



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JUDICIAL REVIEW DIVISION**  
**MISCELLANEOUS APPLICATION NO. 472 OF 2016**  
**IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI AND  
MANDAMUS**  
  
**AND**  
  
**IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010**  
  
**AND**  
  
**IN THE MATTER OF THE LEGAL EDUCATION ACT, NO. 27 of 2012**  
  
**BETWEEN**  
  
**REPUBLIC.....APPLICANT**  
  
**VERSUS**  
  
**COUNCIL OF LEGAL EDUCATION .....RESPONDENT**  
  
***EX-PARTE***  
  
**NYABIRA OGUTA.....EX PARTE APPLICANT**  
  
**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated 1<sup>st</sup> November, 2016, the *ex parte* applicants herein seek the following orders:

1. An Order of certiorari to remove into this Honourable Court and quash the decision of the Respondent contained in the *Students Guide to the Bar Examinations* of August 2016 which increases the number of questions to be tackled during the final examinations offered at the Kenya School of Law from 4 to 5 and reduces the pool of questions from 10 to 6.

2. An Order of *mandamus* to compel the Respondents Council to rescind its decision contained in

the said *Students Guide to the Bar Examinations*, and to examine the 2016 academic class at the Kenya School of Law in the way that the preceding Class was examined in view of the number of questions in the pool as well as the number of questions to be attempted.

3. Costs of the Application be borne by the Respondents.

### **Ex Parte Applicants' Case**

2. According to the applicant, upon her admission to the Kenya School of law earlier on this year, on February 2016, they were given their Students guide to the Bar Examination upon perusal of which it was indicated that all students were to sit for an examination later on in November that year, and were to be tested on all the 9 subjects taught at the Kenya School of Law. It was averred that the examination guide distributed to the Students at that particular time did not mention anywhere that students were going to be required to tackle 5 questions hence their assumption was that, as was always the case, they were required to tackle 4 questions out of a possible 10 questions. To their surprise, in August 2016, 3 months before the final examination, the Respondent did publish and circulate to students a new guide to the bar examination by the Respondent had increased the number of questions to be tackled from the normal 4 out of 6 to 5 questions out of 10. To the Applicant, the increase in the number of questions was not however complimented by a corresponding increase in time to tackle the same questions.

3. It was the applicant's case that the above action by the Respondent is fundamental breach of the doctrine of legitimate expectation, and coming late into the academic year, served to unsettle the minds of the students and to negatively affect the performance of students during the final examinations slated for November 2016. It was further contended that the decision to increase the number of questions should not even stick because the same decision was passed by the Respondent's Board, which board is improperly constituted hence its actions unlawful and invalid. This position was premised on the fact that on the 23<sup>rd</sup> of February 2016, the Chief of Staff and Head of Public Service had notified the Board that its tenure had expired and in addition, this Honourable Court on the 4<sup>th</sup> of April 2016, in Petition No. 425 of 2015 held that the Council had to be reconstituted within a period of 60 days, and that at the expiry of the 60 days the Council would be deemed to be illegally in office.

4. To the applicant therefore so far, the Board has not been reconstituted they are illegally in office hence any action or any decision passed by the same board is unlawful.

### **Respondent's Case**

5. In response to the application the Respondent admitted that indeed this High Court did in Nairobi High Court Petition 425 of 2015, and Nairobi High Court Judicial Review 16 of 2016 order that the Council of Legal Education as had been comprised as at then, the 4<sup>th</sup> of April 2016, be reconstituted within sixty (60) days of the said date to conform to the section 4(5) and 4(9) of the ***Legal Education Act, 2012***, as amended by ***Statute Law Miscellaneous Amendment Act, 2014***, failing which incumbency of the Council of Legal Education would be illegal. However, the Respondent filed Notices of Appeal against both Judgments together with applications for stay pending appeal under Rule 5(2) (b) of the Court of Appeal Rules vide **Nairobi Civil Application No. 116 of 2016 Council of Legal Education vs. Moi University, Commissioner of University Education and the Attorney General** and **Nairobi Civil Appeal No. 117 of 2016 Council of Legal Education vs. Mt. Kenya University, Commission of University Education and Attorney General**. Pursuant to the foregoing, on 15<sup>th</sup> June 2016, the Court of Appeal issued orders, *inter alia* for maintenance of *status quo* of the Council of Legal Education as constituted on 15<sup>th</sup> June 2016, to continue until determination of the Appeals to be filed. Prior to 15<sup>th</sup> June 2016, the Court of Appeal had issued an order of *status quo* for the Council of Legal Education to continue, on 2<sup>nd</sup> June 2016 until *inter partes* hearing on 8<sup>th</sup> June 2016 and on 8<sup>th</sup> June 2016 the orders were extended to 15<sup>th</sup> June 2016 on which day the order of *status quo* was extended until determination of the Appeals to be filed.

6. It was averred that as ordered by the Court of Appeal on 15<sup>th</sup> June 2016, the Council of Legal Education filed the substantive appeals, which were designated **Nairobi Civil Appeal No. 149 of 2016**

**Council of Legal Education vs. Moi University & Others**, and **Nairobi Civil Appeal No. 148 of 2016, Council of Legal Education vs. Mt. Kenya University & Others.** and that the matters now await hearing date. According to the Respondent therefore it is a lawful incumbent and has jurisdiction to discharge the functions set out in section 8 of the **Legal Education Act, 2012** and any other function borne in any written law in Kenya.

7. It was the Respondent's case its powers are exercised pursuant to section 8(1)(f) of the **Legal Education Act, 2012** which proceeds as follows:

'Section 8(1) of the Legal Education Act, 2012:

**'8. Functions of the Council (1)**

***The functions of the Council shall be to—***

***(a) .....***;

***(b) .....***;

***(c) .....***

***(f) administer such professional examinations as may be prescribed under section 13 of the Advocates Act.'***

8. The Respondent's case was that it had taken measures to ensure that the Bar examinations are administered and undertaken in an environment of absolute integrity and transparency. To achieve this end, the Respondent gives forward advice to candidates and all stakeholders which information includes defining the nature of the examinations, dates and other relevant logistics concerning the examinations. While admitting that the student's guide of February 2016, defines other aspects of the examinations, the Respondent however averred that it did not indicate anywhere in the Guide the number of questions that would be carried in each paper, as the ex parte Applicants suggest. In any event, the administration of the examination including the number of questions per paper is by law left to be an exclusive duty of the Respondent which duty is exercised after due determination of all necessary issues necessary to ensure a fair but accurate assessment of the examinees. To the Respondent, the details of administration of the Bar examinations is an internal duty of the Respondent, an expert determination of the Respondent and a matter intended by law to be wholly the internal province of the Respondent, and the Court cannot substitute the expert decision of the Respondent on those merits, with its own.

9. The Respondent deposed that in the year 2016, it had an extended discussion on the matter of the Bar examinations, including setting of examinations and development of the Marking Schemes for the Bar examinations on 2<sup>nd</sup> and 3<sup>rd</sup> June 2016, at Safari Park Hotel in Nairobi hence disabused the allegations that the Respondent exercised its mandate under section 8(1) (f) of the **Legal Education Act, 2012**, arbitrarily, in abuse of power, unreasonably, in bad faith, with procedural impropriety, discriminately, in violation of legitimate expectation and in violation of natural justice. It was its view that issues of which questions should be set, what should be the marking scheme for the questions, how many questions should be attempted, how much time should be assigned for the examinations, on the Bar examinations, are part of the germane issues in administration of any examinations and that these are issues that are always internal and are never and cannot for good reason be open for determination by third parties, to say the students to be examined, and even the Court.

10. The Respondent reiterated that for 2016, the decision took extensive analysis for two (2) days and justifications were made for the adjustments that were then published in the Students' Guide to the Bar Examinations of August 2016 hence the decision of adjusting examinations questions from ten (10) to six (6) is therefore a decision on the merit.

11. On legitimate expectation, it was averred that there does not exist any legitimate expectation to any

examinees on how many questions are set in the Bar examinations in Kenya or in the world over as this matter is made settled by the fact that there is not a representation by the Respondent to the ex parte Applicants promising that the examinations would be ten (10) questions and that if such a representation existed, then it would be an illegal promise, at law. This is so because there must be dynamism in administration of any examinations, which addresses changing nature of parameters in any professional course and that the administration of the examination may as well be on the examinees capacity to tackle a problem question within a limited time at the end of which marking is done, followed by moderation of the examination which accounts for the grading system. In any professional examination, the distribution of the marks after moderation assists the examiner to achieve equity and fairness for the examinees. To the Respondent, the Bar examination is equally administered on these settled principles, the moderation and distribution of the marks after marking is a safeguard that all the examinees shall benefit from including the ex parte Applicants. Accordingly there is not any legitimate expectation founded on the fact that because previous candidates answered questions chosen from ten (10) problems, the ten (10) question quotient must be maintained. That is an expert discretion of the Respondent, who has sat and determined otherwise, for expert reasons and for the end benefit of achieving an assessment that the Respondent can defend as credible, and upon which the Respondent can issue Certificates of Compliance for purposes of enrolment to the Roll of Advocates in Kenya.

12. On the issue of bad faith, it was contended that this line of reasoning is quite unfortunate and exhibits high ignorance since the purpose of the adjustment to the number of questions for the November Bar examinations is not to fail students and it certainly not for any monies from resits and remarks since the Respondent has a budget that is properly funded by the Government of Kenya. If anything, the fees paid for remarks and resits are not profits of the Respondent but are monies wholly applied in payment for venues for those examinations, for the cost of setting the examinations, moderating, marking, printing and other attendant logistics.

13. In the Respondent's view, the questions are set from the substance of courses that the examinees have studied for nearly five (5) years, from universities and at the Kenya School of Law in the Advocates Training Programme.

14. It was the Respondent's case that the pleas of procedural impropriety and natural justice were untenable since in most examinations, even in universities, the first time that students get to how many questions are to be written is on the day they write the examinations in the instructions before beginning the exam. Therefore the Respondent was not enjoined at all to give students any notice of the nature in issue herein. The Respondent was equally not enjoined to any public participation as the ex parte Applicants suggest since the administration of the Bar examination is the exclusive province of the Respondent and the Respondent does not invite help or views on how this examination is conducted.

15. On the alleged discrimination, it was averred that the administration of the Bar examinations is an exclusive mandate of the Respondent, and is administered as the Respondent determines on parameters that the Respondent determines from time to time hence the Respondent is not restrained from adjusting parameters for the Bar examinations just because they are different from parameters of before. Each Bar examination series is different and no two Bar examinations series are the same.

16. It was the Respondent's view that granting the reliefs sought in the application shall be tragic. Firstly because the Bar examinations to be written this month have already been set, secured and only await administration on the due date yet the reliefs sought herein would require obviating the Bar examinations and re setting the examinations for a future date with attendant enormous costs implications in form of examinations setting, secured printing, storage, examinations card printing, venue booking and payment. It would also take a toll on more than 2000 students that have been preparing to write the examinations and are no ready for it. There is also the issue that the examinations as set are the expert determination on the merits by the Respondent under section 8(1) (f) of the **Legal Education Act, 2012**. Granting the reliefs sought, it was contended would be substitution by the Court's view for that of the Respondent and that in effect it is the Court would be administering the Bar examinations and not the Respondent.

### **Applicant's Submissions**

17. It was submitted on behalf of the applicants that when the applicant joined the Kenya School of Law in January 2016, the outline of the *modus operandi* of the School, issued to her did not make any attempt to depart from the former practice and particularly in the mode of examination hence the impugned rules are oppressive and in contravention of what the Applicant legitimately expected, *to wit*, to be given the same treatment as the preceding class, or at the very least, adequate notice at the point of admission. Since Bar examinations are the backbone of the Postgraduate-Diploma, which programme is the defining factor in terms of Legal Practice, it was contended that such oppressive and biased steps directly prejudice the students of the 2016 class, and there is a feeling that the Respondents are deliberately ambushing the Applicant with a less conducive environment to reduce chances of passing the Bar Examinations. Moreover, the decision so arrived at by the Respondent should not stand, as the Council is not properly constituted at the time of passing the impugned regulations, thus making the decision-making *ultra vires*.

18. In the applicant's view, the maker of any decision must follow the law while making the decision. Apart from making the decision in a lawful process, the decision-maker must ensure that they have the requisite authority to make the decision, otherwise the said decision will be made *ultra vires*. The applicant in her submissions relied on various provisions of the Constitution, the Fair Administrative Action Act, 2015, the Legal Education Act and the common law principles. She cited **Crispus Karanja Njogu vs. A G HCC Criminal Appeal. No. 39 of 2000**, where it was stated that:

**“It is trite concept that the Constitution is the supreme law and its provisions ought to be interpreted broadly or liberally and not in a pedantic way i.e. restrictive way – Constitutional provisions must be read to give values and aspirations of the people and the Court must appreciate throughout that the Constitution, of necessity has principles and values embodied in it, that a Constitution is a living piece of legislation. It is a living document.”**

19. She also relied on the principle of public participation as espoused in **Doctors for Life International -vs- Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)**. in which it was held that:

**“If legislation is infused with a degree of openness and participation, this will minimise dangers of arbitrariness and irrationality in the formulation of legislation. The objective in involving the public in the law-making process is to ensure that the legislators are aware of the concerns of the public. And if legislators are aware of those concerns, this will promote the legitimacy, and thus the acceptance, of the legislation. This not only improves the quality of the law-making process, but it also serves as an important principle that government should be open, accessible, accountable and responsive. And this enhances our democracy.”**

20. On the illegality of the composition of the Council, it was submitted that in **Moi University -vs- Council of Legal Education & another [2016] eKLR**, this court, on the 4<sup>th</sup> day of April 2016, made a declaration of the illegality in the constitution of the Council, but suspended this declaration for a period of 60 days to facilitate the proper reconstitution of the said Council. At the expiry of the said period the said Council shall be deemed to be illegally in office.

21. With respect to legitimate expectation, the applicant relied on **Diana Kethi Kilonzo & another -vs- The Independent Electoral & Boundaries Commission (IEBC) & 2 Others**, at Para 133, where the Court expressed itself as follows:

**“At its core, and in its broad sense, the doctrine of legitimate expectation is said to arise out of a promise made by a public body or official which the person relying on anticipates will be fulfilled. It is also said to arise out of the existence of a repeated or regular practice of the public body or official which could reasonably be expected to continue. Essentially, once made, the promise or practice creates an estoppel against the public body or official, so that the person benefitting from the promise or practice would continue to so benefit, and that the promise or practice would not be withdrawn without due process or consultation.”**

22. To the applicant, the promise comes from the Students guide to the Bar Examination of February

2016 which Guide does not have stipulations as to a change of *status quo*, that is, the number of questions to be tackled and the number of questions in the pool wherefrom to choose. Having promised to act in a particular way in regard to the Ex-Parte Applicant, it was submitted that the Respondent cannot purport to change the *modus operandi* of conducting Bar Examinations, unjustifiably, without cause, without written reasons, and without notice and that this is an epitome of arbitrariness. In support of this position, the applicant relied on **Council of Civil Service Unions and Others -vs- Minister for the Civil Service (1985 AC 374 (408-409))**, where it was observed that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

23. In the applicant's view, the benefit or advantage being deprived is the right to choose 4 questions from a pool of 10 questions, and being condemned to choose 5 out of 6 questions and that 4 out of 10 questions is an advantage that has in the past been permitted by the decision maker for candidates to enjoy. It was submitted that there were not given any rational grounds for withdrawing this advantage, but there instead was tremendous irrationality by stealing the advantage within a very short notice to the examination period. In addition, by not giving the students a notice when they were being admitted and even in the Guidelines of February 2016 on the supposed change in the mode of examination, the Respondent was giving the students a direct assurance that the advantage of choosing 4 out of 10 questions will not be arbitrarily withdrawn.

24. The applicant further submitted that it was legitimately expected by the Applicant that the students and the public will be involved in the decision-making process, and their views heard. Further there was legitimate expectation that the Council would carry out its mandate rationally since it is trite law that a statutory body should not exercise its powers irrationally as espoused by **Lord Green** in **Associated Provincial Picture Houses Ltd. vs. Wednesbury Corporation [1948] 1 KB 223** thus:

**“In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded matters that ought to be taken into account.”**

25. According to the applicant, an important matter that needed to be taken into account by the Respondent while coming up with the Guidelines to the Bar Examinations of August 2016 was the proximity to the examination period since the decision is very likely to cause panic and a chaotic environment to the students, as the new Guidelines are a direct ambush, as the students have been preparing for a certain mode of examination.

26. It was therefore the applicant's position that this application was merited and that the orders sought herein deserved.

### **Respondent's Submissions**

27. On behalf of the Respondent, it was submitted that the grievance of the ex parte Applicants is that they want to be given a pool of ten (10) questions to choose five questions to answer in each examinations. This, according to the Respondent is not in consonance with the Respondent who is by statute the **Legal Education Act**, the body authorized to administer the Bar examinations. The Respondent whose examinations the ex parte Applicants have the choice of sitting if they wish, published a Students' Guide to the Bar Examinations in August 2016, three (3) months to the examinations, advising the students and all stakeholders that students shall choose from a pool of six (6) questions five (5) questions.

28. While conceding that the High Court did in **Nairobi High Court Petition 425 of 2015**, and **Nairobi**

**High Court Judicial Review 16 of 2016** order that the Council of Legal Education as had been comprised as at then, the 4<sup>th</sup> of April 2016, be reconstituted within sixty (60) days thereof failing which incumbency of the Council of Legal Education would be illegal, it was submitted that the Respondent filed Notices of Appeal against both Judgments and together with it applications for stay pending appeal under Rule 5(2) (b) of the Court of Appeal Rules pursuant to which on 15<sup>th</sup> June 2016, the Court of Appeal issued orders, *inter alia* an order for *status quo* of the Council of Legal Education as constituted on 15<sup>th</sup> June 2016, to continue until determination of the Appeals to be filed. It was therefore submitted that the Respondent had jurisdiction to discharge the functions set out in section 8 of the **Legal Education Act, 2012** and any other function borne in any written law in Kenya. Relative to the present suit is the Respondent's function under section 8(1)(f) of the **Legal Education Act, 2012** which include the power to administer such professional examinations as may be prescribed under section 13 of the **Advocates Act**. It was therefore submitted that the argument by the *ex parte* Applicants that the Respondent's decision was ultra vires is untenable and must fail.

29. According to the Respondent, it had taken measures to ensure that the Bar examinations are administered and undertaken in an environment of absolute integrity and transparency and to achieve this end, it gives forward advice to candidates and all stakeholders and this information includes defining the nature of the examinations, dates and other relevant logistics concerning the examinations. According to the Respondent, it initially published a students' guide to the Bar examinations, in February 2016 which, whilst it defined other aspects of the Bar examinations, did not indicate anywhere in the Guide the number of questions that would be carried in each paper, as the *ex parte* Applicants have alleged. In any event, the administration of the examination including the number of questions per paper is by law left to be an exclusive duty of the Respondent which duty is exercised after due determination of all necessary issues necessary to ensure a fair but accurate assessment of the examinees.

30. To the Respondent, the details of administration of the Bar examinations is an internal duty of the Respondent, an expert determination of the Respondent and a matter intended by law to be wholly the internal province of the Respondent, and the Court cannot substitute the expert decision of the Respondent on those merits, with its own. It was submitted that in the year 2016, the Respondent had an extended discussion on the matter of the Bar examinations, including setting of examinations and development of the Marking Schemes for the Bar examinations on 2<sup>nd</sup> and 3<sup>rd</sup> June 2016, at Safari Park Hotel in Nairobi during which time it had occasion to review the modalities on the Bar examinations in exercise of its mandate under section 8(1) (f) of the **Legal Education Act, 2012**. It therefore denied all the allegations arbitrariness, abuse of power, unreasonably, in bad faith, with procedural impropriety, discriminately, violation of legitimate expectation and violation of natural justice.

31. According to the Respondent, issues of which questions should be set, what should be the marking scheme for the questions, how many questions should be attempted, how much time should be assigned for the examinations, on the Bar examinations, are part of the germane issues in administration of any examinations and these are issues that are always internal and are never and cannot for good reason be open for determination by third parties, to say the students to be examined, or even the Honourable Court. Before any question is set, marking scheme developed, decision is made on how many questions are to be attempted and how much time is assigned, the Respondent sits and determines relevance and necessity hence the decision is never an arbitrary one nor one made on instincts.

32. It was submitted that for 2016, the decision took extensive analysis for two (2) days and justifications were made for the adjustments that were then published in the Students' Guide to the Bar Examinations of August 2016 hence the decision of adjusting examinations questions from ten (10) to six (6) is a decision on the merits by the Respondent, a public authority exercising jurisdiction at law and the Court cannot question its efficaciousness. To support this submission the Respondent relied on **Republic vs. The Council of Legal Education (2007) eKLR** at page 12 in which **Nyamu, J** (as he then was) expressed himself as follows:

**“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...*'

33. The Respondent also relied on Eunice Cecilia Mwikali Maema vs. Council of Legal Education & 2 others [2013] eKLR, where the Court of Appeal stated:

**“We are also of the view that the learned judge correctly applied the principle in the decision in Susan Mungai V The Council for Legal Education Petition No. 152/2011 to the effect 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.”**

34. It was therefore submitted that the Court is restrained from questioning the efficaciousness of the decision.

35. According to the Respondent, it is the thesis of the ex parte Applicants that the setting of examinations at ten (10) questions for students to choose four (4) in previous examinations begot a legitimate expectation that the examinations would be maintained at ten (10) questions, in posterity. It was however contended by the Respondent that setting examination questions does not beget to any person a legal right/interest. To the Respondent, the ex parte Applicants are not demanding enforcement of any representation, but instead are gleaning legitimate expectation from what they are calling previous examinations. To the Respondent, there are absolutely no repeated or regular practice since for each Bar examinations the Respondent sets anew, and determines from the nature and intensity of what has been set how many questions and how much time should be conferred. It was submitted that the advent of the Respondent setting the Bar examinations was through the *Statute Law Miscellaneous Amendment Act, 2014*, which law came in force in December 2014. Accordingly the first Bar examinations to be administered by the Respondent were in 2015, the 2016 are thus the second series of the Bar examinations. In its view administering a different series of a Bar examinations in a second year does not qualify as a repeated regular practice and relied on Diana Kethi Kilonzo & Another vs. The IEBC & 2 Others, (supra) for the ratio that:

**“At its core, and in its broad sense, the doctrine of legitimate expectation is said to arise out of a promise made by a public body or official which the person relying on anticipates will be fulfilled. It is also said to arise out of the existence of a repeated or regular practice of the public body or official which could reasonably be expected to continue. Essentially, once made, the promise or practice creates an estoppel against the public body or official, so that the person benefitting from the promise would continue to so benefit, and that the promise or practice would not be withdrawn without due process or consultation.”**

36. To the Respondent, there does not exist any legitimate expectation to any examinees on how many questions are set in the Bar examinations in Kenya or in the world over. This matter is made settled by the fact that there is not a representation by the Respondent to the ex parte Applicants promising that the examinations would be ten (10) questions and that if such a representation existed, then it would be an illegal promise, at law because there must be dynamism in administration of any examinations, which addresses changing nature of parameters in any professional course. The administration of the examination may as well be on the examinees capacity to tackle a problem question within a limited time.

37. It was submitted that at the end of the examination, marking is done, followed by moderation of the examination which accounts for the grading system. In any professional examination, the distribution of the marks after moderation assists the examiner to achieve equity and fairness for the examinees. The Bar examination is equally administered on these settled principles, the moderation and distribution of the marks after marking is a safeguard that all the examinees benefit from, including the ex parte Applicants. Accordingly there is not any legitimate expectation founded on the fact that because previous candidates answered questions chosen from ten (10) problems, the ten (10) question quotient must be maintained. That is an expert discretion of the Respondent, who has sat and determined otherwise, for expert reasons and for the end benefit of achieving an assessment that the Respondent can defend as credible, and upon which the Respondent can issue Certificates of Compliance for purposes of enrolment to the Roll of Advocates in Kenya.

38. On the allegation of bad faith, it was submitted that the purpose of the adjustment to the number of questions for the November Bar examinations is not to fail students and it certainly not for any monies from resits and remarks. The Respondent has a budget that is properly funded by the Government of Kenya. If anything, the fees paid for remarks and resits are not profits of the Respondent. Those monies are wholly applied in payment for venues for those examinations, for the cost of setting the examinations, moderating, marking, printing and other attendant logistics. The reason for adjustment of the examination question is to achieve an assessment quotient that the Respondent has expertly adjudged suitable for grading applicants to the Roll of Advocates. It must be understood that the questions are set from the substance of courses that the examinees have studied for nearly five (5) years, from universities and at the Kenya School of Law in the Advocates Training Programme.

39. Dealing with procedural impropriety, public participation and natural justice, it was submitted that this argument is untenable since the notice by the Respondent is even magnanimous. In most examinations, even in universities, the first time that students get to know how many questions are to be written is on the day they write the examinations in the instructions before beginning the exam. To the Respondent, it was not enjoined at all to give students any notice of the nature in issue herein. The Respondent is equally not enjoined to any public participation as the ex parte Applicants suggest. Administration of the Bar examination is the exclusive province of the Respondent and the Respondent does not invite help or views on how this examination is conducted.

40. According to the Respondent, its decisions are enjoined by section 8(1)(f) of the **Legal Education Act, 2012** and that the administration of the examinations includes both freedom and duty to make decisions on how best to set the examinations, administer them, moderate, and mark them, as is suitable in the administrative discretion of the Respondent. Its view was that decisions that the Respondent makes in administering these examinations including how many questions to be set in an examination are not decisions materially and adversely affecting the legal rights or interests of a student, within the meaning of section 4(5)(a) of the **Fair Administrative Action Act, 2015**.

41. It was submitted that the ex parte Applicants knew in January that they shall write the Bar examinations administered by the Respondent from a list of courses that were announced well in advance. Further, it is important to note that the ex parte Applicants have had notice of the Students' Guide for 2016 since publication in August 2016 for an examination to be done three (3) months away.

42. On the allegation of discrimination, it was submitted that the administration of the Bar examinations is an exclusive mandate of the Respondent, and is administered as the Respondent determines on parameters that the Respondent determines from time to time. The Respondent is not restrained from adjusting parameters for the Bar examinations just because they are different from parameters of before since each Bar examination series is different. Accordingly there cannot be discrimination on administration of the Bar examinations when the examinations are not similar.

43. It was therefore the Respondent's case that the writs of Certiorari and *Mandamus* cannot issue on the basis of the matters in issue herein and grounds demonstrated since certiorari cannot issue in absence of infringing conduct. In publishing a Students Guide to the Bar Examinations in August 2016, the Respondent was giving forward advice to examinees on an examination that the Respondent is by law

mandated to administer. In its view, rescinding its decision carried in the Students' Guide to the Bar Examinations, is not a statutory function of the Respondent and that *mandamus* is a writ to compel performance by a public authority of its statutory function. Secondly, a *mandamus* cannot issue to compel a public authority to break the law.

44. The Respondent also relied on the holding in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others** (supra) where it was held that:

**“... it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance.”**

45. It was submitted that granting the reliefs sought in the application shall be tragic. Firstly because the Bar examinations to be written this month have already been set, secured and only await administration on the due date. The reliefs sought herein shall require obviating the Bar examinations and re setting the examinations for a future date. This has enormous costs implications expended on examinations setting, secured printing, storage, examinations card printing, venue booking and payment. It shall also take a toll on more than 2000 students that have been preparing to write the examinations and are no ready for it. Secondly, the examinations as set are the expert determination on the merits by the Respondent under section 8(1) (f) of the ***Legal Education Act, 2012***. Granting the reliefs sought shall be substitution by the Honourable Court's view for that of the Respondent, in effect it is the Court shall be administering the Bar examinations and not the Respondent.

46. According to the Respondent, this is one occasion for withholding any relief that shall cause extreme suffering and hardship to public interest hence the Respondent prayed that the application be dismissed with costs.

### **Determinations**

47. I have considered the foregoing.

48. Before dealing with the substance of this application, in my ruling dated 31<sup>st</sup> October, 2016, I expressed myself as follows:

**“To make matters worse whereas the original application was commenced by only one applicant, *Nyabira Oguta*, the fresh chambers summons which is sought to substitute the original one now has two applicants with an additional name of one *Diran Onkangi*, yet the effect of the substitution is to confer favourable orders on the newly introduced applicant as well. This with due respect is clearly a mischievous way of seeking leave as the intention of the applicant is to have this Court grant leave to the 2<sup>nd</sup> applicant through the backdoor. To do so would turn these proceedings into a circus and render them a theatre of the absurd.**

49. Therefore there is only one applicant in these proceedings as clearly shown in the Notice of Motion dated 1<sup>st</sup> November, 2016.

50. The applicants contend that the Respondent's decision was *ultra vires* its powers since this Court in Nairobi High Court Petition 425 of 2015, and Nairobi High Court Judicial Review 16 of 2016. It is however clear that the order directing that Council of Legal Education as had been comprised be reconstituted within sixty (60) days thereof failing which incumbency of the Council of Legal Education would be illegal, was stayed by the Court of Appeal. In my view, the purpose of a stay order is to prevent the implementation of the order if the same has not been implemented or to suspend its validity and implementation if the decision that has been made. It follows that by granting an order staying the said order, the Respondent's powers and functions under section 8(1)(f) of the **Legal Education Act, 2012** including the power to administer such professional examinations as may be prescribed under section 13 of the **Advocates Act** were to remain in place pending the hearing and determination of its appeal. It is therefore clear that the applicant's challenge to the Respondent's powers based on this Court's said decision cannot be sustained.

51. According to the applicant, upon her admission to the Kenya School of law earlier on this year, on February 2016, they were given their Students guide to the Bar Examination upon perusal of which it was indicated that all students were to sit for an examination later on in November that year, and were to be tested on all the 9 subjects taught at the Kenya School of Law. It was averred that the examination guide distributed to the Students at that particular time did not mention anywhere that students were going to be required to tackle 5 questions hence their assumption was that, as was always the case, they were required to tackle 4 questions out of a possible 10 questions. To their surprise, in August 2016, 3 months before the final examination, the Respondent did publish and circulate to students a new guide to the bar examination by the Respondent had increased the number of questions to be tackled from the normal 4 out of 6 to 5 questions out of 10. To the Applicant, the increase in the number of questions was not however complimented by a corresponding increase in time to tackle the same questions.

52. It was the applicant's case that the above action by the Respondent is fundamental breach of the doctrine of legitimate expectation, and coming late into the academic year, served to unsettle the minds of the students and to negatively affect the performance of students during the final examinations slated for November 2016.

53. This submissions calls for a discourse in the applicability and relevance of the principle of legitimate expectation.

54. The the evolution of the doctrine in the Common law jurisdiction can be traced to an obiter dictum of **Lord Denning M. R** which was restated by **B. N. Pandey** in his article "**Doctrine of Legitimate Expectation**" in which it restated the holding of the court in Sehmidt vs. Secretary of Home Affairs [1969] 2 Ch 149; (1969) 1.All.E.R. 904 that:

**"The speeches in Ridge v Baldwin show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say ..."**

55. In CCSU vs. Minister for the Civil Service [1984] 3 All ER, 935 Lord Diplock stated, at page 949:-

**"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for**

**contending that they should not be withdrawn.**” (Emphasis supplied).

56. It follows that for the principle to apply the action complained of must have the effect of depriving the applicant of some benefit or advantage which either he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment; or he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

57. In this case, clearly the applicant had not had benefit or advantage of fewer questions to be tackled given to her as there is no allegation that she had undertaken the same exams before. Therefore the issue of her having been permitted by Respondent to enjoy the same benefit and which she therefore legitimately expected to be permitted to continue enjoying until there has been communicated to her some rational ground for withdrawing it on which he has been given an opportunity to comment, does not arise.

58. The other consideration is whether the applicant had received assurance from the Respondent that the benefit which she had hitherto enjoyed would not be withdrawn without giving her first an opportunity of advancing reasons for contending that they should not be withdrawn. Since there was no benefit which the applicant had enjoyed hitherto with respect to the number of questions to be tackled, this condition similarly is inapplicable.

59. It is in this context that I understand **De Smith, Woolf & Jowell**, in *“Judicial Review of Administrative Action”* 6<sup>th</sup>Edn. Sweet & Maxwell page 609 to the effect that:

**“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”**

60. Accordingly, the three basic questions were identified in **R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237 at [19]** as follows:

**“In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.”**

61. The rationale for this principle is however stated by **Michael Fordham** in *Judicial Review Handbook* that:

**“Consistency is a principle of good administration. Judicial Review may lie because treatment is unjustifiably unfavourable with action in relevantly likely cases (or prior treatment in the same case), or because it unjustifiably fails to distinguish other unlike cases. Consistency links with freedom from arbitrariness, each of which also links with (and is promoted by) adequate certainty of approach.”**

62. Similarly, in **Rank vs. East Cambridgeshire District Council EWHC 2081 Admin**, it was held:

**“One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process...But it is also important for the purpose of securing public confidence in the operation of the development control system....The potential relevance arises because consistency is desirable and inconsistency may occur if the authority fails to have regard to a previous decision.”**

63. According to this school of thought therefore legitimate expectation is not restricted to those who

have in the past enjoyed a benefit, but is to be extended to those who though had not had the benefit being extended to them, but legitimately expected that the existing practice would be applicable to them when they came under the authority of the Respondent. In my view, this is the position the applicant herein has taken in these proceedings. It is in this respect that I understand the position in **R vs. Inland Revenue Commissioners exp National Federation of Self Employed and Small Business Ltd [1981] UKHL 2** in which it was held that:

**“A taxpayer would not be excluded from seeking judicial review if he could show that the Revenue had either failed in its statutory duty towards him or had been guilty of some action which was an abuse of their powers or outside their powers altogether...I am persuaded that the modern case law recognises a legal duty owed by the Revenue to the general body of the taxpayers to treat taxpayers fairly...to ensure that there are no favourites and no sacrificial victims”**

64. This is the position in **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** where it was held that:

**“The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine.”**

65. Nyamu, J (as he then was) expressed himself on the same issue in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** thus:

**“.....legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation. An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way.....Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised. ....In order to ascertain whether or not the respondents decision and the intended action is an abuse of power I have taken a fairly broad view of the major factors such as the abruptness, arbitrariness, oppressiveness...All these are traits of abuse of power. Thus I hold that the frustration of the applicants’ legitimate expectation...amounts to abuse of power.”**

66. It follows that if the Respondent had adopted a practice by which the students being admitted to the institution were to tackle 4 out of 6 questions, the Respondent would have established a legitimate expectation on the prospective students. However, as the said prospective students had not enjoyed the same benefits, to hold that the Respondent ought to communicate to the said prospective students grounds

for withdrawing it and give them an opportunity to comment thereon would be unreasonable as the Respondent would not be in a position to know the said prospective students. Again it is in this respect that I understand the position expressed in **R vs. North and East Devon Health Authority ex p Coughlan [2001] QB 213 at [57(c)]** that:

**“once the legitimacy of the expectation is established, the court will have the task of weighing the requirement of fairness against any overriding interest relied upon for the change of policy.”**

67. In my view public interest may on occasions be considered in determining whether or not there exist an overriding interest justifying a departure from what has been previously promised.

68. However the decision by the Respondent to increase the number of questions to be tackled in its examinations clearly amount to a change of policy. Though the Respondent is clearly entitled to change its policies relating to examination, it is clear that power ought to be properly exercised and ought not to be misused or abused. According to **Prof Sir William Wade in his Book *Administrative Law***:

**“The powers of public authorities are...essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land...regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose...But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them...”**

69. In my view, it is because of this that our transformative Constitution provides in Article that all State organs, State officers, public officers and all persons whenever they make or apply policy decisions are bound by the national values and principles of governance which include participation of the people, inclusiveness, integrity, transparency and accountability. Our Constitution, in my view is a value-oriented Constitution as opposed to a structural one. The distinction between the two was made by **Ulrich Karpen in *The Constitution of the Federal Republic of Germany*** thus:

**“...the value –oriented, concerned with intensely human and humane aspirations of personality, conscience and freedom; the structure-oriented, concerned with vastly more mundane and mechanical matters like territorial boundaries, local government, institutional arrangements.”**

70. Our Constitution embodies the values of the Kenyan Society, as well as the aspirations, dreams and fears of our nation as espoused in Article 10. It is not focused on presenting an organisation of Government, but rather is a value system itself hence not concerned only with defining human rights and duties of individuals and state organs, but goes further to find values and goals in the Constitution and to transform them into reality. As appreciated by **Ojwang, JSC, in Joseph Kimani Gathungu vs. Attorney Genral & 5 Others Constitutional Reference No. 12 of 2010**:

**“A scrutiny of several Constitutions Kenya has had since independence shows that, whereas the earlier ones were designed as little more than a regulatory formula for State affairs, the Constitution of 2010 is dominated by a “social orientation”, and as its main theme, “rights, welfare, empowerment”, and the Constitution offers these values as the reference-point in governance functions.”**

71. As was appreciated by the majority **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate, Sup. Ct. Advisory Opinion Appl. No. 2 of 2012** at para 54:

**“Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground situations, and of such open texture in their scope for necessary public actions. A consideration of different constitutions are highly legalistic and minimalistic, as regards express safeguards and public commitment. But the Kenya Constitution fuses this approach with declarations of general principles and statements of policy. Such principles or policy declarations signify a value system, an ethos, a culture, or a political environment within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a constitution takes such a fused form in its terms, we believe, a court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that contributes to the development of both the prescribed norm and the declared principle or policy; and care should be taken not to substitute one for the other. In our opinion, the norm of the kind in question herein, should be interpreted in such a manner as to contribute to the enhancement and delineation of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.”**

72. The Court is therefore required in the performance of its judicial function to espouse the value system in the Constitution and to avoid the structural minimalistic approach. The German Federal Constitutional Court in **Luth Decision BVerfGE 7, 198 I. Senate (1 BvR 400/51)** noted as follows:

**“But far from being a value free system the Constitution erects an objective system of values in its section on basic rights and thus expresses and reinforces the validity of the basic rights. This system of values, centering on the freedom of human being to develop the society must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration and judicial decisions. It naturally influences private law as well, no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.”**

73. The foregoing position was aptly summarised by the South African Constitutional Court in **Carmichele vs. Minister of Safety and Security (CCT 48/00) 2001 SA 938 (CC)** in the following terms:

**“Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system. As was stated by the German Federal Constitutional Court: ‘The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as a guiding principle and stimulus for the legislature, executive and the judiciary.’ The same is true of our Constitution. The influence of the fundamental constitutional values on the common law is mandated by section 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed.”**

74. Therefore the Constitution of Kenya, 2010, just like the post Nazi German Basic Law and the post-apartheid 1996 Constitution of South Africa, as ‘a transformative instrument’ is the key instrument to bring about a better and more just society”. See **Michaela Hailbronner** in ***Traditions and Transformations: The Rise of German Constitutionalism***.

75. It is my view that our position is akin to the one described by the German Constitutional Court in **BVverfGE 5, 85** that:

**“Free democratic order of the Basic Law...assumes that the existing state and social conditions can and must be improved. This presents a never-ending task that will present itself in ever new forms and with ever new aspects.”**“

76. This is my understanding of Article 20(2)(3) and (4) of the 2010 Constitution which provides as follows:

***(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.***

***(3) In applying a provision of the Bill of Rights, a court shall—***

***(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and***

***(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.***

***(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—***

***(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and***

***(b) the spirit, purport and objects of the Bill of Rights.***

77. To paraphrase **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57, the Constitution** is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle. It must, of necessity, adapt itself; it cannot lay still. It must adapt to the changing social conditions. As appreciated **In the Matter of the Estate of Lerionka Ole Ntutu [2008] KLR 452:**

**“Constitution of any country of the world should not represent a mere body or skeleton without a soul or spirit of its own. The Court would not like to discard the possibility of the court adopting broader view of using the living tree principle of the interpretation of the Constitution where they are “amongst others, ambiguity, unreasonableness, obvious imbalance or lack of proportionality or absurd situation.”**

78. Similarly in **Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006,** it was held that:

**“...the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits.”**

79. Nyamu, J (as he then was) in **Richard Nduati Kariuki vs. Honourable Leonard Nduati Kariuki & Another [2006] 2 KLR 356** expressed himself as hereunder:

**“The Constitution is a living document. It is a house with many rooms, windows and doors. It is conservative enough to protect the past but flexible enough to advocate new issues and the future.”**

80. It follows that the norms and values identified in Article 10 of the Constitution are bare minimum or just examples. This must be so because Article 10(2) of the Constitution provides that:

***“The national values and principles of governance include...”***

81. By employing the use of the term “include” the framers of the Constitution were alive to the fact that there are other values and principles which may advance the spirit of the Constitution and hence all State organs, State officers, public officers and all persons may be enjoined to apply them. What this means is that the national values and principles of governance in Article 10 of the Constitution are not exclusive but merely inclusive. The Constitution set out to plant the seed of the national values and principles of national governance but left it open to all State organs, State officers, public officers and all persons when applying or interpreting the Constitution, enacting, applying or interpreting any law, or applying or implementing a public policy decision to water and nurture the seedling to ensure that the plant develops all its parts such as the stem, the leaves, the branches and the flowers etc. In other words the national values and principles of governance must grow as the society develops in order to reflect the true state of the society at any given point in time.

82. As to whether these constitutional principles apply to judicial review, the South African Constitutional Court (**Chalkalson, P**) expressed itself on the issue in **Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others (CCT31/99) [2000] ZACC 1; 2000 (2) SA 674; 2000 (3) BCLR 241 (25 February 2000)** at para 33 as follows:

**“The control of public power by the courts through judicial review is and always has been a constitutional matter. Prior to the adoption of the interim Constitution this control was exercised by the courts through the application of common law constitutional principles. Since the adoption of the interim Constitution such control has been regulated by the Constitution which contains express provisions dealing with these matters. The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the Constitution, and in so far as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts.”**

83. It therefore follows that the Respondent in changing its policy no matter how short the policy has been applied, must adhere to the values and principles of governance. I am unable to find that the Respondent in changing its policy with respect to examinations adhered to the said values and principles. In my view, it is only after the Respondent complies with the relevant Constitutional and statutory provisions in effecting the change of policy that this Court would be barred from interfering with the decision. It is that context that I understand the following various decisions dealing with policy decisions.

84. 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 was held that:

**“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.”**

85. 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.”**

86. 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 1<sup>st</sup> 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.”**

87. 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.”**

88. This was a reflection of the position taken in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarsteth [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.”

89. Further, in Daniel Nyongesa and Others vs. Egerton University College CA No. 90 of 1989 Nyarangi, JA stated:

**“Courts are very loathe to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run Universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decision has been made without fairly and justly hearing the person concerned or the other side...”**

90. It is however my view to say that it is one thing to say that the Court ought not to interfere with policy decisions and another to investigate the manner in which such policy decisions are arrived at. While the Court may not set about investigating the merits of the policy decisions, there is nothing barring the Court from investigating the manner and the process through which such policy was arrived at.

91. It was further contended that the Respondent’s decision amounted to discrimination. In his decision in Nyarangi & 3 Others vs. Attorney General HCCP No. 298 of 2008 [2008] KLR 688, Nyamu, J (as he then was) held:

**“The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification...The rights guaranteed in the Constitution are not absolute and their boundaries are set by the rights of others and by the legitimate needs of the society. Generally it is recognised that public order, safety, health and democratic values justify the imposition of restrictions on the exercise of fundamental rights. Section 82 (4) and (8) constitute limitations to the right against discrimination. The rights in the Constitution may be limited only in terms of law of general application 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 and importance of the limitation (b) the relation between the limitation and its purpose (c) less restrictive means to achieve the purpose. The principle of equality and non-discrimination does not mean that all distinctions between people are illegal. Distinctions are legitimate and hence lawful provided they satisfy the following:- (1) Pursue a legitimate aim such as affirmative action to deal with factual inequalities; and (2) Are reasonable in the light of their legitimate aim.”**

92. *Blacks Law Dictionary* defines discrimination as follows:

*The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.*

93. *Wikipedia, the free encyclopedia* defines discrimination as:

*prejudicial treatment of a person or a group of people based on certain characteristics.*

94. *The Bill of Rights Handbook, Fourth Edition 2001*, defines discrimination as follows:

*A particular form of differentiation on illegitimate ground.*

95. The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. In this case, as long as the Respondent complies with the constitutional and statutory procedures for the change of policy, there would be nothing discriminatory in doing so. With respect to the allegation of bad faith, I am not satisfied based on the material placed before me that the Respondent's decision was informed by ulterior motives as alleged.

96. Having said that as stated in *Halsbury's Laws of England 4<sup>th</sup> Edn. Vol. 1(1) para 12 page 270*:

**“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow ‘contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders.’”** [Emphasis added].

97. This position was reiterated by this Court in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** where it was held that:

**“... it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is**

made has already been realized, even if merited. The would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance.”

98. In this case the impugned guidelines were introduced in August, 2016 effective in November, 2016. However these proceedings were not commenced till 4<sup>th</sup> October, 2016. It must always be remembered that judicial review remedies are discretionary in nature and one of the factors which would militate against the grant thereof is delay in seeking relief. As was held by Nyamu, J (as he then was) in Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728 and Mureithi & 2 Others vs. Attorney General & 4 Others [2006] 1 KLR (E&L) 707: “Speed and promptness are the hallmarks of judicial review.” This was emphasised in Republic vs. Minister For Finance & Another Ex Parte Nyong’o & 2 Others, [2007] eKLR where Nyamu, J (as he was then) stated;

“Refocusing on the issue of delay in seeking earlier intervention by the applicants the court must point out again as it has done before, that speed is the hallmark of judicial review... indeed decisions with financial implications must be challenged promptly failing which orders should not issue even where otherwise deserved.”

99. Judicial review, it has therefore been held, acknowledges the need for speedy certainty as to the legitimacy of the target activities and requires the applicants for judicial review to act promptly. See Mutemi Kithome vs. The District Land Adjudication & Settlement Officer Mwingi District & Others Nairobi HCMA No. 1108 of 2004 [2006] 1 EA 116.

100. Therefore whereas under the *Law Reform Act* there is no limitation as to when to apply for orders of prohibition and mandamus while the limitation period for applying for certiorari is six months from the date of the decision that falls under the categories specified under sections 8 and 9 of the *Law Reform Act*, the Court in determining whether or not to grant the relief sought will take into account the delay in making the application and the import and impact of such delay in the administration of justice.

101. This position was similarly appreciated in *Judicial Review Misc. Civil Appl. No. 139 of 2014 between Vania Investments Pool Limited and Capital Markets Authority & Others* where the learned Judge pronounced himself as hereunder:

*“The issue of failure to invoke alternative remedies is intricately linked with the issue of delay. Applications seeking leave to commence judicial review proceedings must be made promptly as soon as grounds giving rise to the need for judicial review become known. Undue and inordinate delay in applying for judicial review is a major factor for consideration. Lord Hope of Craighead in Regina v London Borough of Hammersmith and*

*Fulham (Respondents) and Other Exparte Burkett &*

*Another (FC) (Appellants) [2002] UKHL 23 noted the need for the applicant to move the court promptly when he observed that,*

*“[64] On the other hand it has repeatedly been acknowledged that applications in such cases should be brought as speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in O’Reilly v Mackman [1983] 2 AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision... But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in Swan v Secretary of State for Scotland 1998 SC 479, 487:” It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without*

*starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."*

102. In this case, the applicant is only one. The position of her co-students is not known to Court. I agree that to grant the orders sought herein would have the effect of stalling the exams and that decision would no doubt adversely affect the other students who may well have no problem with the said exams. In this respect, **Musinga, J** (as he then was) in **Republic vs. City Council of Nairobi & Another Ex Parte Peter Oduyo And Stanley Kinyanjui Suing on Behalf of Outdoor Advertising Association of Kenya [2011] eKLR**, observed in a matter where the impugned increased charges were gazetted on 15<sup>th</sup> October 2010 and were effective as from 1<sup>st</sup> January 2011 yet the applicants had moved to court on 8<sup>th</sup> February 2011 that:

**"I agree with Mr. Orina that any challenge to the 1<sup>st</sup> respondent's decision ought to have been brought promptly to avoid unnecessary disruption to the 1<sup>st</sup> respondent's finances which will in turn adversely affect its service delivery to the City residents".**

103. Therefore the grant of the orders sought herein is likely to cause administrative chaos and public inconvenience. Since there is provision for moderation of the results, instead of rendering a decision whose effect is likely to bring chaos to the legal education sector, the matter may still be taken up by the authorities in the process of the moderation of the results.

104. Therefore whereas it is my view that the Respondent's decision in altering its examination policy was tainted with procedural impropriety, in the exercise of my discretion I decline to issue the orders sought herein.

#### **Order**

105. Consequently, Motion on Notice dated 1<sup>st</sup> November, 2016 fails and is dismissed but with no order as to costs.

**Dated at Nairobi this 28<sup>th</sup> day of November, 2016**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**