REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 254 OF 2017

In the matter of: Articles 2, 3, 19, 20, 21, 21, 22, 23, 48, 50, 73, 232, 165 and 259 of

Constitution of Kenya, 2010

and

In the matter of: Alleged contravention of Fundamental Rights and Freedoms under articles 10

27, 41, 43 (10 (f0 and 47 of the constitution of Kenya, 2010

and

In the matter of: Legal Education Act, 2012, Laws of Kenya

and

In the matter of: The Kenya School of Law Act, 2012, Laws of Kenya

and

In the matter of: The Council of Legal Education (Kenya School of Law) Regulations, 2009

and

In the matter of: A decision by the counsel of Legal Education to reject the petitioners application for registration to re-sit the July, 2017 bar examination as contained i its various letters dated 4.5.2017 to each of the petitioners

Between

Daniel Ingida Aluvaala…….1st Petitioner

Juliet Komagum Adong.....2nd Petitioner

versus

Council of Legal Education.....Respondent

and

Kenya School of Law.....Interested Party

JUDGMENT

Introduction

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

2. It is axiomatic that for the proper practice of the advocates' profession there are, essentially, two broad requirements, apart from integrity: they are specialized knowledge and particular skill. The knowledge that is required is knowledge of the substantive and procedural law; the skill involves the ability to apply that knowledge to good effect in practice.

3. A person desiring to practice law in Kenya must in addition to possessing the qualifications stipulated in the Advocates Act, successfully

complete the Advocates Training Programme offered at the Kenya School of Law and pass the examinations administered by the Council of Legal Education.

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

The petitioners' case

5. The petitioners were admitted for the Advocates Training program at the Kenya School of Law in the academic year 2012/2013. The petitioners sat for their first examinations between **12 - 22** November 2012. However, they did not pass all the papers at the first attempt. Since The first petitioner only passed seven papers and failed in two, while the second petitioner failed in one.

6. Their attempts to register to re-sit for the said papers has been rejected. Declining the petitioners request to re-sit the said examination papers, Prof. W. Kulundu-Bitonye, the Secretary/Chief Executive Officer, Council of Legal Education (the Respondent) in identical letters addressed to each of the petitioners, dated 4th May 2017, stated *inter alia* that *"council upholds the position that the clock of time for Advocates Training Programme start running on commencement of the programme at the Kenya School of Law. Unfortunately the Regulation makes no reference to extension of time."*

7. This petition challenges the Respondents decision refusing to grant them the opportunity to re-sit the said examinations and aver that the decision violates their constitutional rights under articles 47, 43 (1) (f), 27 of the constitution.

Respondents grounds of objection

8. The petition is opposed. The Respondent filed grounds of objection stating that:-

> *a. the Respondent in a letter dated 4th May 2017 implemented Regulation **9 (5)** of the Council of Legal Education (Kenya School of Law Regulations 2009, applying through section **29 (3) (a)** of the Kenya School of Law Act, 2012 as required under the Legal Education Act, 2012;*
>
> *b. that Regulation **9 (5)** is still law and the Respondent is enjoined to adhere to it, that the said Regulation is a necessary instrument to facilitate legal education and training in Kenya and that it passes the constitutional limitation under article 24;*
>
> *c. that the five year tenure of the petitioners at the Kenya School of Law runs from the date of registration and that a student is entitled to write a maximum of five bar examination in a maximum of five calendar year;*
>
> *d. that the petitioners are outside the five tenure limited by Regulation **9 (5)** of the Council of Legal Education (Kenya School of Law) Regulations 2009 which period expired in 2016.*
>
> *e. that the petitioners have not demonstrated violation of constitutional rights;*
>
> *f. that it is in public interest that the court ensures consistency in implementation of legal educatio policy in Kenya.*

9. The Kenya School of Law (the Interested Party) did not file a Response to the petition nor did it participate in these proceedings.

The advocates submissions

10. Counsel for the petitioners argued that the five years runs from the date of registering for the first exams not from date of registration at the school and that the impugned decision violateS the principles of natural justice; that it is *ultra vires*; that it is in bad faith; that it is unreasonable and contrary to legitimate expectation and urged the court to review the challenged decision[1] and grant the prayers sought.

11. Counsel referred to a communication dated 5th May 2016 entitled "General Notice No. 17 of 2016" in which Prof. W. Kulundu-Botonye, communicating on the effect of the above regulation stated *"the above implies that the five (5) year rule commences as at the November examination series of the year in which the candidate is required for the Bar Examinations."*

12. The Respondent's counsel submitted that the five years lapsed in November 2016 having commenced from the date of registration at the School not the date of the exam and that the Legal Education Act[2] enjoins the Council of Legal Education to maintain high standards of qualifications and that the petitioners have the option of registering afresh.

The principle of legality

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

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

where the court held as follows:-

> *"(t)he doctrine of legality which requires that power should have a source in law, is applicable whenever public power is exercised . . . . Public power . . . can be validly exercised only if it is clearly sourced in law"**[3]***

15. Courts are similarly constrained by the doctrine of legality, i.e. to exercise only those powers bestowed upon them by the law.[4] The concomitant obligation to uphold the rule of law and, with it, the doctrine of legality, is self-evident. In this regard, the Respondent is constrained by that doctrine to enforce the law by ensuring that its decisions conform to the relevant provisions of the law governing examinations offered at the Kenya School of Law.

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

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

18. Section **4** of the act establishes the Council of Legal Education whose functions are stipulated in section **8** of the act. Its functions include regulating legal education and training in Kenya offered by legal education providers; administering such professional examinations as may be prescribed under section 13 of the Advocates Act[6] and being responsible for setting and enforcing standards relating to the mode and quality of examinations.

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

Issues for determination

20. In light of the above provisions of the law the principle of legality discussed above which requires the Respondents actions to conform with the law, the issue that falls for determination is whether the refusal by the Respondent to register the petitioners to re-sit for the examinations is grounded on the law, and, whether this is a proper case for this court to intervene and grant the reliefs sought.

21. On the question of computation of time, it is my view that a plain and proper construction of the above regulation clearly shows that the student must complete the course within five years from the date of registering at the school. It is my conclusion that the five years must run from the time the student enrols at the school and not from the time the student sits for the first examination. This being the proper construction, the petitioners assertion that time began to run from the date they sat for the first examination is in my view incorrect nor can the letters addressed to them dated 5th May 2016 which they sought refuge override the clear provisions of the regulations.

22. It is not in dispute that Respondent is statutorily mandated to regulate legal education and training in Kenya and to make regulations in respect of requirements for the admissions of persons seeking to enrol in the legal education program. It is also true to state that Admission to the Kenya School of Law is regulated by the law, and the regulations in question have been made to support the law. The said Regulations continue to be in force by dint of section **20 (3)** of the Legal Education Act.[7] I have no difficulty concluding that the Respondent decision is grounded on the law.

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

24. In the Indian case of ***Maharashtra State Board -VS- Kurmarsheth & Others***,[8] it was stated as follows:-

> ***"So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations....."(Emphasis added)***

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

> ***".....to be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formatted by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and departments controlling them."***

26. In *University of Mysore and others v. Gopala Gowda and another**[9]*** the regulations framed by the Academic Council of the University prescribed that in the case of a candidate for the **B. V. Sc.** course failing four times in the first year examination the university can refuse to

grant permission to continue the course. When the regulation was under challenge, the High Court of Mysore held that the regulation was beyond the competence of Academic Council or the University and those bodies had no power to prevent the two students from prosecuting their studies and from appearing at the subsequent examination. In the Special Leave Petition moved by the university, the Supreme Court disagreed with the view taken by the High Court and held:-

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

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

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

29. In *Jawaharlal Nehru University vs. B. S. Narwala*[10] it was ruled that the court should not interfere where qualified academic authorities decide to remove a student from the university on the basis of assessment of his academic performance. In this case a student was removed from the rolls for continuous failing in examinations and for consistent unsatisfactory academic performance. The court held that in the absence of any allegation as to bias or *mala fides*, there would be no basis to interfere.

30. Also relevant is the decision in *R vs. Council of Legal Education**[11]*** where the court stated thus:-

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

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

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

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

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

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

36. It is appropriate to examine whether the regulations are "reasonably related" to a legitimate purpose. In determining reasonableness, relevant factors include **(a)** whether there is a "valid, rational connection" between the regulation and a legitimate and public interest to justify it, which connection cannot be so remote as to render the regulation arbitrary or irrational; **(b)** whether there are alternative means of exercising the asserted constitutional right that remain open to the affected person, which alternatives, if they exist, will require a measure of judicial deference on grounds of the correctness of the officials' expertise.

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

working of educational institutions and the departments controlling them.

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

39. It is equally important that the court should also as far as possible, avoid any decision or interpretation of a statutory provision, rule or byelaw which would bring about the result of rendering the system unworkable in practice or create a situation that will go against clear provisions of the law governing the subject in issue. In this case, the law and the Regulations in question are designed at maintaining and ensuring high professional standards and competence.

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

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

42. The grant of the orders or *certiorari*, *mandamus* and *prohibition* is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

43. Upon analysing all the material before me and upon considering the arguments advanced by both sides, I find that the applicant has not satisfied the threshold for this court to grant the orders of *mandamus, certiorari* and *prohibition* or the declaration sought in prayer **(a).**

44. It is also important to point out that the right under article **43** is not absolute. The Respondents acted in conformity with the cited provisions of the law. This satisfies the requirements set out under article **24** of the Constitution in that the limitation is provided under the law.

45. Article **47** of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.[12]Addressing the subject of legitimate expectation, ***H. W. R. Wade & C. F. Forsyth[13]*** at pages 449 to 450, thus:-

> *"It is not enough that an expectation should exist; it must in addition be legitimate….* ***First*** *of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation….. **Second**, clear statutory words, of course, override an expectation howsoever founded….. **Third,** the notification of a relevant change of policy destroys any expectation founded upon the earlier policy…."*
>
> *"An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."* (Emphasis added)

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

47. I am not unconscious or oblivious of obvious difficulties the petitioners find themselves in, but I cannot ignore the express provisions of the law cited above. The admission to the Kenya School of Law, the regulation, management, control or examinations offered by the school should best be left to the discretion of those who are entrusted with the responsibility. If this Court starts substituting its own opinion in place of opinion expressed by a body mandated and authorized by the law as discussed above, it shall not only be overstepping its mandate, but it will result in chaos. The court can only interfere if the Respondent acted outside their legal mandate or acted unreasonably.

48. It cannot be lost to this court that despite having a conscience, it is a court of law and not of mercy.[14] The court is also bound by the law and more so the statutory provisions and the constitution which binds all. The court is bound by the principle of legality, a key component of the Rule of Law. Consequently, this court finds that the statutory and applicable regulations governing admission to the Kenya School of Law and conduct of the examinations offered by the Respondent must apply with equal force so as to effectively serve the desired purpose.

49. This court takes judicial notice of the fact that it is in the public domain that for several years now there has been a worrying drop in the percentage of candidates passing the examinations at the Kenya School of Law. This is a truly worrying trend. Kenyans should not burry their heads in the sand and simply let it pass unnoticed. The magnitude of the problem is evidenced by the fact that this court has been flooded by a high rate of constitutional petitions filed by students challenging various decisions made by the Council of Legal Education and the Kenya School of Law. Many of these petitions are triggered by failure to pass the examinations while others touch of admissions to the Kenya School of Law.

50. It is my view that a study is urgently needed to determine what might be behind this worrying trend of low pass rates in the examinations. The study could in my view shed light on whether there is a need for improvements in the law school admission criteria, or education and graduation standards at the Universities, or whether it is the training at the Kenya School of Law that warrants improvement and what could be done to raise the bar exam pass rates.

51. In view of my above sentiments, and the public interest need to ensure and maintain high standards and competence in the legal profession, I direct the Deputy of Registrar of this court to forward a copy of this judgment to the Honorable Attorney General and the Council of the Law Society of Kenya with the hope that the issues raised herein will generate a genuine discussion on the subject with a view to ensuring that the concerns raised are addressed and resolved for the good of the law students and the general public.

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

Orders accordingly.

Dated at Nairobi this **24th** day of **October** 2017

John M. Mativo

Judge

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[1] Counsel cited section 7 of the Fair Administrative Action Act, Act No. 4 of 2015

[2] Act No. 27 of 2012

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

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

[5] Act No. 27 of 2012

[6] Cap 16, Laws of Kenya

[7] Supra

[8] **{1985} CLR 1083**

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

[10] (1980) 4 s.c.c. 480.

[11] {2007} eKLR

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

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

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