REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 20 OF 2014

STANLEY NYACHOTI GITEYA……..…… PETITIONER

VERSUS

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

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

JUDGMENT

Introduction

1. By a petition dated 23rd June, 2014 and filed on 23rd June, 2014, the Petitioner herein, STANLEY NYACHOTI GITEYA, seeks the following orders:-

1) "That a declaration be issued declaring that the findings, action recommendation and acts leading to the decision made on 1st October 2012 transmitted to Busoga University on a letter dated 11th October 2012, as articulated therein, of the 1st Respondent as an agents of Republic of Kenya is in contravention with and inconsistent with your petitioner's right to access Advocates Training Programme offered by the 2nd Respondent, the right to equal treatment, benefit and protection before the law, and the right to a procedurally fair and a lawful administrative action or decision under the Constitution. Nonetheless such contravention amounts to limiting your petitioner rights in unconstitutional manner and unreasonably not justifiable in a democratic society, based on human dignity and equality. Thus inconsistent with Articles, 2 (4), (5) & (6), 10(1) (b) & (c), 10(2) (a) & (b), 19 (3) & (c), 20(1) & (2), 21(1), 27 (1) & (2), 27 (4), 43(1) (f), 47(1) and 24 (1) of the Constitution and invalid.

2) That a declaration be issued declaring that the decision of the 1st Respondent as an agent of Republic of Kenya contained in the letter dated 11th October 2012 is in breach of Kenya's obligation under general rules of international law enshrined under Article 2 (5) of the Constitution and thus invalid (i.e. principle of sovereign equality and rule/principle of non-intervention to another state domestic affairs).

3) That a declaration be issued declaring that the 1st respondent acts or omissions as an agent of Republic of Kenya contained in the letter dated 11th October 2012 is in breach of Republic of Kenya treaties or conventions obligation enshrined under Article 2 (5) & (6) of the

Constitution as read together with Articles 6 (a) (d) & (f), 102 (2) (e) (g) (h) (j) & (k), 104 (3) (g) and 126 (1) & (2) (a) & (b) of the Treaty establishing East Africa Community, Article 1 (2), Article 2 (1), Article 2 (4) of the Charter of the United Nations, Article 1 ICCPR, Article 7, Article 26 of the Universal Declaration of Human Rights and Articles 2, 3, 17 (1) of the African Charter on Human and Peoples' Rights thus invalid.

4) That a declaration be issued declaring that Regulation 19 of the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations of 2009, is in contravention with Republic of Kenya treaties or conventions and general rules of international law obligation enshrined under article 2 (5) & (6) of the Constitution as read together with articles, 5 (1) (2) & (3), 6 (a) & (d), 102 (2) (e) (f) (g) (h) (j) & (k), 104 (3) (g) and 126 (1) & (2) (a) & (b) of the Treaty establishing east African Community, Articles 5 (1) (3) (a) & 11 (1) (a) of the Protocol on the establishment of the east African Community Common Market, Article 26 of the Universal Declaration of Human Rights, Articles 2, 3, 17(1) of the African Charter on Human And People's Rights, and general rules of international law obligation under Principle 10 of the Basic Principles on The Role of Lawyers welcomed by the General Assembly in Resolution 45/121 of 14 and thus invalid.

5) A declaration be issued declaring that the continued action of barring your Petitioner admission despite his qualification and the knowledge of Busoga University bachelor of laws degree programme accreditation by Law Council of Uganda and National Council of Higher Education of Uganda by the Respondents amount to violations of the obligation of Republic of Kenya by the Respondents as its agents under Articles 2 (5) & (6) of the Constitution as read together with Articles, 5 (1) & (3) (b), Articles 6 (a) (d) & (f), 102(2) (e) (f) (g)(h) (j) & (k), 104 (3) (g) and 126 (1) & (2) (a) & (b) of Treaty establishing East African Community, and Articles 5 (1) (3) (a) & 11 (1) (a) of the Protocol on the establishment of the East African Community Common Market thus unconstitutional and invalid.

6) That an order of Judicial Review of certiorari be issued removing to this Honourable Court for purposes of being quashed and set aside the findings, action, recommendation and the decision therein of the 1st respondent contained in the letter transmitted to Busoga University dated 11th October 2012 (headed, "notice of no admission of Busoga University Law Graduates to Kenya jurisdiction"), recommending against your petitioner admission to the Kenya School of Law and other Busoga University Bachelor of Laws graduates.

7) That an order of Judicial Review of Mandamus do issue to oblige the 1st Respondent to recommend your petitioner to the Director of the 2nd Respondent to admit your petitioner at the beginning of the next academic year 2015/2016 as a student for training and to pursue Advocate Training Programme offered by them.

8) That an Order of Judicial Review of Mandamus do issue to oblige the Director of the 2nd Respondent to admit your petitioner with effect from the beginning of the next academic year 2015/2016 as a student for training and to pursue Advocate Training Programme offered by them and compelling them to issue him with relevant enrolment/admission letter for preparation to the same.

9) That orders of award of redress in terms of normal damages, and general damages be granted as the court shall assess to the declaration of violations of fundamental rights by the unconstitutional action and infringement by the Respondents including loss of time caused for your petitioner to establish himself as Professional Advocate in Kenya and the elements of distress and inconvenience suffered as consequences flowing from the breach.

10) An order of award of accruing interest on the principal sum awarded above (9) according to the court rates from the date admission was declined upon reliance on the recommendation of the impugned decision to your petitioner and the same awards be paid within the next

thirty (30) days from the date of delivering judgment to this petition.

11) An order of award of costs of the petition and interest thereto to your petitioner against the Respondents jointly and severally."

Background

2. The Petitioner herein, a law graduate from Busoga University, applied to be admitted to the Kenya School of Law (Managed by the 2nd Respondent) to undertake a Diploma Course in order to gain admission to the Roll of Advocates and subsequently practice law in Kenya. The Petitioner was however informed that the 1st Respondent had, vide a letter dated 11th October, 2012, made a decision to stop admitting students from Busoga University where the Petitioner had graduated from and this prompted the Petitioner together in other affected law students from the same Busoga University to file an initial suit in Nairobi being **Nairobi High Court Judicial Review Application No. 395 of 2012, Republic vs Council of Legal Education & others ex-parte Stanley Nyachoti & others (Hereinafter, "the Nairobi case")**. The Nairobi suit was however dismissed and the Petitioner thereafter filed this instant petition.

Petitioner's case

3. The Petitioner's case is that, as a Kenyan citizen he is entitled to the enjoyment of fundamental rights enshrined in the Bill of Rights as guaranteed by **Articles 19 (1) (2) and (3) and 20 (1) and (2)** of the Constitution.

4. He states that his right to education, especially access to education without unlawful distinction, exclusion or restriction, right to equal treatment, benefit and protection by the law, right to fair and lawful administrative action, under the Constitution have been infringed, violated and, denied by the 1st respondent's decision to reject his application for admission to the advocates training programme offered by the 2nd respondent.

5. The petitioner therefore contends that his rights to education have been limited in an unconstitutional and unreasonable manner which is not justifiable in a democratic society, based on human dignity and equality.

6. The Petitioner argues that having successfully attained a Bachelor of Laws Degree (LLB) from Busoga University which was then accredited by the Law Council of Uganda to offer Law Degree programs as envisaged in a memorandum of understanding between the 1st Respondent and the Law Council of Uganda, he was entitled to be admitted to the Advocate Training Programme in fulfillment of the mandatory requirement for advocates training under **Section 13 (1)** of the **Advocates Act Cap 16 Laws of Kenya** without which he will not be admitted to the Roll of Advocates in Kenya.

7. The Petitioner contends that the decision by the 1st respondent contained in the letter dated 11th October, 2012 not admit graduates from Busoga University contravenes the harmonious reading of **Articles 2 (5) (6), 19 (3) (b) and (c), 20 (1) (2), 43 (1) and (f), 10 (1) (b) and (2) (a) and (b), 27 (1) and (2), 47(1) and 24 (1) of the Constitution** and results in acts which are inconsistent with Kenya's obligations under treaties and general rules of international laws that uphold sovereign equality, mutual trust, non intervention and fostering of cooperation.

8. The Petitioner argues that the enforcement of **Regulation 19 of the Council Legal Education (Accreditation) Regulations, 2009** against Busoga University was unlawful as it infringed the petitioner's right to access advocate training programme, right to equal treatment, benefit and protection of the law guaranteed by the constitution.

9. According to the Petitioner, the treaty establishing East African Community the Protocol on the Establishment of the East African Community Common Market and Vienna Convention on the **Law of Treaties 1969** envisage the existence of an agreed harmonized common syllabus for training of lawyers

and obligate the regulators of Legal Education in East Africa to mutually recognize academic and professional qualifications granted by Partner States.

10. It is the petitioner's argument that subjecting Busoga University to an assessment of the suitability of its education facilities in order to ensure compliance of the accreditation regulation amounted to the contravention of **Article 2 (5) and (6) of the Constitution**.

11. The petitioner contends that the 1st respondent's decision not to admit graduates from Busoga University to the 2nd respondent's institution violated his legitimate expectation to be admitted for advocate training despite his qualifications form a university in a Partner State in blatant disregard of Kenya's treaty or conventions and general rules of international law.

12. The petitioner adds that reliance on the letter dated 11th October 2012 not to admit him to advocate training programme amounted to discriminative or preferential treatment of the petitioner before the law contrary to **Article 27 and 43 of the Constitution**.

Respondent's case

13. In opposition to the petition, the respondents filed Grounds of Opposition dated 7th August, 2014 in which they listed the following grounds:

a. The Petition is *res Judicata*: the issues sought to be litigated in the Petition were subject of litigation and judgment in Nairobi High Court Judicial Review Application No. 395 of 2012 Republic vs. Council of Legal Education & Others ex parte Stanley Nyachoti Gitey & Others;

b. The Petition is a collateral challenge to the decision of the High Court Nairobi High Court Judicial Review Application No. 395 of 2012 Republic vs. Council of Legal Education & Others exparte Stanley Nyachoti Giteya & Others:

c. The Petition does not seek vindication of fundamental rights, but alleges contravention of Treaty obligations;

d. The petition does not, *acceptably*, indicate provisions of the Bill of Rights allegedly contravened and correlate them with a demonstration of facts on how violation was done. *Without Prejudice*, the allegations of violations are completely without any merit whatsoever, considering:

i) Provisions of the Advocate Act (Chapter 16 of the Laws of Kenya:

ii) Provisions of the legal Education Act, 2012;

iii) The reason by Parliament to regulate legal education and training in Kenya;

e. An Order of Mandamus does not issue to compel an authority to breach the law;

f. Legitimate expectation cannot be enforced in contravention of law;

g. The Petitioner's right to access education, is enforceable subject to legislated restrictions, it is not an absolute right;

h. The Respondents shall further plead the averments in the Replying Affidavit of Prof. W. Kulundu Bitonye sworn at Nairobi on 5th December 2012 filed in Nairobi High Court Judicial Review Application No. 395 of 2012 Republic vs. Council of Legal Education & Others Ex parte Stanley Nyachoti Giteya & Others and produced herein as annexture STN7 to the Petitioner's Supporting Affidavit;

i. The petition as drawn and field is an abuse of court process.

14. In the said replying affidavit of Professor W. Kulundu Bitonye sworn on 5th December, 2012 he outlined the general purpose of the 1st respondent and its supervisory and regulatory control over professional legal education and training in Kenya. According to Professor Bitonye, admission to legal advocates training programme require applicants to obtain Bachelor of Laws Degree from a recognized university among other requirements.

15. The respondents deponent avers that to ensure quality control, Council of Legal Education (Accreditation of Legal Institutions) regulation of 2009 (hereinafter "the Regulations") and manual for Accreditation (hereinafter "the manual") was passed under the council for Legal Education Act (hereinafter "the Act") which laid down the irreducible standards that every university seeking recognition for purposes of admission of its graduate students to the Kenya School of Law had to satisfy. The regulations and manual prescribe the requirements for accreditation of legal education institutions by the council to ensure that the said institutions comply with the training standards laid down by the 1st respondent in the discharge of its regulatory and supervisory mandate under the Act.

16. The respondents case is that Regulation 12 requires accredited institution to maintain the prescribed standards failure of which the accreditation can be revoked while Regulation 19 mandates the 1st respondent to consider, recognize or reject recognition of any foreign university notwithstanding the general recognition of the Commission of Higher Education (hereinafter, "the commission").

17. Regulation 22 (a) of the Regulations allows the 1st respondent to visit, and inspect institutions offering legal education that are accredited to ensure their compliance with the basic requirements and that the standards of qualification between legal councils in Kenya, Uganda and Tanzania have been crafted to as much as possible conform to ensure similarity.

18. The 1st respondent's case is that during meetings held between 13th and 26th March 2012 between a team of staff from Kenya School of Law, the Chairman, committee of Legal education in Uganda and the Secretary of the Law Council of Uganda on the education institutions accredited to offer Bachelor of Laws degree in Uganda, it was discovered that Busoga University was not a Legal Education Institution accredited by the Law Council of Legal Education in Uganda whereupon the 1st respondent wrote to Busoga University's vice chancellor cautioning him that with effect from 23rd May 2011, the 1st respondent would cease admitting graduates from Busoga University unless and until the said University received accreditation status from the Uganda law council to which the said chancellor replied that the university was in the process of securing accreditation from Uganda Law Council. A further enquiry from the said Uganda Law Council revealed that the Law Council Committee on Legal Education and Training conducted an inspection of the Busoga faculty of Law on 30th April 2010 and found considerable improvement in faculties but pointed out some shortcomings in the faculty staffing that constrained it from approving the law programme to be accredited by the National Council for Higher Education but that under the principles of equity the accreditation of the Law Program was done as the university had rectified the shortcomings and implemented the recommendations on the required standards.

19. On 28th September 2012, a team of Professionals from the 1st respondents visited Busoga University to assess their facilities and submitted a report to the 1st respondent's Quality Assurance Accreditation and Compliance Committee for consideration which committee at its meeting of 1st October 2012 declined to recognize Busoga University thereby prompting the 1st respondent to write the impugned letter dated 11th October, 2012 notifying the Vice Chancellor of Busoga University that the 1st respondent had declined to recognize the Law faculty of the said University citing reasons categorized as poor staffing, physical facilities, library resources and financial support to the faculty.

20. The respondents' position is that the actual physical assessment of the facilities at Busoga University undertaken on 28th September 2012 confirmed that the said university was incapable of meeting the quality control standards which the 1st respondent is charged with ensuring in accordance with its

mandate.

21. The respondents reiterate that no preferential/discriminate treatment had been accorded to any student in particular as all the students seeking admission to the 2nd respondent's school had to comply with the regulations and standards prescribed by the Council of Legal education Accreditation of Legal Educations of 2009, Third Schedule.

22. According to the respondents, legitimate expectation cannot override the law and as such, they cannot be compelled to compromise on quality control standards which the 1st respondent is mandated to protect and uphold.

23. When the petition came up for hearing on 9th July 2015, parties agreed to have it heard by way of written submissions.

Petitioner's submissions

24. The petitioner who appeared in person, gave a detailed background of his case, reiterated the contents of this affidavit in support of the petition and submitted that Busoga University is an accredited university recognized by Uganda Government as offering law degree programmes in accordance with the standards of training of lawyers envisaged by the treaty established by the East African Countries.

25. He contends that the rejection of his application for admission to the 2nd respondent's institution on the basis of the 1st respondent's decision contained in the letter dated 11th October, 2012 infringed on his right to access education and training as enshrined in the Constitution.

26. He further submits that his right to equal treatment and fair administrative action under **Articles 27 and 47** respectively of the Constitution had been infringed.

27. The petitioner argues that the respondent's decision not to admit graduates from Busoga university also contravened Kenya's obligation of mutual cooperation in legal education training of lawyers under **Article 2 (5) (c) of the Constitution** and the Treaty on the establishment of the East African Community.

28. The petitioner outlined the issues for determination as follows:

a) Whether the petition is re judicata and hence an abuse of the court process.

b) Whether the 1st respondent's decision not to admit law graduates of Busoga University to the 2nd respondent's institution amounted to a contravention of Kenya's obligations as a state under Article 2 of the Constitution, and therefore a breach of the obligation to sovereign equality, mutual trust and non-intervention owed to the Republic of Uganda as a state.

c) Whether failure by the 1st respondent to accredit Busoga University and the law degree programme amounted to an infringement of the petitioners rights and contravened the obligation of good governance and rule of law.

d) Whether Section 13 (1) (b) of the Advocates Act Cap 16 Laws of Kenya which legislates restrictions to the right to access professional education of Advocate Training Programme and Regulation 19 of the Council of Legal Education (Accreditation of Legal Institutions) Regulations contravene Kenya's obligations under general rules of International Law and Treaties or conventions.

e) Whether the 1st respondent's actions violates the petitioners right to fair administrative justice, right to equal protection of the law and was not justifiable.

f) Whether this court can exercise its discretion to award the appropriate reliefs sought.

29. On res judicata, the petitioner submitted that the issues that arose in the Nairobi case were not litigated and finally decided upon by a competent court because the case was filed outside the limitation period as envisaged under **Section 9 of the Law Reform Act Cap 26 Laws of Kenya**, and therefore the suit was found to be in competent and was struck out. According to the petitioner, all the other findings that the court made in the Nairobi case were statements Obiter dictum as they were statements made on issues that did not strictly call for a decision.

30. The petitioner also submitted that the doctrine of res judicata was not applicable in this case because the initial Nairobi case was struck out by the court and for that reason there was no former suit or suit within the meaning of **Section 2 and 7 of the Civil Procedure Act**.

31. The petitioner further submitted that the issues sought to be litigated upon in the instant petition are not the same as the issues that arose in the Nairobi case and therefore the doctrine of res judicata was not applicable.

32. It was the petitioner's case that under **Articles 20, 10 and 259** of the Constitution, the doctrine of res judicata was not applicable because the articles mandate the court to apply and interpret the Constitution in the manner that favours the enforcement of the fundamental rights, promote the purpose of the Constitution, its values, principles, advance human rights, the spirit and objects of the Bill of Rights, and respect, protect and fulfill all rights in the Bill of Rights.

33. The petitioner contended that Article 10 of the Constitution bestows on the court, as a state organ, a binding obligation to apply the law on res judicata in such a manner that it does not hinder, restrict or torpedo the application of the national values and principles of governance of human rights. On this point, the petitioner relied on the finding of Justice Lenaola in the case of **Okiya Omtatah Okoiti & Another Vs Attorney General and 6 Others [2014] eKLR** in which it was held as follows:

> **"Whereas these principles have generally been applied liberally in civil suits, the same cannot be said of their application in constitutional matters. I say so because, in my view, the principle of res-judicata can and should only be invoked in constitutional matters in the clearest of cases and where a party is re-litigating the same matter before the Constitutional Court and where the court is called upon to re-determine an issue between the same parties and on the same subject matter. While therefore the principle is a principle of law of wide application, therefore it must be sparingly invoked in rights- based litigation and the reason is obvious."**

34. On whether or not the 1st respondent's decision not to accredit Busoga University amounted to breach of International Laws and treaties ratified by Kenya, the petitioner submitted, while quoting several authorities on the principle governing International relations, that accreditation of universities in Uganda was the preserve of the appropriate national institutions in charge of regulating education within the Republic of Uganda whose mandate include the harmonization of training standards in Uganda as agreed by partner States of the East Africa Community and therefore the action by the 1st respondent to visit Busoga University with a view to assessing its actual physical facilities contravened the principle of sovereign equality, mutual trust and non-intervention to the sovereignty of the Republic of Uganda as a state in the conduct of its domestic affairs.

35. The petitioner argued that the mandate to accredit universities within the Republic of Uganda and ensure compliance with the mutually agreed similar standards of training of Lawyers within the East African Community is bestowed in the appropriate national institutions within Uganda's territory, in this case the Law Council of Uganda and the National Council for Higher Education of Uganda. According to the petitioner, the 1st respondents' decision not to accredit Busoga University amounted to the contravention of the right to self-determination of the Republic of Uganda as a state in conduct of its domestic affairs of regulating universities within its own territory and implementation of its treaty obligation including the compliance of obligation contained in the treaty for the establishment of the East African Community.

36. The petitioner submitted that the 1st respondent's refusal to accredit Busoga University so that its law graduates could access professional advocates training within Kenyan Jurisdiction contravened the principle of respect of the rule of law because there is no provision in the Treaty for the Establishment of the East African Community giving the 1st respondent the power to illegally purport to have powers to accredit universities and law degree programmes within the Republic of Uganda.

37. On whether the legislated restriction to the right to access professional Advocate Training Programme offered by the 2nd respondent under the Advocates Act, (the Kenya School of Law) Regulations of 2009 and Council of Legal Education (Accreditation of Legal Institutions) Regulations 2009 contravened Kenya's obligations under general rules of international law and treaties d and infringes on the rights envisaged by them and the Bill of rights under the Constitution, the Petitioner submitted that the effect of the implementation of the legislations to wit; **Section 13 (1) (b) of the Advocates Act, paragraph 1 (b)** of 2nd schedule of the **Kenya School of Law Act, paragraph 5 (b) of the 1st schedule of the Council of Legal education (Kenya School of Law) Regulations 2009** infringed on the rights guaranteed by the Constitution and therefore the said Sections of the statutes ought to be declared invalid and unconstitutional.

38. The petitioner submitted that it was entitled to compensation in damages to the tune of Kshs. 30,000,000/= together with costs and interest since his constitutional rights had been violated and that such an award would take into account the distress, injured feelings, humiliation, anxiety and uncertainty that he has endured before and during court proceedings among others.

Respondents submissions

39. Through their advocates, Ms Ochieng, Onyango, Kibet & Ohaga Advocates, the respondents isolated the issues requiring this court's determination as follows:

1. **Whether the Petition at hand is *res judicata*;**

2. **Whether the Petitioner's right to education is enforceable subject to legislated restrictions;**

3. **Whether the respondents have breached the Petitioners legitimate expectation;**

4. **Whether the petition is an abuse of court process.**

40. The respondent submitted that the principle of res judicata applies to all litigation including Constitutional Petitions as was held in the case of **Richard Kariuki vs Leonard Kariuki & Another Nairobi Misc. Civ App. No. 7 of 2006 (unreported)** when the court stated thus:-

> **"Fundamental principles of law and Public Policy like res judicata are valid and applicable in constitutional matters."**

41. The respondents cited **Section 7 of the Civil Procedure Act (cap 21 of laws of Kenya)** on the definition of the res judicata principle together with several authorities espousing the same principle which I will highlight in this judgment as follows:-

In **Republic vs. Hogan [1974]** it was held that:

> **"Issue estoppels can be said to exist when there is a judicial establishment proposition of law or fact between parties to earlier litigation and when the same question arises in later litigation between the same parties. In the later litigation the established proposition is treated as conclusive between those same parties."**

42. While juxtaposing the instant petition with earlier related case being **Republic vs Council of Legal Education & others exparte Keniz Agira & 23 others [2013] eKLR**, the respondents submitted that in

the earlier case, the Petitioner was one of the ex-parte applicants in an application that was premised on the grounds that:

> **a) The decision made by the respondent not to admit applicants to Kenya School of Law was made without jurisdiction and therefore ex-facie illegal.**
>
> **b) The issues regarding the accreditation of Busoga University raised by the Council of Legal education after the applicants completed their training at Busoga University should not be applied retrospectively to stop the admission of the applicant to Kenya School of Law.**
>
> **c) The decision by the Council of Legal education to suspend the accreditation of Busoga University can only affect students joining the Institution after the suspension of the accreditation and not before.**
>
> **d) The Council of Legal Education has at all material times during the training of the applicants admitted graduates from Busoga University to the Kenya School of Law.**
>
> **e)The requirement of procedural fairness demands that if such a decision is made by those in the position of the respondent, then persons such as the applicants should be given a hearing at which to make representations as to why the said decision should be waived in their cases. The respondent did not afford the applicant's any opportunity to address them on the obvious but grave personal consequences which would arise from the decision.**

43. The respondents argued that following the aforesaid ruling of Odunga J in the Nairobi Case, there was no illegality in the actions of the 1st respondent in refusing to accredit Busoga University as it was its legal mandate to do so. It was the respondents case that the petitioner used the same facts as those in the already determined case of **Republic V. Council of Legal Education & others ex parte Keniz Otieno & 23 others (supra)** and this showed that the petitioner was trying by all means to circumvent the earlier decision of the court in order to institute a similar suit through instant petition.

44. The respondents relied on the decision in the case of **Lilian Njeri Muranja & John Muranja Mahinda Vs Virginia Nyambura Ndiba & Kajiado County Government [2014] eKLR**, in which it was stated as follows:

> **"The test to determine whether a matter is res judicata was well laid in the case of DSV Silo vs The Owners of Sennar [1985] 2 All ER 104 and repeated in the Kenyan case of Bernard Mugo Ndegwa vs James Nderitu Githae and 2 others [2010] eKLR. The applicant, alleging res judicata, must show that (a) The matter in issue is identical in both suits, (b) that the parties in the suit are substantially the same, (c) there is a concurrence of jurisdiction of the court (d) That the subject matter is the same and finally, (e) that there is a final determination as far as the previous decision is concerned. Juxtaposing the above principles with the facts of this case, it is apparent that the antagonistic parties are the same, the subject matter as well as the claim is the same and the jurisdiction of the courts which handled and is handling the matter is concurrent. It is the same Plaintiffs who filed the previous suit who have filed the instant suit as well as the application".**

45. It was therefore the respondents' submission that the subject matter in issue in this petition is identical to the one in the earlier case as both suits relate to the legality of the 1st respondents decision to discontinue admitting students from Busoga University, the parties in the suit are substantially the same as the petitioner was one of the ex-parte applicant in the previous suit while the 1st respondent was the respondent in the previous suit, there is concurrence of the court's jurisdiction and there was a final decision as far as the previous decision is concerned.

46. The respondents also cited the case of **ET Vs Attorney General and Another [2012] eKLR** in which it was stated that court must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court.

47. On whether or not the petitioner's right to education had been infringed and whether or not the 1st respondents actions and regulations contravened the general rules of international law and treaties ratified by Kenya as well as the bill of rights enshrined in the Constitution, the respondents submitted that it is the same constitution that allows the state under **Article 21 (2**) to take legislative, policy and other measures, including the setting of standards to achieve the progressive realization of the rights guaranteed under **Article 43 of the Constitution**. The respondents therefore submitted that the state, through parliament, was justified to enact **Council Legal Education Act** and the **Legal Education Act 2012** in order to define the right to Legal education in Kenya and subject it to proper regulation.

48. The respondents further submitted that the petitioner's own documents showed that the 1st respondent's role/decision not to admit Busoga University law graduates was well within its mandate after carrying out various audits that revealed that the said university had failed to adhere to the rules put in place to govern legal education.

49. On the Petitioner's claim that the respondents' regulations were discriminatory, the respondents submitted while relying on the case of **John Kabui Mwai & 3 Others Vs Kenya National Examination Council and 2 Others [2011] eKLR** in which it was held inter alia, that discrimination which is forbidden by the Constitution is the unfair or prejudicial treatment of a person or group of persons based on certain characteristics. In this regard the respondents noted that it had admitted all the other students into the Kenya School of Law who had met and complied with regulatory requirements envisaged under the Legal Education Act and the 1st respondent's regulations. The respondents added that the petitioner had failed to show that the Legal Education Act contravened the provisions of the Constitution as it is the Act that the 1st respondent relied on in declaring that Busoga University had not complied with the regulations.

50. On the Petitioner's allegation of breach of his legitimate expectation, the respondents, while relying on the case of **Republic Vs Council of Legal Education & Others exparte Keniz Otieno Agira & 23 others (supra),** submitted that legitimate expectation cannot operate against the law as the term legitimate cannot be based on actions which are patently illegal.

51. The respondents further submitted that having shown that the petition is res judicata as well as not disclosing which constitutional provisions that had allegedly been breached, it amounted to an abuse of the court process and they thus sought its dismissal with costs.

Determination

52. After considering the pleadings filed herein, the submissions made by the parties, the law and the authorities cited, I am of the view that the first issue for determination is whether or not the petition is res judicata.

53. On res judicata, the petitioner's contention was that the related case before the Nairobi Court being **Republic vs Council of Legal Education & Others exparte Keniz Otieno Agira & 23 others (Supra)** was struck out for want of jurisdiction because the application was filed outside the time frame of 6 months period and that the issues that arose in the said Nairobi case were not litigated and finally decided upon by the court. The petitioner argued that the issues in the instant case are not the same as the issues that arose in the Nairobi. The Petitioner also argued that the principle of res judicata is not applicable in constitutional matters because Articles 20, 259 of the Constitution mandates the court to apply and interpret the Constitution in a manner that favours the enforcement of fundamental rights. The respondents' case, on the other hand, was the res judicata principle was applicable in this case since the Nairobi Case was based on issues that are identical to the issues in the instant petition, the parties in both suits are substantially the same, the subject matter is the same, the court's jurisdiction is concurrent and a final decision was made in the previous case.

54. S**ection 7 of the Civil Procedure Act (Cap 21 of the Laws of Kenya)** established the principle of res judicata thus:

"No court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

55. In the case of **Kamunye & Others Vs Pioneer General Assurance Society Ltd [1971] E.A 263 at 265**, the court of Appeal had the following to say on the res judicata principle:

"the test whether or not a suit is barred by Res Judicata seems to me to be – is the plaintiff in the second suit trying to bring before the court in another way and in the form of a new cause of action a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If so, the plea of Res Judicata applies not only to points upon which the first court was actually required to adjudicate, but every point which properly belonged to the subject of litigation and which might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit for Res Judicata to apply."

56. The case of **Henderson Vs Henderson (1843) 67 ER 313** summarized res judicata principle as follows:

"…. where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which parties exercising reasonable diligence, might have brought forward at the time."

57. Can the instant case be said to be res judicata? The answer to this question calls on this court to peruse the decision in the Nairobi case that is alleged to have settled the issues in question including the entire pleadings of the previous case and compare the same with the instant petition in order to determine what issues were actually determined in the previous case, and if they are the same issues covered in the subsequent case, whether the parties are the same or litigating under the same title and if the previous case was determined by a court of competent jurisdiction.

58. The test of determining whether a matter is res judicata was also stated in the case of **Benard Mugo Ndegwa vs James Nderitu Githae & 2 others [2010] eKLR** as follows:

1) That the matter in issue is identical in both suits.

2) The parties in the suit are the same.

3) Sameness of the title/claim.

4) Concurrence of jurisdiction and

5) Finality of the previous decision.

59. Upon comparing the previous suit with the instant petition I note there is similarity of the matter in issue in both suits in the sense that both cases relate to the decision contained in the letter dated 11th October, 2012 by the 1st respondent to advise the 2nd respondent not to admit law graduates from Busoga University.

60. Indeed, at the heart of both suits is the 1st respondent's decision to reject applications by graduates of Busoga University for admission to the Advocate Training Programme offered by the 2nd respondent. The only difference in the two suits is that the previous one was brought by way of Judicial Review while the subsequent case takes the shape of a Constitutional Petition.

61.I also note that the Petitioner in the instant Petitioner was one of the exparte applicants (2nd exparte applicant) in the Nairobi case while the 1st respondent was also a respondent in the previous suit. The claim herein is identical to the claim in the previous suit. The Nairobi court in which the previous suit was filed has concurrent jurisdiction with this court and the trial court at Nairobi pronounced itself with finality on the main issue raised, which was, whether or not the respondents were justified to deny the petitioner admission to The Advocates Training Programme. On this issue, Odunga J pronounced himself in the Nairobi case as follows:

> **"…there is nothing in the council of Legal Education (Kenya School of Law) which bars the council from reviewing its earlier decision to admit or deny admission to students from a particular university. In other words, there is nothing that bars the council from reviewing, varying or rescinding its earlier decision. Therefore the mere fact that students from Busoga University may in the past have been admitted to the school would not estop the Respondent from rescinding its decision if it was satisfied that subsequent events made the admission of students from the said University untenable as long as its decision was not irrational, illegal or procedurally improper. I have already stated that the Respondent took the necessary steps to inform the University of the steps it intended to take. The University has not alleged that the Respondent breached the due process in arriving at its decision. At the time the said decision was taken in May 2012, the applicants had not graduated from the said University. In the circumstances of this case, I agree with the Respondent that it was the duty of the University to take the necessary steps to inform the applicants of the developments."**

62. It is therefore noteworthy that apart from the decision by the Judge in the Nairobi case to strike out the said suit for its incompetence for being time barred, the said court also went further to determine other attendant issues raised in the previous suit such as the role of the 1st respondent in admission of students to the Kenya School of Law, which role, as already noted above, the court found to have been properly executed.

63. A keen perusal of the Nairobi case reveals that all the pertinent issues raised therein were substantially and indeed directly the same issues raised in the instant petition and that the judge in the previous suit did not merely strike out the suit without deliberating upon all the other issues raised but exhaustively considered the merits of the case after which final orders were made as follows:.

> **"In the result, even if these proceedings had been instituted within the time limited under Section 9 of the Law Reform Act, I would have found no merits in the Notice of Motion dated 31st October 2012 and would have dismissed the same. It follows that the application is in competent and is struck out with no order as to costs taking into account my finding with respect to the powers of the respondent to deny recognition to foreign universities."**

64. Under the above circumstances, this court holds that the doctrine of Res Judicata is applicable in this case as requiring this court to reopen the issues already determined by the previous court is akin to asking this court to sit on appeal on a decision of a court of concurrent jurisdiction.

65. The court in the previous suit went to great lengths to outline the role functions and jurisdiction of the 1st respondent as established under the council for Legal Education Act and held that the 1st respondent was at liberty to deny students from Busoga University admission to the School of Law while citing the decision in **Susan Mungai Vs The Council of Legal Education and 2 others** in which it was held:

> **"The Council of Legal Education followed to the letter the purpose and objects of the Act including the applicable regulations and the 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 the 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 Vs 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."

66. The instant petition can be said to be the exact replica of the Nairobi case save for the fact that the petitioner has added a new twist to it by introducing the issue of infringement of his right to education and the contravention of international treaties ratified by Kenya as well as the bill of rights enshrined in the constitution. These new additions are exactly what the courts have held time and again that the courts need to be vigilant and guard against because litigants can use them to evade the doctrine of res judicata **(See ET Vs Attorney General & Another (supra)**.

67. In any event, in line with the holding of the Court of Appeal in **Kamunye & Others Vs Pioneer General Assurance Society Ltd (supra)**, the issues of breach of right to education and international treaties between partner states are issues which the petitioner ought to have presented before the first court (read Nairobi case) had he exercised reasonable diligence as they are points which properly belonged to the same subject of litigation.

68. Clearly therefore, the rule of res Judicata frowns upon litigants who file fresh suits only to introduce new matters which they ought to have presented to court but had not canvassed in the previous suits.

69. The petitioners argument that constitutional matter do not fall under the ambit of the res judicata rule does not hold any water in view of the courts holding in the case of **Richard Kariuki Vs Leonard Kariuki** & **Another (supra)** in which it was held that the res judicata principle is applicable in constitutional matters.

70. In view of my above findings on the issue of Res Judicata, I agree with respondents' submissions that this petition is res judicata and ought to be struck out in its entirety. My above finding on res judicata would have been sufficient to dispose of this entire petition, however, I am still minded to consider the other issues raised by the petitioner being the question of whether or not his constitutional right to education had been violated in contravention of the general rules of International law and treaties ratified by Kenya as well as the Bill of Rights enshrined in the Constitution.

71. The other issue closely linked with the petitioner's alleged right to education is the issue of breach of his legitimate expectation.

72. The petitioner's case was that the respondents had breached his right to education by failing to honour/recognize his law degree from a partner state thereby denying him a chance to be admitted to the Kenya School of Law. In the same vein, the petitioner submitted that by refusing to admit him to the Law

School on account of failure by Busoga University to meet the criteria and requirements of the legal education provider, the respondent breached his legitimate expectation as other students from Busoga University had been admitted before.

73. Once again, this court observes that the question of the petitioners legitimate expectation had been deliberated upon by the Judge Odunga who heard the Nairobi case when he observed that the mere fact that students from Busoga University may, in the past, have been admitted to the school would not stop the respondent from rescinding its decision if it is satisfied that subsequent events made the admission of students from the said university untenable as long as its decision was not irrational, illegal or procedurally improper.

74. Clearly therefore, in the instant petition, the petitioner has not established that there was anything illegal, irrational or unprocedural in the 1st respondent's black listing of students from Busoga University.

75. The said Busoga University with which the respondents had an understanding, has not appealed against the respondents decision or complained of any breach in the process in which the decision to reject its students was arrived at.

76. In **Republic Vs Kenya Revenue Authority & 3 others exparte Five forty Aviation Ltd [2015] eKLR**, the court held that the concept of legitimate expectation cannot operate against the law and therefore cannot be based on actions that are patently illegal.

77. In the instant petition, the respondents established that they followed the due process before refusing to admit students of Busoga University and therefore, I find the issue of breach of petitioner's legitimate expectation does not arise.

78. On infringement of petitioner Constitutional right to education, **Article 43 (1) (f) of the Constitution** provides that every person has the right to education.

79. Article 21 (2) of the Constitution mandates the state to

> **"take legislative, policy and other measures including the setting of standards, to achieve the progressive realization of the rights guaranteed under Article 43."**

80. Article 24 of the Constitution of Kenya states that:

> **"24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—**
>
> > **(*a*) the nature of the right or fundamental freedom;**
> >
> > **(*b*) the importance of the purpose of the limitation;**
> >
> > **(*c*) the nature and extent of the limitation;**
> >
> > **(*d*) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and**
> >
> > **(*e*) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.**
>
> **(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—**
>
> > **(*a*) in the case of a provision enacted or amended on or after the effective date, is not**

valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(*b*) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(*c*) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) The provisions of this Chapter on equality shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) Despite clause (1) and (2), a provision in legislation may limit the application of the rights or fundamental freedoms in the following provisions to persons serving in the Kenya Defence Forces or the National Police Service—

(*a*) Article 31—Privacy;

(*b*) Article 36—Freedom of association;

(*c*) Article 37—Assembly, demonstration, picketing and petition;

(*d*) Article 41—Labour relations;

(*e*) Article 43—Economic and social rights; and

(*f*) Article 49—Rights of arrested persons."

81. My understanding of the above articles is that the right to education was not provided for in the constitution in a vacuum because the same Constitution mandates the state to take all measures including setting standards to achieve the right to education.

82. It is on the basis of **Articles 21 and 24** that the state through parliament enacted the Council of Legal education Act, then the Legal Education Act 2012 which is **"An Act of Parliament to provide for the establishment of the Legal education, the establishment of the Legal education Appeals Tribunal, the regulation and licensing of legal education providers and for connected purposes."**

83. Section 8 (1) of the Legal Education Act provides for the function of the Council as follows:

"8. (1) The functions of the Council shall be to—

(a)regulate legal education and training in Kenya;

(b)licence legal education providers;

(c)supervise legal education providers; and

(d) advise the Government on matters relating to legal education and training."

84. A reading of the above section shows that the right to legal education in Kenya is not absolute or automatic as it is subject to proper regulation by the council as was done by the 1st respondent in the

instant case. I find that the petitioner cannot claim that the regulations set by the Legal education (Kenya School of Law) Regulations, the Advocate Act, and the Kenya School of Law Act contravened the Constitution because the said rules and regulations apply equally and across the board to all persons seeking admission to the Kenya School of Law and not specifically to graduates of Busoga University.

85. The petitioner has not shown that other people who did not meet the laid down standards of admission to Kenya School of Law were admitted to the said school so as to justify his claim that he was subjected to discriminatory treatment.

86. I find that the 1st respondent's decision not to accredit Busoga University was made on merit and pursuant to the regulations aimed at achieving the highest professional stands of advocates training.

87. The petitioner has not shown that the 1st respondent invoked the powers vested on it by parliament for an improper purpose, arbitrarily, unfairly or irrationally so as to justify the intervention by this court.

88. The petitioners suggestion that **Section 13 (1) (b) of the Advocates Act, paragraph 1 (b) of the 2nd schedule of Kenya School of Law Act and paragraph 5 (b) of the 1st schedule of the Council of Legal Education (Kenya School of Law) Regulations 2009** be declared invalid and unconstitutional is in my view a kin to suggest that the 2nd respondent be compelled to admit every Tom, Dick and Harry to its institution without any control, regulation or regard to the validity of their qualifications. In my view, no learning institution can run effectively without set standards rules and regulations and I find nothing unconstitutional in the respondents enforcement of the said standards.

89. It is my further finding the decision by not to accredit Busoga University did not come out of the blue. The respondents have in the affidavit of Prof. W. Kulundu Bitonye sworn on 5th December, 2012, given a detailed account of the steps, meeting and correspondence that took place between them Busoga University and Uganda Law Council before a decision was taken to withdraw Busoga University's accreditation. From the said detailed account, it is noteworthy that upon realizing that Busoga University Law Faculty was not accredited by the Uganda Law Council as an institution offering law degrees, Busoga University was given an opportunity to remedy the defect and regularize its accreditation status. This did not happen soon enough or at all and a physical assessment of the said university's facilities revealed that they fell way below the standards set by the 1st respondent, thereby leaving the 1st respondent with no choice but to decline to accredit the university.

90. The detailed account of the events preceding the decision not to accredit Busoga University have not been rebutted by the said university or the petitioner thereby making the petitioner's claim of unfair treatment or discrimination a clear case of twisting the obvious and clear facts to suit his own needs.

Order:

91. Having found that the instant petition is res Judicata and having found that there is no merit in the petitioner's claim that his right to education and legitimate expectation have been infringed, the order that commends itself to me is to dismiss the petition dated 23rd June, 2014 with no orders as to costs.

Dated, signed and delivered in open court this 18th day of August, 2016

HON. W. A.OKWANY

JUDGE

In the presence of:

- N/A for the Petitioner

- N/A for the Respondent

- Omwoyo court clerk