



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW DIVISION
MISC. CIVIL APPLICATION NO.163 OF 2017

REPUBLIC.....APPLICANT

VERSUS

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

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

ATTORNEY GENERAL.....3RD RESPONDENT

EX PARTE: SIGI WAIGUMO MWANZIA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 7th April, 2017 the *ex parte* applicant herein, **Sigi Waigumo Mwanzia**, seeks the following orders:

a. That an order of Certiorari do issue to bring into this honourable court for the purpose of being quashed the 1st respondent's decision contained in the letter dated 10/3/2017 declining to recognize or approve the applicant's Bachelor of Laws degree in Law and Politics, Cardiff University, Prifysgol Caerdydd, UK for purposes of the Advocates Training Programme at the 2nd respondent.

b. That an order of Mandamus do issue to compel the 1st respondent to recognize or approve the applicant's Bachelor of Laws degree in Law and Politics, Cardiff University, prifysgol Caerdydd, UK for purposes of the Advocates Training Programme at the 2nd respondent.

c. That an order of Mandamus do issue to compel 1st respondent to notify the applicant which of the sixteen (16) core units set out under Regulation 16 (2) of the Third Schedule to the Legal Education (Quality Assurance and Accreditation) Regulations, 2016 is the Applicant required to study prior to her admission to the 2nd respondent's Advocates Training Programme.

d. That costs of this application be provided for.

Ex Parte Applicants' Case

2. According to the applicant, she is a holder of a Bachelor of Laws Degree in Law and Politics from Cardiff University, UK having been awarded the same on 8th July, 2015. She also holds a Master of Arts degree in International Development from the University of Warwick.
3. It was the applicant's case as presented by her learned counsel, **Miss Nyagah**, that by a letter dated 6th March, 2017, Cardiff University, UK confirmed that she was admitted to the University's LLB Law and Politics degree programme on 24th September, 2012 and completed the same on 12th June, 2015.
4. According to the applicant, on 8th March, 2017 she submitted an application to the 1st Respondent, the Council of Legal Education (hereinafter referred to as "the Council") seeking recognition or approval of his said degree with a view to being admitted into the Kenya School of Law (hereinafter referred to as "the School"), the 2nd Respondent's Advocates Training Programme (ATP).
5. However by a letter dated 10th March, 2017, the Council informed the applicant that it had declined to approve and recognise the applicant's said degree for the purposes of the bar programme the Council on the ground that the qualification for admission to the School is the holding or eligibility for conferment of the Bachelor of Laws Degree from an institution prescribed by the Council and not any other nomenclature. The applicant however took the view that despite her being in possession of an LLB degree from Cardiff University, the Respondents declined to recognise or approve the same without giving any reason for doing so.
6. It was the applicant's case that the decision to decline recognition of his LLB degree without recommending that the applicant undertakes remedial programme was in bad faith as the same was designed to jeopardise the applicant's pursuit of her career in the legal profession.
7. While the applicant admitted that she had not covered the 16 core units as set out under Regulation 16(2) of the Third Schedule to the **Legal Education (Quality Assurance and Accreditation) Regulations** (hereinafter referred to as "the Regulations"), she was ready and willing to pursue studies on the core units which are not included in her LLB degree programme as shall be identified by the Council. However before undertaking the same, the applicant contended that she requires recognition or approval of her said degree by the Council which is a requirement by the universities accredited to offer the said remedial courses.
8. It was the applicant's case that the decision to decline her recognition has serious and far reaching consequences as the same amounts to depriving her of an opportunity to pursue the ATP hence her desire to pursue a career in the legal profession shall remain unfulfilled.
9. According to the applicant, Regulation 6 of the Regulations provides for the minimum requirements for admission to the ATP one of which is a Bachelor of Laws degree from a recognised university. In her view, she is eligible to be admitted to the School to pursue the ATP programme since she passed her examinations at the Cardiff University and was conferred with a Bachelor of Laws degree in Law and Politics therefrom.
10. According to the applicant under Regulation 7(4) and (5) of the Regulations, the Council can only decline to recognise or approve foreign qualifications in law where the Council determines that the quality assurance of that foreign legal provider do not satisfy the quality standards set out in the Third Schedule to the Regulations. However upon declining to approve the foreign qualification, the Council ought to recommend to the applicant to undertaken a remedial programme at a legal education provider. It was however the applicant's contention that the reason given by the Council for declining to recognise her degree on the grounds that it is a degree of "other nomenclature", amounted to acting illegally as the said reason is contrary to clear legal provisions. In support of her case the applicant relied on **Pastoli vs.**

Kabale District Local Government Council and Others [2008] 2 EA 300, Council of Civil Unions vs. Minister for Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479.

11. It was the applicant's case that by not taking into account the fact that the applicant holds a Bachelor of Laws Degree from a recognised university, the Council acted in an unreasonable and irrational manner. The same decision was further unreasonable and irrational simply because it was based on the fact that a party from studying law the applicant also studied some units in politics. In this respect the applicant relied on **Kevin K. Mwiti vs. Council of Legal Education & Others JR Misc. Appl. No. 377 of 2015.**

12. It was the applicant's case that in the year 2012 a student named **Eunice Cecilia Mwikali Maema** who was awarded the degree of Bachelor of Laws in Law and Business from Coventry University, England had her degree recognised by the Council and referred to **Eunice Cicilia Mwikali Maema vs. The Council of Legal Education & 2 Others Civil Appeal No. 121 of 2013.** It was contended that the Council's decision breached the applicant's legitimate expectation that her degree would be recognised since the Council had previously recognised or approved degrees of other individuals in the same position as the applicant and proceeded to recommend to them to pursue Pre-Kenya School of Law Core Compliance Courses Programme before being admitted into the School. In support of this position the applicant relied on **Kevin K. Mwiti vs. Council of Legal Education & Others** and **Republic vs. Attorney General & Another ex parte Waswa & 2 Others [2005] 1 KLR 280.**

13. It was further contended by the applicant that the Council's decision amounts to unjustifiable discrimination against her since the Council had previously recognised a degree of the same nomenclature as that of the applicant. The case of **Nyarangi & 3 Others vs. Attorney General [2008] KLR 688** was cited in support of this position. Based on **CCSU vs. Minister for Civil Service [1984] 3 All ER 935,** it was contended that where legitimate expectation is found to apply, if a public authority is to depart from it, it must be demonstrated that there exist good reason for that departure.

14. It was contended that though the applicant is the holder of a Bachelor of Laws degree from Cardiff University, the Council has not made a determination to the effect that the quality standards of Cardiff University do not satisfy the quality standards set out in the Regulations. Consequently, no basis exists for the Council to decline to recognise and approve the applicant's Bachelor of Laws degree. In this respect the applicant relied on **Monica Wamboi Nga'ng'a & Others vs. Council of Legal Education & 4 Others [2017] eKLR.**

15. However being aware that she had not covered the 16 core units set out under Regulation 16(2) of the Third Schedule to the Regulations, the applicant expressed readiness and willingness to pursue studies on the same as shall be identified by the Council. To do so she however requires recognition or approval from the Council.

16. The applicant therefore urged the Court to allow the application.

1st Respondent's Case

17. The application was opposed by the 1st Respondent, the Council of Legal Education on the following grounds:

1. At the time that the Ex parte Applicant enrolled for the LLB degree in 2011, the law in force was the Council of Legal Education Act (Chapter 16A of the Law of Kenya), and the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations 2009, which provided at Regulation 11 and 3rd Schedule paragraph 17 (b) as follows, regarding a qualifying LLB degree:

'the Undergraduate Programme shall carry a minimum of 1680 minimum contact hours'.

The Ex parte Applicant's Undergraduate Programme lasted for 328.2 hours. This is evident

from the Ex parte Applicant's own Affidavit-filed herein, at paragraph 3(k) the Ex parte Applicant avers as follows:

'A copy of the modules taken by the Applicant at Cardiff University between 2012 and 2015 in order to attain her LLB degree marked "SWM-11".'

The said "SWM-11" carries the following courses and contact hours:

- a. Contract Law- 25 Hours;
- b. Public Law- 32 Hours;
- c. Legal Foundations- 28.4 Hours;
- d. Criminal Law-30 Hours;
- e. Tort-44 Hours;
- f. Land Law-31 Hours;
- g. Jurisprudence-32 Hours;
- h. Trusts- 43 Hours;
- i. Law of European Union-28 Hours;
- j. Human Rights law-40 Hours;

Total- 333.4 Hours.

This is grossly short of the minimum contact hours necessary for a qualifying LLB degree for purposes of the Advocates Training Programme in Kenya.

2. The Ex parte Applicant needed to possess these qualifications before admission for the LLB programme;

2. The Ex parte Applicant does not possess the minimum mandatory qualifications before admission for the LLB Programme;

3. The Council of Legal Education is a creature of the law, established for purposes of regulation of legal education for purposes of attaining highest legal education standards in Kenya, it is thus enjoined by law to enforce the law equally without favour or inconsistency;

4. The Ex parte Applicant does not possess a qualifying LLB degree; the Ex parte Applicant is holder of degree known as 'Bachelor of Laws in Law and Politics'. This is not LLB as contemplated under section 16 and Second Schedule to the Kenya School of Law Act, 2012. Faced with similar circumstances the High Court and Court of Appeal rejected similar qualifications in Muamar Nabeel Onyango Khan vs. Council of Legal Education & 2 Others (2014) eKLR, and Muamar Nabeel Onyango Khan vs. Council of Legal Education & Others (2015) eKLR;

5. The prayers in the Notice of Motion are un-grantable for the reasons that:

a. There is no valid ground advanced to quash the decision of the 1st Respondent to enforce the law;

b. The Honourable Court has no jurisdiction to issue a writ of *Mandamus* against the 1st Respondent to violate the law, see the Court of Appeal in *Kenya National Examinations Council vs. Republic Ex parte Kemunto Regina Ouro (2010) eKLR*. In the judgment the Court of Appeal held:

‘...In view of the above rule mandamus could not properly issue. 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.’

c. The law is 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: See the Court of Appeal in *Kenya National Examinations Council vs. Republic Ex Pate Geoffrey Gathenji Njoroge & 9 Others (1997) eKLR*. In said *Kenya National Examination Council* case the court quoted from *Halsbury’s Laws of England, 4th Edition Vol I* at page 111 para 90 which says in part:

“where a statute, which imposes a duty leaves a discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid a mandamus cannot command that duty in question to be carried out in a specific way”.

Further in the same case the Court said:

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

d. It is the 1st Respondent’s professional view that the Ex parte Applicant does not qualify, a decision arrived at on merits, fairly and in accordance with the law. This decision is protected by law: Court of Appeal in *Eunice Cecilia Mwikali Maema v Council of Legal Education & 2 others [2013] eKLR*:

*‘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.’*

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

18. It was the Council’s case as presented by its learned counsel, **Mr Bwire**, that the applicant does not hold an LLB Degree for the purposes of the ATP hence it was this deficiency that made it difficult for the Council to make a decision regarding a remedial action. The Council contended that had the applicant’s degree been an LLB degree there would have been no difficulty in treating the applicant as other students. It was contended that the Council could not style the applicant’s degree as an LLB degree for the purposes of the ATP.

19. It was contended that to qualify for the LLB Programme the applicant ought to have undertaken a minimum of 1680 contact hours according to the **Council for Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009**. However the applicant’s undergraduate programme lasted for 333.4 hours which in Kenyan context is less than just one year hence deficient for a regulator to admit

the applicant.

20. With respect to the case of **Eunice Cecilia Mwikali Maema** it was contended that her qualifications satisfied the hours hence her position was not similar to that of the applicant. Secondly, it was contended that after the said decision, the Council acted in accordance with the law. In a subsequent case of **Nabil Onyango Khan**, the applicant had obtained a degree in Politics and Law and the Council declined to consider his degree as qualifying for the ATP which decision was upheld by the Court of Appeal. It was therefore contended that since the degree before this Court is the same as that of **Nabil Onyango Khan**, the Council's hand are tied by the decision of the Court of Appeal. It was therefore contended that the Council's decision is not discriminatory and irrational.

21. To compel the Council to recognise and approve the applicant's degree, it was contended would amount to compelling it to act contrary to law.

22. It was the Council's case that its decision was a merit decision arrived at based on the hours, the nomenclature and weighted the same against the standards hence the Court cannot substitute its decision for that of the Council. The Council's position was therefore that the applicant's qualification is not one that can be referred to a remedial action since in the Council's estimation this is not an LLB degree.

23. In rejoinder, it was the applicant's case that the issue of the hours of contact was not raised in the affidavit and that it was not the basis upon which the Council declined to approve the applicant's application. With respect to the case of **Nabil Onyango Khan** it was contended that the degree in question was a Bachelor of Arts Degree and not a Bachelor of Laws Degree. With respect to the order of mandamus it was the applicant's case that all she is asking for is that the Council be compelled to act in accordance with the law and not questioning the merits of the decision.

2nd Respondent's Case

24. On the part of the 2nd Respondent the Court was informed that it would abide by the Court's decision.

Determinations

25. I have considered the application, the statement, the verifying affidavit and the documents exhibited thereto, the grounds of opposition, the submissions and authorities cited in support thereof.

26. Section 16 of the *Kenya School of Law Act* 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.

27. The Second Schedule outlines the admission requirements as follows:

A person shall be admitted to the School if-

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

c) *Has sat and passed the Pre-Bar examination set by the school.*

28. It is clear that in this case the applicant holds a Bachelor of Laws Degree in Law and Politics from Cardiff University. It is not the Council's position that Cardiff University is not one of the universities prescribed by the Council of Legal Education. In its letter dated 10th March, 2017, the only basis upon which the applicant's degree was not approved or recognised was because it was not an LLB Degree but as it put it a degree "of any other nomenclature". It is clear that the reason why the Council termed the applicant's degree a degree "of any other nomenclature" was because the same did not stop at Bachelor of Laws but added "in Law and Politics."

29. In the case of **Eunice Cecilia Mwikali Maema vs. Council of Legal Education & 2 Others** (supra), the appellant had been awarded the degree of Bachelor of Laws in Law and Business by Coventry University in England. The Council however declined the appellant's admission to the ATP on the ground that her degree did not meet the threshold of 16 core subjects prescribed by law for the purposes of admission to the ATP and the letter went on to list 8 of the core subjects that the appellant had not covered. The appellant's application was therefore not dismissed on the ground that it was a degree "of any other nomenclature". In fact the Court of Appeal at paragraph 29 of the judgement expressed itself as hereunder:

"On a plain reading of paragraph 5 of the First Schedule reproduced above, it would seem that provided an applicant was a holder or eligible to hold an LLB degree from any recognised university in Kenya or other institution prescribed by the Council having passed the relevant examinations of such university or institution and met the other criteria set out thereunder, such applicant would be eligible for admission to the advocates training programme, irrespective of the content of such degree."

30. The Council however relied on **Muamar Nabeel Onyango Khan vs. Council for Legal Education & Others [2014] eKLR** and **Muamar Nabeel Onyango Khan vs. Council for Legal Education & Others [2015] eKLR**. However as rightly contended by the applicant the applicant/appellant was a holder of a Bachelor of Arts Degree in Politics and Law from the University of Bradford in the United Kingdom. The Court held that the provisions talk of an LLB degree and not any other. The Court found that the appellant was not as holder of an LLB Degree.

31. In my view the applicant's position is in *pari materia* with that **Eunice Cecilia Mwikali Maema** and is distinguishable from the case of **Muamar Nabeel Onyango Khan**. It is therefore clear to me that the ground upon which the applicant's application for approval or recognition for admission to the ATP was disallowed was irrational.

32. It is however contended that the applicant's course did not meet the minimum of 1680 contact hours according to the ***Council for Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009***. It is clear that in the Council's decision, this was not one of the grounds relied upon by the Council for declining to approve or recognise the applicant's degree. It is therefore not a basis upon which the Council's decision can be upheld. Similarly the issue of the core subjects was not the ground for declining to approve or recognise the applicant's application.

33. Section 4(2) of the ***Fair Administrative Action Act*** which is a reflection of Article 47(2) of the Constitution provides that every person has the right to be given written reasons for any administrative action that is taken against him. The two reasons relied upon by the Council were clearly not the basis upon the impugned decision was made. The basis upon which the decision was grounded was clearly untenable.

34. The applicant however admits that she had not covered the 16 core units as set out under Regulation 16(2) of the Third Schedule to the ***Legal Education (Quality Assurance and Accreditation) Regulations***. What are the options available to the applicant in such circumstances? Regulation 7(5) of the ***Legal Education (Quality Assurance and Accreditation) Regulations*** provides as follows:

The Council shall recommend to a person who has applied for the recognition and approval of his or her qualifications from a foreign legal education provider that has not been recognised or approved by the Council to undertake a remedial programme at a legal education provider.

35. It is therefore clear that where the applicant holds an LLB Degree from a recognised foreign legal provider but in the Council's view her qualifications do not satisfy the quality standards set out in the Third Schedule to the Regulations, the Council is under a legal obligation to recommend to the applicant a remedial programme at a legal education provider.

36. It is therefore clear that the decision made by the Council cannot stand and must be quashed.

37. With respect to the prayer for mandamus, to issue the same would amount to directing the Council on how to exercise its discretion in light of the quality standards set out in the Third Schedule to the Regulations. Section 11 of the ***Fair Administrative Action Act, 2015*** provides as follows:

(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order-

(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;

(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;

(d) prohibiting the administrator from acting in a particular manner;

(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

(g) prohibiting the administrator from acting in a particular manner;

(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;

(i) granting a temporary interdict or other temporary relief; or

(j) for the award of costs or other pecuniary compensation in appropriate cases.

38. This Court is therefore empowered to set aside the administrative action or decision and remit the matter for reconsideration by the administrator, with or without directions. In light of the issues raised herein the order which commends itself to me and which I hereby issue is that the decision of the 1st Respondent contained in the letter dated 10th March, 2017 declining to recognise or approve the applicant's Bachelor of Laws degree in Law and Politics, Cardiff University, for the purposes of the Advocates Training Programme at the 2nd Respondent is hereby removed into this Court and is quashed and or set aside.

39. I however direct the 1st Respondent to consider the applicant's application de novo and in so doing not to treat the applicant's degree as a degree "of any other nomenclature". That reconsideration will be

undertaken within the next 30 days a decision therefor furnished to the applicant. My decision is informed by the decision of Nyamu, J (as he then was) in **Republic –vs- The Council of Legal Education ex parte James Njuguna and 14 Others, (2007) eKLR** at page 12 in which he expressed himself as follows:

“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.”

40. The same position was adopted by the Court of Appeal in **Eunice Cecilia Mwikali Maema vs. Council of Legal Education & 2 others [2013] eKLR**, when it 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.”

41. However under section 6(4) of the *Fair Administrative Action Act* it is provided that:

Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.

42. Therefore I issue an order that in default of such a decision an order of mandamus will issue compelling the 1st Respondent to recognise or approve the applicant’s said degree for the purposes of the Advocates Training Programme at the 2nd Respondent and to notify the applicant which of the 16 core units set out under Regulation 16(2) of the said Regulations the applicant is required to study prior to her admission to the said Advocates Training Programme at the 2nd Respondent.

43. As the applicant’s application is not wholly successful in terms of her prayers, each party will bear own costs of these proceedings.

44. It is so ordered.

Dated at Nairobi this 25th day of September, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Nyagah for the applicant

Mr Bwire for the Respondent

CA Ooko