



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CONSTITUTIONAL PETITION NO. 3 OF 2017

NTELE JAMES KIPAMBI.....PETITIONER

-VERSUS-

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

THE KENYA SCHOOL OF LAW..... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL..... 3RD RESPONDENT

RULING

NTELE JAMES KIPAMBI herein after referred to as the Petitioner filed this petition dated the 3rd March 2017 against the Council of Legal Education hereinafter the 1st Respondent, the Kenya School of Law hereinafter the 2nd Respondent and the Attorney General hereinafter the 3rd Respondent pursuant to Articles 2(1), 3(1), 10, 19, 20, 21, 23, 27(1)(2)(4)(6), 28, 35, 43(1)(f), 47, 48, 50(1), 159, 165(3)(b) of the Constitution of Kenya. The petition was further grounded on Section 48 of the Council of Legal Education Act, No. 27 of 2012, Section 5 of the First Schedule of the Council of Legal Education Act Cap. 16A (Repealed), the Council of Legal Education (Kenya School of Law Regulations) 2009 (Repealed) and Section 13(1) (a) (b) of the Advocates Act, Cap. 16.

Petitioner's case:

1. The Petitioner's case is set out in the Petition dated 16th March 2017 and the Affidavit sworn by the Petitioner dated 28th June 2017. The grounds relied upon are set out in the petition as well as the affidavit.
2. The Petitioner averred that between the years of 2007 and 2011 he was admitted into The Open University of Tanzania which is fully accredited by the Tanzania Commission for Universities and its LL.B degree Program is also recognized and accredited for his undergraduate Bachelor of Laws (LL.B) degree Program which he successfully completed and graduated on the 26th November 2011.
3. Having graduated with the LL.B degree, the Petitioner averred that he applied for the pre-bar examinations offered by the 2nd Respondent and in the year 2011 he was admitted to sit for the pre-bar examinations as per the Council of Legal Education (Kenya School of Law) Regulations 2009 and was given admission number PRE-2011078 and that as of July 2016, he had passed all the requisite pre-bar units hence was legible to be admitted by the 2nd Respondent to the Advocates Training Program.
4. The Petitioner contended that upon making a formal Application to the Advocates Training Program, the 1st Respondent wrote him a letter dated 3rd march 2016 claiming that it cannot recognize and approve

the LL.B degree of The Open University of Tanzania and suggested that the Petitioner had not provided evidence to confirm whether the LL.B degree Program of the Open University of Tanzania is recognized when the same is recognized by the Tanzania Commission for Universities. In response, the Petitioner wrote a letter to the 1st Respondent on the 9th of June 2016, accompanied by the documents which showed that he had sat for the pre-bar exams and that The Open University of Tanzania is recognized and accredited by Tanzania Commission for Universities.

5. It was the Petitioner's averment that he received a letter dated 21st July 2016 from the 1st Respondent seeking to have the issue finalized and therefore requested for a copy of the letter which formally admitted him to sit for the pre-bar examinations offered by the 2nd Respondent. Following this development, the Petitioner visited the 2nd Respondent to furnish him with a copy of his admission letter as he had lost his copy since they are the custodian of all the records pertaining to admissions. Unfortunately, the letter could not be traced. The Petitioner wrote a follow up letter to the 2nd Respondent requesting for the original/copy of the admission letter from their file records.

6. It was averred that on the 29th of November 2016, the Petitioner received a letter from the 2nd Respondent confirming that he had cleared the Pre bar examinations which letter he hoped would serve as an alternative to his misplaced letter of Admission. Subsequently, he wrote a letter to the 1st respondent informing them that he had been admitted to sit the pre bar examinations, had passed and as such was eligible to be cleared by the 1st Respondent to apply for the Advocates Training Program. The 1st Respondent responded on the 11th January 2017 claiming that it could not recognize his LL.B degree certificate.

7. The Petitioner averred that the letter from the 1st Respondent has caused him to suffer undue prejudice having completed his LL.B degree from a recognized university and subsequently passing the pre-bar examinations. It was contended that the actions of the 1st Respondent are unlawful and discriminatory in nature towards the Petitioner.

8. The Petitioner averred that they were bound by the legal requirements provided in the Council of Legal Education Act(2009) Repealed as they had enrolled for the pre-bar examinations before the coming into force of the Kenya School of Law Act(2012) and the Legal Education Act(2012)

9. The Petitioner intimated that they stood to suffer irreparable loss and damage if the 1st Respondent was not compelled to clear the Petitioner to apply for the Advocates Training Program and at the same time if the 2nd Respondent is not compelled to admit him into the Program. It was their contention that it was only just and fair that the orders are granted as the Respondents will suffer no prejudice from the same.

10. The Petitioner's contended that the 1st respondent's decision to refuse to acknowledge his LL.B degree and the 2nd Respondents refusal to admit him was in contravention of Articles 2(1), 3(1), 10, 19, 20, 21, 23, 27(1)(2)(4)(6), 28, 35, 43(1)(f), 47, 48, 50(1), 159, 165(3)(b) of the Constitution of Kenya. He therefore sought the following reliefs:

- a. An order compelling the 1st and 2nd Respondents to clear and admit respectively, the Petitioner to the advocates Training Program.
- b. A prohibitory injunction be and is hereby issued prohibiting the respondents unlawful actions as against the petitioner who was by then regulated by the Council of Legal Regulations of 2009 and not of the 2015 Regulations.
- c. A declaration that the 1st Regulator's action of allowing the Petitioner to sit the pre-bar exam in effect allowed him to be admitted into the Advocates Training Program by the 2nd Respondent subject to him passing all the pre-bar units as the applicable regulation by the were then Council of Legal Education (Kenya School of Law) regulations of 2009.

- d. A Declaration that the Petitioner constitutional rights under articles 10, 27 and 43 (1) (f), 28, 35, 47 and 48 of the constitution are threatened, violated and/ or by 1st and 2nd Respondents.
- e. A declaration that the provisions of the Council of Legal Education Act, 2012 and the Kenya School of Law Act 2012 as well as the regulations passed thereunder never applied to the Petitioner herein.
- f. A conservatory order protecting the Petitioner rights and freedoms to education and equality from discrimination
- g. An order for compensation for loss suffered.
- h. Costs of this suit plus interest.
- i. Any other relief that this court may deem fit and just do grant to the proposed plaintiff.

11. Counsel for all parties agreed to proceed by way of written submissions.

Petitioner's submissions:

12. The Petitioner articulated 4 issues for determination:

- a. Whether or not the Respondents actions are unlawful and unconstitutional?
- b. Whether or not the Respondents should be compelled to admit the Respondent to the Advocates Training Program?
- c. Whether or not a conservatory order should be issued by the Honourable Court conserving the Petitioner's right to education.
- d. Whether or not the Petitioner is duly qualified to be admitted to the Advocates Training Program?

13. The Petitioner submitted that The Respondents actions are *ultra vires* and unconstitutional as regards the Petitioner's right to be treated fairly and without discrimination in terms of *Articles* 10, 27, 28, 43 (1) (f), 35, 47 and 48 of the Constitution. This is pegged on the fact that Petitioner/Applicant was admitted at the Open University of Tanzania between 2007 & 2011 and graduated on 26th November, 2011 with an LLB degree yet the 2nd Respondent has declined to recognize his LL.B Degree. This is unjustifiable and an infringement on the Petitioner's Constitutional Rights.

14. The Petitioner submits that having passed his pre bar examination, he has met all the pre requisites for admission into the Advocates Training Program which at the time of him applying was the Council of Legal Education Act, 1995 (Repealed) and the **Council of Legal Education (KSL) Regulations 2009** (Vide Kenya Gazette Legal Notice Number 169 of 2009). In particular, Section 4 of the former act sets out the criteria for admission under schedule I of the act and Regulation 5 thereof provides *inter alia*;

"5. A person shall not be eligible for admission for the Post Graduate Diploma (Advocate Training Program) 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 at 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 Program; 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 pre-condition for admission.”

15. The Petitioner submitted that it will be just and prudent that the court issues final conservatory orders conserving the Petitioner's Constitutional right to Education and of his loss of legitimate expectation of being an advocate. This would ensure the strict adherence of the rule of law and principles of natural justice by the Respondents herein being compelled to admit him to the Advocates Training Program as he has satisfied the pre-requisite requirements. It was submitted that the applicable law in the Petitioner's case was the Council of Legal Education Act, 1995 (Repealed) and the Council of Legal Education (KSL) Regulations 2009 (Vide Kenya Gazette Legal Notice Number 169 of 2009 and not the Kenya School of Law Act, Council of Legal Education Act and Regulations (2012) as the latter two apply to the Petitioner retrospectively and not retroactively. In support of this view, the cases of **Joyce W. Gichohi versus CLE and others Miscellaneous Application No. 492 of 2016** and **Kevin K. Mwiti & Others Versus Kenya School of Law & Others Constitutional Petition Number 377 of 2015** were cited.

16. The Petitioner submitted that they had duly complied with the mandatory requirements for admission into the Advocates training Program and it was in the interests of justice that they be admitted in view of the fact that the Respondents had infringed upon the Petitioner's legitimate expectation of being an advocate.

1st Respondents submissions:

17. The 1st Respondent's grounds of objection can be summarized as:

a. There has not been demonstrated a violation of fundamental rights of the Petitioner under Article 10, 27, 35 and 43(1) of the Constitution.

b. In absence of demonstration of any violation of fundamental rights claimed as Articles 27, 35 and 43(1) (f) and Article 10 of the Constitution, the interpretative and or declarative jurisdiction of the High Court under Article 23 of the Constitution cannot be invoked.

c. The Case of **Joyce Gichohi vs. Council of Legal Education & Others (2017) eKLR** is not binding on the present court and neither are its findings in support of the Petitioner's claims

d. The prayers of the Petition are ungrantable at law.

18. The 1st respondent submitted that it was guided by the existing law, resting with the substantive provisions of the Legal Education Act, 2012 in making any and all decisions in the present case. They submitted that the national values at Article 10 of the Constitution are supported, rather than violated, by deference to provisions of the law.

19. It was submitted that contravention of Article 27 has not been demonstrated at all. The Petitioner was enjoined to furnish evidence of other persons in his category who have been given preferential treatment,

not just make incomparable statements. There had not been evidenced other persons in the Petitioner's category, that is to say persons with degrees from long distance which have been certified by the Council, yet rejecting the Petitioner's. Counsel cited *Muamar Nabeel Onyango Khan vs. Council of Legal Education and Others {2015} eKLR* as well as *Susan Mungai v Council of Legal Education (2012) eKLR* in support of their argument.

20. Regarding Right to Education under Article 43(1)(f), the 1st Respondent submitted that it is not an absolute right and party cannot enjoy the right to education in the context of Advocates Training Program, without first satisfying the substance of the *Legal Education Act, 2012, Kenya School of Law Act, 2012* and the *Council of Legal Education (Kenya School of Law) Regulations 2009*.

21. The 1st Respondent submitted that in order for it to be recognized, a degree in law by long distance learning has to satisfy the physical standards, the library standards and the Curriculum standards set out in the Third Schedule to the Legal Education (Accreditation of Legal Education Institutions) Regulations 2009. It was submitted that the 1st Respondent mirrored the Petitioner's degree on these thresholds and found it deficient.

22. The 1st respondent posited that if the Court herein shall be inclined to follow the decision in **Joyce Gichohi** (*supra*), then all the Honourable Court can direct is that the 1st Respondent re-considers the aptitude and credentials of the Petitioner under the law, but not to order that the Petitioner be certified to have passed the test of the law.

23. The 1st respondent submitted that the court has no jurisdiction to issue a writ of Mandamus against the Respondents to violate the law citing the decision of the Court of Appeal in *Kenya National Examinations Council v Republic Ex parte Kemunto Regina Ouro (2010) eKLR*.

24. It was further submitted that the Court cannot issue a writ of Mandamus against a public authority to perform its function in a particular way if statute gives discretion to the public authority, and the court cannot itself perform the function of the public authority. The Court of Appeal's decision in *Kenya National Examinations Council v Republic Ex-Parte Geoffrey Gathenji Njoroge and 9 Others (1997) eKLR* was cited.

25. The 1st respondent submitted that the requirement for Pre-Bar is a requirement of the law, it does not guarantee admission, it is merely one of the steps in the eligibility. Direction to sit Pre-Bar, did not guarantee the Petitioner admission to the Advocates Training Program. The Petitioner's qualifications had to be subjected to the threshold of law.

26. In response to the Petitioner's 5th prayer, that was the 1st respondent's submission that the requirements of law being exacted on the Petitioner are the requirements that were in place at the time of the Petitioner's qualifications but necessarily the law in present today must be imported to apply. It is instructive that the Diploma in Law that the Petitioner seeks is issued today, and accordingly in so far as there is no appreciable inconsistency, the law in force presently, to say the Kenya School of Law Act, and the Legal Education Act, 2012 apply.

27. The 1st respondent submitted that Conservatory Orders issues on a Notice of Motion under **Rules 3 and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**). Such relief does not issue on substantive Petition.

28. The 1st respondent prayed that the Petition be dismissed.

2nd Respondent's case:

29. The 2nd Respondent articulated 3 issues for determination:

- a. Whether the approval to sit for the pre bar exam amounted to automatic admission to the advocate Training Program.
- b. Whether there is a breach of any fundamental rights and freedoms of the Petitioner under Article 10, 27, 43(1)(f) and 35.
- c. Is the Petitioner entitled to the prayers sought.

30. The 2nd Respondent submitted that the applicable criteria for admission into the Advocates Training Program was as provided by the **Council of Legal Education (Kenya School of Law) Regulations of 2009 (LN 169 of 2009)** regulation 4 as read with clause 5 of the 1st Schedule. The Petitioner's application fell under part (d) of the criteria as he had not attained the minimum required O'level score for entry under any of the other categories. Category (d) has three concurrent requirements for a person to be admissible for an offer to the Advocates Training Program, they must;

- i. Have scored a minimum of a C minus in English and a C minus aggregate in KCSE and
- ii. Possess a Bachelor of Laws Degree from a recognized university, and
- iii. Sit and pass the Pre-Bar Examinations as a precondition for admission.

31. It was submitted that the 1st Respondent in exercising its discretion in assessment of applicants for admissibility as provided under section 16 of the Kenya School of Law Act found the petitioner inadmissible on the basis of lack of recognition the university that offered his Bachelor of Laws degree. It was further submitted that the 1st Respondent is empowered under section 8 of the Legal Education Act, No. 27 of 2012 to recognize foreign qualification, therefore the 2nd Respondent in its rejection of the Petitioner's application informed him that he had not gotten clearance from the 1st Respondent.

32. It was submitted that the 2nd Respondent did not create any legitimate expectation that the Petitioner would be admitted to the Advocates Training Program by dint of his passing the Pre-Bar Examinations as the sub-sect of the criteria he applied under has three concurrent requirements that have to be fulfilled for admissibility, as pleaded above.

33. Further, it was submitted that it is a well-recognized legal principle that where a statute imposes a duty and leaves discretion as to the mode of performing that duty in the hands of the party on whom the obligations is laid, a mandamus order cannot issue to command the duty in question to be performed in a specific way.

34. The 2nd Respondent submitted that the assessment of admissibility of applicants to the join the Advocates Training Program is a duty whose discretion is left to the 2nd Respondent under section 6 of the Act. The 2nd Respondent relied on **Kenya National Examination Council v Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996 (KNEC decision)**, quoted by Korir J in **Republic v Kenya National Examinations Council & another Ex-Parte Audrey Mbugua Ithibu [2014] eKLR** where the Court of Appeal indicated that:

***“The order must command no more than the party against Whom the application is made is legally bound to perform. “drew a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on who the obligation is laid, a mandamus cannot command the duty in question to carried out in a specific way.*”**

35. The 2nd Respondent submitted that legitimate expectation cannot subsist contrary to clear statutory, provisions, citing **Justice Kalpana H Rawal v judicial Service Commission & 3 Others [2016] e KLR**. In the Petition the admission criteria as provided in the LN 169 of 2009 is a clear statutory provision, and the alleged legitimate expectation of the Petitioner if recognized runs contrary, and therefore cannot subsist.

36. It was submitted that the 2nd Respondent has not infringed on the Petitioner's right under Article 35 as the Petitioner has failed to demonstrate in his Petition that he made any request for information to the 2nd Respondent which was either denied or not responded to. Counsel cited the cases of *National Association for Financial Inclusion of the Informal Sector v Minister of Finance and Another* *Petition No. 40 of 2012 [2012] eKLR* quoted at paragraph 24 of *Charles Omanga & 8 others v Attorney General & Another* *[2014] eKLR* as well as *Andrew Omtatah Okoiti v Attorney General & 2 Others* *[2011] eKLR* to illustrate his point.

37. It was the 2nd Respondent's submission that there is no breach of Article 27 of the Constitution as the admission criteria applies uniformly to all applicants of the Advocates Training Program that is offered by the 2nd Respondent. The Act legally mandates the 2nd Respondent to receive applicants and exercise its discretion in analysis of admissibility, in accordance with section 16 of the Act. The 1st Respondent is legally mandated under section 8 of the Legal Education Act to set and enforce guidelines on legal education in Kenya. The purpose of the standards is to ensure quality control and that the graduates who reach the market are fit for purpose. The decision of what constitutes proper standards, and who is admissible to the Advocates Training Program are discretions of the 1st Respondent and the 2nd Respondent, respectively. The Court, therefore, ought not to decide for the 2nd Respondent and the 1st Respondent which standards and guidelines are appropriate for it to administer to prospective students unless the discretion is exercised improperly. The cases relied upon for this position were *Republic v The Council of Legal Education ex parte James Njuguna & 14 Others, Misc Civil Case No. 137 of 2004 [2007]* and *Maharashtra State Board of Secondary and Higher Secondary Education and Another v Kurnarsteth* *[1985] LRC 5.*

38. It was the view of the 2nd Respondent that the denial of admission to the ATP before confirmation of recognition of the university by the 1st Respondent is lawful. To decide to the contrary would amount to treating the Petitioner differently from other students in a similar situation and it is that action that would amount to discrimination.

39. With reference to the Right to Education, the 2nd Respondent submitted that it is the applicant who is obligated to ensure that they meet the minimum requirements for admission to whichever education Program they want to attend as well as meet any financial/ time and other requirements like the institutional regulations applicable for students, once they meet the minimum requirements and granted admission. It is incumbent upon any applicant as an obligation holder, including the Petitioner, to ensure that they meet the minimum requirements for admission to the Advocates Training Program.

40. It was submitted that the 2nd Respondent as a duty bearer has fulfilled its duty under the right to education by ensuring that it mounts the Program, and invites persons to show interest in joining the Program. Therefore the 2nd Respondent has not infringed on the Petitioner's right to education, it is the Petitioner who has not fulfilled his obligations in order to actualize the right.

41. The 2nd Respondent submitted detailed reasons as to why the Petitioner was not entitled to the prayers sought.

Analysis and determination:

42. Having intimately apprised myself of all the parties arguments and submissions, I have framed the following issues for determination:

- a. Whether the Petitioner's fundamental rights and freedoms as espoused in Articles 10, 27,35, 43(1)(f), and 47 of the Constitution have been breached.
- b. Whether the approval to sit for the pre bar exam amounted to automatic admission to the Advocate Training Program.
- c. Whether the Petitioner is entitled to the prayers sought.

43. Under Article 10 of the Constitution, some of the national values and principles of governance which bind State organs, State officers, public officers and all persons when enacting, applying or interpreting any law or making or implementing public policy decision are equality and non-discrimination.

44. Article 27 guarantees that every person is equal before the law and has the right to equal protection and equal benefit of the law this includes the full and equal enjoyment of all rights and fundamental freedoms.

45. Article 43(1) (f) guarantees every person's right to education.

46. In the present circumstances, the Petitioner alleges that the 1st and 2nd Respondents action of barring his admission to the Advocates Training Program is discriminatory against his right to education under Article 43(1) (f). In questioning whether or not the Petitioner's rights in this regard have been controverted, I will first examine the qualifications that the Petitioner ought to have in order to secure admission to the training program

47. The requirements for admission that the Petitioner ought to have met to qualify for admission are to be found in **Council of Legal Education (KSL) Regulations 2009 first Schedule, regulation 5** which provides:

“5. A person shall not be eligible for admission for the Post Graduate Diploma (Advocate Training Program) 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 at 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 Program; 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 pre-condition for admission.”

48. From the pleadings, the only bone of contention in the criteria for admission is the provision that the LL.B degree be from a “recognized university”. Specifically, the 2nd Respondent refused to recognize the Petitioner's degree on account of it being acquired through the long distance mode of learning. It is upon this basis that the Petitioner claims the actions of the Respondents as discriminatory. For there to have been discrimination, it must be shown that the Petitioner was subjected to a different set of standards of admission than his peers. In this regard I agree with the position in **Muamar Nabeel Onyango Khan v Council of Legal Education and Others (2015) eKLR** where the Court of Appeal held that to demonstrate discrimination, it was incumbent upon a Petitioner to demonstrate that there are in fact other beneficiaries of similar circumstances.

49. Instructively, in the case of ***Susan Mungai v Council of Legal Education (2012) eKLR*** the Court rejected the plea of discrimination and reasoned as follows:

“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 petitioner’s 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 15th 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.”

50. On the question of the Petitioner’s right to education, the court is of the position that this right can only be enjoyed pursuant to the Petitioner meeting the minimum legal requirements cited above in **Council of Legal Education (Kenya School of Law) Regulations of 2009 (LN 169 of 2009)**. Specifically, the requirement in relation to the Petitioner’s circumstance is:

“(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 pre-condition for admission.”

51. Section 8 of the Legal Education Act, No. 27 of 2012 empowers the 1st respondent to recognise and approve qualifications obtained outside Kenya for purposes of admission to the Roll. In my view, the 1st Respondent is the one with the statutory mandate to establish and maintain the standards for admission to the Advocates Training Program. These standards must uniformly be applied to all persons seeking to be part of the Program. The Court of Appeal in ***Eunice Cecilia Mwikali Maema vs. Council of Legal Education & 2 others [2013] eKLR*** reasoned that:

*“All applications for admission to the School must be considered against the same standards set by the Council. In ***Butime Torn v Muhumuza David and Another Election Petition Appeal No. 11 of 2011*** to which we were referred by counsel for the appellant, it was held that when*

regulating a profession the same standards should apply to all persons seeking to enter into the profession.”

52. The Court cannot therefore purport to usurp the role of the Respondents in regulating the standards of admission to the advocates Training Program. It is well established that where a statute imposes a duty and leaves discretion as to the mode of performing that duty in the hands of the party on whom the obligations is laid, a mandamus order cannot issue to command the duty in question to be performed in a specific way. The Court holds the view that as it is the 1st Respondents mandate to recognize foreign qualifications, this authority cannot be usurped unless it is exercised improperly. The court agrees with the decision in **Republic v The Council of Legal Education ex parte James Njuguna and 14 Others, Misc Civil Case No. 137 of 2004 [2007]** where Nyamu J stated:

“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.”

53. The court further relies on the decision in **Maharashtra State Board of Secondary and Higher Secondary Education and Another v Kurnarstheeth [1985] LRC 5** where 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 delegatd by the statute. The responsible representative entrusted to make by laws must ordinarily be presumed to know what is necessary, reasonable, just and fair. ”

54. On the basis of the preceding discussion, this court therefore finds and holds that the Rights of the Petitioner to be protected against discrimination and their right to education have not in any way been impeded by the Respondents actions.

55. The next question is whether the Petitioner’s Rights under Article 35 were violated. Article 35 provides for the Right of Access to Information. It is the Petitioner’s contention that the 2nd Respondent violated this Right by failing to provide the Petitioner with the copy of his original letter of admission to sit the pre-bar examinations. The Court agrees with the position of Musinga J in **Andrew Omtatah okoiti v Attorney General & 2 Others [2011] eKLR**, where it was stated that,

“Before an application is made to court to compel the state or another person to disclose any information that is required for the exercise or protection of any right or fundamental freedom, the applicant must first demonstrate that a request for the information required was made to the state or to the other person in possession of the same and the request was disallowed. The court cannot be the first port of call. The petitioner herein did not demonstrate that he requested the JSC’ to avail to him any information that he considered necessary and the same was not granted.”

56. The petitioner’s letter to the 2nd respondent requesting a copy of the admission letter was responded to by the 2nd respondent through the letter dated 29th of November 2016. It follows therefore that the allegation by the petitioner that the 2nd respondent declined to provide information does not hold water

and the court finds and holds as much.

57. The court shall now render itself on the matter of whether passing the pre-bar examination guaranteed direct admission into the Advocates Training Program offered by the 2nd respondent. Regulation 5(d) describes three pre-requisites for admission, an LL.B degree from a recognized university; 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; sitting and passing the Pre-Bar Examination set by the Council of Legal Education. One cannot be admitted without satisfying all the three requirements. As to whether the Petitioner's legitimate expectation to be admitted to the Advocates Training Program on Account of their being offered the pre-bar examination has been violated I refer to the case of citing Justice **Kalpana H Rawal v judicial Service Commission & 3 Others [2016] e KLR** where it was held that legitimate expectation cannot subsist contrary to clear statutory provisions.

58. Regarding the issue of whether the petitioner is entitled to the prayers sought, I will look at each prayer on its own merits and in relation to the preceding arguments.

59. The first prayer is one seeking an order compelling the 1st and 2nd Respondents to clear and admit respectively, the Petitioner to the advocates Training Program. The petitioner is essentially seeking an Order of Mandamus against the respondents. In this question, the courts position as intimated above is that it cannot usurp the authority of statutory body acting within its mandate, as such the prayer fails. For avoidance of doubt, the court in in **Kenya National Examinations Council v Republic Ex Parte Geoffrey Gathenji Njoroge and 9 Others (1997) eKLR** opined thus:

"The High Court cannot, however, through mandamus, compel the licensing court to either grant or refuse to grant the license. The power to grant or refuse a license is vested in the licensing court and unless there is a right of appeal, the High Court cannot itself grant a license."

60. The Petitioner in his second prayer urges the court to grant a prohibitory injunction prohibiting the Respondent's unlawful actions as against the petitioner. In the eyes of the court, the Respondents acted within their mandate and it would be improper to interfere with their actions. I associate myself with the finding in **R v judicial Service Commission ex parte Pareno Misc. Civil Application No. 1025 of 2003**, where the Court stated that ***"it is not the function of the courts to substitute their decision in place of those made by the targeted or challenged body."***

61. It is the Petitioner's third prayer that there issue a declaration that the 1st Regulator's action of allowing the Petitioner to sit the pre-bar exam in effect allowed him to be admitted into the Advocates Training Program by the 2nd Respondent subject to him passing all the pre-bar units as the applicable regulation by the were then Council of Legal Education (Kenya School of Law) regulations of 2009. The court in its analysis has found that sitting for the pre-bar examinations was one of three pre conditions that the Petitioner had to meet in order to be eligible for admission in the Advocates Training Program. The court finds and holds that the passing of pre-bar examinations alone is not a guarantee of admission. Therefore this prayer fails.

62. Regarding the prayer that a declaration issue that the Petitioner's constitutional rights under articles 10,27 and 43 (1)(f), 28 ,35, 47 and 48 of the constitution are threatened and/ or violated by 1st and 2nd Respondents it is the courts perspective that the Petitioner has failed to demonstrate the alleged violations of his fundamental rights.

63. The Petitioner has sought a declaration that the provisions of the Council of Legal Education Act, 2012 and the Kenya School of Law Act 2012 as well as the regulations passed thereunder never applied to the Petitioner herein. The court determined that the regulations applicable to the Petitioner's circumstance were those contained in **Council of Legal Education (Kenya School of Law) Regulations of 2009 (LN 169 of 2009)**. In light of this, the prayer is unnecessary.

64. It is the Petitioner’s prayer that a conservatory order protecting their rights and freedoms to education and equality from discrimination issues. The court finds that pursuant to **Rules 3 and 19 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms practice and procedure Rules, 2013)**, a conservatory order issue by way of a notice of Motion. The petitioner seeks a conservatory order as a prayer in the Petition. This is untenable. In any case, conservatory Orders are issued in the course of proceedings for the purpose of maintaining the status quo of the subject matter such that the decision of the Court is not rendered nugatory when the matter is concluded. This position is substantiated by the holding in in **Muslims For Human Rights (MUHURI) & 2 Others v Attorney General & 2 Others High Court Petition No. 7 of 2011** where Justice Ibrahim stated:

“What is clear to me from the authorities is that strictly a “Conservatory Order is not an injunction as known in Civil matters or generally in other legal proceedings but is an order that tends to and is intended to preserve the subject/matter or set of Page 10 of 12 circumstance that exist on the ground in such a way that the constitutional proceedings and ca use of action is not rendered nugatory .”

65. From the foregoing arguments, it is evident that the court has not found any infringement on the rights of the Petitioner by the Respondents’ hence the Court holds that the Petitioner is not entitled to damages as claimed.

66. It is the Courts finding that the Petition dated 16 March 2017 lacks merit for the reasons articulated in the foregoing analysis.

Orders:

In the upshot, the court makes the following Orders:

(1) The Petition dated 16th March 2017 is dismissed.

(2) No orders as to costs

It is so ordered.

DATED, DELIVERED AND SIGNED AT KAJIADO THIS 25th DAY OF SEPTEMBER, 2017.

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R NYAKUNDI

JUDGE

In the presence of:

Mr. Muaka advocate for the petitioner

Mr. Kariuki advocate for the 1st Respondent

Ms. Kiberenge for the 2nd Respondent

Mr. Mateli Court Assistant