REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.415 OF 2015

IN THE MATTER OF ARTICLES 3, 10, 20, 22, 23, 27, 28, 35, 43, 47 & 159 OF THE CONSTITUTION OF KENYA

AND

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

BETWEEN

KOKEBE KEVIN ODHIAMBO……1ST PETITIONER

KINGATUA DAVID NJOROGE…….2ND PETITIONER

WANGECHI PATRICK MACHARIA…….3RD PETITIONER

AKOKO BERYL..…….4TH PETITIONER

KORI KENT MUSONERA…….5TH PETITIONER

OKETCH JEREMIAH…….6TH PETITIONER

OBIRI HILDA…….7TH PETITIONER

NJOGU JAMES……..……..8TH PETITIONER

WEKESA LINDA…..…….9TH PETITIONER

KWENDO CYNTHIA…….10TH PETITIONER

NAFULA ALICE JUMA…..……...11TH PETITIONER

KYARISIIMA HOPE..……..…12TH PETITIONER

NAMANYA JEREMY…..…….13TH PETITIONER

VERSUS

COUNCIL OF LEGAL EDUCATION…….....…….1ST RESPONDENT

THE KENYA SCHOOL OF LAW…..…….....……2ND RESPONDENT

THE SECRETARY, COUNCIL OF LEGAL EDUCATION……...……3RD RESPONDENT

ATTORNEY GENERAL……...……4TH RESPONDENT

MAKERERE UNIVERSITY..…….…….....INTERESTED PARTY

JUDGEMENT

Introduction

1. The Petitioners herein describe themselves as Bachelor of Laws Degree graduates from Makerere University, Uganda, the interested party herein (hereinafter referred to as "the University") prospective students of Kenya School of Law, the 2nd Respondent herein (hereinafter referred to as "the School").

2. The 1st Respondent is a body corporate established by the ***Council of Legal Education Act, 2012*** whose objectives include regulating legal education in Kenya (hereinafter referred to as "the Council").

3. The 2nd Respondent is a body corporate established under the ***Kenya School of Law Act***.

4. The 3rd Respondent is the Secretary/Chief Executive Officer of the Council.

5. The 4th Respondent is the Principal Legal Adviser to the Government of the Republic of Kenya who according to the Petitioners is mandated by law to represent the Respondents.

6. The interested party, Makerere University, is an institution of higher learning in Uganda.

7. According to the Petitioners, they successfully completed their undergraduate studies on 30th May, 2015 and are due to graduate in early 2016. Following an advertisement by the Council in September, 2015, the Petitioners applied for Advocates Training Program (hereinafter referred to as "the Program" or the "ATP") pre bar examinations and paid Kshs 10,000/- for the conversion and approval of foreign qualifications of their degrees form the said University.

8. However the petitioners received letters rejecting the credibility of their law degree qualifications and a recommendation that the petitioner attend remedial Programmes in three units at the Riara University, the three units being Commercial Law, Law of Succession and Legal Systems & Methods. According to the Petitioners, the 3rd Respondent informed them that students from the said University have in the past been a source of trouble for the respondents and that the 3rd Respondents would see to it that they would face difficulties in becoming advocates. The Petitioners were, nevertheless asked to provide the 1st respondent with the course outlines and reading lists for the said units for confirmation whether they conformed to the required standards. The Petitioners then contacted the University which facilitated the said requirements. However, the Respondents informed the Petitioners that their verbal appeals had been unsuccessful on the grounds that the Petitioners had not done commercial and Legal Systems to the satisfaction of the 1st respondent.

9. According to the Petitioners, the 1st and 3rd respondents had not evaluated the contents of the course lists as provided. To the Petitioners, the respondents' sole objective in rejecting the petitioners' qualifications was to unfairly and in a discriminatory manner punish the petitioners for having obtained

their degrees from outside the country. To the Petitioners, the Council did nit consider the fact that in the course lists provided, it was clear that the Law of Agency, Higher Purchase and Legal Systems were covered therein. The Petitioners contended that the only problem the 1st Respondent had with the Degrees awarded by the University was in respect of an alleged incompleteness of the Commercial Law Unit. However, having obtained a course list for the said Unit in Commercial Law as offered by Riara University, they were of the view that it was similar to what was offered at Makerere University.

10. According to the Petitioners the course lists provided by the University Law School show that their law degrees meet the minimum criteria for qualifications under the Legal Education Act hence the rejection of their consideration for admission to undertake Pre Bar examinations offered by the 1st Respondent is not only arbitrary but necessitated by malice and bad faith as the decision was arrived at without carrying out investigations into the courses offered by the University. To the Petitioners, based on comparison with academic course outlines of other local universities who have been allowed to undertake the Pre Bar examinations, the treatment of the Petitioners' degree qualification by the respondents is discriminatory, arbitrary and without justification. To the Petitioners that rejection is an insult to the petitioners' dignity as human beings, unfair and oppressive. As the petitioners and their parents have invested heavily in their education, it was contended that the said decision is against the Petitioners' legitimate expectation. It was further contended that the said decision contravened the rules of natural justice since neither the Petitioners nor the University were given an opportunity of being heard before the decision was arrived at. It was the Petitioners; case that the decision by the School meant that their careers and economically productive life would be unnecessarily delayed for years before the could achieve their childhood dreams of being advocates of the High Court, yet they have all the necessary requirements and qualifications of achieving their dreams if only the respondents followed the law and allowed them to sit Pre Bar examinations. The said action, it was further contended is a denial of the Petitioners' rights to education and profession and the right to make a livelihood.

11. According to the Petitioners, the act of arbitrarily branding the University law degrees as half baked was contrary to Article 47 of the Constitution as the 1st and 3rd respondents do not have any regulations or systems in place to accord students the right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action. The Petitioners also averred that they are entitled to information to determine the basis of deregistration and the persons who were involved in the exercise and if any consultation took place. It was therefore the Petitioners' case that their basic constitutional rights had been infringed and they were entitled to protection under Articles, 20(1),(2) & (3)(b), 22(1), 23(1) and (3) and their right to legitimate expectation and urged the Court to declare that the decision not to recognise the Law Degree from the University unconstitutional, null and void

12. It was submitted on behalf of the Petitioners that contrary to the positions adopted by the Respondents, the petitioners have raised specific complaints against the Respondents touching on discrimination in the exercise of the 1st Respondent's powers under the ***Council of Legal Education Act, 2012*** resulting from differential treatment given to the law students from local universities and graduates of universities from outside Kenya. This coupled with allegation of denial of the right to education and fair administrative action, in the Petitioners' view meet the criteria set out in the **Annarita Karimi Njeru vs. Attorney General [1979] KLR 154; [1976-80] 1 KLR 1272**.

13. It was added that the petition also seeks to enforce the rights of the petitioners enshrined under Article 43 (on Social and Economic Rights) of the petitioners in light of the complaint that the respondents are the only institutions allowed to offer bar studies in Kenya. It was further submitted that the blatant breach of the right to fair administrative action under Article 47 was also complained of in light of the trashing of the degrees without affording them reasonable explanation.

14.. Based on Articles 2(5) and 47 of the Constitution as read with international instruments such as ***International Covenant on Economic, Social and Cultural Rights***, Articles 13(2) and 26 of the Universal Declaration of Human Rights, it was submitted that the right to education extends to institutions of higher education hence the callous denial of the facilities to the petitioners is a blatant denial of their rights to education by accessing the 1st and 2nd respondent's institutions. In support of this submission the Petitioners relied on **Kibebo vs. Kibebo**

2nd and 4th Respondents' Case.

15. The 2nd and 4th Respondents filed the following grounds of opposition in response to the Petition:

> **1. That the petition is misconceived, frivolous and otherwise an abuse of the Court process.**
>
> **2. That the petitioners have failed to cite with precision the relevant provisions of the Constitution alleged to have been violated and the manner in which the 2nd and 4th Respondents have violated the same to warrant the intervention of this Honourable Court.**
>
> **3. That the Kenya School of Law has not received nor deliberated on any applications from the petitioners. Hence the School has not denied admission to any of the petitioners nor infringed on their rights.**
>
> **4. That the analysis of foreign degrees for purposes of recognition, and compliance to the *Legal Education Act, 2012* is solely the function of the Council of Legal Education and therefore the enjoinder of the 2nd Respondent is premature and ill-advised.**
>
> **5. That the petition does not disclose any constitutional violations or breaches by the 2nd and 4th Respondent.**

16. It was submitted on behalf of the 2nd and 4th Respondents that the petition is incompetent and fatally defective on grounds that the petitioner has failed to cite with precision the relevant provisions of the Constitution alleged to have been violated and the manner in which the 2nd and 4th Respondents have violated the same to warrant the intervention of this honourable court. In support of this submission the said Respondents relied on **Annarita Karimi Njeru vs. Attorney General [1979] KLR 154; [1976-80] 1 KLR 1272** where it was held that where a person is alleging a contravention or threat of contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat. To the said Respondents, the petitioner has not shown how the 2nd and 4th Respondents have violated his rights. Further reliance was placed on **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR**, where the Court of Appeal expressed itself as follows:

> **"The petition before the High Court referred to Articles 1,2,3,4,10,19,20and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organ ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars. We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the petitioner should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to."**

17. It was further submitted that in **Republic vs. Commissioner of Police exparte Nicholus Gitutu Karia** and **Rashid Odhiambo Aloggoh and 245 others versus Hacco Industries,** it was held that:

> "…**any applicant who alleges that his /her rights have been infringed must not only make allegations but also state clearly with supporting facts and instances where such rights have been infringed. Failure to do so makes the application fatally defective."**

18. According to the said Respondents, the 2nd respondent is not involved in receiving nor deliberating on

any applications from the petitioners since the analysis of foreign degrees for purposes of compliance with the ***Council Education Act, 2012 is*** solely the function of the Council of Legal Education. The said Respondent relied on section 16 of the ***Kenya School of Law Act***.

19. It was therefore submitted that by dint of the above provisions, it is the mandate of Council of Legal Education to regulate legal education standards in Kenya and provide requirements for admission of persons at the Kenya School of Law and the case of **Eunice Cecilia Mwikali Maema vs The Council of Legal Education & others (Civil Appeal No, 121 of 2013**, was cited in support of this position.

20. It was submitted that section 8 of the ***Council of Legal Education Act*** is clear that the functions of the Council include *inter alia*, to regulate legal education and training in Kenya offered by legal education providers and harmonization of legal education programmes and in support of this submission the Respondents cited the decision of **Muchelule, J** in **Muamar Nabeel Onyango Khan vs. Council of Legal Education & 2 others [2014] eKLR**.

21. It was therefore the Respondents' contention that the petitioners failed *in toto* to demonstrate the alleged violation of their Constitutional rights or the availability of the orders sought against the 2nd and 4th Respondents hence the petition lacks merit and they urged this Honourable Court to dismiss the same with costs.

22. The 2nd and 4th Respondents therefore prayed that the petition be dismissed with costs to them.

1st and 3rd Respondents' Case

23. In response to the petition the 1st and 3rd Respondents similarly filed grounds of opposition.

24. According to these Respondents, pursuant to section 8 of the ***Legal Education Act, 2013***, the Council as a professional body executing the mandate at law, that has an in built mechanisms for fairness, its substantive findings are insulated. While appreciating the jurisdiction of this Court as the Cathedral of justice to mete justice under Article 23 of the Constitution, it was contended that that jurisdiction, however, is exercised within certain defined and legal frameworks, for rights are defined and limited by law. In support of this position, the Respondents relied on **Republic vs. The Council of Legal Education ex parte James Njuguna and 14 Others, Misc Civil Case No. 137 of 2004 [2007] eKLR.**

25. **The said Respondents also relied on Muamar Nabeel Onyango Khan vs. Council of Legal Education & 2 others (supra) and Eunice Cecilia Mwikali Maema vs. Council of Legal Education and 2 Others (supra) and averred that this Court cannot concern itself with the policy behind the Act and the Regulations governing threshold criteria as long as they are within the scope of the parent Act, the *Legal Education Act*. Reliance was further placed on Council of Civil Unions vs. Minister for the Civil Service [1985] AC 374 HL**.

26. To the Respondents, the letters the subject of these proceedings are not out of proportion with the objectives of the Council under the ***Legal Education Act*** and that the purpose the Council is seeking to achieve is maintaining high standards of qualifications in the legal profession hence even from this standpoint the decision can neither be said to be unfair or unreasonable or out of proportion.

27. It was submitted that section 16 of the ***Kenya School of Law Act*** as read with section 23 of the ***Legal Education Act*** set out the criteria for admission to the School which criteria the Council has zealously enforced since its inception, and despite objections thereto, the position has been commonly and decisively settled.

28. It was submitted that the process of evaluation is a detailed and professional process adjudicating course content beyond the titles of courses stated in the outlines. According to the Respondents, the petitioners have simply relied on the titles without disclosing the contents and substance. To the Respondents, the decision was one of a professional body, solely mandated to make such determination

and exercise such discretion and the process of making the decision has not been called in to question in this case as opposed to its substance. It was further contended that the said decision was in the circumstances of the case not unreasonable. Being not an unreasonable decision it was of the courses.

29. According to the Respondents, the credibility of the law degrees from the interested party was not impeached in the letters the subject of these proceedings. The letters only advised for remedial actions be taken for purposes of admission to the School hence certiorari cannot issue to quash a non-existent decision. In was in any case submitted that if there was such impeachment the right of action would only accrue to the interested party as opposed to the petitioners.

30. It was submitted that to grant an order directing the petitioners to participate in the pre-bar exams without confirmation by the 1st Respondent that their degrees are complaint would amount to a violation of the law since pre bar is a requirement under he Second Schedule.

31. It was submitted that there was no evidence of discrimination as alleged by the petitioners since they were considered on the same legal blanket applicable to all applicants and reliance was placed on **Nyarangi & 3 Others vs. Attorney General [2008] KLR 688**, **John Kabui Mwai & 3 Others vs. Kenya National Examinations Council & 2 Others [2011] eKLR**. With respect to the right to dignity, it was submitted based on **Dawood and Anor. vs. Minister for Home Affairs and Others (CCT35/99) [2000] ZACC 8** and **Richard Dickson Ogendo & 2 Others vs. Attorney General & 5 Others [2014] eKLR** that the 1st and 3rd Respondents did not violate the Petitioners' right to dignity.

32. On the compliance with Article 47 of the Constitution as read with section 8 of the Fair Administrative Action Act, 2015, it was submitted based on **Republic vs. Kenya National Examination Council & Anor. exp Kipkurui Michele D. Jeruto & 34 Ors. [2015] eKLR** that whereas it is true that for a body entrusted with he powers to determine the rights of the subjects to be said to have been satisfied, it must have considered all the relevant factors, in this case all relevant factors were taken into account since the Petitioners were advised of the outcome of the assessment, were allowed to furnish proof of satisfaction of the threshold and were given the reasons for the decision. On furnishing more proof, the Law of Succession was removed from the list of the deficient courses.

33. On legitimate expectation, it was submitted based on **Republic vs. Kenya Revenue Authority & 3 Ors exp Five Forty Aviation Limited [2015] KLR eKLR** that purported authorisation, waiver, acquiescence and delay do not preclude a public body from re-asserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with legal right or inventory that it claims. It was submitted that there was no promise by the Council to any petitioner that they would be treated differently and even if there was any, it would be unenforceable for being contra statute. In support of this position, the said Respondents relied on **Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others [2014] eKLR**.

34. To the Respondents, in light of the several enactments guiding legal education in Kenya, and establishment of bodies such as the Council to ensure that the said legislation are conformed with, demanding compliance with the said provisions before joining the ATP cannot be said to be a hindrance to a right to education moreso when the Petitioners have not been barred from joining the ATP but have only been referred for remedial programme, as has been done for all other persons in their category after which they would have standing to join the programme.

35. It was further submitted that in light of the foregoing the claims for exemplary damages and costs cannot similarly be sustained. The said Respondents further contended that the Petitioners have not set out with some level of particularity the specific rights that have been alleged to be violated under Article 22 hence based on **Annarita Karimi Njeru vs. Attorney General** (supra), the petition fell short of the required threshold.

Determinations

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

37. The first issue is whether this petition meets the threshold set out in the ***Annarita Karimi Case*** (supra) and the relevance of that threshold under the current constitutional dispensation. In the said case **Trevelyan, J** held:

> **"If a person is seeking redress from the High Court in a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they have been infringed."**

38. What then are the principles guiding the application of the principle of *stare decisis*, assuming it applies in the instant circumstances? As was held by **Emukule, J** in **Koinange vs. Commission of Inquiry Into The Goldenberg Affair Nairobi HCMCA No. 372 of 2006 [2006] 2 KLR 529**.

> **"The doctrine of *stare decisis* is predicated upon the principle of precedent under which it is necessary for a court to follow earlier judicial decisions when the same facts arise again in litigation. The phrase *stare decisis* literally means, "stand by things decided". This doctrine is simply that when a point or principles of law has been once officially decided or settled by the Ruling of a competent court in a case in which it is directly and necessarily invoked, it will no longer be considered as open to examination or to a new ruling by the same tribunal or by those which are bound to follow its adjudications, unless it be for urgent reasons and exceptional cases."**

39. The said doctrine is so sacrosanct in our jurisprudence that even the highest court in the land will not lightly ignore the same and was recognised by **Sir Charles Newbold, P** in **Dodhia vs. National & Grindlays Bank Limited and Another [1970] EA 195** where he pronounced himself as follows:

> **"A system of law requires considerable degree of certainty and uniformity and such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision of its own. But there is a great difference between a final court of appeal and a subordinate court of appeal. If it is considered that a decision of a subordinate court of appeal was wrong it would always be open to have it tested and if necessary rectified in the final court of appeal. Thus, on the face of it, there is a need for greater flexibility in a final court of appeal than there is any other court in the judicial hierarchy. Further, the need for such flexibility is the greater and not the less in a developing country, as there is a greater likelihood of rapid changes in the customs, habits and needs of its people, which changes should be reflected in the decisions of the final court of appeal. It should, moreover, be borne in mind that too strict an adherence to the principle of *stare decisis* would, in fact, defeat the object of creating certainty, as a final court of appeal faced by a decision which was unsuited to the present needs of the community would seek to distinguish it. The result of distinguishing a decision when there was no real difference results in uncertainty, an uncertainty which would not exist if it were clearly stated that the old decision was nolonger the law…"**

40. Duffus, VP on his part held:

> **"The adherence to the principle of judicial precedent or *stare decisis* is of utmost importance in the administration of justice in the Courts in East Africa and thus to the conduct of the everyday affairs of its inhabitants, it provides a degree of certainty as to what is the law of the country and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court**

of Appeal and subject to these decisions also to the decisions of the High Court in the particular State."

41. Whereas the Constitution seems to deal only with the binding force of the decisions of the Supreme Court, it is my view that good order and proper administration of justice dictates that lower courts adhere to the decisions of courts of superior hierarchy where legally acceptable circumstances exist. As was appreciated by **Musinga, J** as he then was in **Rift Valley Sports Club vs. Patrick James Ocholla Nakuru HCCA NO. 172 of 2002 [2005] eKLR**:

"A judicial decision must be based on proper legal grounds but never on feelings alone, no matter how strong such feelings may be. The doctrine of stare *decisis* is very important in our judicial system and must be respected as much as possible otherwise judicial decisions would be chaotic and unpredictable."

42. A similar position was taken by the Supreme Court in **Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others Petition No. 4 of 2012 [2013] eKLR** when it held that:

"Adherence to precedent should be the rule and not the exception....the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."

43. The circumstances in which a Court may decline to follow a decision which would otherwise be binding on it are (a) where there are conflicting previous decisions of the court; or (b), the previous decision is inconsistent with a decision of another court binding on the court; or (c) the previous decision was given *per incuriam.* As a general rule though not exhaustive the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong. See **Lalitmohan Mansukhlal Bhatt vs. Prataprai Luxmichand and Another Civil Appeal No. 70 of 1963 [1964] EA 414.**

44. The binding nature of a decision of a superior Court however does not necessarily connote concurrence. This was appreciated by a five judge bench of the Court of Appeal in **Mwai Kibaki vs. Daniel Toroitich Arap Moi Civil Appeal Nos. 172 & 173 of 1999 [2008] 2 KLR (EP) 351; [2000] 1 EA 115** where it was held that:

"The High Court, while it has the right and indeed the duty to *critically examine* the decisions of the Court of Appeal, must in the end follow those decisions unless they can be distinguished from the case under review on some other principle such as that *obiter dictum* if applicable. It is necessary for each lower tier to accept loyally the decisions of the higher tiers. Even in the same tier, where it has taken the freedom to review its own decisions, it will do so cautiously. Precedent is regarded as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as an orderly development of legal rules…" [Underlining mine].

45. A similar view was expressed by the Court of Appeal in **National Bank of Kenya Ltd vs. Wilson Ndolo Ayah Civil Appeal No. 119 of 2002 [2009] KLR 762** where it was held:

"It is good discipline in courts for the proper smooth and efficient administration of justice that the doctrine of precedent be adhered to. If for any reason a Judge of the High Court does not agree with any particular decision of the Court of Appeal, it has been the practice that one expresses his views but at the end of the day follows the decision which is binding on that court. The High Court has no discretion in the matter."

46. It follows that even in circumstances where a court is bound by a decision a superior Court there is nothing to stop it from expressing its opinion thereon. Nevertheless as was held by **Ringera, J** (as he then was) in **Deposit Protection Fund Board vs. Sunbeam Supermarket Limited & 2 Others Nairobi (Milimani) HCCC No.3099 of 1996 [2004] 1 KLR 37** under the doctrine of *stare decisis* the High Court is bound by the decision of the Court of Appeal regardless of whether the decision is agreeable.

47. Where however the legal or constitutional terrain has shifted, a shift that materially affects past decisions, to insist on adherence to past inconsistent decisions under the guise of the doctrine of precedent is in my view unacceptable. This position was appreciated by this Court in Nairobi High Court Miscellaneous Application No. 596 of 2008 - **Kenya Union of Savings and Credit Cooperatives (KUSCCO) Limited vs. Nairobi City Council (Now Nairobi City County)** where it was held:

> **"…all the pre-Constitution of Kenya, 2010 decisions must now, pursuant to section 7(1) of the Transitional and Consequential Provisions of the Constitution, be looked at in the light of the current constitutional dispensation. This does not mean that all such decisions ought to be ignored but must be interpreted and construed in a manner that gives effect to the Constitution..."**

48. It is therefore my view that the case of **Annarita Karimi** though still relevant ought to be read with the provisions of the current Constitution in mind. Under provisions of Article 22(3)(b) and (d) of the Constitution, the Chief Justice is enjoined to make rules providing for the court proceedings which satisfy the criteria that formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary, entertain proceedings on the basis of informal documentation and that the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. Whereas it is prudent that the applicant ought to set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed, to dismiss an application merely because these requirements are not adhered to would in my view defeat the spirit of Article 22(3)(b) under which proceedings may even be commenced on the basis of informal documentation. In my view, where it is apparent to the Court that the Bill of Rights has been or is threatened with contravention, to avoid to enforce the Bill of Rights on the ground that the supplicant for the orders has not set out with reasonable degree of precision that of which he complains has been infringed, and the manner in which they are alleged to be infringed where the Court can glean from the pleadings the substance of what is complained, of would amount to this Court shirking from its constitutional duty of granting relief to deserving persons and to sacrifice the constitutional principles and the dictates of the rule of law at the altar of procedural issues. Where there is a conflict between procedural dictates and constitutional principles especially with respect to the provisions relating to the Bill of Rights it is my view and I so hold that the latter ought to prevail over the former. However, parties ought not to simply throw at the Court the provisions of the Constitution without expounding on the facts on which they are based and expect the Court to look for the facts itself. It is upon the parties to bring themselves within the ambit of the relevant constitutional provisions by relating the facts of their case to the said provisions and explain how in their view those provisions are relevant to their case. Whereas the Court ought to encourage sloppy and carelessly drafted applications:

> **"the initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice."**
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> **See Deepak Chamanlal Kamani & Another vs. Kenya Anti-Corruption Commission & 2 Others Civil Appeal (Application) No. 152 of 2009.**

49. In my view, where the Respondents are able to discern the constitutional provisions alleged to have

been infringed it would amount to a heresy to disallow an otherwise merited petition simply on the basis that the provision under which the petition is based are not disclosed. A respondent in such circumstances ought to apply for particulars instead. Under Article 20(3)(b) of the Constitution, this Court is enjoined, in applying the provisions of the Bill of Rights to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. This Constitutional edict cannot be achieved when Courts, particularly the High Court which is mandated to apply and interpret the Constitution, readily accede to submissions that the precision required in constitutional petitions have not been met. As was held by **Madan, JA** (as he then was) in **Chase International Investment Corporation and Another vs. Laxman Keshra and Others [1978] KLR 143; [1976-80] 1 KLR 891**, when the ghosts of the past stand in the path of justice clanking their medieval chains the proper course of the judge is to pass through them undeterred.

50. In this petition, the Respondents have adequately dealt with the issues raised and there is no allegation that they were disabled from adequately dealing with the issues raised by the failure by the petitioners to be precise on the provisions of the Constitution they were relying on. Accordingly, I would not disallow the petition on the basis of lack of precision.

51. In this petition, the letters which communicated the decisions which aggrieved the Petitioners are dated 14th September, 2015 and 22nd September, 2015. 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.***

52. The Second Schedule outlines the admission requirements as follows:

> ***A person shall be admitted to the School if-***
>
> ***a) Having passed the relevant examination of any recognized university in Kenya holds, or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) of that university; or***
>
> ***b) Having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) in the grant of that university, university college or other institution-***
>
> ***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; or***
>
> ***c) Has sat and passed the Pre-Bar examination set by the school.***

53. It is therefore clear that one of the requirements for admission to the School is that the applicant must have passed the relevant examinations of a University, University College or other institutions which examinations are prescribed by the Council of Legal Education. Prescription, in my view not only entails the course content but must necessarily entail the substances of the courses as well. The right body to determine whether the substance of a particular course purported to have been offered and undertaken is the Council.

54. It is trite 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. This was the position adopted by **Muchelule, J** in **Muamar Nabeel Onyango Khan vs. Council of Legal Education & 2 others [2014] eKLR** in which he expressed himself as follows:

> **"Back to the crucial, and only question: did the petitioner qualify to be admitted to the Kenya School of Law? Once again, it is emphasized that the decision to admit or not to admit**

belonged to the respondents. Once they showed that they were acting within the law, doing so fairly and that they were subjecting the petitioner to the same standards they were subjecting other candidates, the court cannot interfere. The respondents must be left with the power to insist on the highest possible professional standards for those who wish to qualify as advocates (Republic Vs The Council of Legal Education Ex-parte James Njuguna & Others, Misc. Civil Application No. 137 of 2004 at Nairobi).

55. However, I must caution that this position does not mean that the School and the Council are the sole judge when it comes to the exercise of discretion on who to admit and who not to admit. To hold thus would be to throw the rule of law out of the window. The Court is under a constitutional obligation to ensure that the safeguards provided under Article 47 of the Constitution are not destroyed by being whittled away in purported exercise of discretion. Accordingly the Courts are empowered to and are under a duty to investigate allegations of abuse of power and improper exercise of discretion. I therefore associate myself with the holding in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**, that:

"When litigants come to the courts it is the core business of the courts and the courts' role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance."

56. The circumstances under which the Court would be entitled to interfere with discretion even where it appears to be unfettered are now well known. The Court can interfere (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

57. It must however be appreciated that the Council in conjunction with the School are the institutions specially tasked with providing professional training to and examining those who intend to be advocates. To unduly curtail their powers in carrying out that onerous mandate would amount to usurping their mandates and substituting the Court's discretion for that of the School. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. As was appreciated by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

58. **I agree with the position adopted in Council of Civil Unions vs. Minister for the Civil Service [1985] AC 374 HL** that:

"It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show. Many features will come into

play including the nature of the decision and the relationship of those involved on either side before the decision was taken."

59. 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. In this regard the decision in **Muamar Nabeel Onyango Khan vs. Council of Legal Education & 2 others (supra) comes in handy. In the said case 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 2013 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."

60. **This was the position in Eunice Cecilia Mwikali Maema vs. Council of Legal Education and 2 Others (supra)** where 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."

61. The role of an advocate in society in so far as the clients are concerned is that of trust as between the advocate and the client as opposed to that of a businessman and a customer. Apart from that an advocate is an officer of the Court and certain standards are expected of him or her when carrying out his or her duties as such advocate. The client entrusts him or her with execution of the client's lawful instructions in accordance with certain standards and also expects him or her to be a safe repository of the client's confidential information as well as the client's funds. The need for proper training both theoretically and practically cannot therefore be overemphasised.

62. The decision of what constitutes proper guidelines necessary for the proper breeding of advocates ought to be left for the wise counsel of the Council and the School with the Court only intervening to ensure that there is fairness in whatever process is put in place for evaluating the applicants to join the ATP. This Court, therefore, ought not to decide for the School and the Council which guidelines are appropriate for it to administer on its prospective students even if the Court was of the view that such guidelines are not suitable or necessary as long as they are geared towards the attainment of the intended statutory objectives. As was held in **Republic vs. The Council of Legal Education ex parte James Njuguna and 14 Others, Misc Civil Case No. 137 of 2004 [2007] eKLR:**

"It would not be improper 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 as enumerated in the ten situations above."

63. In other words it is not the Court's view on the suitability of the guidelines that should determine whether or not the Court should interfere with the guidelines. Where it is not shown that the decision was unreasonable, I associate myself with the decision of the Court of Appeal in **Eunice Cecilia Mwikali Maema vs. Council of Legal Education and 2 Others Civil Appeal No. 121 of 2013** that:

> **"the Council has the power to set standards to ensure that the highest professional standards are maintained in the profession and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the Regulations."**

64. I also wish to associate myself with the decision in **Susan Mungai vs. The Council of Legal Education & 2 Others Constitutional Petition No. 152 of 2011 in which Mumbi Ngugi, J expressed herself as follows while citing with approval 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):**

> **"The Council of Legal Education followed to the letter the purpose and objects of the Act including the applicable regulations and this Court has no reason to intervene in a way that interferes with the merit of the decisions clearly falling within the relevant regulations and which have been applied by the Council of Legal Education without any procedural irregularity or for an improper purpose. I decline to do so. The Council of Legal Education has the power and duty to insist on the highest professional standard for those who wish to qualify as advocates. The Regulations are aimed at achieving this. The decision was made on merit and this Court has no reason to intervene. The Regulations and the policy behind the rules were properly made pursuant to the Act and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the regulations...The Council of Legal Education is the best judge of merit pertaining to academic standards and not the courts. Parliament clearly vests the power of formulating policy of training and examining of advocates on the Council of Legal Education and it would be wrong in the view of this court to intervene with the merits of the decision by the Council of Legal Education...a Court of law would only be entitled to inquire into the merits of a decision in circumstances where the decision maker abused its discretion, exercised its decision for an improper purpose, acted in breach of its duty to act fairly, failed to exercise its statutory duty reasonably, acts in a manner which frustrates the purposes of the Act which gives it power to act, exercises its discretion arbitrarily or unreasonably, or where its decision is irrational or unreasonable as defined in the case of *Associated Provincial Picture Houses Ltd. –v- Wednesbury Corporation [1947] 1 KB 223*. In the case before me, there is no evidence to suggest that the 1st respondent, in dealing with the application for admission by the petitioner, acted in any of the ways set out above that would justify interference by this Court with its decision."**

65. The learned Judge continued:

> **"I find and hold 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 as enumerated in the ten situations above. In judicial review, the courts quash decision made by public bodies so that these same bodies remake the decisions in accordance with the law. It is not proper for the court to substitute its decision which is what this court is being asked to do by issuing a mandamus to compel a re-sit. I reiterate my earlier findings on this point in the case of *R v JUDICIAL SERVICE COMMISSION ex-parte PARENO Misc Civil Application No.1025 of 2003* (now reported) that it is not the function of the courts to substitute their decisions in place of those made by the targeted or challenged bodies."**

66. This was a reflection of the position taken in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarstheth [1985] LRC** in which it was held:

> **"so long as the body entrusted with the task of framing the rules or regulations acts within**

the scope of the authority conferred on it in the sense that the rules and 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 of the efficaciousness of such rules and regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair."

67. In this case, the petitioners were duly informed the reason why they could not be allowed to undertake the pre bar examinations. They were advised to undertake remedial programme before their applications could be considered. They duly contested the first decision and their contest was considered and partly allowed. It cannot therefore be said that the petitioners were never given a hearing before the decision was made. In these proceedings the Court is not concerned with the merits or otherwise of the decision to direct them to undertake remedial programme. It is the mandate of the School and the Council to ensure that both local and foreign students attain the same standards in their university training and where the same are not attained to advice on the remedial action to be taken. In this case, it is my view that the decision by the School and the Council to require the petitioners to undertake remedial programme cannot be termed unreasonable. It must be remembered that it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.

68. To accede to the Petitioners' contention that the decision requiring them to undertake remedial action to enable them meet the standards required of their fellow students before being admitted to the Programme would amount to treating the petitioners differently from their fellow students and it is that action that would amount to discrimination. As to whether the substance of the courses undertaken by them are the same as those of their colleagues is not a matter for determination in these proceedings unless it is shown that the alleged differences are irrational. Based on the material placed before me I cannot determine the substance of the course contents undertaken by the Petitioners vis-à-vis the other students in order for me to arrive at the decision that the Respondents' decision is irrational.

69. The petitioners alleged that their legitimate expectations had been breached. I however agree with the decision in **Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others [2014] eKLR** that:

"...legitimate expectation, however strong it may be, cannot prevail against express provisions of the Constitution. If a person or a statutory body promises a certain relief or benefit to a claimant or undertakes to do something in favour of a claimant but in a way that offends the Constitution, the claimant cannot purport to rely on the doctrine of legitimate expectation to pursue the claim or the promise."

70. In other words for legitimate expectation to be successfully invoked, the expectation must itself be legitimate in the sense that it must itself be lawful. Where a statutory body is exercising statutory powers, its actions cannot be termed as contrary to legitimate expectation as long as they are acting in accordance

with the statute and the statute has not been impugned. I therefore disagree with the petitioners that their legitimate expectations were violated by the Respondents.

71. The petitioners also alleged the violation of their right to dignity. As rightly submitted by the Respondents, this alleged violation was not sufficiently expounded on in order to be the basis for reversing the Respondents' decision. As was rightly held in **Dawood and Anor. vs. Minister for Home Affairs and Others (CCT35/99) [2000] ZACC 8** and **Richard Dickson Ogendo & 2 Others vs. Attorney General & 5 Others [2014] eKLR** whereas the enforcement of the law that meets constitutional muster may lead to inconvenience, that alone is not a violation of a person's right to human dignity hence by exercising their duty by applying the same requirements under the ***Legal Education Act***, the Respondents did not violate the Petitioners' right to dignity.

72. With respect to the breach of the right to education, this Court in **Republic vs. Commission for Higher Education Ex-Parte Peter Soita Shitanda [2013]eKLR** expressed itself as hereunder:

> **"Article 43(1)(f) of the Constitution provides that every person has the right to education. The right to education would make no sense if a person's academic qualification is not recognised by the State on unreasonable grounds. Where therefore the authorities concerned hold the view that a particular person's educational qualification is not recognised, the authority is under a Constitutional duty to furnish the person with written reasons for non-recognition. Once those reasons are furnished, it is not for the Court in the exercise of its judicial review jurisdiction to investigate the merits of the decision."**

73. In this case, as correctly submitted by the Respondents, the Law Degrees from Makerere University, the interested party herein, were not impeached or declared to be substandard. The Petitioners were only required to take some remedial steps before they could be allowed to undertake the pre bar examinations. Such steps were necessary in order to put the petitioners at par with the local students in order to avoid differential treatment which would amount to unjustifiable discrimination. Dealing with the issue of setting different standards for candidates taking the same course or training the Court of Appeal in **Eunice Cecilia Mwikali Maema v Council of Legal Education & 2 others** (supra) expressed itself as follows:

> **"All applications for admission to the School must be considered against the same standards set by the Council. In *Butime Tom V Muhumuza David and Another Election Petition Appeal No. 11 of 2011* to which we were referred by counsel for the appellant, it was held that when regulating a profession the same standards should apply to all persons seeking to enter into the profession..."**

74. It is therefore my view that the decision by the Respondents cannot be successfully impeached. To do so would amount to unduly interfering with the discretion statutorily given to the School and the Council to set standards to ensure that the highest professional standards are maintained in the profession and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the Regulations. The School and the Counsel must be left with the power to insist on the highest possible professional standards for those who wish to qualify as advocates and to determine who qualifies for the purposes of admission to the School as long as they operate within the bounds of legal reasonableness and fairness.

75. I have perused the letters written by the School and whereas the same were copied to Riara University, the Petitioners were not specifically referred to undertake their remedial programmes at the said University. There is therefore no basis upon which I can find that the Petitioners could only undertake the same at the said University in order for me to impeach the said decision.

Order

76. Accordingly I find no merit in this petition which I hereby dismiss but in order to promote reconciliation between the Petitioners and the Respondents, there will be no order as to costs.

Dated at Nairobi this 6th day of January, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Njenga for Mr Kinuthia for the Petitioners

Cc Kazungu