REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 132 OF 2013

IN THE MATTER OF ARTICLES 2, 3, 19, 20, 21, 22, 23, 165 AND 259 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10, 27, 30, 36, 40, 41, 43, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE OF MATTER THE KENYA SCHOOL OF LAW ACT (ACTS NO. 26 OF 2012) LAWS OF KENYA.

AND

IN THE MATTER OF THE COUNCLIL OF LEGAL EDUCATION ACT (ACTS NO. 27 OF 2012) LAWS OF KENYA.

AND

IN THE MATTER OF THE UNIVERSITIES ACT (ACTS NO. 42 OF 2012) LAWS OF KENYA

AND

IN THE MATTER OFTHE KENYA NATIONAL QUALIFICATIONS FRAMEWORK ACT (ACTS NO. 22 OF 2014) LAWS OF KENYA

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT (ACTS NO. 4 OF 2015) LAWS OF KENYA.

BETWEEN

ALICE WANJIRU NJIRU………………..…………………..PETITIONER

VERSUS

THE KENYA SCHOOL OF LAW……………………1ST RESPONDENT

COUNCIL OF LEGAL EDUCATION………………2ND RESPONDENT

CABINET SECRETARY, MINISTRY OF EDUCATION

SCIENCE & TECHNOLOGY……………………….3RD RESPONDENT

AND

KENYA NATIONAL

QUALIFICATION AUTHORITY……………1ST INTERESTED PARTY

COMMISSION FOR

UNIVERSITIES EDUCATION..……………2ND INTERESTED PARTY

UNIVERSITY OF NAIROBI…………………3TH INTERESTED PARTY

MOI UNIVERSITY..……………………………4TH INTERESTED PARTY

KENYATTA UNIVERSITY..…………………5TH INTERESTED PARTY

JOMO KENYATTA UNIVERSITY OF SCIENCE

& TECHNOLOGY..……………………………6TH INTERESTED PARTY

KISII UNIVERSITY………….………………7TH INTERESTED PARTY

AFRICAN NAZARENE UNIVERSITY……...8TH INTERESTED PARTY

RIARA UNIVERSITY....………….....….….…9TH INTERESTED PARTY

MOUNT KENYA UNIVERSITY…....….….…10TH INTERESTED PARTY

STRATHMORE UNIVERSITY………..…11TH INTERESTED PARTY

KABARAK UNIVERSITY..….…………12TH INTERESTED PARTY

CATHOLIC UNIVERSITY

OF EASTERN AFRICA………………13TH INTERESTED PARTY

NAIROBI INSTITUTE

OF BUSINESS STUDIES…………..…..14TH INTERESTED PARTY

THE KENYA UNIVERSITIES & COLLEGES

CENTRAL PLACEMENT SERVICE……..15TH INTERESTED PARTY

JUDGEMENT

The Parties

1. The Petitioner, **Alice Wanjiru Njiru,** is an adult Kenyan Citizen of sound mind and disposition, a holder of Bachelor of Laws from Uganda Pentecostal University-Uganda. According to her this petition is brought on her behalf and on behalf all persons who hold education qualification as hers and those studying bachelor of laws or interested in studying the same in Kenya or elsewhere and ultimately studying for Advocates Training Programme **(ATP)** in Kenya at the Kenya School of law.

2. The 1st Respondent, **The Kenya School of Law** (hereinafter referred to as "the School"), is a public body established under section 3(1) of the ***Kenya School of Law Act*** **(No. 26 of 2012) Laws of Kenya**, whose mandate *inter alia* is admitting and training qualified persons to the school to study for the **Advocates Training Programme (ATP)**.

3. The 2nd Respondent, **Council of Legal Education** (hereinafter referred to as "the Council"), is a body corporate established under section 4 of the ***Legal Education Act, 2012,*** Laws of Kenya.

4. The 3rd Respondent, **Cabinet Secretary, Ministry of Education Science and Technology** (hereinafter referred to as "the CS"), is in charge of *inter alia* all matters related to education in Kenya.

5. The 1st Interested Party, **the Kenya National Qualification Authority** (hereinafter referred to as "the Authority") is a public body established under section 6(1) of the ***Kenya National Qualifications Framework Act, 2014*** Laws of Kenya whose mandate as set out under section 8 thereof are *inter alia* to:

> *(i) Co-ordinate and supervise the development of policies on national qualification;*
>
> *(ii) Develop a framework for the development of an accreditation system on qualification;*
>
> *(iii) Develop and review interrelationships and linkages across national qualifications in consultation with the stakeholders, relevant institutions and agencies;*
>
> *(iv) Publish an annual report on the status of national qualifications;*
>
> *(v) Set standards and benchmarks for qualifications and competencies including skills, knowledge, attitudes and values;*
>
> *(vi) Define levels of qualifications and competencies;*
>
> *(vii) Provide for the recognition of attainment or competencies including skills, knowledge, attitude and values;*
>
> *(viii) Facilitate linkages, credit transfers and exemptions and a vertical and horizontal mobility at all levels to enable entry, re-entry and exit;*
>
> *(ix) Establish standards for harmonization and recognition of national qualifications;*
>
> *(x) Build confidence in the national qualifications system that contributes to the national economy;*
>
> *(xi) Provide pathways that support the development and maintenance of flexible access to qualifications;*
>
> *(xii) Promote the recognition of national qualifications internationally.*

6. The 2nd Interested Party, **Commission for Universities Education** (hereinafter referred to as "the

Commission") is a public body established under section 4(1) of the ***Universities Act, 2012*** Laws of Kenya, mandated under section 5 thereof to *inter alia*;

> *(i) Promote the object of university education.*
>
> *(ii) Promote, set standards and assure relevance in the quality of university education;*
>
> *(iii) Monitor and evaluate the state of university education systems in relation to the national goals;*
>
> *(iv) Develop policy for criteria and requirements for admission to universities;*
>
> *(v) Recognize and equate degrees, diplomas and certificates conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set standards set by the Commission from time to time;*
>
> *(vi) Undertake or cause to be undertaken, regular inspections, monitoring and evaluation of universities to ensure compliance with set standards and guidelines;*
>
> *(vii) Accredit and inspect university programme in Kenya.*

7. The 3rd to 7th Interested Parties are public university, chartered under section 13(1) of the ***Universities Act, 2012,*** Laws of Kenya and offer degrees in law related courses.

8. The 8th to 13th Interested Parties are described as private universities, chartered under section 13(1) of the ***Universities Act, 2012*** Laws of Kenya and offer degrees in law related courses.

9. The 14th Interested Party, **Nairobi Institute of Business Studies** (hereinafter referred to as "the Institute") is described as a private tertiary training institution of higher learning registered by the Ministry of Education, Science and Technology (MOEST) and *inter alia* offers certificate and diploma in legal studies.

10. The 15th Interested Party, **the Kenya Universities & Colleges Central Placement Service** is a public body established under section 55(1) of the ***Universities Act, 2012*** Laws of Kenya, whose functions include coordinating the placement of the government sponsored students to universities and colleges, disseminating information on available programmes, their cost and areas of study prioritized by the Government and develop career guidance programmes for the benefit of students.

The Petitioner's Case

11. According to the Petitioner she sat for her Kenya Certificate of Secondary Education, Examination of November/December 2005, attaining a Mean Grade of C (Plain) and Grade B- (Minus). In the year 2008 she applied for and was admitted to study for university bridging certificate at the Uganda Pentecostal University-Uganda, where she sat and passed the examination thereof in March, 2008. In the same year the Petitioner was admitted to study for a Bachelor of Laws Degree at the same university, graduating on 15th February, 2013.

12. It was the Petitioner's case that her studies at the **Uganda Pentecostal University-Uganda** was informed by the prevailing laws at the time, being the ***Council of Legal Education Act*** **(Cap. 16A)** Laws of Kenya (repealed). It was averred that like any other person who holds a Bachelor of Laws Degree and who do not qualify for Direct entry for admission to the School for **ATP** she was expected to sit for the Pre-Bar Examination in the year, 2013 but the same was not offered in that year. However, the 1st and 2nd Respondents in early in the year, 2013, had placed a paid advertisement in the local daily which in part reads:-

"KENYA SCHOOL OF LAW

…

At a meeting called to interpret the admission criteria given the foregoing scenario the Kenya School of Law Board in consultation with the Council of Legal education resolved that the following principle will guide the admission process into the academic year 2014/2015.

"The second Schedule to the Kenya School of Law Act will be followed subject to any discretionary powers which hitherto been exercised by the Council of Legal Education and the Kenya School Law prior to 2012 to ensure confirmation with the anti-discrimination provision of Article 27 of the Kenyan Constitution, 2010.

Accordingly the following categories of persons will be admissible to the ATP at Kenya School of Law for academic year/2014/2015 for those who:

(I) Having passed the relevant 6 examination of any recognized university in Kenya Holds or have become eligible for the conferment of the Bachelor of Laws Degree (LL.B) of that university; or

(II) Having passed the relevant examinations of a university, university college or other institution prescribed by the council, holds or have became eligible for the conferment of the Bachelor of Laws Degree (LL.B) in the grant of that university, university college or other institution:-

> *(i) Attained a minimum entry requirements for admission to a university in Kenya; and*
>
> *(ii) Obtained a minimum grade B (Plain)in the English Language or Kiswahili and a mean grade of C+ (Plus) in the Kenya Certificate of Secondary Examination or its equivalent;*

(III) Having passed the Bachelor of Laws (LL.B) examination of a recognized university and having attained minimum of a C+ (C Plus) in English and minimum of an aggregate C (Plain) in the Kenya Certificate of Secondary Education and hold a higher qualification e.g. "A" level, "IB" relevant "Diploma" other undergraduate degree" or have attained a higher degree in law after the undergraduate studies in Bachelor of Laws (LL.B) Programme.

(IV) Having passed the relevant Bachelor of Laws (LL.B) examination of a recognized university and having attained a minimum of C-(Minus) in English and Minimum and a Minimum of an aggregate grade of C- (C Minus) in the Kenya Certificate of Section Examination sit and pass the Pre-Bar Examination set by the Kenya School of Law.

PROVIDED that persons who were eligible to sit for the Pre-Bar Examination but did not do so in 2013 will be given an opportunity to so when the examination is next offered.

(V) This admission Criterion will operate for a transitional period of there (3) years from January, 15th 2013 to allow applicants who had joined the University system before the coming into force of the Kenya School of Law Act, 2012 to complete their study programmes"

13. The Petitioner averred that after waiting for close to two years for the Pre-Bar Examination in vain, she applied to the 1st Respondent in the year, 2014 for the Advocates Training Programme (ATP), but it was not until 5th February, 2015 that the application thereto was responded to, as follows:-

"RE: ADMMISSION TO KENYA SCHOOL OF LAW.

Pursuant to your interest in joining the Advocates Training Programme, you are hereby invited to attend an interview to assess your suitability for admission into the programme on Wednesday 11th February, 2015 at 9:00am. The venue of the interview will be the school's boardroom.

You shall bring with you the following original documents:

1. KCSE/GCE/IGCE or "O and A" level certificates (or equivalent)

2. Final academic transcripts.

3. LLB certificate."

14. The meeting, according to the Petitioner which was slated for 11th February, 2015 never took place despite the Petitioner presenting herself before the 1st Respondent as directed. However vide a letter dated 19th February, 2015, to the Petitioner, in which letter, while not taking cognizance cognizance of the advert referred to above, the School instead delved into irrelevant facts. The letter in part reads;-

"Dear Ms. Njiru

RE: ADMISSION TO THE KENYA SCHOOL OF LAW-2014/2015 ACADEMIC YEAR.

We have received and considered your application for admission into ATP 2015.

It is regretted that your application was not successful because of the following:

1. Mean Grade C (Plain) and English Grade B- (Minus) in KCSE.

This is below the minimum stipulated grade of C+ (Plus) and B (Plain) respectively as per second Schedule of the Kenya School of Law Act, 2012 (see attached).

2. To be admissible into bachelor's degree programme in Uganda, one must have the following minimum qualification:

a. For direct entry –

i) Uganda Certificate of Education (UCE); and

ii) At least 2 principal passes at Uganda Advanced certificate of Education (UACE) obtained at the same sitting or its equivalent.

b. For mature age entry-

i) 25 years of age and above; and

ii) Must have passed mature age entry examination with 50% mark and above.

This is as stipulated in "this University and Other Tertiary Institutions (minimum entry requirements) Regulations, 2007 (see attached)

Your admission to Uganda Pentecostal University fall short of this criteria and Ipso facto that of the Kenya School of Law."

15. Further, it was pleaded that the School on 2nd November, 2015 through a paid up advertisement in the local dailies, called for applications for admission to the Advocates Training Programmes for the 2016/2017 Academic Year, which advert in part read:-

"Pursuant to a court Order in JR 377 of 2015 (consolidated), it is notified to the general public that that the 2016/2017 Academic year for the Advocates Training Programme (ATP) at the Kenya School of Law shall commence on 18th January, 2016. The effect of the order is that applicants in

the LLB class prior to the enactment of the Kenya School of Law act, 2012, are to be subjected to the eligibility criteria provided below.

<u>Eligibility Criteria</u>

The following categories of persons will be admission to the programme; those who:

(i) Having passed the relevant examination of any recognized university in Kenya, hold or have become eligible for conferment of the Bachelor of Laws degree (LL.B) of that University; or

(ii) Having passed the relevant examinations of a University, university College or other institutions prescribed by the Council of Legal education, hold or have become eligible for the conferment of the Bachelor of Laws degree (LL.B) in the grant of the University, university college or other institution, and had prior to enrolling at the university college or other institution;

(iii) Attained minimum entry requirement for admission to a university in Kenya; and,

(iv) Obtained a minimum grade B (Plain) in English Language or Kiswahili and a mean grade of C (Plus)in the Kenya Certificate of Secondary Examination or its equivalent;

(v) Having Passed the Bachelor of Laws (LL.B) Examination of a recognized university and having attained a minimum of C (Plus) in English and a Minimum of C (Plain) aggregate in the Kenya Certificate of Secondary Examination and hold a higher qualification e.g. "A" levels, "IB" relevant "Diploma", other "undergraduate degree" or having at5tained attained a higher degree in law after the undergraduate studies in Bachelor of Laws (LL.B) programme.

(vi) Having passed the relevant Bachelor of Laws (LL.B) examination of a recognized university and having attained a minimum of C-(Minus) in English and Minimum and a Minimum of an aggregate grade of C- (C Minus) in the Kenya Certificate of Section Examination sit and pass the Pre-Bar Examination set by the Kenya School of Law.

PROVIDED that persons who were eligible to sit for the Pre-Bar examination but did not do so will be given an opportunity to do so when the examination is next offered.

NB.

(i) Applicants from foreign universities and those in possession of Secondary School certificate not based on 8.4.4 system must provide written evidence of clearance from Council of Legal Education(Kenya)"

16. On 24th November, 2015, the Petitioner after noting that the School had again postponed the Pre-Bar Examination, instructed her advocates on record to write and enquire about the possibility of the same being offered and as such raised an issue of discrimination on the part of the Council in the manner in which it was conducting its process of admission thereto. On 30th November, 2015, the School replied to the Petitioner's Letter and insisted that admissions to the Advocates Training Programme 2016/2017 will be as per newspaper advertisement dated 24th November, 2015. To the surprise of the Petitioner, on 3rd December, 2015, despite the School promising to stick by the earlier advert, it placed yet another paid up advertisement in the local dailies which in part reads;-

"APPLICATION FOR PRE-BAR EXAMINATION 2016/2017

ACADEMIC YEAR

The Kenya School of Law hereby invites application for pre-bar examination from prospective applicants who hold a Bachelor of Laws Degree (LL.B) from a recognized university and attained a minimum grade of C- (Minus) in English and a minimum grade of C- (minus) in the Kenya

Certificate of Secondary education examination or its equivalent.

….

The Pre-Bar Examination shall be held on Wednesday 6th January, 2016.

….

NB:

1. ….

2. For admission to the Advocates Training Programme applicants will need to have undertaken the 16 core subject as required under the Legal Education Act, 2012, obtained clearance from the Council of Legal Education for those who possess foreign degrees and secondary education qualification not base on the 8.4.4 system."

17. On 7th December, 2015, the Petitioner proceeded to the offices of the School to make further enquiries on the Pre-Bar Examination and was informed by the academic registrar that it is a must to have a clearance from the Council prior to making an application to sit for the said examination. Accordingly, on 18th December, 2015, the Petitioner applied to the Council for approval and recognition of her degree certificate awarded by the **Uganda Pentecostal University-Uganda** a foreign university and paid a fee of Kenya Shillings Ten Thousand (KES.10,000/-) only for that purpose. On 15th January, 2016, the Council way after the Pre-bar Examination had already been completed, responded to the Petitioner's application for clearance of her degree certificate awarded by a foreign university as hereunder:-

"Dear Ms. Njiru

RECOGNITION AND APPROVAL OF FOREIGN QUALIFICATIONS: LL.B UGANDA PENTECOSTAL UNIVERSITY.

Reference is made to your application for recognition and approval of LL.B Degree from Uganda Pentecostal University, Uganda, for purposes of the Advocates Training Programme.

A review of the application reveals that you did not meet the threshold for admission into the LL.B Degree programme. The "O" level certificate attached show that you attained a mean grade of C plain, C plain in English and C+ (plus) in Kiswahili. The law requires at least a mean grade of C+ plus and B plain in English or Kiswahili.

Belatedly, you did not avail evidence of having passed the Pre-Bar examination administrated by the Kenya School of Law. Although a University Bridging Course was undertaken prior to the LL.B Programme, Council does not recognize Bridging Course for purposes of progression to the LL.B degree.

In view of the above, the applicant does not meet the threshold prescribed by Part II of the Second Schedule to the legal education Act, 2012.

Council regrettably declines to recognize and approve your LL.B qualifications for purposes of the Advocates Training Programme.

Council wishes you well in your future."

18. It was the Petitioner's case that she realized that the School had been issuing misleading information to the public through the paid up advertisements herein, in that every person desirous to study for Advocates Training Programme and holds a Bachelor of Laws (LL.B) Degree from a foreign university

must seek clearance from the Council**,** who do not possess such a mandate under any the law and as such leading to misuse of tax payers money, actions which should be curbed at the earliest.

19. It was the Petitioner's case that the School and the Council acted ultra vires in purporting to subject the Petitioner's Bachelor of Laws (LL.B) Degree certificate awarded by the Uganda Pentecostal University though an illegal recognition and approval of foreign qualifications, which process is null a void.

20. According to the Petitioner, on 6th February, 2016 the Council and the *CS without any legal foundation caused to be legislated and published* ***The Legal Education Act (Accreditation and Quality Assurance) Regulation, 2016*** (hereinafter referred to as "the Regulations")**,** allegedly under powers conferred to them under section 46 (1) of the ***Legal Education Act, 2012,*** Laws of Kenya, which section stands repealed by dint of the provisions of section 29 of ***The Kenya National Qualification Framework Act, 2014,*** Laws of Kenya.

21. To the Petitioner, in developing the said Regulations, the said Respondents usurped the authority of the Authority reserved under ***The Kenya National Qualification Framework Act, 2014,*** which Act came into force on 31st December, 2014**,** shifting the CS's mandate to make subsidiary legislation on all matters of all cadre of education absolutely thereto**.** In her view, the only subsidiary regulation which can be sustained for the time being under the ***Legal Education Act, 2012*** are those which only came into force prior to enactment of the ***Kenya National Qualification Framework Act, 2014***. It was her case that the Commission is the only body in Kenya that is bestowed with the authority to recognize and equate degrees, diplomas and certificates awarded by foreign Universities and institutions in accordance with the standards and guidelines set by the Authority.

22. The Petitioner averred that the 3rd to 13th Interested Parties are institutions of higher learning granted authority to operate as such by the Commission and they offer *inter alia* legal education based courses while the 14th Interested Party (sic) is a middle level college offering certificate and diploma in legal studies with the authority of the Ministry of Education, Science and Technology (MOEST).

23. The 15th Interested Party (sic) while carrying out its function of placement of government sponsored students to the 3rd to 7th Interested Parties and in particular for a Bachelor of Law degree, it must do so in a manner that upholds equity and through criteria that promote affirmative action for the marginalized, the minorities and persons with disabilities. It was thus her case that the spirit of section 56(2) of the ***Universities Act***, shall be greatly be battered if the School is allowed and continue to subject the Petitioner and other prospective students for Advocates Training Programme to section 16 of the ***Kenya School of Law Act,*** as that would mean institutionalizing discriminatory practices.

24. Just like the 15th Interested Party (sic) co-ordinates students' placement for and on behalf of the Government, each of the 3rd to 14th Interested Party, admit students independently for their respective Bachelor of Laws (LL.B) Programme in accordance with approved admission criteria by the Commission for the time being.

25. It was the Petitioner's case that section 16 of the ***Kenya School of Law Act, 2012***, was repealed by sections 4(f) and 8(k) and (p) of the ***Kenya National Qualification Framework Act, 2014***. Further the Second Schedule to the said section 16 of the ***Kenya School of Law Act*** is self conflicting, in that whereas part (a) provides for admission requirements into the Advocates Training Programme, the said criteria limits the mobility and progression within education, training and career path for those who hold qualification pursuant to Part (b) of the same schedule which provides for admission requirements into the Para-Legal programme with grades lower than the latter.

26. The Petitioner averred that the ***Legal Education Act, 2012***, since its coming into force on the 28th September,2012 has undergone almost total mutilation and or repeal of numerous provisions thereto by other various statutes, in that;-

(a) Section 3 of the ***Legal Education Act, 2012***, was repealed by section 3(1) of the ***Universities Act, 2012***, Laws of Kenya.

(b) Section 8 with an exemption to subsection (1) (f) and the whole of Part III of the ***Legal Education Act, 2012***, was repealed by sections 5, 61, 70 and Part III of the ***Universities Act, 2012***.

(c) Section 46(1) with an exemption of Paragraph (f) of the Legal ***Education Act, 2012,*** was repealed by sections 4, 8 and 29 of the ***Kenya National Qualification Framework Act, 2014***.

27. According to the petitioner, the Respondents are actuating illegal actions and unless compelled (sic) by this Honourable Court from so doing they are determined to continue with the breach of the constructional (sic) rights of the petitioner herein and the public at large.

28. The Petitioner's case was that 1st and 2nd Respondents in refusing to recognize and approve the her Bachelor of Laws (LL.B) Degree awarded by **Uganda Pentecostal University-Uganda**, the subject matter of this Petition, thereby breaching principles and values enshrined in the Constitution and violated the legal principles of legitimate expectation. The Petitioner had the following, among others, legitimate expectations:

a) The Respondents would exercise their powers lawfully pursuant to Article 10 of the Constitution of Kenya in arriving at their decision and would in doing so adhere to fairness and all other known principles of law and honour their expected obligations and duty to that effect.

b) The Respondents would treat all persons before it equally and not act in any manner that was discriminatory or treat any person differently from others in respect of the admission to registration of a trade union.

c) The Respondents would not act contrary to the provisions of the Constitution of Kenya, 2010, the ***Kenya School of Law Act, 2012***, Laws of Kenya, ***The Council of Legal Education Act, 2012***, ***The Universities Act, 2012***, ***The Kenya National Qualification Framework Act, 2014***, and any other related laws in addition to the Principles of public policy and rules of natural justice.

29. The Petitioner therefore sought the following orders:

a) A declaration that the Respondents have violated and/or are likely to violate the constitutional rights of the Petitioner's the people she represent and in particular Articles 10, 27, 43, 47, 48 and 50 of the Constitution of Kenya.

b) An Order to quash the decision of the 2nd and 3rd Respondents as contained in the *Legal Notice No. 15, The Legal Education (Accreditation & Quality Assurance) Regulations, 2016*, Legislative Supplement No. 7.

c) An order to quash the 2nd Respondent's Decision contained in a letter to the Petitioner dated 15th January, 2016 titled "Recognition and Approval of Foreign Qualifications: LL.B Uganda Pentecostal University".

d)A Declaration that;-

(i) Section 16 of the *Kenya School of Law Act*, 2012, stands repealed by sections 4(f) and 8(k) and (p) of the *Kenya National Qualification Act, 2014*.

(ii) Section 46(1) of *the Legal education Act, 2012*, with an exemption of Paragraph (f) thereof stands repealed by sections 4, 8 and 29 of the *Kenya National Framework Authority Act*, 2014.

(iii) Sections 8, 18, 19, 20 and 21 of the *Legal Education Act, 2012*, stand repealed by sections 5, 61, 70 and Part III of the *Universities Act, 2012*.

(iv) Part IV of the *Legal Education Act, 2012*, stands repealed by Part III of the *Universities Act, 2012*.

e) An order prohibiting the 2nd Respondent from recognition and approval of Bachelor of Laws (LL.B) Degree or related qualifications awarded by a University in Kenya or a Foreign University or Institution.

f) An Order for Special damages of KES. 10, 000/- to the Petitioner.

g) General damages for breach of Petitioner's constitutional rights and loss of opportunities.

h) An order compelling the 1st Respondent to Admit the Petitioner for Advocates Training Programme (ATP).

i) Or any other such Orders as this Honourable Court shall deem just.

30. In her submissions the Petitioner relied on Articles 23(1) and 165(6) of the Constitution and section 7 of the ***Fair Administrative Actions Act, 2015*** and noted that the 1st Respondent is on record indicating that it is not opposed to the Petition while the 3rd and 4th Respondents as well as the Interested Parties elected not to participate in the matter save for the 2nd Interested Party who only filed a Notice of Appointment of Advocates through the firm of M/S Patrick Teddy & Partners on 12.5.2016. According to the Petitioner the position adopted by the 2nd Respondent that the Petitioner did not meet the threshold for admission into LL.B Degree Programme having attained an aggregate mean grade of C (Plain), C plain in English and C+ (plus) in Kiswahili while the law required a mean grade of C+ plus and B plain in English or Kiswahili was not true as the Petitioner attained an aggregate mean grade of C Plain and B- (Minus) in both English and Kiswahili. While the 2nd Respondent's decision was pegged on Part III of the ***Legal Education (Accreditation and Quality Assurance) Regulations*, 2016,** at the time of joining university for the under graduate studies in LL.B degree programme in the year, 2008, the Petitioner was guided by the provisions of the ***Council of Legal Education Act*** (Cap.16A) Laws of Kenya (repealed) and in particular the ***Council of Legal Education (Kenya School of Law) Regulations, 2009*** ("Law School Regulation, 2009").

31. According to the Petitioner, although the ***Law School Regulation, 2009*** come into force when the Petitioner had already joined university for her LL.B Degree Programme, the petitioner is not asking this Honourable Court to be excepted (sic) from the Regulations as other persons who graduated before her have been subject thereof and because to do so the Petitioner would be seeking preferential treatment. According to her, her Kenya Certificate of Secondary Education Grades are in conformity Part A (II) of the First Schedule of Law School Regulation, 2009 on ***Admissions Requirements Into the Advocates Training Programme***, which regulations the 2nd Respondent alleges to have applied in arriving at its decision. In her submissions the Petitioner relied on **Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others (2015) eKLR.**

32. According to the Petitioner, neither the ***Kenya School of Law Act, 2012,*** nor the **Council *of Legal Education Act, 2012***, contains any provisions that empower the 2nd Respondent to recognize and approve LL.B degree certificates obtained from any foreign university or institution. It was the Petitioner's case that the 2nd Respondent by its action in purporting to recognize and approve the Petitioner's LL.B degree certificate was not based on any lawful process and as such breached and or violated various principles of natural Justice, acted *ultra vires,* acted with improper motive, acted unreasonable, acted against the principle of proportionality, acted with *mala fide* and legitimate expectation. It was submitted that whereas section 8(1) of the ***Council of Legal Education Act, 2012*** empowers the Council to recognize and approve qualifications obtained outside Kenya for purposes of admission to the Roll, that provision does not authorise it to scrutinize, academic documents for the purpose of admission to the **ATP**s. The

School is mandated to admit students to any of its programme pursuant to the ***Kenya School of Law Act, 2012*** or the regulations in force for the time being, being ***Council of Legal Education (Kenya School of Law) Regulation, 2009.***

33. It was therefore submitted that there is no known procedure under any subsidiary regulation that the 2nd Respondent followed while arriving at its decision as contained in its letter dated 15th January, 2016. Going by its pleading there is no provision on recognition and approval of foreign qualification either under the alleged ***Council of Legal Education (Accreditation of Legal Education Institution) Regulations, 2009*** or even the ***Council of Legal Education (Kenya School of Law) Regulation, 2009.*** Of importance is that these laws come into force while the Petitioner had already joined university for her LL.B Degree Programme.

34. According to the Petitioner, the 1st Interested Party is the only body in Kenya that is empowered to come up with regulations on recognition of qualification under the ***Kenya National Qualification Framework Act, 2014*** Laws of Kenya which come into force on 14th January, 2014 since section 4 of the Act list the objectives of the 1st Interested Party as inter alia to establish standards for recognizing qualifications obtained in Kenya and outside Kenya. The Petitioner submitted that the 2nd Respondent can only either apply subsidiary regulations which were in place before the coming into force of the ***Kenya National Qualification Framework Act, 2014*** or those made under this Act and as such it cannot purport to legislate in any other manner as concerns legal education in Kenya. It was therefore submitted that the 2nd Respondent in purporting to recognize and approve the petitioner's usurped the mandate of the 2nd Interested Party under Section 5 of the ***Universities Act, 2012*** which empowers it to recognize and equate degrees, diplomas and certificate conferred or awarded by foreign universities and institutions in accordance with the standards with the standards and guideline set by the Commission from time to time.

35. In support of this position the Petitioner relied on **Republic vs. Council of Legal Education & Another Ex-Parte Mount Kenya University [2016] eKLR**.

36. The Petitioner's case was therefore that the 1st Respondent's decision to direct the Petitioner to procure clearance unknown under the law from the 2nd Respondent and the 2nd Respondent's consideration of irrelevant issues in arriving at its decision to reject recognition and approval was unreasonable and as such it is subject to be checked by this Honourable Court**.** To this end it is the Petitioner's contention that these acts amounts to discrimination contrary to Article 27(4) of the Constitution of Kenya. In this respect the Petitioner relied on **R vs. Cabinet Secretary for Transport & Infrastructure Principle Secretary & 5 Others Ex-Parte Kenya Country Bus Owners Association & 8 Others [2014] eKLR, Nyarangi & 3 Ors vs. Attorney General [2008] eKLR, Salim Juma Oditi vs. Minister for Local Government & Ors [2008] eKLR** and **Associated Provincial Pictures Houses Ltd vs. Wednesbury Corporation (1948) 1KB 223 at P. 229.**

37. It was the Petitioner's case that the direction by the 1st Respondent to seek clearance from the 2nd Respondent taking in consideration the laws prevailing at the time of her joining university for her undergraduate studies was in bad faith. In support of her legitimate expectation, the Petitioner relied on **Republic vs. The District Land Adjudication & Settlement Suba District & Ano. [2013] eKLR, Rahab Wanjiru Njuguna vs. Inspector General of Police & another [2013] eKLR** and **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001.**

38. It was further submitted that the assertions that the 2nd Respondent has powers to make regulations as it did pursuant to section 48(2)(b) of the ***Legal Education Act, 2012*** are misplaced and in the absence of any averments to the contrary the publication of the aforesaid legal notice was undertaken under section 46(2) thereof and there was no intention of laying the same before parliament and in any event that assertion is an afterthought owing to the fact that the 2nd Respondent's response to the Petitioner's petition is done by away of grounds of opposition rather than or in addition to a Replying Affidavit.

39. It was submitted that this Court is enjoined under Article 20 of the Constitution, in interpretation of

the rights guaranteed therein to do so in a manner that favours the Petitioner and in so submitting the Petitioner relied on **R vs. Cabinet Secretary for Transport & Infrastructure Principle Secretary & 5 Others Ex-Parte Kenya Country Bus Owners Association & 8 Others.**

40. In the premises it was urged that this Court has jurisdiction to grant the orders so sought by the Petitioner's in the Petition and any other order that its deems merited in light of various breaches of the law by the 1st and 2nd Respondents.

1st Respondent's Case

41. In response to the Petition, the 1st Respondent herein, the School, averred that on 31st October, 2014, the School received an application for admission to the Advocates Training Programme from the Petition and upon verification of her documents, her application was denied because she fell short of the mandatory entry requirements required by the Second Schedule to the ***Kenya School of Law Act, 2012***. On 19th February, 2015, the 1st Respondent wrote to the Petitioner informing her that her application was unsuccessful because her mean grade of C plain and English Grade B- (minus) in KCSE fell short of the minimum stipulated grade C+ (plus) and B (plain) respectively as per the Second Schedule of the ***Kenya School of Law Act, 2012***. Further, the 1st Respondent informed her that her admission to the Uganda Pentecostal University falls short of the admission criteria for admission to a Bachelor Degree Programme in Uganda, and *ipso facto*, that of the 1st Respondent.

42. It was disclosed that on 26th February, 2015, the Petitioner appealed against the decision not to admit her, and on 2nd March, 2015 the decision to deny her appeal was communicated to her.

43. It was averred that on 24th November, 2015, the 1st Respondent placed an advertisement in the local dailies inviting application for admission to the Advocates Training Programme and on 3rd December, 2015, the 1st Respondent placed an advertisement in the *Daily Nation* inviting applicants for pre-bar examination for admission to the Advocates Training Programme which advert was an indication to all eligible prospective applicants when the 1st Respondent was offering the Pre-bar examination as previously specified in its advert of 24th November, 2015. It was disclosed that in the advert, the 1st Respondent invited applications for Pre-bar examination from prospective applicants who hold a Bachelor of Laws Degree (LLB) from a recognised University and attained a minimum grade C- (minus) in English and a minimum of C- (minus) in the Kenya Certificate of Secondary Education examinations. However, the 1st Respondent did not receive any application to sit for Pre-bar examination from the Petitioner as stipulated in the advertisement dated 3rd December, 2015. It was its position that the advert did not require the applicants to get clearance from the 2nd Respondent in order to sit Pre-bar examinations.

44. The School averred that the Pre-bar examination is one of the pre-entry requirements for the ATP for the applicants who fall within the stipulated admission criteria. It was explained that the clearance was an admission requirement to the ATP, the admissibility of which for the Pre-bar applicants could only be fully assessed on passing of the Pre-bar examinations. Accordingly, the 1st Respondent informed prospective applicants of this requirement, and directed them to procure the clearance from the 2nd Respondent in compliance with section 8(3)(g) of the ***Legal Education Act, 2012***, which vests the mandate of equation of foreign legal qualification in the 2nd Respondent.

45. It was averred based on legal advice that Pre-bar examination are offered by the 1st Respondent in accordance with the advertisements dated 24th November, 2015 and 17th January, 2014. The eligibility criteria, it was deposed is provided in the advertisements dated 17th January, 2014, 24th November, 2015, 3rd December, 2015, and preserved as guidelines in **Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others (2015) eKLR** are lifted from the ***Council of Legal Education (Kenya School of Law) Regulations, 2009*** First Schedule, article 5, as preserved under section 29 of the ***Kenya School of Law***

Act, No. 24 of 2012.

46. It was the School's position that it extended the same admission criteria to all the applicants and therefore no discrimination was visited upon the Petitioner.

2nd Respondent's Case

47. In response to the petition the 2nd Respondent filed the following grounds of opposition:

> **a) Section 4(f) and 8 (k) and (p) of the Kenya National Qualifications Framework Act, 2014 does not repeal Section 16 nor Second Schedule to the Kenya School of Law Act, 2012.**
>
> **b) Sections 4, 8 and 9 of the Kenya National Qualifications Framework Act, 2014 do not repeal Section 46(1) of the Legal Education Act, 2012;**
>
> **c) Section 5, 61, 70 and Part III of the Universities Act, 2012, do not repeal Sections 8, 18, 19, 20, 21 and Part IV of the Legal Education Act, 2012;**
>
> **d) The 2nd Respondent did not act contrary Articles 10, 73 and 232 of the Constitution of Kenya in considering and responding to the Petitioner's application vide a letter dated 15th January, 2016.**
>
> **e) The Petitioner has not put forward any benchmark or standards of the Kenya National Qualification Framework Authority that has been violated;**
>
> **f) In enforcing provisions of the Legal Education Act, 2012 and by the 1st Respondent enforcing the provisions of the Kenya School of Law Act, 2012, the Petitioner was not discriminated against, there was no violation of the Petitioner's right to education, there was no violation of fair administrative action and certainly did not violate Petitioner's right to access to justice.**
>
> **g) Under the doctrine of Separation of Powers, the Court has no jurisdiction to set aside The Legal Education (Accreditation & Quality Assurance) Regulations, 2016, because they are not Subsidiary Legislation. They had been gazetted by Legal Notice No. 15 of 2016 for laying before parliament in accordance to Section 11 of the Statutory Instruments Act, 2013. Parliament was however in recess and in accordance with Section 11 (4) of the statutory Instruments Act, 2013, they become void, until publication. Presently, the Regulation under Legal Education Act, 2012 is undertaken through the importation of Section 48 (2)(b) of the Legal education Act, the council of Legal education (Accreditation of Legal Education Institution) Regulations, 2009;**
>
> **h) This Honourable court has no jurisdiction to set aside lawful decisions of public authorities, undertaken under the law;**
>
> **i) The claim for violation of fundamental rights and attendance reliefs is denied and objected to;**
>
> **j) The different statutes cross referenced in the Petition, relate to difference agencies of government, they exist not in conflict but as a correlate.**

48. In their submissions the 2nd Respondents contended that under section 8(1) of the ***Legal Education Act, 2012***, the 2nd Respondent has the sole mandate of regulating legal education and training in Kenya and to recognize and approve qualifications obtained outside Kenya for purposes of admission to the Roll. In order to carry out these functions, section 46(1) of the ***Legal Education Act, 2012*** gives them an additional mandate in the following terms:

> ***46(1) The Cabinet Secretary may, upon recommendation of the Council … make Regulations for the purposes of giving effect to the provisions of this Act, and in particular, such Regulations may —***
>
> > ***(a) …….***
> >
> > ***(b) make provision for the assessment criteria to be used by the Council in consultation with the local bar associations in other jurisdictions, in accrediting foreign programmes;***
> >
> > ***(c) provide for the Council to…establish mechanisms for the continuous monitoring and evaluation of the programmes of foreign universities recognized by the Council.***

49. From the foregoing provision, it was submitted that it is clear that the power to make regulations under the ***Legal Education Act, 2012*** not only belongs to the Council but also to the CS**.** In enacting the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016*** through Legal Notice No. 15 of 2016, the Council, with the approval of the CS was, therefore, essentially carrying out its statutory mandate in order to give effect to the provisions of sections 8 and 46(1) of the ***Legal Education Act***.

50. According to the said Respondent, it is trite law that where a power or discretion is donated to a particular body, the Courts ought to exercise restraint in and ought not to readily accede to invitation to interfere with the exercise of such powers and discretion and referred to **Kokebe Kevin Odhiambo & 12 Others vs. Council of Legal Education & 4 Others [2016] eKLR** on circumstances when the Court is entitled to interfere with such discretion and in the present petition, none of the above grounds have been sufficiently proved, leading to the conclusion that the 2nd and 3rd Respondents lawfully exercised their powers, thus there is no justification for an intervention by the Courts on the exercise of such powers. The Respondents also supported their position by citing **Susan Mungai vs. The Council of Legal Education & 2 Others Constitutional Petition No. 152 of 2011** where **Mumbi Ngugi, J** while citing the case of **Republic –vs- The Council of Legal Education ex parte James Njuguna and 14 Others, Misc Civil Case No. 137 of 2004** (unreported) found that:

> **"…it would not be proper or right for the court to veto powers conferred by Parliament on a public authority or body such as the Council of Legal Education and for the court to substitute its own view from that of the Council of Legal Education to which discretion was given except where the discretion has been improperly exercised…"**

51. According to the said Respondents, in enacting the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016***, both the 2nd & 3rd Respondents whilst in consultation acted well within their statutory powers and as such the regulations should not be interfered with.

52. As to whether the ***Kenya National Qualifications Framework Act, 2014*** repeals section 46(1) of the ***Legal Education Act, 2012*** the said Respondents reproduced section 29 of the ***Kenya National Qualifications Framework Act, 2014*** which provides that:

> ***The Cabinet may, in consultation with the Council, make regulations generally for the better carrying out of the purposes of this Act***

53. To the said Respondents a reading of the two sections, shows that section 29 instead of repealing, actually compliments section 46(1) by allowing the CS, in consultation with the Council of the Kenya National Qualifications Authority, to make regulations for the better carrying out of the functions of the Act which include *inter alia*;

> ***a. Developing a framework for the development of an accreditation system on qualifications; and***
>
> ***b. Establishing standard for harmonization and recognition of national and foreign qualifications…***

54. It was contended that these function the 3rd Respondent rightly exercised together with the 2nd Respondent whilst enacting the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016***. It was therefore submitted that section 29 of the ***Kenya National Qualifications Framework Act, 2014*** does not in any way repeal section 46(1) of the ***Legal Education Act, 2012***.

55. As to whether the petitioner's constitutional rights and in particular her right to education under Article 43(1)(f) and her right to equality and non-discrimination under Article 27 of the Constitution were infringed by virtue of the fact that she was denied admission to the Advocates Training Programme on the grounds that she did not qualify to join the same as her foreign degree was not recognized, reliance was placed on this Court's decision in **Kokebe Kevin Odhiambo & 12 Others vs. Council of Legal Education & 4 Others [2016] eKLR** where it was held that:

> **"There is nothing inherently wrong or unreasonable in the School and the Council setting reasonable guidelines for the attainment of their statutory mandate as long as such guidelines are lawful and are geared towards ensuring that those whom they admit for ATP are duly qualified to undertake the training and the eventual task for which they intend to train. The guidelines however must cut across board and there ought not to be any discrimination in evaluating the applicants for admission to the programme."**

56. They also relied on **Muamar Nabeel Onyango Khan vs. Council of Legal Education & 2 Others [2014] eKLR** where it was held that:

> **"We reiterate this Court's statements in the cases of *Eunice Mwikali Maema vs. The Council of Legal Education & 2 Others, Nairobi CA No. 121 of 201*3 and *Susan Mungai vs. The Council of Legal Education & Others Nairobi HC Petition No. 152 of 2011* that for purposes of admission to the ATP, there should not be "different or double standards for local and foreign degree holders". Both should be subject to the same standards. We therefore find that by requiring the applicant, like all other applicants, to meet the threshold for admission to the ATP, the respondents did not in any way violate her constitutional rights to fair administrative action and/or education and training."**

57. In **Eunice Cecilia Mwikali Maema vs. Council of Legal Education and 2 Others (supra)** it was held that:

> **"While we accept the submissions by counsel for the appellant that foreign universities and institutions outside Kenya are outside the 'accreditation jurisdiction' of the Council, in our view, the requirement that a degree from a foreign university or institution, in order for it to be recognised for purposes of admission to advocates training programme, must be shown to contain the core units is not to extend the 'accreditation jurisdiction' of the Council. It is to avoid different or double standards for local and foreign law degree holders. We think that law degrees earned from foreign universities or institutions must for purposes of admission to the advocates training programme at the school, be held against the standards that the council has set out."**

58. It was therefore submitted that in light of the above decisions the Petitioner's constitutional rights cannot be said to have been infringed by the mere fact that her foreign qualifications were subjected to a recognition standard and failed to meet the required standard. Accordingly, it was submitted that the petitioner herein is not entitled to the prayers sought as she has failed to prove her case to merit. Further, whereas this court has a constitutional mandate to protect and safeguard the rights and freedoms of individuals, the onus is on the petitioner to satisfactorily demonstrate to the court that her rights were violated when the 1st & 2nd Respondents failed to admit her to the Advocates Training Program, a fact which she has failed to prove hence the instant petition lacks merit and the Court was urged to dismiss the same.

3rd and 4th Respondents' Case

59. In response to the Petition the 3rd and 4th Respondents relied on the following grounds of opposition:

> **1) That by dint of section 23 of the *Interpretation and General Provisions Act*, Cap.2 Laws of Kenya; section 16 of the *Kenya School of Law Act, 2012*, sections 8, 18, 19, 20, 21, 46 and Part IV of the *Legal Education Act, 2012* are applicable in the circumstances of the petition herein;**
>
> **2) That the Petitioner by dint of Section 16 and Schedule II of the Kenya School of Law Act, having attained an aggregate grade of C (Plain) did not qualify to be admitted at the Kenya School of Law and as a consequence no legitimate expectation can arise;**
>
> **3) That the 1st and 2nd Respondents are under a duty to set the highest professional standards, through admission to the Advocates Training Program, of the profession and this duty cannot be abdicated to the court;**
>
> **4) FURTHER that by dint of Section 30 of the Kenya National Qualification Framework Act, No.22 of 2014, the Examining Bodies which were established under various Acts immediately prior to the coming into force of this Act are allowed to continue to operate and seek accreditation under the Act from the transitional period contemplated is yet to run out;**
>
> **5) That by dint of this court's decisions in *Kokebe Kevin Odhiambo & 12 Others vs. Council of Legal Education & 4 Others [2016] eKLR, Godwin Mwangi Maina& Another vs Kenya School of Law [2015] eKLR, Republic vs. Kenya School of Law & Another Ex Parte: Ibrahim Maalim Abdullahi [2014] eKLR; and the court of Appeal's decision in Eunice Cecilia Mwikali Maema vs. Council of Legal Education & 2 Others [2013] eKLR*, the issues raised herein are *res judicata.***
>
> **6) That this petition does not raise any constitutional issues and it is otherwise an abuse of this court's process.**

60. The said Respondent submitted that the ***Kenya National Qualifications Framework Act, 2014***, does not confer the **Kenya National Qualifications Framework Authority** (KNQF Authority) with jurisdiction to actually undertake any regulation since the KNQF Authority is actually an equalization policy maker, to aid and ensure predictability in national qualifications in Kenya. The ***KNQF Act*** therefore does not diminish or take away jurisdiction from other government agencies from undertaking their statutory mandates of regulations and or examining applicants for purposes of national qualifications and that is why, at section 30 of the ***KNQF Act***, Parliament provides as follows:

> ***The Examining Bodies which were established under various Acts immediately prior to the coming into force of this Act shall continue to operate and shall seek accreditation under this Act from the Authority within a period of two years from the date of the commencement of the Act.***

61. The said two years, it was submitted lapsed in December 2016.

62. According to the said Respondents, the ***KNQF Act*** then at section 2 defines 'accreditation' as follows:

> *'"**accreditation** " means procedure by which institutions offering education and training are formally recognized as having met the standards set out in various laws of Kenya;'*

63. It was their submission that the acknowledgement of existence of other bodies established by law and the sanction that they shall proceed, means proceed under their various statutes.

64. The said Respondent referred to the objects and functions of the KNQF Authority under the ***KNQF Act, 2014*** and submitted that it is evident that the KNQF Authority has a more policy duty of setting guiding standards in qualification benchmarking. The standards set, would then be utilized but where some agencies are to regulate according to statutes, then the established standards will inform the

Regulations that would be made under the statutes. In the premises, the KNQF Authority cannot and neither is it conceived to perform the functions of the Kenya School of Law under the ***Kenya School of Law Act, 2012***. To say that the ***KNQF Act*** does not bear the threshold minimum for eligibility to enter an accredited institution.

65. The said Respondents in their submissions relied on section 16 of the ***Kenya School of Law Act, 2012*** and the Second Schedule to the ***Kenya School of Law Act, 2012***, and submitted that the two statutes clearly provide for separate matters. In legislating the threshold for entrance in to a professional course, it was submitted, the Kenya School of Law is not providing for a national qualification.

66. As to whether section 16 second Schedule to the ***Kenya School of Law Act***, has been impliedly repealed by section 4(f) and 8(k) and (p) of the ***KNQF Act***, the said Respondents submitted that sections 4(f) and 8(k) and (p) of the ***KNQF Act*** do not in anyway even suggest that the function of the KNFQ Authority is to determine thresholds for joining professional course, subject of specialized statutes since the purpose of the ***KNQF Act*** is not to obliterate other statutes and agencies but to augment them, not by dictation but by developing a framework that guides them on matters of benchmarking qualifications. It was therefore submitted that sections 4(f) and 8(k) and (p) of the ***Kenya National Qualifications Framework Act, 2014***, neither repealed section 16 nor Second Schedule to the ***Kenya School of Law Act, 2012***.

67. As to whether sections 4, 8, and 29 of the ***Kenya National Qualifications Framework Act, 2014*** repealed section 46(1) of the ***Legal Education Act, 2012***, it was reiterated that the KNQF Authority is not a regulator but a facilitating agency, with the function of development framework for national qualifications. It cannot and does not regulate legal education in Kenya which is the function of the Council of Legal Education does.

68. To the said Respondents, it has to be understood that the two (2) statutes are conceptually different and provide for different matters. The ***KNQF Act*** is *an Act of Parliament to establish the Kenya National Qualifications Authority; to provide for the development of a Kenya Qualifications Framework and for connected purposes*. On the other hand the ***Legal Education Act, 2012*** is an *Act of Parliament to provide for the establishment of the Council of Legal Education; the establishment of the Legal Education Appeals Tribunal; the regulation and licensing of legal education providers and for connected purposes*. To them, section 46(1) of the ***Legal Education Act, 2012*** is the donation by Parliament for enactment of subsidiary legislation to effectuate the aspirations of Parliament under the ***Legal Education Act.***

69. It was submitted that the provisions section 29 of the ***KNQF Act*** do not conflict with the provisions of matters provided for under section 46(1) of the ***Legal Education Act***. According to them, section 46(1)(a) provides for the power to: *develop a framework for the implementation of a programme for continuing legal education aiming at the professional development and maintenance of standards in all cadres of the legal profession.* This is mandate to develop framework on continuous legal education for professional development and maintenance of standards. It has got nothing to do with national qualifications. The KNQF Authority has no such mandate, and in any event has no such expertise, and in this respect the Court's attention was drawn to section 10 of the Act, for its composition. To them there is absolutely no conflict between the statutes, and accordingly no repeal.

70. Section 46(1)(b) deals with the power to: *make provision for the assessment criteria to be used by the Council in consultation with the local bar associations in other jurisdictions, in accrediting foreign programmes*. In their submission the term accreditation has not been defined in any legal instrument in Kenya, save so far, section 2 of the ***KNQF Act*** which states that it means *procedure by which institutions offering education and training are formally recognized as having met the standards set out in various laws of Kenya*. It was submitted that the term refers to both a process and a status.

71. It was submitted that the allowance in Kenya of foreign qualifications for purposes of qualification to the Advocates Training Programme and ultimately the Roll of Advocates, portended a serious conundrum. Strictly speaking the Kenyan Parliament could not legislate controls to be enforced by law schools in other jurisdictions, for want of jurisdiction and for strictures of the doctrine of State

Sovereignty. Yet, there was a need for uniformity of substantive qualifications for all parties and to protect the integrity of the Kenyan professional legal sector and reference was made to **Eunice Cecilia MwikaliMaema vs. Council of Legal Education & 2 Others [2013] eKLR.**

72. To them, it is with this object in mind that Parliament then mandated under the ***Legal Education Act, 2012*** for Rules to be made, that enable cross border reach out by the Council of Legal Education to local bar associations in foreign jurisdiction, to enable formulation of guidelines for recognizing foreign programmes. For avoidance of doubt this is a special duty, of recognizing foreign programmes for purposes of admission to the Advocates Training Programme. The closest this mandate comes with provisions of the ***KNQF Act*** is at section 4(b), which bear the object of the KNQF Act as being to *establish standards for recognising qualifications obtained in Kenya and outside Kenya.* It was submitted that section 46(1)(b) is dealing with recognition of foreign programmes, not necessarily qualifications. This is broader, to mean, that if for instance an applicant is to attend an institution that is not prescribed by the Council of Legal Education, then such applicant's qualifications would not be recognized, for deficiency not of principally not the actual qualification but for institution's deficiency. It could be that such qualification is accepted by other agencies in Kenya, but it shall not be accepted for special purposes of admission to the Advocates Training Programme in Kenya.

73. Further, section 4(b) of the ***KNFQ Act*** and the section 46(1) (b) of the ***Legal Education Act, 2012***, can accommodate each other. ***The Qualification Framework Act***, establishes standards generally, which become guiding to user agencies. These standards may even be adopted under legislative frameworks, to say the Council of Legal Education may under section 46(1)(b) be guided with the general framework and accordingly the Cabinet Secretary would make Regulations under still under section 46(1)(b) that reflect the general benchmark of the ***National Qualification Framework Act***, while lacing it with the special needs of the legal education sector, as intended by section 46(1)(b). Besides, it has not been alleged that there are in existence Regulations under section 46(1)(b) of the ***Legal Education Act, 2012*** that are in contravention with standards established under the ***KNQF Act***. It was submitted that the ***KNQF Act*** does not lay claim to monopoly of recognition but is a policy generator for use by other agencies. In fact on realizing that there could be other statutory agencies pre-dating it dealing with regulation, section 30 of the ***KNQF Act***, respects those pre-existing institutions and their roles. It was therefore their position that ***KNQF Act*** does not repeal section 46(1)(b) of the ***Legal Education Act, 2012***.

74. It was submitted that section 46(1)(c) *provide for the Council to, in consultation with Commission for University Education, establish mechanisms for the continuous monitoring and evaluation of the programmes of foreign universities recognized by the Council*. According to their submissions, the ***KNQF Act*** does not donate any mandate for regulation for monitoring continuous monitoring or evaluation of foreign universities' programmes hence there is absolutely no conflict between the ***KNQF Act*** and section 46(1)(c) of the ***Legal Education Act, 2012***. It was submitted that whereas section 46(1)(d): *authorize the charging by the Council of fees in respect of any application, licence or other service under this Act,* the ***KNQF Act*** does not donate any mandate for regulation for levying of fees in respect of licensing of legal education providers or other services under the *Legal Education Act, 2012* or any other agency for that matter. Therefore there is absolutely no conflict between the ***KNQF Act*** and section 46(1)(d) of the ***Legal Education Act, 2012***. According to the said Respondents, section 46(1)(e) *make provision for the establishment of legal education and training institutions.* However, since the ***KNQF Act*** does not donate any mandate for regulation for establishment of legal education and training institutions, there is absolutely no conflict between the ***KNQF Act*** and section 46(1) (e) of the ***Legal Education Act, 2012***.

75. With respect to section 46(1)(f) it was conceded that the same *provides for the terms and conditions of service, including the appointment, dismissal, remuneration and retiring benefits of the members of staff of the Council.* With respect to the general power to *prescribe any other thing required or permitted to be prescribed for the better carrying out of the objects of this Act*, it was submitted that this is the general mandate for making rules to effectuate the ***Legal Education Act, 2012*** and lends itself to no conflict at all.

76. It was therefore the said Respondent's case that sections 4, 8, and 29 of the ***Kenya National***

Qualifications Framework Act, 2014 do not repeal section 46(1) of the ***Legal Education Act, 2012***.

77. With respect to issue whether sections 5,61, 70 and Part III of the ***Universities Act, 2012,*** repeal sections 8, 18, 19, 20 and 21 of the ***Legal Education Act, 2012***, it was submitted that for the purposes of this case the relevant distinction is **accreditation** and **licensing** of legal education providers in Kenya. While sections 5, 61, 70 and Part III of the ***Universities Act, 2012*** provide for **accreditation** of Universities and University programmes, sections 8, 18, 19, 20 and 21 of the ***Legal Education Act, 2012*** provide for **licensing** of legal education providers in Kenya. According to them, accreditation as used in the given statutes is not licensing. They submitted that there is no jurisdiction under the ***Universities Act, 2012*** for licensing of legal education providers in Kenya as this is a sole province of the Council of Legal Education.

78. According to the Respondents, section 2 of the ***Legal Education Act, 2012***, as expanded by an amendment by the ***Statute Law Miscellaneous Amendment Act, 2014***, defines the meaning of legal education providers as including institutions chartered under section 19 of the ***Universities Act, 2012*** and these are essentially universities. Section 8(1) of the ***Legal Education Act, 2012*** on the other hand provides for the functions of the Council as including to *licence legal education providers.* Section 8(2)(a) then elaborates that the Council *shall, with respect to legal education providers, be responsible for setting and enforcing standards relating to the accreditation of legal education providers for the purposes of licensing.*

79. The Respondents then cited section 18 which provides for licensing legal education, section 19 which deals with issuance of licence, section 20 which deals with display of licence and section 21 which deals with suspension or revocation of licence and submitted that section 2 foremost brings universities under the direct regulation of the Council of Legal Education, in so far as they are to provide legal education training. Section 8(1)(b) then expressly gives the Council of Legal Education the mandate to licence legal education providers in Kenya, including universities. Section 8(2)(b) then legislates that the Council of Legal Education shall be responsible for setting and standards for accreditation for purposes of licensing. This expressly advises any reader thereof that there is setting up of standards for accreditation, after which there is licensing. The law deploys the phrase '***accreditation for purposes of licensing'***. Section 18 provides for the application for licence. Such applicant must firstly be an institution duly chartered and accredited by the Commission of University Education under the ***Universities Act, 2012***. Section 19 provides that the Council of Legal Education shall upon receipt of the application for licence, actually assess the applicant for suitability and competence before issuance of the licence. The Council does not therefore rubber stamp an application, it actually has to assess it. Section 20, enjoins every accredited institution to display its licence in every branch where it offers legal education. This is different from section 61 of the ***Universities Act, 2012***, which enjoins Universities to display instruments of accreditation. Section 21 provides for the revocation of a licence if a licensed legal education provider contravenes the conditions of licence.

80. The respondents reiterated that as deployed and intended in the ***Universities Act, 2012*** and ***Legal Education Act, 2012***, accreditation is different from licensing. First there is accreditation by the Commission of University Education under the ***Universities Act, 2012***, which then makes an institution eligible to offer the various accredited courses. They submitted that if any such institution however be desirous of offering legal education, such institution has to additionally obtain a licence. This licence is issued by the Council of Legal Education under provisions of the ***Legal Education Act, 2012***.

81. It was submitted that the distinction of the kind of regulation undertaken under the ***Universities Act, 2012*** and the regulation under the ***Legal Education Act, 2012*** was best captured by the Court of Appeal in **Nairobi Civil Appeal No 240 of 2013 Engineers Board of Kenya vs. Jesse Waweru Wahome, Commission of Higher Education & Others** as follows at paragraph 47 and 48:

> **'These definitions can be applied at two levels: The first level is where an institution seeks authorization from the Government or any authorized body to be registered to offer a given training or a given service. This is important because the Government is, in general, the custodian of the standards that should be maintained by all professions. The government can,**

by itself or its designated bodies, grant such authorization to permit, by way of registration, institutions or firms to offer given academic trainings or given services. Examples include Commission of Higher Education, which under the Universities Act, authorizes private universities to offer degree courses and the Kenya Medical Practitioners & Dentists Board which, under the Medical Practitioners and Dentist Act authorizes hospitals or clinics to offer medial services.

48. The second level of accreditation is not governmental in the sense that it is not required for purposes of authorization or registration to offer an academic training or a given professional service. It is the quality assurance accreditation for the purposes of recognition, call it approval if you like, that a given institution or firm offers academic course or service that meets the required standards of a given profession. This is the level in which the Council of Legal Education, the Medical Practitioners and Dentist Board, the Accountants Board and the appellant Board, to mention a few fall. ….'

82. It was contended that given the dichotomies of the matters legislated by the ***Universities Act 2012*** and the ***Legal Education Act, 2012*** sections 5, 61, 70 and Part III of the ***Universities Act, 2012***, do not repeal sections 8, 18, 19, 20 and 21 of the ***Legal Education Act, 2012***. Similar submissions were made in respect of the contention that Part III of the ***Universities Act, 2012*** repeals part IV of the ***Legal Education Act, 2012***.

83. As to whether the 2nd Respondent failed to hear the Petitioner before drafting its letter dated 15th January 2016 in violation of the fair administrative action and natural justice, it was submitted that the Petitioner on advice of the 1st Respondent applied to the 2nd Respondent for approval of her foreign degree qualification before further consideration for admission to the Advocates Training Programme could be undertaken and concluded which application was complete with appendices including degree certificate and O level certificates hence the application was itself complete on what was being sought by the Petitioner. The 2nd Respondent of its part, duly received the application with the necessary appendices and gave consideration. This consideration accorded with the law and a response of the 2nd Respondent, complete with the reasons were carried in the 2nd Respondent's letter of 15th January 2016.

84. It was submitted that at law, it is not mandatory for the 2nd Respondent to have orally seen and heard the Petitioner since the nature of the inquiry was to be undertaken through written medium. This is so because considering the written application together with its appendices was an acceptable 'hearing' of the Petitioner. In this respect they submitted that there was no procedural violations, before or during the response dated 15th January 2016 and relied on **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** followed in **Paul Kuria Kiore vs. Kenyatta University Nairobi High Court Constitutional Petition No. 396 of 2014**.

85. As regards alleged constitutional violations with respect to her fundamental rights to protection from discrimination (Article 27), right to education (Article 43) and access to justice (Article 48), it was submitted that in assessing and responding to the Petitioner's application, it was purely guided by the law, which has been applied to all other like applicants. In any event the Petitioner has not let evidence of differential treatment. With respect to the claim to right to education, it was submitted that this right is limited by law. This right is to be enjoyed as defined and limited by law. Declining to approve the Petitioner's application because of deficiency to meet statutory threshold requirements, does not violate the right to education. With respect to the right to the right to access justice, it was submitted that the 2nd Respondent has in no way any capacity to limit the Petitioner to access justice. If anything the Petitioner has freely filed this Petition.

86. On the issue of eligibility of admission, it was submitted that the admission of applicants to the Advocates Training Programme is the exclusive province of the 1st Respondent, under provisions of the ***Kenya School of Law Act, 2012***. This is not the duty or mandate of the 2nd Respondent, whose functions are outlined in the ***Legal Education Act, 2012***. The 2nd Respondent's duty however is to see to it that

there is compliance with the law. Such that when the Petitioner applied to the 2nd Respondent for approval of her qualifications, the much that the 2nd Respondent did was to mirror them to the law, the section 16 and second Schedule to the ***Kenya School of Law Act, 2012***, and advise accordingly.

87. After reproducing the law before and after the amendment, it was submitted that the 2nd Respondent merely mirrored the Petitioner's qualifications on this threshold and replied.

88. It was submitted that like any constitutional democracy in the world Kenya is internally supervised by the doctrine of separation of powers: that the three arms of government, to say the Executive, Legislative and Judicial arms are distinct, independent of each and each check each other. To say that the Legislative arm is to principally make laws, the judicial arm is to interpret those laws and the Executive arm is to implement or execute those laws. Unless therefore the legislative arm or any agency operating under the mandate of the legislative arm has actually made the law, such draft or intention, cannot be interfered with by the Judicial arm of government. For instance the judicial arm of government cannot issues orders to restrain a Bill of Parliament from progressing to the Second Reading because of, for instance being discriminatory. Proper jurisprudence would entail that the Judicial arm waits for the Bill to become law, then declare that law unconstitutional. The Judicial arm of government has no jurisdiction to declare a Bill of Parliament unconstitutional.

89. In the present case, it was submitted that the Court has no jurisdiction to set aside ***Legal Education (Accreditation & Quality Assurance) Regulations, 2016***, because they are not Subsidiary Legislation. They had been gazetted by Legal Notice No. 15 of 2016 for laying before Parliament in accordance with section 11 of the ***Statutory Instruments Act, 2013***. Parliament was however in recess and in accordance with section 11(4) of the ***Statutory Instruments Act, 2013***, they became void, until publication. Presently, the regulation under ***Legal Education Act, 2012*** is undertaken through the importation of section 48(2)(b) of the ***Legal Education Act***, the ***Council of Legal Education (Accreditation of Legal Education Institutions) Regulations 2009***.

90. While urging the Court to dismiss the petition the 3rd and 4th Respondents relied on **Maraga, JA's** (as he then was) decision in **Nairobi Civil Appeal No 240 of 2013 - Engineers Board of Kenya vs. Jesse Waweru Wahome, Commission of Higher Education & Others**.

2nd Interested Party's Case

91. The 2nd interested party, the Commission for University Education, on its part relied on this Court's decision in Miscellaneous Application No. 16 of 2016 and insisted that it is the only body in Kenya bestowed with the authority to recognise and equate degrees, diplomas and certificates conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set by the 1st interested party.

92. Pursuant to that power it is mandated to, *inter alia*, accredit universities, examine and approve proposals for courses of study and cause regulations by private universities, ensure maintenance of standards for causes of study and examinations in the universities, to arrange visitations and inspection of private universities, and to perform and exercise all other functions and powers conferred on it by the Act.

Determinations

93. I have considered the issues raised both in support of and in opposition to the petition.

94. Before delving *into the merits of the application, I must point out that the manner in which this petition was drafted was rather casual for such a serious matter as a constitutional petition. Whereas some sentences were incomplete others were simply incomprehensible. It would seem that the drafter of the petition did not take time to proof-read the same after it was drawn. Counsel ought to take extra care in such matters to ensure that the document filed in Court does not contain such mistakes as grammatical or syntactic maladies which force the Court to second-guess what the sentence or the words are meant to*

portray. A few mistakes may be excused but when the mistakes become too many it shows lack of seriousness on the part of the draftsperson. The Petition for example states that:

> ***According to the petitioner, the Respondents are actuating illegal actions and unless compelled (sic) by this Honourable Court from so doing they are determined to continue with the breach of the constructional (sic) rights of the petitioner herein and the public at large…1st and 2nd Respondents in refusing to recognize and approve the (sic) her Bachelor of Laws (LL.B) Degree awarded by Uganda Pentecostal University-Uganda, the subject matter of this Petition, thereby breaching principles and values enshrined in the Constitution and violated the legal principles of legitimate expectation.***

95. Counsel ought to take care that the pleadings brought before Court are such that the Court does not strain to decipher what is meant by the same otherwise the Court may take the state of the pleadings into account to making a determination on costs.

96. 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.***

97. Before the amendment the Second Schedule to the Act at section 1 and 2 thereof provided:

> ***(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 (LL.B) 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 (LL.B) in the grant of that university, university college or other institution:***
>
> ***(i)attained a minimum entry requirements 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***
>
> ***(2) has sat and passed the Pre-Bar examination set by the School.***

98. It is clear that before the amendment, subsection 2 was an alternative to what was required under subsection 1. With the advent of the Amendment Act, this provision was varied to read:

> ***A person shall be admitted to the School if—***
>
> ***(a) having passed the relevant examination of any recognized university in Kenya, or of any university, university college or any other institution prescribed by the Council, holds or becomes eligible for the conferment of the Bachelor of Laws (LLB) degree of that university, university college or institution; 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; and

(iii) has sat and passed the pre-Bar examination set by the school.

99. The import and impact of the amendment was that the pre-bar examination is nolonger an option but an added requirement. The Petitioner however does not contest the requirement that she should be subjected to pre-Bar examination. According to her, she sat for her Kenya Certificate of Secondary Education, Examination of November/December 2005, attaining a Mean Grade of C (Plain) and Grade B- (Minus). In the year 2008 she applied for and was admitted to study for university bridging certificate at the Uganda Pentecostal University-Uganda, where she sat and passed the examination thereof in March, 2008. In the same year the Petitioner was admitted to study for a Bachelor of Laws Degree at the same university, graduating on 15th February, 2013.

100. In **Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others [2015] eKLR,** this Court held that those students who had been admitted to the LLB Degree Course ought to be treated in accordance with the law that was in existence at that time. Accordingly, the Petitioner herein was entitled to be admitted to the ATP if she could prove that she has sat and passed the Pre-Bar examination set by the School. It is clear that at that time there was no requirement that the applicant seeks and obtains clearance from the 2nd Respondent herein. Therefore by imposing a condition that the Petitioner must obtain clearance from the 2nd Respondent the 1st Respondent took into account an irrelevant matter. As was held in **Minister for Aboriginal Affairs vs. Peko-Wallsend Ltd (1986) 162 CLR 24 at 39-40 and 55:**

> **"A decision-maker will err by failing to take into account a relevant consideration or taking an irrelevant consideration into account. These grounds will only be made out if a decision-maker fails to take into account a consideration which the decision-maker is bound to take into account in making the decision or takes into account a consideration which the decision-maker is bound to ignore."**

101. In **Zachariah Wagunza & Another vs. Office of the Registrar Academic Kenyatta University & 2 Others [2013] eKLR** this Court held that:

> **"Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration."**

102. It is therefore clear that by imposing a condition not known to law the 1st Respondent's decision to deny the Petitioner admission to the ATP cannot be upheld. The provision of the law which the 1st Respondent relied upon being section 8(3)(g) of the ***Legal Education Act, 2012*** only permits the Council to advise the Government on the standardization, recognition and equation o legal education qualifications awarded by foreign institution. That power cannot be interpreted to include the power to require applicants to the ATP to obtain clearance from the 2nd Respondent.

103. It was however averred that on 24th November, 2015, the 1st Respondent placed an advertisement in the local dailies inviting application for admission to the Advocates Training Programme and on 3rd December, 2015, the 1st Respondent placed an advertisement in the *Daily Nation* inviting applicants for pre-bar examination for admission to the Advocates Training Programme which advert was an indication to all eligible prospective applicants when the 1st Respondent was offering the Pre-bar examination as previously specified in its advert of 24th November, 2015. It was disclosed that in the advert, the 1st Respondent invited applications for Pre-bar examination from prospective applicants who held a Bachelor

of Laws Degree (LLB) from a recognised University and attained a minimum grade C- (minus) in English and a minimum of C- (minus) in the Kenya Certificate of Secondary Education examinations. However, the 1st Respondent did not receive any application to sit for Pre-bar examination from the Petitioner as stipulated in the advertisement dated 3rd December, 2015. It was its position that the advert did not require the applicants to get clearance from the 2nd Respondent in order to sit Pre-bar examinations.

104. The Petitioner further took issue with the various provisions of the law. She contended that:

> **1) Section 16 of the *Kenya School of Law Act*, 2012, stands repealed by sections 4(f) and 8(k) and (p) of the *Kenya National Qualification Act, 2014*.**
>
> **2) Section 46(1) of *the Legal education Act, 2012*, with an exemption of Paragraph (f) thereof stands repealed by sections 4, 8 and 29 of the *Kenya National Framework Authority Act*, 2014.**
>
> **3) Sections 8, 18, 19, 20 and 21 of the *Legal Education Act, 2012*, stand repealed by sections 5, 61, 70 and Part III of the *Universities Act, 2012*.**
>
> **4) Part IV of the *Legal Education Act, 2012*, stands repealed by Part III of the *Universities Act, 2012*.**

105. From the outset, it is clear that no serious attempt was made by the Petitioner to expound on why she was of the view that the said provisions were repealed considering the fact that the Petitioner was relying on the principle of implied repeal as opposed to an express repeal of legislation. The said principle, (*leges posterior respriores contrarias abrogant)* is to the effect new laws are given preference in case of an inconsistency with the older laws. In **Street Estates Limited vs. Minister of Health [1934] 1 KB**, it was held that:

> **"But it can also do it another way, namely, by enacting a provision clearly inconsistent with the previous Act; without going through them, four pages of MAXWELL ON THE INTERPRETATION OF STATUTES are devoted to cases in which without using the word "repeal" Parliament has repealed a previous provision by enacting a provision inconsistent with it. In those circumstances it seems to me impossible to say that these words...have no effect."**

106. I also rely on the holding in **High Court Petition No. 320 of 2011 - Elle Kenya Limited & Others –vs- The Attorney General and Others,** that:

> **"It seems to me, in the first instance, plain that the legislature is unable, according to our Constitution, to bind itself as to the form of subsequent legislation; it is impossible for Parliament to say that in a subsequent Act of Parliament dealing with this subject matter shall there never be an implied repeal. If Parliament chooses in a subsequent Act to make it plain that the earlier statute is being to some extent repealed, effect must be given to the intention just because it is the will of the Legislature."**

107. This principle was adopted by the Uganda Court of Appeal in **David Sejjaka Nalima vs. Rebecca Musoke Civil Appeal No. 12 of 1985** where it was held that:

> **"According to principles of construction if the provisions of a later Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier Act stands impliedly repealed by the latter Act. It is immaterial whether both Acts are Penal Acts or both refer to Civil Rights. The former must be taken to be repealed by implication. Another branch of the proposition is that if the provisions are not wholly inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the Act."**

108. This principle was properly adopted in my view in **Martin Wanderi & 19 Others vs. Engineers Registration Board of Kenya & 5 Others [2014] eKLR**, where the Court, while faced with the dispute pitying the Engineers Board and the Commission for University Education rendered itself as follows with regard to the powers of the Commission for University Education:

> **"…Suffice to say that the effect of the enactment of the Universities Act after the Engineers Act, with the same powers vested in the Commission for Universities Education to accredit courses for universities, takes away the powers vested in the Board by section 7(1)(l). This is because of the canons of interpretation with regard to the timing of legislation, and the doctrine of implied repeal, which is to the effect that where provisions of one Act of Parliament are inconsistent or repugnant to the provisions of an earlier Act, the later Act abrogates the inconsistency in the earlier one…."**

109. The same position was restated in **United States vs. Borden Co 308 US 188, (1939)** where the court rendered itself as follows:

> **"…There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy'…"**

110. In **Steve Thoburn vs. Sunderland City Council 2002 EWHC 195** the court stated that:

> **"[I]f they [the two statutes] are inconsistent to that extent [viz. so that they cannot stand together], then the earlier Act is impliedly repealed by the later in accordance with the maxim Leges posterior espriores contrarias abrogant'…Authority to the effect that the doctrine of implied repeal may operate in this limited fashion is to be found in Goodwin v Phillips [1908] 7 CLR 1, in the High Court of Australia, in which Griffith CJ stated at 7:"…if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act."**

111. A similar position was taken in **High Court Petition No. 320 of 2011 Elle Kenya Limited & Others vs. The Attorney General and Others,** where the court stated as follows at paragraph 39 of its decision:

> **"In the English case of Vauxhall Estates Ltd v Liverpool Corporation [1932] 1K.B., the court stated as follows at page 746; "If it is once admitted that Parliament, in spite of those words of the sub-section has power by a later Act expressly to repeal or expressly to amend the provisions of the sub-section and to introduce provisions inconsistent with them, I am unable to understand why Parliament should not have power impliedly to repeal or impliedly to amend these provisions by the mere enactment of provisions completely inconsistent with them..."**

112. To the Court in **Nzioka & 2 Others vs. Tiomin Kenya Ltd, Mombasa Civil Case No. 97 of 2001**:

> **"...The EMC Act being a more recent Act must be construed as repealing the old Act where there is inconsistency....where the provision of one statute are so inconsistent with the provisions of a similar but later one, which does not expressly repeal the earlier Act, the courts admit an implied repeal."**

113. However in **Re Kenya National Union of Teachers [1969] EA 637** it was held that:

> **"The Teachers Service Commission Act contains no specific provisions precluding the application to teachers of the provisions of the Trade Disputes Act. Nor is there any provision which by clear implication has such an effect. If the provisions of the later Act were manifestly inconsistent with the earlier, then on general principles of construction the Court**

would be obliged to treat the earlier as *pro tanto* repealed by the later. But the provisions of the two enactments can stand side by side without contradiction, as long as the dual functions of the commission established by the later enactment are kept distinct. Provided that this is done, there is no conflict between the provisions of the two Acts, nor is it necessary to hold that by taking cognisance of the present dispute the Industrial Court would in any way be usurping the functions imposed by Parliament on the Teachers Service Commission."

114. In other words, the court does not construe a later Act as repealing an earlier one unless it is impossible to make the two Acts or the two sections of the Acts stand together i.e. if the section of the latter Act can only be given a sensible meaning if it is treated as impliedly repealing the section of the earlier Act. See **Attorney General vs. Silver Springs Hotel Ltd and Others SCCA No. 1 of 1989** and **Re Berrey [1936] 1 Ch. 274.**

115. I have read section 16 of the second Schedule to the ***Kenya School of Law Act***, which was contended to have been impliedly repealed by section 4(f) and 8(k) and (p) of the ***KNQF Act***. It is clear that section 4(f) provides the object of the Act which is ***to facilitate mobility and progression within education, training and career paths***. Section 8(k) and (p) on the other hand provides as follows:

> ***The functions of the Authority shall be to-***
>
> > ***(k) provide for the recognition of attainment or competencies including skills, knowledge, attitudes and values;***
> >
> > ***(p) provide pathways that support the development and maintenance***

116. Clearly these provisions do not deal with the thresholds for joining a professional course which is the subject of section 16 of the second Schedule to the ***Kenya School of Law Act.***

117. With respect to the contention that sections 4, 8, and 29 of the ***Kenya National Qualifications Framework Act, 2014*** repealed section 46(1) of the ***Legal Education Act, 2012***, I have found elsewhere in this judgement that the KNQF Authority is just a facilitating agency, with the function of development of framework for national qualifications and cannot and does not regulate legal education in Kenya which is the function of the Council of Legal Education.

118. In this case, section 29 of the ***Kenya National Qualifications Framework Act, 2014*** provides that:

> ***The Cabinet may, in consultation with the Council, make regulations generally for the better carrying out of the purposes of this Act***

119. It follows that the power to make regulations is given to the Cabinet Secretary who is of course expected to consult the Council before doing so. Therefore the position taken by the Petitioner that the power to make regulation has now been given to the KNQF Authority is incorrect. It is trite that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

120. In this case section 4 of the ***KNQF Act, 2014*** states as follows:

> ***The object of this Act is to -***

(a) establish the Kenya National Qualifications Authority;

(b) establish standards for recognising qualifications obtained in Kenya and outside Kenya;

(c) develop a system of competence, life-long learning and attainment of national qualifications;

(d) align the qualifications obtained in Kenya with the global benchmarks in order to promote national and trans-national mobility of workers;

(e) strengthen the national quality assurance systems for national qualifications; and

(f) facilitate mobility and progression within education, training and career paths'.

121. As regards the functions, section 8(1) thereof provides as follows:

The functions of the Authority shall be to-

(a) co-ordinate and supervise the development of policies on national qualifications;

(b) develop a framework for the development of an accreditation system on qualifications;

(c) develop a system for assessment of national qualifications;

(d) develop and review interrelationships and linkages across national qualifications in consultation with stakeholders, relevant institutions and agencies;

(e) maintain a national database of national qualifications;

(f) publish manuals, codes and guidelines on national qualifications;

(g) advise and support any person, body or institution which is responsible for the award of national qualifications;

(h) publish an annual report on the status of national qualifications;

(i) set standards and benchmarks for qualifications and competencies including skills, knowledge, attitudes and values;

(j) define the levels of qualifications and competencies;

(k) provide for the recognition of attainment or competencies including skills, knowledge, attitudes and values;

(i) facilitate linkages, credit transfers and exemptions and a vertical and horizontal mobility at all levels to enable entry, re-entry and exit; and

(m) conduct research on equalization of qualifications;

(n) establish standards for harmonization and recognition of national and foreign qualifications;

(o) build confidence in the national qualifications system that contributes to the national economy;

(p) provide pathways that support the development and maintenance of flexible access to qualifications;

(q) promote the recognition of national qualifications internationally; and

(r) perform such other functions as may be provided under this Act.

122. It is clear that there is no express power conferred upon the KNQF Authority to make regulations. Therefore that power cannot be exercised by the Authority since where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation and the Courts must be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. They must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

123. I therefore find no merit in the contention that the Council and the CS without any legal foundation caused to be legislated and published ***The Legal Education Act (Accreditation and Quality Assurance) Regulation, 2016.*** I agree with the 1st and 2nd Respondents that the power to make regulations under the ***Legal Education Act, 2012*** belongs to both the Council and the CS**.** Therefore in enacting the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016*** through Legal Notice No. 15 of 2016, the Council, with the approval of the CS was, therefore, essentially carrying out its statutory mandate in order to give effect to the provisions of sections 8 and 46(1) of the ***Legal Education Act***.

124. As stated above, the ***Kenya National Qualifications Framework Act, 2014***, does not confer the **Kenya National Qualifications Framework Authority** (KNQF Authority) jurisdiction to actually undertake any regulation. I accordingly agree with the 1st and 2nd Respondents that since the KNQF Authority does not possess the expertise in legal matters, it is actually an equalization policy maker, to aid and ensure predictability in national qualifications in Kenya. The ***KNQF Act*** therefore does not diminish or take away jurisdiction from other government agencies from undertaking their statutory mandates of regulations and or examining applicants for purposes of national qualifications. This position is affirmed by section 30 of the ***KNQF Act***, which provides that:

> ***The Examining Bodies which were established under various Acts immediately prior to the coming into force of this Act shall continue to operate and shall seek accreditation under this Act from the Authority within a period of two years from the date of the commencement of the Act.***

125. I similarly agree that there is a distinction between “accreditation” and “licensing”. Therefore where legislation confers the power of accreditation on one body and licensing on another, one body cannot purport to carry out both functions. In this case, while sections 5, 61, 70 and Part III of the ***Universities Act, 2012*** provide for **accreditation** of Universities and University programmes, sections 8, 18, 19, 20 and 21 of the ***Legal Education Act, 2012*** provide for **licensing** of legal education providers in Kenya.

126. Sections 18, 19, 20 and 21 of the ***Legal Education Act*** provides that:

> ***18. (1) An institution that intends to offer any course or programme of legal education in Kenya for the award of a degree, diploma or certificate as a professional qualification in law shall apply to the Council for a licence.***
>
> ***(2) An application under subsection (1) shall be in the prescribed form and shall be accompanied by the prescribed fee.***
>
> ***(3) A person who offers any course or programme of legal education in Kenya for the award of a***

degree, diploma or certificate as a professional qualification in law without a licence commits an offence and shall be liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.

(4) The Council may by notice in the Gazette declare a course or programme, specified in the notice, being offered or provided by any person or institution to be a course or programme for which a licence is required under this section.

(5) A certificate of attendance at a course, workshop or seminar shall not be considered a degree, diploma or certificate for purposes of this Act.

(6) A document issued at the end of a programme or training after the commencement of the Act, purporting to be evidence of the award of a degree, diploma or certificate in law shall not be valid unless the Council had licensed the programme or training'.

19. (1) Where the Council, after considering an application under section 18, determines that the applicant is suitable and competent to offer legal education programmes or training, the Council may issue a licence to the applicant.

(2) The Council shall specify, in the licence, the courses or legal education programmes which the legal education provider may offer and any terms and conditions that the Council may consider necessary.

(3) The Council shall, upon licensing an institution as a legal education provider under this Act, publish the name of the institution in the Gazette and at least one daily newspaper with nationwide circulation.

20.(1) Every accredited legal education provider shall display its licence in a prominent place, at its registered office and at every branch office in which the business of a legal education provider is conducted.

(2)A legal education provider shall clearly state in all its letters, accounts, agreements and other documents and the fact that it is licensed as a legal education provider.

21 (1) Where the Council has reasonable grounds to believe that a legal education provider is not complying with the terms and conditions of the licence, the Council may, after giving the legal education provider an opportunity to be heard, by notice in writing require the legal education provider to take the corrective action specified in the notice within the period specified in the notice, to the satisfaction of the Council.

(2) If the legal education provider fails to comply with a notice issued under subsection (1) within the period specified in the notice, the Council may, after calling upon the legal education provider to show cause why the licence should not be cancelled, cancel the licence.

(3) The Council may, if it determines that a legal education provider is not carrying out its functions in a proper manner or is in breach of the terms and conditions of its licence—

(a) suspend the licence for such period as the Council considers necessary; or

(b) revoke the licence

127. From the foregoing I agree that there is the setting up of standards for accreditation, after which there is licensing. It is in this light that I associate myself with the Court of Appeal's position in **Nairobi Civil Appeal No 240 of 2013 - Engineers Board of Kenya vs. Jesse Waweru Wahome, Commission of Higher Education & Others** at paragraphs 47 and 48 that:

’47. These definitions can be applied at two levels: The first level is where an institution seeks authorization from the Government or any authorized body to be registered to offer a given training or a given service. This is important because the Government is, in general, the custodian of the standards that should be maintained by all professions. The government can, by itself or its designated bodies, grant such authorization to permit, by way of registration, institutions or firms to offer given academic trainings or given services. Examples include Commission of Higher Education, which under the Universities Act, authorizes private universities to offer degree courses and the Kenya Medical Practitioners & Dentists Board which, under the Medical Practitioners and Dentist Act authorizes hospitals or clinics to offer medial services.

48. The second level of accreditation is not governmental in the sense that it is not required for purposes of authorization or registration to offer an academic training or a given professional service. It is the quality assurance accreditation for the purposes of recognition, call it approval if you like, that a given institution or firm offers academic course or service that meets the required standards of a given profession. This is the level in which the Council of Legal Education, the Medical Practitioners and Dentist Board, the Accountants Board and the appellant Board, to mention a few fall. ….’

128. It is therefore my view that given the matters legislated by the ***Universities Act 2012*** and the ***Legal Education Act, 2012*** sections 5, 61, 70 and Part III of the ***Universities Act, 2012***, do not repeal sections 8, 18, 19, 20 and 21 of the ***Legal Education Act, 2012***. Similarly, Part III of the ***Universities Act, 2012*** does not repeal part IV of the ***Legal Education Act, 2012*****.**

129. Having found that the 2nd Respondent had no power to clear the Petitioner before being considered for admission to the ATP, the issue of the violation of the Petitioner’s right to a hearing does not arise. It is however my view that the 1st Respondent was under an obligation to consider he Petitioner’s application for admission to the ATP without directing her to be cleared by the 2nd Respondent first.

130 . The Petitioner has purported to bring this Petition on her behalf and on behalf all persons who hold education qualification as hers and those studying bachelor of laws or interested in studying the same in Kenya or elsewhere and ultimately studying for Advocates Training Programme **(ATP)** in Kenya at the Kenya School of law. I take it that the Petitioner has come under Article 258 of the Constitution which provides as follows:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

131. In this case the Petitioner has not averred that the non-disclosed persons she brings this Petition on their behalf cannot act in their names. Further it has not been shown to my satisfaction that there exist persons in the class of the Petitioner herein. To grant the orders sought herein for the benefit of persons whose particulars are undisclosed and who cannot be identified would be to open floodgates to busy-bodies to undeservedly make use of the order to their advantage and that would amount to abuse of the Court process.

132. In the premises the only person in whose favour the orders sought can inure is the Petitioner.

133. I have considered the issues raised herein and it is my finding that apart from two reliefs the other reliefs cannot be granted. There is no material placed before me for example on the basis of which I can assess the general damages claimed.

Order

134. In the premises I issue the following orders:

> **(1) A declaration that the Petitioner was entitled to be treated under the legal regime prevailing at the time she was admitted to the LLB Degree course.**
>
> **(2) A declaration that under the current legal regime the 2nd Respondent has no power to clear persons seeking to join the Kenya School of Law for Advocates Training Programme.**
>
> **(3) An order directing the 2nd Respondent to refund to the Petitioner Kshs 10,000/= paid by the Petitioner towards the said clearance.**
>
> **(4) An order directing the 1st Respondent to consider the Petitioner's application for admission to the said ATP programme in accordance with the law and the decision of this Court for the next admission following the application by the Petitioner.**
>
> **(5) In light of my sentiments as regard the manner in which the petition drawn and as the petitioner has not succeeded in all her prayers, there will be no order as to costs.**

135. Orders accordingly.

Dated at Nairobi this 30th day of October, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Oduor for the 2nd Respondent

CA Ooko