

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 248 OF 2017

**IN THE MATTER OF ARTICLES 3, 10, 20, 21, 22, 23, 27,28, 43 (F), 47 & 159 OF THE
CONSTITUTION**

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS
UNDER ARTICLES 28, 43 (F) AND 47 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES**

AND

**IN THE MATTER OF SECTIONS 4, 5, 7, 8 AND 9 OF THE FAIR ADMINISTRATIVE ACTION
ACT**

AND

**IN THE MATTER OF THE LEGAL EDUCATION ACT, 2012 AND THE KENYA SCHOOL
OF LAW ACT, 2012**

AND

**IN THE MATTER OF CONTRAVENTION OF THE RIGHT TO EDUCATION, EQUALITY
AND FREEDOM FROM DISCRIMINATION, HUMAN DIGNITY AND RIGHT TO FAIR
ADMINISTRATIVE ACTION**

BETWEEN

DULLU KORA ELISHA..... PETITIONER

VERSUS

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

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

JUDGMENT

The petitioners' case

1. The petitioner avers that he was conferred a Bachelor of Laws Degree from the Makerere University. He applied for clearance from the Council of Legal Education, for purposes of applying for admission to the Advocates Training Programme at the Kenya School of Law. The council approved his Bachelor of

Laws Degree qualification.

2. The petitioner submitted his application for admission to the Advocates Training Programme at the Kenya School of Law in October 2016. He received a letter dated 10th November 2016 from the first Respondent indicating that his application was successful. Consequently he paid tuition fees and was registered as a student on 26th January 2017. He was issued with a student identity card and commenced his studies.

3. He further avers that at the time of registration at the Kenya School of Law, he notified the registration officer that his graduation at Makerere University was scheduled for February 2017 and that he would furnish a copy of degree certificate and academic transcripts after the graduation ceremony at which point they would be released to him. The Petitioner states that the Registration officer implored him to submit the degree certificate transcripts by 31st March 2017.

4. Fearing that he would not submit the degree certificate and transcripts in time, the petitioner obtained a letter from Makerere University explaining the delay, but notwithstanding the said letter, the second Respondent wrote to the petitioner on 11th April 2017 advising him to seek 'late deferral' from the Advocates Training Programme or stand deregistered from the school. His appeal for extension of time to submit his academic credentials was rejected.

5. The petitioner cites violations of his rights under Articles 27 (1), 28, 43 47 of the constitution and sections 4 (1) (3) & (5) (1) (c) of the Fair Administrative Action Act[1] and prays for the reliefs sought in the petition.

First Respondents' Response

6. The first Respondent is the Kenya School of Law, a state co-corporation established under Section 3 of the Kenya School of Law Act,[2] the successor to the Kenya School of Law which was established under the Council of Legal Education Act.[3] Its mandate is to train persons for the purposes of the Advocates Act,[4] hence, it mounts the Advocates Training Programme. Fredrick Muhia, its academic Manager swore the Replying Affidavit filed on 13th June 2017 on behalf of the School and its Director, the second Respondent.

7. He avers that Section 16 of the Kenya School of Law Act[5] as read with part (a) of the second Schedule of the Act[6] sets out the requirements for admission to the Advocates Training Programme the School. It reads:-

The Admission requirements will be as follows—

(a) Admission Requirements into the Advocates Training Programme

(1) 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—

8. He further avers that the requirements under part (a) above allows for an application using transcripts that evidence eligibility for conferment of a Bachelor of Laws Degree; that the petitioner applied for admission to the Advocates Training Programme using his academic transcripts evidencing eligibility for

admission. Upon assessment of the petitioners application in accordance with Sections **16** and **17** as read with Regulation **8 (1)** of the Kenya School of Law (Training Programmes) Regulations, 2015, the Respondent found the Petitioner eligible for admission and offered him a provisional admission offer letter.

9. He averred that the Kenya School of Law Board pursuant to section **28** of the Act^[7] promulgated the Regulations which provide *inter alia* for the eligibility for registration for the Advocates Training Programme. At the time of Registration, a student is required in addition to evidence of payment of the requisite fees, to provide original copies of the relevant academic certificates or academic award, relevant academic transcripts and applicants identification card or valid passport. Further admission and eligibility for registration for the programme are distinct and governed by different criteria.

10. He further avers that the petitioner upon accepting the offer as per Regulation **8 (2)** presented himself for registration on 25th January 2017 whereupon inspection of his documents as required under Regulation **8 (2)**, the petitioner was found to be missing the original academic certificate or academic award.

11. He also averred that the Respondent in exercise of his discretion allowed the petitioner to register without an academic certificate or academic award on express representation by the Petitioner that he would submit it on or before 31st March 2017. The relevant document entitled 'Kenya School of Law Document(s) Commitment Form' reads "*I Dullu Komora Elisha...do hereby commit to submit my LL.B Degree certificate on or before 31st March 2017.*"

12. Subsequently, the Respondent issued a notice to all students who had not submitted their original certificates to submit them to or before 31st March 2017. Despite the notice and the said commitment, the petitioner failed to submit his LL.B Degree certificate within the stipulated time, hence the decision to differ the Petitioners registration. He denied the alleged violation of the petitioners constitutional right to education or violation fair administrative action.

Petitioners' advocates submissions

13. The crux of the petitioners' counsels submissions is that:-**(i)** the impugned decision is unfair and is not anchored in law; **(ii)** that the petitioner is qualified in that he was awarded a Bachelor of Laws Degree from Makerere University; **(iii)** that deferral can only be made with regard to registration; **(iv)** that the regulations do not provide for deferral after commence of the training; **(v)** that the Regulations do not confer powers to the school to de-register student; **(vi)** that a student can only be expelled on grounds of indiscipline;^[8] **(vii)** that the decision violates the Right to Fair Administrative Action; **(viii)** that the decision is a violation of Articles 27, 28, 43 (1) (f), 47.

Respondents' advocates submissions

14. The crux of the Respondents' counsel's submissions is that:- **(i)** the petitioner was issued with a provisional admission; **(ii)** the petitioners registration was on condition upon fulfilling various conditions among them submitting a copy and original of his LL.B Degree certificate; **(ii)** in exercise of its discretion, the first Respondent allowed the Petitioner on condition that he would present the Degree certificate on or before 31st March 2017 BUT instead he presented a letter stating that the certificate will be presented "as soon as possible"; **(iii)** the petitioner is asking the Kenya School of Law to declare that he holds a Degree from Makerere University, which can only be done by the University; **(iv)** allowing the Petitioners request has consequences in that in future the school will be required to register applicants without the requisite statutory documents or refuse registration for applicants who do not have the required documents; **(v)** the Respondent acted fairly.

Issues for determination

15. From the opposing position presented by both parties, the core issue that falls for determination is the legality or otherwise of the impugned decision.

16. In a recent decision of this court i.e. *Daniel Ingida Aluvaala & Another vs Council of Legal Education & Another*^[9] in which the Respondents decision grounded on the relevant Regulations governing conduct of the Council of Legal Education examinations, I had the occasion to consider the principle of legality. Because this Petition challenges a decision grounded on Regulations, I quote below extensively from the said decision in which stated:-

The principle of legality

"Public bodies, no matter how well-intentioned, may only do what the law empowers them to do. That is the essence of the principle of legality, the bedrock of our constitutional dispensation, which is enshrined in our constitution. It follows that for the impugned decisions to be allowed to stand, it must be demonstrated that the decision is grounded on law.

As such, the Respondents actions must conform to the doctrine of legality. Put differently, a failure to exercise that power where the exigencies of a particular case require it, would amount to undermining the legality principle which, is inextricably linked to the rule of law. Guidance can be obtained from the South African case of *AAA Investments (Pty) Ltd vs Micro Finance Regulatory Council* and another where the court held as follows:-

"(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised Public power . . . can be validly exercised only if it is clearly sourced in law"^[10]

Courts are similarly constrained by the doctrine of legality, i.e. to exercise only those powers bestowed upon them by the law.^[11] The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, the Respondent is constrained by that doctrine to enforce the law by ensuring that its decisions conform to the relevant provisions of the law governing examinations offered at the Kenya School of Law.

The respondent has not only a statutory duty but also a moral duty to uphold the law and to ensure due compliance with the law and Regulations governing the examinations. It would in general be wrong to whittle away the obligation of the Respondent as a public body to uphold the law. A lenient approach could be an open invitation to the Respondent to act against its legal mandate and pose a real danger of compromising both the professional ability and competence of persons released to the public to practice law."

17. Section **16** of the Kenya School of Law Act^[12] which deals with admission requirements provides that "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."

18. It is not disputed that the school has powers under Section **28** of the Act to pass the Regulations in question. The Regulations govern the matters provided under the said section which include "such other matters as the Board may consider necessary, conducive or incidental to the attainment of the objects of the School."

19. It is not in dispute that the Kenya School of Law is statutorily mandated to consider applications and if it is satisfied that the applicant meets the admission criteria, admit the applicant to the School.

20. From the material before me, it is evident that the Petitioner was admitted on condition that he would submit his LL.B. Degree certificate on or before 31st March 2017. He has not supplied it to date. I find no reason to doubt that his admission was conditional upon him providing the Degree certificate. Having failed to satisfy the said condition, he cannot be said to have fulfilled all admission requirements. He cannot be heard to continue insisting on proceeding with his studies when he has failed to satisfy such a crucial admission requirement. He is obliged to comply with all the admission requirements.

21. In the Indian case of *Maharashtra State Board -VS- Kurmarsheth & Others*,^[13] it was stated as

follows:-

“So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or 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 or efficaciousness of such rules or regulations.....”(Emphasis added)

22. In the above case, the court emphasised the need:-

“.....to 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 formatted by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and departments controlling them.”

23. In *University of Mysore and others v. Gopala Gowda and another*^[14] the regulations framed by the Academic Council of the University prescribed that in the case of a candidate for the **B. V. Sc.** course failing four times in the first year examination the university can refuse to grant permission to continue the course. When the regulation was under challenge, the High Court of Mysore held that the regulation was beyond the competence of Academic Council or the University and those bodies had no power to prevent the two students from prosecuting their studies and from appearing at the subsequent examination. In the Special Leave Petition moved by the university, the Supreme Court disagreed with the view taken by the High Court and held:-

“The Academic Council is invested with the power of controlling and generally regulating teaching courses of studies to be pursued, and maintenance of the standards thereof, and for those purposes the Academic Council is competent to make regulations, amongst others, relating to the courses, schemes of examination and conditions on which students shall be admitted to the examinations, degrees, diplomas, certificates and other academic distinctions. The Academic Council is thereby invested with power to control the entire academic life of the student from the stage of admission to a course or branch of study depending upon possession of the minimum qualifications prescribed”.

24. Also relevant is the decision in *R vs. Council of Legal Education*^[15] where the court 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...”

25. In *Daniel Ingida Aluvaala & Another vs Council of Legal Education & Another*^[16] I observed that:-

“Self-restraint adopted by the judiciary in exercising the power of review in academic matters has left certain academic decisions or regulations governing training and qualifications of professionals untouched. These areas are not disturbed by the courts unless the decisions under challenge are constitutionally so fragile and unsustainable. Academic decisions of the universities and other educational institutions requiring expertise and experience belong to this category. If the decision is legal and lawful, the reasonableness and propriety of the same may not be questioned by the courts. In other words, among the Wednesbury principles of ‘illegality’, ‘irrationality’ and ‘impropriety’, if the decision can get over the first test, it may withstand the other two tests, unless it is shockingly unreasonable, perverse or improper.

It is true that Courts have upheld the constitutional right of every citizen to select a profession or course of study subject to a fair, reasonable, and academic requirements. But like all rights and freedoms guaranteed by the Constitution, their exercise may be so regulated pursuant to the power of the

Regulating body to safeguard general welfare of the public."

26. The crucial question which must be answered is what is the standard by which the constitutional validity of legislation or Regulation should be judged. In this regard such a question should be answered with reference to the standards of review laid down by our courts when the constitutional validity of a statute is challenged which include two main standards:-

a. The first is the "rationality" test. This is the standard that applies to all legislation under the rule of law;

b. The second, and more exacting standard, is that of "reasonableness" or "proportionality", which applies when legislation limits a fundamental right in the Bill of Rights. Article 24 (1) of the Constitution provides that such a limitation is valid only if it is "reasonable and justifiable in an open and democratic society."

27. It is important to mention that the regulations are "reasonably related" to a legitimate purpose, that is to enable the first Respondent fulfill its statutory mandate of ensuring that all admissions comply with the law. In determining reasonableness, relevant factors include **(a)** whether there is a "valid, rational connection" between the regulation and a legitimate and public interest to justify it, which connection cannot be so remote as to render the regulation arbitrary or irrational; **(b)** whether there are alternative means of exercising the asserted constitutional right that remain open to the affected person, which alternatives, if they exist, will require a measure of judicial deference as to the corrections officials' expertise.

28. The petitioner has the option of availing his Degree certificate and continue with his studies. I find nothing illegal about the decision to differ his registration. It is equally important to point out that the court should also as far as possible, avoid any decision or interpretation of a statutory provision, regulation, 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. In this case, the law and the Regulations in question are designed govern qualifications and requirements for admission at the Kenya School of Law.

29. It is my view that the impugned decision is reasonable and valid. The decision is logically related to the legitimate purpose of regulating admission requirements to the Kenya School of Law. The requirement for a Degree certificate is not unreasonable at all. The decision to differ the Petitioners registration is not unreasonable. It gives the petitioner a chance to submit the required documents. This is an easy, reasonable alternative. The Respondents have a important statutory obligation to adhere to adhere to the law governing admissions.

30. It is also important to point out that the right under article **43** is 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.

31. It is 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. In this case, the law and the Regulations in question are designed at governing admission requirements to the school.

32. The 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 for under the law or regulations. The decision in question can only be challenged on grounds of **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 Respondents.

33. 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.

34. 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*, *certiorari* and *prohibition* or the declaration sought in prayer (a).

35. Article 47 of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.^[17] Addressing the subject of legitimate expectation, *H. W. R. Wade & C. F. Forsyth*^[18] at pages 449 to 450, thus:-

*“It is not enough that an expectation should exist; it must in addition be legitimate....**First** of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation..... **Second**, clear statutory words, of course, override an expectation howsoever founded..... **Third**, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy....”*

“An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice.” (Emphasis added)

36. It follows that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute. The relevant provisions of the law cited earlier clearly show that the Respondents decision is grounded on the relevant statutory provisions.

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

Orders accordingly.

Dated at Nairobi this 31st day of October, 2017

John M. Mativo

Judge

^[1] Act No. 4 of 2015

^[2] Act No. 26 of 2012

^[3] Repealed, Cap 16A

^[4] Cap 16, Laws of Kenya

^[5] Act No. 26 of 2012

^[6] Ibid

[7] Ibid

[8] See Regulation 38 (g)

[9] Petition No. 254 of 2017

[10] AAA Investments (Pty) Ltd v Micro Finance Regulatory Council [\[2006\] ZACC 9; 2007 \(1\) SA 343](#) (CC).

[11] National Director of Public Prosecutions vs Zuma, Harms DP

[12] Act No. 26 of 2012

[13] {1985} CLR 1083

[14] A.I.R. 1965 S.C. 1932.

[15] {2007} eKLR

[16] Supra

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

[\[18\]](#) Administrative Law, by [H.W.R. Wade](#), [C. F. Forsyth](#), Oxford University Press, 2000