REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 482 OF 2018

SIMON KRYPTON LETAMBUI.....PETITIONER

VERSUS

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

COUNCIL OF LEGAL EDUCATION.....2ND RESPONDENT

JUDGMENT

1. The petitioner herein describes himself as an adult residing in Nairobi while the 1st and 2nd respondents are body corporates established under the Kenya School of Law Act and Legal Education Act respectively. In the petition dated 27th September 2017, the petitioner seeks the following orders:-

a) A declaration that the 1st respondent violated the petitioner's right to fair administrative action under Article 47(1) of the Constitution that is expeditious, efficient, lawful, reasonable and procedurally fair by failing and/or neglecting to consider the Appeal for review lodged by the petitioner on 2nd March, 2015 and/or to communicate the outcome of the review to the petitioner despite the said outcome having a direct bearing on the petitioner's eligibility to apply for the 2017 Pre- Bar Examination slated for 10th November, 2017 and admission into the Advocate Training Programme.

b) A declaration that the 1st respondent violated the petitioner's right to access information under Article 35 of the Constitution by withholding information as to whether the petitioner's appeal for review lodged on 2nd March 2015 had been placed before the relevant committee and if so, the outcome of the said review which information was required by the petitioner to enable him exercise his right to education.

c) A declaration that the 1st respondent violated the petitioner's right to equality and freedom from discrimination under Article 27 of the Constitution by rejecting the Petitioner's application to sit the Pre-Bar examinations administered by the 1st respondent as a prerequisite for admission to the Advocates Training programme despite the petitioner meeting the requirements laid down in Legal Notice 357 of 1997 published on gazette Notice No.9259.

d) A declaration that the 1st respondent violated the petitioner's right to education under Article 43(1) (f) of the Constitution for declining the petitioner's application to sit the Pre-Bar examinations despite the Petitioner meeting the requirements laid down in Legal Notice 357 of 1997 published on gazette Notice No.9259.

e) An order of Mandamus compelling the 1st respondent and 2nd respondent to consider the petitioner's application for admission to the Advocates Training Programme offered by the 1st respondent under the Legal Notice 357 of 1997 published on gazette Notice No.9259 and compelling the 1st respondent to admit the petitioner to the Advocates Training Programme subject to passing the Pre-Bar examinations.

f) Costs of this petition.

2. The facts of the case are that the petitioner sat for Kenya certificate of Secondary Education (KCSE) in 1997 and obtained an aggregate mean grade C- (C minus) and D+(D plus) grade in the English subject. He then undertook a bridging course in English subject at the then Kenya Polytechnic (now the Technical University of Kenya) and obtained Grade 1 Distinction in the final examination after which he was in 1999 admitted to the said Polytechnic to pursue a Diploma Course in Land Surveying and Mapping where he graduated in 2001 with a Credit Pass. The petitioner was thereafter admitted to Busoga University in Uganda in 2005 to pursue Bachelor of Laws Degree and he states that

his admission was based on the Diploma Certificate that he had obtained from the Kenya Polytechnic. He graduated from Busoga University with a 2nd Class Upper Division.

3. The petitioner's case is that pursuant to the 2nd respondent's guidelines issued through Legal Notice 397 of 1997 and published in the Kenya Gazette No. 9259, there were requirements to be met for admission to the 1st respondent school as at the time he was admitted to pursue the Law Degree at Busoga University and that in 2009, his application for admission to the 1st respondent was declined on the basis that he did not attain a mean grade B (plain) in the English subject in the Kenya Certificate of Secondary Education (KCSE). The petitioner contends that he had legitimate expectation that the 1st respondent would consider and apply the eligibility criteria for admission set out in Legal Notice No. 397 of 1997 while considering his application for admission into the Advocates Training programme (ATP).

4. The petitioner contends that through his letter dated 19th August 2010, he appealed to the 1st respondent for admission to sit for the Pre-Bar Examination which appeal was declined and that he further appealed for review of the 1st respondents said decision to the 1st respondent's Board which Board did not communicate its decision to him in writing.

5. It is the petitioner's case that his rights to Fair Administrative Action, access to information, equality and freedom from discrimination, inherent human dignity and right to education have been violated.

6. At the hearing of the petition, Mr. Nyamodi, learned counsel for the petitioner, highlighted the issues for determination to be as follows:

i. Whether the 1st respondent violated the petitioner's right to fair administrative action.

ii. Whether the 1st respondent violated the petitioner's right to access to information.

iii. Whether the 1st respondent violated the petitioner's right to equality and freedom from discrimination.

iv. Whether the 1st respondent violated the petitioner's inherent right to human dignity and to have that dignity protected.

v. Whether the 1st respondent violated the petitioner's right to education.

7. On fair administrative action, counsel submitted that the respondents were enjoined by the provisions of the Constitution and the Fair Administrative Actions Act to safeguard his rights under Article 47 of the Constitution. For this argument, counsel relied on the decision in the case of **Sceneries Ltd vs National Lands Commission [2017]eKLR** wherein the importance of observing the rules of natural justice and in particular, hearing a person who is likely to be adversely affected by a decision before the said decision is made was underscored.

8. Reliance was also placed on the decision of Nyamweya J. in the case of **Disaranio Limited vs Kenya National Highways Authority & Attorney General [2017] eKLR** wherein the fair administrative action was defined.

9. Counsel also submitted that the petitioner had a legitimate expectation that the 1st respondent would provide him with information on whether his appeal had been placed before the 1st respondent's board and the outcome thereof. It was the petitioner's case that he required the said information to further his right to education under Article 43 of the Constitution. Counsel relied on the decision in the case of **Timothy Njoya vs Attorney General & Another [2014] eKLR** wherein Lenaola J. (as he then was) dealt with the issue of the applicability of the right to information.

10. On the right to equality and freedom from discrimination under Article 27 of the Constitution the petitioner submitted that in failing to consider the petitioner's application for admission into the Advocates Training Programme using guideline issued by the 2nd respondent vide legal Notice 397 of 1997 published in the Gazette Notice No. 9259, the 1st respondent violated the petitioners right to equality and freedom from discrimination.

11. On the inherent right to human dignity under Article 28 of the Constitution, the petitioner argued that failure to issue a response to his appeal subjected him to mental torture thus violating his inherent right to human dignity.

12. Finally, in respect to the claim of violation of right to education under Article 43 of the Constitution, the petitioner contended that the 1st respondent's rejection of his application to sit for the pre-bar examinations, a prerequisite to admission into the Advocates Training Program, violated his right to education.

Respondents' case

13. The 2nd respondent filed Grounds of Opposition dated 17th September 2018 in response to the petition. The 2nd respondent's case is that it is only enjoined to certify foreign qualifications in accordance with the Legal Education Act, 2012 and the Regulations made thereunder and the Kenya School of Law Act in which case, the court has no jurisdiction to compel it to certify a qualification that does not meet the legal threshold. For this argument, counsel relied on the Court of Appeal decision in the case of **Kenya National Examination Council vs The Republic Exparte Kemunto Regina Ouro [2010] eKLR** wherein it was held, inter alia, that the law does not mandate the council to act against its Rules and that mandamus can only issue to compel performance of a public duty imposed by law.

14. The respondents' case is that the Diploma in Law at the Kenya School of Law resulting in sitting the bar examination is issued in accordance with the existing/current law being Section 16 of the Kenya School of Law Act, 2012 and Schedule 2 thereto and the Third

Schedule to the Council of Legal Education (Accreditation and Quality Assurance) Regulations, 2016. According to the respondents, a Diploma in Law cannot be offered to the petitioner on Regulations that do not exist having been repealed more than 10 years ago.

15. The respondents maintained that Legal Notice No. 357 of 1997 published in the Kenya Gazette No. 9259 was repealed by the enactment of the Council of Legal Education (Kenya School of Law Admission) Regulation 2007 and that the 2nd respondent can only certify foreign qualifications that satisfy the Second Schedule of the Kenya School of Law Act, 2012.

16. At the hearing of the petition, Mr Oduor, learned counsel for the 2nd respondent submitted that the prayer for an order of mandamus to compel the 2nd respondent to consider his application for admission was not tenable because the 2nd respondent only approves foreign qualifications and is not concerned with admissions to the 1st respondent institution and that even assuming that the 2nd respondent could admit students, the petitioner had not demonstrated that he made any application for such admission. For the above reasons, counsel argued that the instant petition is premature as the petitioner had not applied to it for the approval of his foreign degree.

Analysis and determination

17. I have considered the pleadings filed herein, the parties' respective submissions and the authorities that they cited. I note that the main issue for determination is whether the petitioner has made out a case to warrant the issuance of the orders sought in the petition.

18. I have considered the provisions of Legal Notice 357 of 1997 published in the Gazette Notice No. 9259 under which the petitioner claims that he is entitled to be admitted by the 1st respondent to the Advocates Training programme. I note that the said Gazette Notice states as follows:

> ***GAZETTE NOTICE No. 9259***
>
> ***THE ADVOCATES (ADMISSION) REGULATIONS, 1997***
>
> ***(L.N. 357 of 1997)***
>
> ***EXERCISE OF DISCRETION***
>
> ***(UNDER RULE 8(C)***
>
> ***At its meeting held on the 22nd October, 2004, the Council of Legal Education exercising its general discretion under the provisions or rule 8(b) (ii) and rule 8 (c) of the Advocates (Admission) Regulations, 1997 has directed as follows:***
>
> ***That candidates who have recently applied or had on previous occasions applied for admissions to the Kenya School of Law and who are or were ineligible for admission under Rule 8(b) (ii) but satisfy the requirements of rule 8(b) (i) may present themselves for an interview by the interviewing sub-committee of the Council of Legal Education to determine their competence to undertake studies at the school at a time and place to be soon determined.***
>
> ***Candidates who pass the interview will further be required to sit and pass a proficiency test in English to be administered by the Kenya National Examinations Council at a date and place to be determined.***
>
> ***Candidates who pass the interview will further be required to sit and pass a proficiency test in English to be administered by the Kenya National Examinations Council at a date and place to be soon determined.***
>
> ***The opportunity to sit and pass the proficiency test is on a "once" only basis and no second chance will be given to failing candidates. Applicants to the school who have previously been given an opportunity to sit the proficiency test will not be given a second chance under this dispensation.***
>
> ***Those who pass both the interview and the proficiency test will become eligible for admission to the school.***
>
> ***The following candidates who recently applied for admission to the Kenya School of Law for the academic year 2004/2005 have been determined eligible for the said interview and will be conducted in due course for the same.***
>
> ***Agonda, Jacqueline Adhiambo***
>
> ***Boinett Alfrida Telagat***

19. A plain reading of the above legal notice shows that it was specifically referring to and was applicable to candidates who had recently applied or had on previous occasions applied for admission to the Kenya School of Law and were ineligible for admission under Rule 8(b) (ii) but satisfy rule 8(b) (i).

20. In the present case, the petitioner claims that he obtained his law degree from Busoga University in 2009 at least 5 years after the issuance of the impugned legal notice. My finding is that the petitioner does not fall in the category of persons that the Legal Notice in question was referring as having recently or previously applied for admission to the law school. My take is that an application made 5 years after the notice does not fit in the description of the candidates referred to in the impugned notice as having recently applied as nowhere in

the impugned notice is it stated that the notice will be applicable for future applicants.

21. My further finding is that the impugned legal notice issued in October 2004 was clearly worded at the top to be an "exercise of discretion" which shows that it was intended for a specific period and persons and was not intended to operate indefinitely. Even assuming, for argument's sake, that the applicant applied for admission to the law school within the timelines envisaged in the impugned notice, I find that the respondent will still have the discretion to decide whether or not to accept his application as long as it is shown that the decision was not unreasonable and that such discretion is exercised within the confines of the rules and regulations governing the respondent's operations. In this regard I associate myself with the decision of the Court of Appeal in **Eunice Cecilia Mwikali Maema vs. The Council of Legal Education and 2 Others** wherein it was held 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."***

22. I also wish to associate myself with the decision in **Susan Mungai vs. The Council of Legal Education & 2 Others Constitutional Petition No. 152 of 2011** in which Mumbi Ngugi J. expressed herself as follows while citing with approval the case of **Republic –vs- The Council of Legal Education ex parte James Njuguna and 14 Others, Misc. Civil Case No. 137 of 2004 (Unreported):**

> **"The Council of Legal Education followed to the letter the purpose and objects of the Act including the applicable regulations and this Court has no reason to intervene in a way that interferes with the merit of the decisions clearly falling within the relevant regulations and which have been applied by the Council of Legal Education without any procedural irregularity or for an improper purpose. I decline to do so. The Council of Legal Education has the power and duty to insist on the highest professional standard for those who wish to qualify as advocates. The Regulations are aimed at achieving this. The decision was made on merit and this Court has no reason to intervene. The Regulations and the policy behind the rules were properly made pursuant to the Act and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the regulations...*** ***The Council of Legal Education is the best judge of merit pertaining to academic standards and not the courts. Parliament clearly vests the power of formulating policy of training and examining of advocates on the Council of Legal Education and it would be wrong in the view of this court to intervene with the merits of the decision by the Council of Legal Education..... a Court of law would only be entitled to inquire into the merits of a decision in circumstances where the decision maker abused its discretion, exercised its decision for an improper purpose, acted in breach of its duty to act fairly, failed to exercise its statutory duty reasonably, acts in a manner which frustrates the purposes of the Act which gives it power to act, exercises its discretion arbitrarily or unreasonably, or where its decision is irrational or unreasonable as defined in the case of Associated Provincial Picture Houses Ltd. –v- Wednesbury Corporation [1947] 1 KB 223*** **. In the case before me, there is no evidence to suggest that the 1st respondent, in dealing with the application for admission by the petitioner, acted in any of the ways set out above that would justify interference by this Court with its decision."** [Emphasis mine].

The Court further held:

> **"I find and hold that it would not be proper or right for the court to veto powers conferred by Parliament on a public authority or body such as the Council of Legal Education and for the court to substitute its own view from that of the Council of Legal Education to which discretion was given except where the discretion has been improperly exercised as enumerated in the ten situations above. In judicial review, the courts quash decision made by public bodies so that these same bodies remake the decisions in accordance with the law. It is not proper for the court to substitute its decision which is what this court is being asked to do by issuing a mandamus to compel a re-sit. I reiterate my earlier findings on this point in the case of *R v JUDICIAL SERVICE COMMISSION ex-parte PARENO Misc. Civil Application No.1025 of 2003* (now reported) that it is not the function of the courts to substitute their decisions in place of those made by the targeted or challenged bodies."**

23. The same position was taken in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarstheth [1985] LRC** in which it was held:

> ***"so long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of the efficaciousness of such rules and regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair."***

24. I further find that having been repealed by the enactment of Council of Legal Education (Kenya School of Law Admission) Regulations 2007, the petitioner cannot through a petition filed in 2017, more than 10 years after the repeal of the Legal Notice, claim that he is entitled to admission to the 1st respondent school, under a regulation that is no longer operational.

25. For the above reasons, this court cannot be seen to compel the respondents to act against its rules or to admit a student on regulations that had long been repealed. In any event, the legal notice that the petitioner relied upon to be the basis for this application was clear that it was an exercise of discretion which to my mind means that the decision on whether or not to admit a student under the said legal notice was at the 1st respondent's discretion. In **Kenya National Examinations Council vs Republic Exparte Geoffrey Gathenji Njoroge & 9 Others [1997] e KLR** it was held that the court cannot issue a writ against a public authority to perform its function in a particular way if statute gives discretion to it.

26. While this court recognizes that the petitioner underwent his law degree course prior to the repeal of Legal Notice No. 357 of 1997, under which he seeks admission to the 1st respondent school, the critical question which he has not addressed to this petition is whether the university he attended in this case Busoga University which is a foreign university is one of the universities whose degree is recognized by the 1st respondent.

27. My above findings on the applicability of L. No. 357 of 1997 to the present case would have been sufficient to determine this petition but I am still minded to consider the petitioner's claim that his rights under Articles 35 and 47 the Constitution were violated by the respondents' failure to admit him to the ATP.

28. I have perused annexure **"SKLO6"** to the supporting affidavit to the petition and I note that it is a letter from the 1st respondent dated 15th September 2009 in which the 1st respondent explained to the petitioner its admission requirements and criteria as stipulated under its laws and further explained to the petitioner the reasons for his ineligibility to be admitted to the school having obtained Grade D+ in English instead of the C- that would have enabled him to do proficiency examination required for such admission.

29. The petitioner has not stated that he had satisfied the threshold for admission to the 1st respondent and was denied the opportunity for admission. I find that the claim under Article 47 of the Constitution was therefore not proved as no adverse action was taken by the 1st respondent against the petitioner other than to restate to him the criteria for admission as is provided for under the laws and regulations.

30. Similarly, having comprehensively answered the petitioner's application for admission through the letter of 15th September 2009, I find that the petitioner's claim that he was denied right to access information under Article 35 is misplaced.

31. In the same vein, the petitioners claim that he had legitimate expectation that he would be admitted under Legal Notice No. 357 of 1997 is not tenable as the said legal notice as I have already found in this judgment, is not only obsolete and longer operational, but was also clearly intended to apply only to a specific group of candidates for a specific period of time.

32. The Supreme Court in the case of **Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others, Petition No. 14 of 2014** stated at paragraph 269 that the emerging principles on legitimate expectation may be succinctly set out as follows:

> ***a) there must be an express, clear and unambiguous promise given by a public authority;***
>
> ***b) the expectation itself must be reasonable;***
>
> ***c) the representation must be one which was competent and lawful for the decision-maker to make; and***
>
> ***d) There cannot be a legitimate expectation against clear provisions of the law or the Constitution.***

33. In the instant case, I find that there was no express, clear and unambiguous promise or representation made to the petitioner that he will be admitted to the 1st respondent school as such a promise could only be based on the applicable law.

Article 43 of the Constitution

34. It is now trite law that the right to education is not an absolute right but one of those rights that are subject to limitation under Article 24 of the Constitution which stipulates:

> ***(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including--***
>
> ***(a) the nature of the right or fundamental freedom;***
> ***(b) the importance of the purpose of the limitation;***
> ***(c) the nature and extent of the limitation;***
> ***(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and***
> ***(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.***

35. From the provisions of the above Article, it is clear that the first test is whether the limitation in question is prescribed by the law. This means that the limitation must be expressly contained in a statute. It is only after the limitation passes this first test that the court would be called upon to consider if it was reasonable and justifiable in a free and democratic society taking into account all the relevant factors spelt out in the Article, that is, the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the need to balance the rights and freedoms of an individual against the rights of the others, the relation between the limitation and its purpose and lastly, whether there are less restrictive means to achieve the purpose.

36. In the instant case, as I have already found in this judgment, the petitioner's right to be admitted to the 1st respondent was subject to the 1st respondents' rules and regulations. Courts have severally held that they will not intervene in the activities of academic institutions where such activities are governed by the respective institution's rules and regulations. (See **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarstheth** (supra).

37. Lastly on the claim that the petitioner was discriminated when his application to the pre-bar examination administered by the 1st respondent as a pre- requisite for the admission to the Advocates Training Programme, I find that the real reason for rejection of the petitioner's application for admission was his failure to meet the laid down criteria for such admission. The petitioner did not establish that there were candidates who had similar qualifications or grades as his grades and were admitted by the 1st respondent so as to justify his claim that he was discriminated. I am guided by the decision in **John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others [2011] eKLR**, wherein it was held that:

> ***"It should be noted that discrimination which is forbidden by the Constitution is unfair or prejudicial treatment of a person or group of persons based on certain characteristics. (James Nyasora Nyarangi and Others –Vs- Attorney General, HC. Petition No. 298 of 2008 at Nairobi). The element of what is unfair or prejudicial treatment has to be determined objectively in the light of the facts of each case. The High Court above cited with approval the observation in President of the Republic of South Africa & Another –Vs- John Phillip Hugo 1997 (4) SAICC Para 41 as follows: - "We need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case, therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in different context." At the heart of this case, therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyse a claim of discrimination has both a subjective and an objective component."***

38. For the above reasons, and having regard to the findings made in this judgment, I find that the instant petition is not merited and the order that commends itself to me is the order to dismiss it with no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 29th day of November 2018.

W. A. OKWANY

JUDGE

In the presence of:

Miss Ooga for Nyamodi for the petitioner

Court Assistant – Kombo