REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 200 OF 2017

IN THE MATTER OF ARTICLES 2, 10, 19, 20, 22, 21, 22, 23, 27, 28, 40, 43 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 2, 10, 19, 20, 21, 22, 23, 27, 28, 40, 43 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 12 & 13 OF THE ADVOCATES ACT, CAP 16, LAWS OF KENYA

AND

IN THE MATTER OF SECTION 16 OF THE KENYA SCHOOL OF LAW ACT, NO. 26 OF THE LAWS OF KENYA

BETWEEN

OBEY SEGRAN SEGRANA.....PETITIONER

VERSUS

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

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

JUDGEMENT

The petitioners' case

1. The petitioner, a Liberian national who has lawfully resided in Kenya since 1997 sat for the Kenya Certificate of Primary Education in the year 2006 at Baraton International School. She attended Segero Seventh Day Adventist Secondary School where she attained grade B plain in her Kenya Certificate of Secondary Education. In 2012, she joined Moi University School of Law and graduated with a Bachelor of Laws Degree on 16th December 2016.

2. The core of her case is that her application for admission to the Kenya School of Law was declined on account of the provisions of sections **12** and **13** of the Advocates Act[1] and that she had legitimate expectation to be admitted at the School, hence the refusal by the first Respondent to admit her violates her constitutional rights enshrined under articles 10, 27 (1), (3) and (4), 47 of the constitution and her right to education, training and employment.

3. The petitioner also cites this court's decision in rendered in Petition numbers 505 of 2016 and 509 of

2016 where the court declared the second Respondents failure to admit students from East African Countries as unconstitutional.

The first Respondents case

4. The first Respondent admits that the petitioners application for admission was declined due to a stoppage of consideration of applications from foreigners and further that the petitioners' appeal for late admission was declined on grounds that it did not comply with sections **4 (2) (a)** of the Kenya School of Law Act[2] as read with sections **12** and **13** of the Advocates Act[3] and that the Advocates Training Programme must comply with the said sections and reiterated that under the said provisions, the first Respondents discretion to admit students is limited to nationals from Kenya, Rwanda, Uganda, Burundi and Tanzania a position that was affirmed in constitutional petition number 505 of 2016 consolidated with petition number 509 of 2016 referred to by the petitioner, and that the petitioner is not a national of any of the above countries, hence, by dint of her nationality, she does not qualify for admission to the Advocates Training Programme under the Advocates Act.[4]

5. The first Respondent denied violating the petitioners rights under articles 27, 28 and 43 of the constitution and reiterated that it acted in accordance within the provisions of section 4 of the Kenya School of Law Act[5] and sections 12 and 13 of the Advocates Act[6] and in conformity with article 24 of the constitution and that the petitioner was promptly informed of the reasons for non-admission, hence her rights to a fair administrative action act were not violated.

The second Respondent's case

6. The second Respondents' objection is that; **(a)** sections 12 and 13 of the Advocates Act[7] as read with section 4 of the Kenya School of Law Act[8] forbid admission to the Advocates Training Programme and administration of bar examinations to persons who are not nationals of Kenya, Uganda, Tanzania, Burundi and Rwanda; **(b)** that the reliefs sought are not available in that the second Respondent was merely enforcing the law; that there is no violation of petitioners' rights and that no grounds have been advanced to warrant quashing of the decision in question.

Petitioners' Advocates' submissions

7. Counsel for the petitioner submitted that the petitioner is eligible for admission to the Kenya School of Law, that article 43 (1) (f) of the constitution provides for the right to education to every person, while article 47 (1) provides for the right to fair administrative action and relied on the decision of this court in the case of *Jonnah Tusasirwe & 10 Others vs Council of Legal Education & 3 Others*.[9] Counsel also cited the petitioners right to legitimate expectation and argued that the first Respondent has in the past admitted students from countries outside East Africa.

First Respondents' Advocates submissions

8. The first Respondent's counsel submitted that the provisions of section 4 of the Kenya School of Law Act[10] and the provisions of the second schedule to the Act[11] must be construed in light of the provisions of the Advocates Act, particularly sections **12** and **13** of the Advocates Act[12] and argued that the above provisions place a restriction on admission to persons who are not from the East African Community, a position that was up held by this court in *Jonnah Tusasirwe & 10 Others vs Council of Legal Education & 3 Others*.[13]

9. Counsel also submitted that the doctrine of legitimate expectation cannot be used to perpetuate illegalities or to provide benefits that are not bestowed by the law[14] and that clear statutory provisions override any contrary expectation.[15] Counsel also submitted that sections **12** and **13** of the Advocates Act[16] limits the petitioners right to admission to the law school which is restricted to citizens of the countries listed therein, which limitation falls within the provisions of article **24** of the constitution and that the rights under article **43** of the constitution is not absolute and concluded that the petitioner is not entitled to the reliefs sought.[17]

Second Respondents' Advocates submissions

10. Counsel for the second Respondent submitted that no prayer has been sought seeking to declare the sections in question as unconstitutional, yet the actions complained of are grounded on the said sections, hence the orders sought are not available.

Analysis of the law, facts, issues and authorities

11. Because the petitioner heavily relied on the decision of this court rendered in *Jonnah Tusasirwe & 10 Others vs Council of Legal Education & 3 Others*,[18] I find it appropriate to spare some ink and paper to address my mind on what I consider to be the precedential value of said decision and its relevancy (if any) to the present case.

12. It is settled law that a case is only an authority for what it decides. This was correctly observed in *State of Orissa v. Sudhansu Sekhar Misra* where it was held:-[19]

> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in Quinn vs. Leathem,* ***[20]****that "Now before discussing the case of Allen vs. Flood* ***[21]*** *and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides..." (Emphasis added)*

13. The ratio of any decision must be understood in the background of the facts of that case.[22] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.[23] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[24]

14. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[25] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[26] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[27] My plea is to keep the path of justice clear of obstructions which could impede it.

15. In *Jonnah Tusasirwe & 10 Others vs Council of Legal Education & 3 Others* ***[28]*** which the petitioner has cited both in the petition and severally in their submissions, this court pronounced itself clearly that the provisions in question apply to students from the East African Countries. The petitioners in one of the consolidated petitions were all Ugandans, while the petitioner in the other petition was a citizen of South Sudan, now a member of the East Africa Community. (The protocol establishing the East African Community was cited in the said case). In its judgement, this court stated *inter alia* that:-

> *".....Section 12 on the qualification for admission as advocate stated that:-*
>
> *12. Subject to this Act, no person shall be admitted as an advocate unless—*
>
> *(a) he is a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania; and*
>
> *(b) he is duly qualified in accordance with section 13.*
>
> *Applying the plain meaning rule, section 12 (a) is clear on the categories of persons who qualify*

for admission, that is, "unless he is a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania."The above provision requires no explanation."

16. In the said case, it was admitted by the second Respondent that the school had in the past in total disregard of the law admitted students from outside East Africa which the court noted by way of *orbita dictum* but was not the *ratio decidenti* of the decision. Thus, the facts of the said case can safely be distinguished from the present case in that the petitioner is a citizen of Liberia and not any of the East African countries.

17. I find that the following is the core issue for determination, namely, **(a)** whether the petitioner is entitled to judicial review reliefs in the nature of *certiorari* and *prohibition* or any of the reliefs sought in the in the petition.

18. Section 4 (2) of the Kenya School of Law[29] provides that the object of the School includes to train persons to be advocates under the Advocates Act.[30] The said section cannot be construed in isolation but must be read together with the relevant provisions of the Advocates Act[31] and the second schedule to the act which provides the criteria for admission to the Advocates Training Programme.

19. Section 12 of the Advocates Act[32] provides for admission as advocates of persons from Rwanda, Burundi, Uganda and Tanzania subject to them qualifying under section **13** of the Advocates Act.[33]The petitioner is not from any of the said countries.

20. Section 13 of the Advocates Act[34] provides for various avenues of qualification for admission to the bar which include undertaking the Advocates Training Programme, the reading of sections 13 (1) (a) & (b) expressly excludes the petitioner since she is not from East Africa. This position was clearly stated in *Jonnah Tusasirwe & 10 Others vs Council of Legal Education & 3 Others**[35]*** cited by the petitioner.

21. It is important to point out that the petition does not challenge the constitutionality of the above provisions. Clearly, the Respondents acted within the provisions of the said sections. It has not been demonstrated that the Respondents acted *ultra vires* the said provisions, or that the challenged decision is tainted with illegality or irrationality nor is it alleged that the Respondents have refused to act. Thus, the reliefs sought cannot be granted.

22. It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.

23. The first Respondent is vested with powers to make the decision in question. No abuse of such powers has been alleged or proved. It has not been shown that this power was not exercised as provided under the law or regulations. An administrative decision can only be challenged for ***illegality, irrationality*** *and* ***procedural impropriety.*** A close look at the material presented before me does not demonstrate any of the above. The decision has not been shown to be illegal or *ultra vires* or outside the functions of the Respondent. Thus, there is no basis for granting the judicial review orders sought.

24. The grant of the orders or *certiorari*, *mandamus* and *prohibition* is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought. Upon analysing all the material before me and upon considering the arguments advanced by both sides, I find that the applicant has not satisfied the threshold for this court to grant the orders of *mandamus* and *prohibition*.

25. It is also important to point out that the rights alleged to have been violated are not absolute. The

Respondents acted in conformity with the cited provisions of the law. This satisfies the requirements set out under article **24** of the Constitution in that the limitation is provided under the law.

26. Article **47** of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[36]Further there is a right to be given reasons to any person who has been or is likely to be adversely affected by administrative action.[37]As stated above, the decision complained of is grounded on the law. I also find that the petitioner was notified the reasons why her application was declined, and she has stated so in her petition, hence, violation of article 47 cannot arise.

27. I am not unconscious or oblivious of grave injustice which might be done to the petitioner, because of refusal by this Court to interfere but I cannot ignore the express provisions of the law cited above. The admission to the Kenya School of Law, the regulation, management, control or examinations offered by the school should best be left to the discretion of those who are entrusted with the responsibility. If this Court starts substituting its own opinion in place of opinion expressed by a body mandated by the law, it shall not only be overstepping its mandate, but it will result in chaos. The court can only interfere if the Respondents acted outside their legal mandate or acted unreasonably.

28. The test of reasonableness is not applied in a vacuum but in the context of life's realities. As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and the departments controlling them.

29. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded.

30. It is equally important that the court should also as far as possible, avoid any decision or interpretation of a statutory provision, rule or byelaw which would bring about the result of rendering the system unworkable in practice or create a situation that will go against clear provisions of the law governing the subject in issue.

31. Even though the issue before me is governed by the provisions of the law discussed above as opposed to policy, also relevant is the decision in *R vs. Council of Legal Education**[38]*** where the court Judge stated thus:-

> *"The other reason why this court has declined to intervene is one of principle in that academic matters involving issues of policy the courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should be largely non-justiciable.…"*

32. I find that the issues disclosed in this petition are not juticiable since the decision complained of is in conformity with the law. As stated above, the petitioner did not challenge the constitutionality of the provisions in question.

33. It cannot be lost to this court that despite having a conscience, it is a court of law and not of mercy. [39] It is also bound by the law and more so the statutory provisions and the constitution which binds all. Consequently, the constitutional, statutory and applicable regulations governing admission to the Kenya School of Law must apply with equal force so as to effectively serve the desired purpose. I sincerely sympathize with the petitioner who attended Primary, Secondary and University Education in Kenya and has lawfully lived in Kenya since 1997, and is now on the verge of commencing her dream career. I find that my hands are tied by the clear provisions of the law.

34. In view of my conclusions herein above, I decline to grant the reliefs sought in this petition. Accordingly, I dismiss the petition with no orders as to costs.

Orders accordingly.

Dated at Nairobi this _ **21st** day of **September** 2017

John M. Mativo

Judge

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[1] Cap 16, Laws of Kenya

[2] Act No. 26 of 2012

[3] Supra

[4] Ibid

[5] Supra

[6] Supra

[7] Ibid

[8] Supra

[9]{2017}eKLR

[10] Supra

[11] Ibid

[12] Supra

[13] Ibid

[14] Counsel cited Communication Commission of Kenya & 5 Others vs Royal Media & 5 Others, SC Pet. Nos. 14, 14 A, 14 B & 14 C of 2014

[15] Counsel cited Justice Kaplana H. Rawal vs JSC & 3 Others {2016}eKLR cited

[16] Supra

[17] Counsel cited Kenya National Examination Council vs Republic ex parte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996

[18] Supra

[19] MANU/SC/0047/1967

[20] {1901} AC 495

[21] {1898} AC 1

[22] Ambica Quarry Works vs. State of Gujarat and Ors. MANU/SC/0049/1986

[23] Ibid

[24] Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59)

[25] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[26] Ibid

[27] Ibid

[28] Supra

[29] Act No. 26 of 2012

[30] Supra

[31] Ibid

[32] Supra

[33] Ibid

[34] Ibid

[35] Supra

[36] Article 47(1) of the Constitution of Kenya, 2010

[37] Article 47(2) of the Constitution of Kenya, 201

[38] {2007} eKLR

[39] Yusuf Gitau Abdalla vs. The Building Centre (K) Ltd & 4 Others, Petition 23 of 2014