REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 347 OF 2017

IN THE MATTER OF AN APPLICATION UNDER ARTICLES 2 (1), 3(1), 10 (1) AND (2), 19, 20, 21, 22, 23 AND 25 (A), 27 (1) AND (2), 43 (1) (F), 47 (1), 48, 165 (3) (B), 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS ENSHRINED IN CHAPTER FOUR IN SO FAR AS THE PETITIONERS CONSTITUTIONAL RIGHTS UNDER ARTICLE 25 (A), 27 (1) AND (2), 43 (1) (F) AND 47 (1) OF THE CONSTITUTION OF THE REPUBLIC OF KENYA HAVE BEEN VIOLATED/INFRINGED AND THREATENED

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF REGULATION 9 (5) COUNCIL OF LEGAL EDUCATION (KENYA SCHOOL OF LAW REGULATIONS), 2009

AND

IN THE MATTER OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, ARTICLES 5 AND 26

AND

IN THE MATTER OF THE INTERNATIONAL COVENANT OF CIVIL AND POLITICAL RIGHTS, ARTICLES 1 AND 7

AND

IN THE MATTER OF AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS, ARTICLE 5 AND 17

BETWEEN

RONALD OMONDI OIMBO…….
….PETITIONER

VERSUS

THE COUNCIL OF LEGAL EDUCATION.....…….
….....RESPONDENT

JUDGMENT

Introduction

1. It is undisputed that in any civilized society the maintenance of proper standards of excellence in all professions is essential. The profession of advocacy is no exception. Even though Universities train law graduates, it is not their function to produce graduates who are ready-made legal practitioners, nor are they able to do so as matters presently stand. This crucial burden falls squarely on the Council of Legal Education to ensure, in the interests of the public, that the required standards are met and maintained.

2. In a recent decision of this court, I noted that "It is axiomatic that for the proper practice of the advocates' profession there are, essentially, two broad requirements, apart from integrity:- they are specialized knowledge and particular skill. The knowledge that is required is knowledge of the substantive and procedural law; the skill involves the ability to apply that knowledge to good effect in practice."[1]

3. A person desiring to practice law in Kenya must in addition to possessing the qualifications stipulated in the Advocates Act, successfully complete the Advocates Training Programme offered at the Kenya School of Law and pass the examinations administered by the Respondent herein, the Council of Legal Education.

4. Regulation **9 (5)** of The Council of Legal Education (Kenya School of Law Regulations), 2009 provides that " in respect of the Advocates Training Programme a candidate shall be allowed a maximum of five years within which to complete the course of study."

The petitioners' case

5. The petitioner was admitted for the Advocates Training program at the Kenya School of Law in the academic year 2010/2011. In the same academic year, the Petitioner sat for the Bar examinations. He passed six out of nine units. He made a second attempt, but this time he passed one paper out of three. He made another attempt but he failed in both.

6. The Petitioner attributes his failure in the said exams to the sickness, and insists that since it was his last chance under the Regulations he had no option but to sit for the exam notwithstanding his being sick.

7. His appeal to the Respondent to allow him to sit for the exam in July 2017 on grounds that he was unwell when he sat for the last exam was rejected. The rejection was based on Regulation **9 (5)** of The Council of Legal Education (Kenya School of Law Regulations) 2009 and General Notice No. 17 of 2016 which provides that a student must complete the Advocates Training Programme within five years from the date of registering at the school.

8. The petitioner now challenges the Respondents' decision refusing to grant him the opportunity to re-sit for the said examinations on grounds that the decision violates his constitutional rights under articles 43 (1), 25 (a), 27 (1) (2), 41 (1), 47 (1) of the constitution, Articles 5 and 26 of The Universal Declaration of Human Rights and Article 6 and 17 of the African Charter on Human and People Rights. He asks for the reliefs sought in the petition.

Respondents grounds of objection

9. The Respondent filed grounds of objection stating that:-

*a. the Respondent implemented Regulation **9 (5)** of the Council of Legal Education (Kenya School of Law Regulations 2009, applying through section **29 (3) (a)** of the Kenya School of Law Act, 2012 as required under the Legal Education Act, 2012;*

*b. that Regulation **9 (5)** is still law and the Respondent is enjoined to adhere to it, that the said Regulation is a necessary instrument to facilitate legal education and training in Kenya and that it passes the constitutional limitation under article 24;*

c. that the Petitioner is outside the five year tenure prescribed under the Regulations and that the petitioner has not demonstrated violation of constitutional rights;

d. that the decision complained of is a professional decision made by the Respondent as an expert and the court ought not to substitute its decision in place of the Respondents decision, and further, it is in public interest that the court ensures consistency in implementation of legal education policy in Kenya.

Petitioners' Submissions

10. The petitioner acted in person. The crux of his submissions are that:- **(i)** the impugned decision violates his right to a Fair Administrative Action Act; **(ii)** Regulation **9 (5)** is unconstitutional; **(iii)** the refusal violates his Rights under Articles 25 (a), 27, 43 (1) (f), 47 (1) (2) and 56 (b) of the Constitution, Articles 5 and 26 of The Universal Declaration of Human Rights, Articles 1 and 7 of The International Covenant on Civil and Political Rights and Articles 5 and 17 of the African Charter on Human and Peoples Rights.

Respondents' Advocates Submissions

11. The Respondent's counsel submitted that:- **(i)** the petitioner exhausted his sittings as per Regulation **9 (5)**; **(ii)** He had the option of differing his paper but did not do so; **(iii)** it is important to maintain standards at the school; **(iv)** the court has to balance the petitioners rights and the mandate of the school.

Analysis of the facts, the law and authorities

12. This court has had the opportunity to consider identical issues as in the present case in the case of *Daniel Ingida Aluvaala and another vs Council of Legal Education & Another*.[2] Because of the similarity of the facts and issues in this petition and the said case, I will quote extensively from the said decision in which I stated:-

"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"**[3]***

Courts are similarly constrained by the doctrine of legality, i.e to exercise only those powers

bestowed upon them by the law.[4] 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 see to 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.

*Section **3** of the Legal Education Act[5] stipulates the objective of the act which is to **(a)** promote legal education and maintenance of the highest possible standards in legal education; and **(b)** provide a system to guarantee the quality of legal education and legal education providers.*

*Section **4** of the act establishes the Council of Legal Education whose functions are stipulated in section **8** of the act. Its functions include regulating legal education and training in Kenya offered by legal education providers, administering such professional examinations as may be prescribed under Section 13 of the Advocates Act and being responsible for setting and enforcing standards relating to the mode and quality of examinations.*

*Section **8 (3)** of the act empowers the Respondent in carrying out its functions to inter alia make Regulations in respect of requirements for the admission of persons seeking to enroll in legal education programmes."*

Issues for determination

13. The issue that falls for determination is whether the refusal by the Respondent to register the petitioner to re-sit for the examinations is grounded on the law, and, whether this is a proper case for the court to intervene and grant the reliefs sought. Also for consideration is the question whether or not Regulation **9 (5)** challenged in these proceedings is unconstitutional.

14. It is not contested that the Petitioner has been caught up by the five year Regulation. What is contested is whether the Petitioner ought to be exempted from the five year limitation on grounds that he was "sick" when he sat for his last examination.

15. The Petitioner claims that at the time he sat for the examination on 29th November 2016 and 5th December 2016 he was unwell. He relies on a letter dated 14th February 2017. The Petitioner did not inform the School authorities that he was unwell at the time of sitting for the said papers. He did not apply to differ the exam on medical grounds which option was open to him. He subjected himself to the examination fully aware of the applicable Regulations.

16. Curiously, the letter relied upon is dated 14th February 2017, weeks after the results were released in January 2017 and clearly after he knew that he had failed. The document is a letter and not a medical report. No treatment cards were annexed. Ordinarily, a medical report contains the history of the patient, examination, findings on examination or diagnosis, treatment given, follow up if any and prognosis. The timing of the document, the contents and the fact that it was procured weeks after the results were out, coupled with the fact that the Petitioner, fully aware of the Regulations and consequences never disclosed his alleged sickness to the school at the time of sitting for the exams leaves serious doubts in the mind of the court.

17. It is not in dispute that Respondent is statutorily mandated to regulate legal education and training in Kenya and to make regulations in respect of requirements for the admissions of persons seeking to enrol in the legal education program and to regulate the examinations. It is also true to state that Admission to the Kenya School of Law and the Training is regulated by the law, and the regulations in question have

been made to support the law. The said Regulations continue to be in force by dint of section 29 (2) (a) of the Act. I have no difficulty concluding that the Respondent decision is grounded on the law.

18. Regarding the reluctance by courts to intervene in academic decisions, in the above cited case I addressed the question in the following terms:-

> *"I am also alive to the fact that truly academic decisions are to be distinguished from the administrative decisions of the academic bodies. This is because administrative decisions are subject to judicial review. Purely academic decisions are treated as beyond the courts reach though, on facts, in several cases the courts can interfere. Therefore, as demonstrated by the authorities cited below, the guiding principle and the proposition of law in so far as judicial review of academic decisions is concerned stands as at to-day undisturbed is that the court should be slow to interfere and should only seldom interfere in academic decisions of academic bodies. The reluctance for interference of the court is evident from the following decisions."*

19. To buttress my above stated position, I cited the Indian case of ***Maharashtra State Board -VS- Kurmarsheth & Others***,[6] where 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)***

20. In the above case, the same 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."***

21. Also cited in the said case is the case of *University of Mysore and others v. Gopala Gowda and another*[7] where 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".*

22. It was further found that failure by a student to qualify for promotion or degree in four examinations is certainly a reasonable test of such inaptitude or supervening disability. If after securing admission to an institution imparting training for professional course, a student is to be held entitled to continue indefinitely to attend the institution without adequate application and to continue to offer himself for successive examinations, a lowering of academic standards would inevitably result.

23. Regarding the power granted by the law to the first Respondent I observed as follows:-

> *"Power to maintain standards in the course of studies confers authority not merely to prescribe*

minimum qualification for admission, courses of study, and minimum attendance at an institution which may qualify the student for admission to the examination, but also authority to refuse to grant a degree, diploma, certificate or other academic distinction to students who fail to satisfy the examiners' assessment at the final examination."

24. In the above cited decision, I also cited *Jawaharlal Nehru University vs. B. S. Narwala*[8] where it was ruled that the court should not interfere where qualified academic authorities decide to remove a student from the university on the basis of assessment of his academic performance. In this case a student was removed from the rolls for continuous failing in examinations and for consistent unsatisfactory academic performance. The court held that in the absence of any allegation as to bias or *mala fides*, there would be no basis to interfere.

25. Also relevant is the decision in *R vs. Council of Legal Education*[9] 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.…"

26. I also 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.

Thus, persons who desire to engage in the learned professions requiring scientific or technical knowledge may be required to take an examination as a prerequisite to engaging in their chosen careers. This regulation takes particular pertinence in the fields like law and medicine, to protect the public from the potentially deadly effects of incompetence and ignorance among those who would practice in these professional fields.

It must be stressed, nevertheless, that the power to regulate the exercise of a profession or pursuit of an occupation cannot be exercised by the Respondent or its agents in an arbitrary, despotic, or oppressive manner. A body that regulates the exercise of a particular privilege has the authority to both forbid and grant such privilege in accordance with certain conditions. Such conditions may not, however, require giving up ones constitutional rights.

The Respondent cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the law. However, the Regulator can require high standards of qualifications, such as good moral character or proficiency in law, before it admits an applicant to the bar. This is done by examining the applicant. The decision complained of must have a rational connection with the desired purpose, which is to ensure high professional standards. The petitioners have not shown the decision complained of or the regulations are not connected to this purpose nor has bad faith or malice been established."

27. I now address the question whether, properly construed, Regulation **9 (5)** passes constitutional muster. The appropriate place to begin is with the constitutional and jurisprudential principles that govern the task of statutory interpretation before me.

The relevant statutory interpretation principles

28. Article 2 (4) of the Constitution provides that any law, that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid.

29. Article 259 of the Constitution provides that the Constitution shall be interpreted in a manner that promotes it's purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights and permits the development of the law; and contributes to good governance. Consistent with this, when the constitutionality of legislation or Regulations is in issue, the court is under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.[10]

30. Thus, when the constitutionality of legislation is challenged, a court ought first to determine whether, through "the application of all legitimate interpretive aids,"[11] the impugned legislation is capable of being read in a manner that is constitutionally compliant.

31. Our Constitution requires a purposive approach to statutory interpretation. The technique of paying attention to context in statutory construction is now required by the Constitution.[12] As pointed out above, the constitution introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the 'spirit, purport and objects of the Bill of Rights.'

32. The purpose of a statute plays an important role in establishing a context that clarifies the scope and intended effect of a law.[13] The often quoted dissenting judgment of **Schreiner JA** eloquently articulates the importance of context in statutory interpretation:-

> *"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and within limits, its background."* ***[14]***

33. A contextual or purposive reading of a statute must of course remain faithful to the actual wording of the statute. When confronted with legislation which includes wording not capable of sustaining an interpretation that would render it constitutionally compliant, courts are required, as discussed above, to declare the legislation unconstitutional and invalid. As it stands, this exposition is generally accepted, but it must be said that context is everything in law, and obviously one needs to examine the particular statute and all the facts that gave rise to it.

34. It is indeed an important principle of the rule of law, which is a foundational value of our Constitution, that rules be articulated clearly and in a manner accessible to those governed by the rules. [15] A contextual interpretation of a statute, therefore, must be sufficiently clear to accord with the rule of law.

35. Mindful of the imperative to read legislation or Regulations in conformity with the Constitution, but only to do so when that reading would not unduly strain the legislation or Regulations, I turn to an analysis of the constitutionality of Regulation **9 (5)** which I have been invited to declare as unconstitutional.

36. Regulation **9 (5)** of The Council of Legal Education (Kenya School of Law Regulations), 2009

provides that " in respect of the Advocates Training Programme a candidate shall be allowed a maximum of five years within which to complete the course of study."

37. The first 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.

38. Section **3** of the Legal Education Act[16] stipulates the objective of the act which is to **(a)** promote legal education and maintenance of the highest possible standards in legal education; and **(b)** provide a system to guarantee the quality of legal education and legal education providers.

39. Section **4** of the act establishes the Council of Legal Education whose functions are stipulated in section **8** of the act. Its functions include regulating legal education and training in Kenya offered by legal education providers; administering such professional examinations as may be prescribed under section 13 of the Advocates Act[17] and being responsible for setting and enforcing standards relating to the mode and quality of examinations.

40. Section **8 (3)** of the act empowers the Respondent in carrying out its functions to *inter alia* make Regulations in respect of requirements for the admission of persons seeking to enroll in legal education programmes.

41. 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."*

42. 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. 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 to the corrections officials' expertise.

43. 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. In this case, the law and the Regulations in question are designed at maintaining and ensuring high professional standards and competence.

44. It is my view that the impugned regulation is reasonable and valid. The regulation is logically related to the legitimate public concerns of maintaining high professional standards. Moreover, the regulation does not deprive the petitioner the opportunity to pursue his career. It gives them a chance to register afresh for the programme. Nor is there an obvious, easy alternative to the regulation, since monitoring standards clearly is an important statutory obligation aimed at public good.

45. The petitioner has failed to demonstrate that the impugned Regulations are unconstitutional. It is also important to point out that the right under article 43 is not absolute. The Respondent 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.

46. I cannot do better than reproduce in verbatim what I stated in my earlier cited decision on the question of the rationale for court not to interfere with decisions made by academic institution where I stated:-

> *"I am also alive to the fact that truly academic decisions are to be distinguished from the administrative decisions of the academic bodies. This is because administrative decisions are subject to judicial review. Purely academic decisions are treated as beyond the courts reach though, on facts, in several cases the courts can interfere. Therefore, as demonstrated by the authorities cited below, the guiding principle and the proposition of law in so far as judicial review of academic decisions is concerned stands as at to-day undisturbed is that the court should be slow to interfere and should only seldom interfere in academic decisions of academic bodies. The reluctance for interference of the court is evident from the following decisions.*
>
> *In the Indian case of* ***Maharashtra State Board -VS- Kurmarsheth & Others****,**[18] it was stated as follows:-*
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> ***"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)***
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> *In the above case, the court emphasised the need:-*
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> ***".....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."***
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> *In University of Mysore and others v. Gopala Gowda and another**[19] 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:-*
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> *"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".*
>
> *It was further found that failure by a student to qualify for promotion or degree in four examinations is certainly a reasonable test of such inaptitude or supervening disability. If after securing admission to an institution imparting training for professional course, a student is to be held entitled to continue indefinitely to attend the institution without adequate application and to continue to offer himself for successive examinations, a lowering of academic standards would inevitably result.*

Power to maintain standards in the course of studies confers authority not merely to prescribe minimum qualification for admission, courses of study, and minimum attendance at an institution which may qualify the student for admission to the examination, but also authority to refuse to grant a degree, diploma, certificate or other academic distinction to students who fail to satisfy the examiners' assessment at the final examination.

In *Jawaharlal Nehru University vs. B. S. Narwala*[20] it was ruled that the court should not interfere where qualified academic authorities decide to remove a student from the university on the basis of assessment of his academic performance. In this case a student was removed from the rolls for continuous failing in *examinations and for consistent unsatisfactory academic performance. The court held that in the absence of any allegation as to bias or mala fides, there would be no basis to interfere.*

*Also relevant is the decision in R vs. Council of Legal Education**[21]** 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.…"

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.

Thus, persons who desire to engage in the learned professions requiring scientific or technical knowledge may be required to take an examination as a prerequisite to engaging in their chosen careers. This regulation takes particular pertinence in the fields like law and medicine, to protect the public from the potentially deadly effects of incompetence and ignorance among those who would practice in these professional fields.

It must be stressed, nevertheless, that the power to regulate the exercise of a profession or pursuit of an occupation cannot be exercised by the Respondent or its agents in an arbitrary, despotic, or oppressive manner. A body that regulates the exercise of a particular privilege has the authority to both forbid and grant such privilege in accordance with certain conditions. Such conditions may not, however, require giving up ones constitutional rights.

The Respondent cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the law. However, the Regulator can require high standards of qualifications, such as good moral character or proficiency in law, before it admits an applicant to the bar. This is done by examining the applicant. The decision complained of must have a rational connection with the desired purpose, which is to ensure high professional standards. The petitioners have not shown the decision complained of or the regulations are not connected to this purpose nor has bad faith or malice been established."

47. On the alleged violation of the Right to a fair Administration Action, Article **47** of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[22]Addressing the subject of legitimate expectation, ***H. W. R. Wade & C. F. Forsyth[23]*** 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)

48. 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.

49. In conclusion, I find that the Petitioner has failed to prove that the impugned Regulation is unconstitutional nor has he proved the alleged violation of his constitutional rights.

50. In view of 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

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[1] Infra note two

[2] Pet No. 254 of 2017

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

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

[5] Act No. 27 of 2012

[6] **{1985} CLR 1083**

[7] A.l.R. 1965 S.C. 1932.

[8] (1980) 4 S.C.C. 480.

[9] {2007} eKLR

[10]Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others [2000] ZACC 12; 2001(1) SA 545; 2000 (10) BCLR 1079 (CC) at para 22.

[11] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24

[12] Ngcobo J while interpreting a similar provision in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others, [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[13] Thornton Legislative Drafting 4ed (1996) at 155 cited in JR de Ville above n 18 at 244.

[14] University of Cape Town vs Cape Bar Council and Another 1986 (4) SA 903 (AD). See also Jaga v Dönges NO and Another; Bhana v Dönges NO and Another 1950 (4) SA 653 (A) at 662-3.

[15] Dawood and Another v Minister for Home Affairs and Others; Shalabi and Another v Minister for Home Affairs and Others; Thomas and Another v Minister for Home Affairs and Others [2000] ZACC 8; 2000 (3) SA 936 (CC) ; 2000 (8) BCLR 837 (CC) at para 47.

[16] Act No. 27 of 2012

[17] Cap 16, Laws of Kenya

[18] **{1985} CLR 1083**

[19]A.l.R. 1965 S.C. 1932.

[20]{1980} 4 S.C.C. 480.

[21]{2007} eKLR

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

[23] Administrative Law, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000