL.B. Degree qualification for purposes of the Advocates Training Programme.

Please note that your academic requirements do not supersede the provisions of Section 4(2) (a) of the Kenya School of Law Act 2012 as read with Section 12 and 13 of the Advocates Act [Cap 16], as it relates to admission to the Roll of Advocates in Kenya.

Council wishes you well in you endeavours”

2. Through the petition dated 10th January, 2019 the Petitioner contests the Respondent’s decision on the grounds that it violates his rights as enshrined in Articles 27, 43, 47 and 48 of the Constitution and is contrary to and inconsistent with the constitutional principles in Articles 10, 73 and 232 of the Constitution. In support of his petition, the Petitioner filed submissions dated 4th March, 2019 and supplementary submissions dated 23rd September, 2019.

3. The Respondent opposed the petition through a statement of grounds of opposition and skeletal arguments dated 27th September, 2019 and filed on 30th September, 2019 the day the petition was heard.

4. In this case, I do not find it necessary to rehash the positions taken by the parties because when the petition came for oral arguments the advocates for the parties made some concessions which gave a clear direction to this court concerning the determination of the petition.

5. Contrary to its statement in the letter dated 22nd January, 2018, which indicated that the Petitioner’s degree did not meet the standards set

by the Legal Education Act, 2012, the Respondent acknowledged that the law that is applicable to the Petitioner's case is found in the repealed Council of Legal Education Act, Cap 16A together with the attendant regulations namely the Council of Legal Education (Accreditation) Regulations, 2009 and the Council of Legal Education (Kenya School of Law) Regulations, 2009. This is actually the position adopted by the Respondent in its letter dated 27th March, 2018 in response to the Petitioner's appeal against its decision of 22nd January, 2018.

6. The letter dated 27th March, 2018 stated, *inter alia*:-

“Having been admitted to the Uganda Pentecostal University Bachelor of Laws Programme on 28th June, 2012, the Legal Education Act, 2012 had not commenced application. Therefore, the applicable law and subsidiary legislation governing admission to the Advocates Training Programme (ATP) was the Council of Legal Education Act, [Cap 16A] together with the attendant Regulations, the Council of Legal Education (Accreditation) Regulations, 2009 and the Council of Legal Education (Kenya School of Law) Regulations, 2009. Part II of the First Schedule to the Kenya School of Law, Regulations of 2009 specifically prescribed the admission criteria to the ATP which are elucidated in your letter.”

7. The letter further stated that:-

“A review of your application reveals that you did not meet any of the admission criteria, to the LL.B. as stated in our letter dated 22nd January, 2018. Importantly, the Pre-University course you attended prior to admission to the LL.B. Programme at the Uganda Pentecostal University was not prescribed as an entry criteria to the bachelor of Laws (LL.B.) Programme. Relatedly, Council does not recognize Pre-University examinations since it is not recognized by law as a criteria for admission to the Undergraduate Bachelor of Laws Programme.”

8. This letter and the response to the petition dismantles the foundation of the petition on the basis of retrospective application of the Council of Legal Education Act, 2012 to the Petitioner's case by the Respondent.

9. The logical question that follows is whether the Petitioner's degree complied with the legal regime that was in place when the Petitioner registered for his degree programme in 2012. The relevant law is found in the repealed Council of Legal Education Act, Cap 16A which at Regulation 5 found in Part II of the First Schedule to the Council of Legal Education (Kenya School of Law) Regulations, 2009 provided that:-

“5. A person shall not be eligible for admission for the Post Graduate Diploma (Advocate Training Programme) unless that person has-

(a) passed the relevant examination of any recognized university in Kenya, he holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) of that university;

(b) passed the relevant examinations of a university, university college or other institutions prescribed by the Council, he holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) in the grant of that university, university college or other institution, had prior to enrolling a that university, university college or other institution-

(i) attained a minimum entry requirements for admission to a university in Kenya; and

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

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

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

10. There is no contestation that the Petitioner obtained a B- (B minus) in English and an aggregate grade C+ (C plus) in his Kenya Certificate of Secondary Education and his only road to the Kenya School of Law was Regulation 5(d) of the First Schedule of the Council of Legal Education (Kenya School of Law) Regulations, 2009. He needed to sit the pre-bar examination before being allowed to join the Kenya School of Law. Happily his counsel stated at the hearing that **“we have no problem with the pre-bar examination.”**

11. That should then put this matter to rest. However, a little more has to be said in order for the parties to understand that the only route is the one I have already pointed out. The Petitioner alleged discrimination in violation of Article 27 of the Constitution; violation of the right to education as guaranteed by Article 43(1)(f) of the Constitution; violation of the right to fair administrative action provided by Article 47 of the Constitution; violation of Article 48 which provides the right to access to justice; and breach of legitimate expectation. In light of what I have already stated those issues are determined as hereunder.

12. Although the Petitioner alleged that his right to equality and freedom from discrimination was violated by the Respondent, he did not place any evidence before the court to demonstrate that he was treated differently from those who were in similar circumstances with him.

Indeed the Petitioner acknowledged the Respondent's position when he averred at paragraph 7 of his affidavit sworn on 10th January, 2019 in support of the petition that:-

“That I aver that, I, like any other person who holds Bachelor of Laws (LL.B.) Degree and who does not qualify for direct entry for admission to the Respondent's Advocates Training Programme expected to sit for the Pre-Bar Examinations or pursue another degree in a different field or pursue a higher degree in law but the Respondent did not allow me sit for the exams or allow me pursue alternative progression laid under Council of Legal Education Act (Cap.16A) Laws of Kenya (repealed).”

13. This acknowledgement by the Petitioner confirms the fact that the Respondent was acting in compliance with the law. Indeed in **Susan Mungai v Council of Legal Education [2012] eKLR** it was stated that:-

“25. The petitioner applied by letter dated 25th September 2006 for admission to the Kenya School of Law. The respondents, after considering the petitioner's qualifications against the regulations for admission to the Kenya School of Law, rejected her application on the basis that she did not have the requisite qualifications. The respondents assessed the petitioners qualifications against the requirements of the Council of Legal Education (Kenya School of Law) Regulations, 1997. Under these regulations, the petitioner did not qualify for admission to the Kenya School of Law. From the pleadings of the parties, it is clear that the respondents applied exactly the same criteria to measure the petitioner's application and qualifications as they did for all other applicants. The criteria was then set out in the Council of Legal Education (Kenya School of Law) Regulations, 1997.

26. The petitioner tacitly concedes this when she submits that the 1st respondent did not have jurisdiction under the provisions of section 14 of the Council of Legal Education Act to enact the Council of Legal Education (Kenya School of Law) Regulations, 1997; that it acted *ultra-vires* its powers and in violation of the Advocates Act by purporting to amend it through subsidiary legislation; that the only qualifications required for admission to the Kenya School of Law were those set out in Section 13 of the Advocates Act, and that neither section 14 of the Council of Legal Education Act nor any other provision in that Act donates power to the Council to make rules for admission of Advocates outside the statutory qualifications set out under the Advocates Act.

27. From the above matters, it is clear that, rather than the respondents having acted in a manner that was discriminatory against the petitioner, it was the petitioner who was seeking what can only be viewed as preferential treatment from the respondents. The Admission Regulations applicable to all those seeking admission to the Kenya School of Law in 2006 when the petitioner made her application were the Council of Legal Education (Kenya School of Law) Regulations, 1997. There is nothing before this Court to show that all other applicants were not required to meet these qualifications. What the petitioner was asking was for the 1st respondent to waive these requirements with regard to her; and what she is asking this Court to do is to find that even if she was not qualified under those regulations, they were against the requirements of the Advocates Act anyway, and she should not have been required to meet them.”

14. Allowing the petition on the basis that the Petitioner was discriminated by the Respondent will entrench discrimination by giving the Petitioner preferential treatment. This court cannot order the Respondent to do that which is contrary to the law. **Kenya National Examinations Council v Republic Exparte Kemunto Regina Ouru [2010] eKLR** the Court of Appeal held that:-

“It is against the law to require an authority to do what is contrary to the law Mandamus issues to compel performance of a public duty imposed by law. The law does not mandate the council to act against its rules.”

15. Further support is also found in the Court of Appeal decision in **Eunice Cecilia Mwikali Maema v Council of Legal Education & 2 others [2013] eKLR** where it was held that:

“35. While we accept the submission by counsel for the appellant that foreign universities and institutions outside Kenya are outside the ‘accreditation jurisdiction’ of the Council, in our view, the requirement that a degree from a foreign university or institution, in order for it to be recognized for purposes of admission to advocates training programme, must be shown to contain the core units is not to extend the ‘accreditation jurisdiction’ of the Council. It is to avoid different or double standards for local and foreign law degree holders. We think that law degrees earned from foreign universities or institutions must for purposes of admission to the advocates training programme at the school, be held against the standards that the council has set out.”

16. The Court went ahead and held that:-

“40. We are also of the view that the learned judge correctly applied the principle in the decision in Susan Mungai V The Council for Legal Education Petition No. 152/2011 to the effect that the Council has the power to set standards to ensure that the highest professional standards are maintained in the profession and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the Regulations.”

17. In light of what I have stated above, it is clear that the Petitioner did not prove discriminatory treatment by the Respondent and neither was he discriminated upon by the Respondent.

18. The same position applies to the Petitioner's allegation that his right to education was violated. For this, I only need to add that rights are not enjoyed in a vacuum. They are enjoyed within the laws established to regulate various sectors in the country. The right to education

is regulated by laws made for the education sector. Among these laws are the laws that regulate legal education in Kenya. The right to study and obtain a law degree is subject to the standards set by Kenyan laws. It cannot be said that the right has been violated if an applicant has not met the qualifications for admission to the Kenya School of Law.

19. The Petitioner's right to fair administrative action was not violated. He has exhibited correspondences between him and the Respondent showing that the Respondent considered his arguments and gave him reasons for disagreeing with his point of view. The right to a fair hearing does not mean that the issue in dispute has to be determined in favour of the person subjected to the administrative process in order for the right to be fulfilled. In light of the material placed before the court, I am satisfied that the Respondent did not violate Article 47 of the Constitution.

20. Article 48 of the Constitution provides that:-

“The State shall ensure access to justice for all persons and, if any fee is required it shall be reasonable and shall not impede access to justice.”

I do not understand what the Petitioner means when he states that this right was violated by the Respondent. Apart from quoting the Article in his petition he never expounded on how the right to access justice was violated. Without saying more, I find that his petition fails in that aspect.

21. As for the claim by the Petitioner that the Respondent violated his legitimate expectation, I only need to state that legitimate expectation can only operate within the law. The Respondent was simply complying with the law and it could not contravene the law in order to meet the Petitioner's expectations, legitimate or otherwise.

22. Finally, the Petitioner averred that the Respondent did not act in compliance with the provisions of Articles 10, 73 and 232 of the Constitution in arriving at its decisions. The cited provisions provides the national values and principles of governance, the responsibilities of leadership, and the values and principles of public service. Having found that the Respondent acted in compliance with the law and the Constitution, and there being no evidence that the Respondent violated the said values and principles, I find that the Respondent did not violate the said values and principles.

23. Before making the final orders, I note the mention by the Petitioner that the Respondent denied him an opportunity to sit pre-bar examination. I do not find any evidence on record to support this statement. It must however be stated that the Petitioner is indeed entitled to sit pre-bar examination so as to jump the final hurdle between him and the bar examination. His education could not have been in vain considering that there was an opening that allowed him to attain his dreams.

24. Considering what has been stated in this judgment, it follows that this petition finds no favour with this court. The same is therefore dismissed with each party being directed to meet own costs of the petition.

Dated, signed and delivered at Nairobi this 19th day of December, 2019

W. Korir,

Judge of the High Court