REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 542 OF 2013

IN THE MATTER OF ARTICLES 22,23,165(3) (B) AND (D), 258, OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 10(2),24, 27 AND 28 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF INTERPRETATION OF ARTICLES 77,259 AND 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATER OF THE BETTING CONTROL AND GAMING ACT, CHAPTER 131 OF THE LAWS OF KENYA

BETWEEN

PROF. PAUL MUSILI WAMBUA.....PETITIONER

AND

ATTORNEY GENERAL.....RESPONDENT

AND

ASSOCIATION OF HUMAN RESOURCE

PRACTITIONERS OF KENYA.....1ST INTERESTED PARTY

COMMISSION ON ADMINISTRATIVE

JUSTICE…….2ND INTERESTED PARTY

JUDGEMENT

1. By an amended petition dated 6th February, 2014, the Petitioner herein, **Prof. Paul Musili Wambua,** seeks the following orders:

(a) A declaration that lecturers in public universities are not state officers and as such are not precluded from participating in any other gainful employment as envisaged by Article 77 of the Constitution.

(b) A declaration that Section 3(1)(a) of the Betting Lotteries and Gaming Act is inconsistent with the Constitution in as far as it limits the fundamental freedom from discrimination of the Petitioner by virtue of being a lecturer in a public university contrary to the extent permissible by Article 24(1) of the Constitution.

(c) An injunction do issue forthwith against the Interested Party from continuing with its apparent witch-hunt in a bid to malign the Petitioner on the basis of its erroneous interpretation of the constitution.

(d) A declaration that the Section 3(1)(a) of the Betting Lotteries and Gaming Act ought to be construed *mutatis mutandis* with the provisions of the constitution to ensure that it does not offend Articles 24 and 27 of the Constitution, 2010.

(e) A declaration that the Petitioner is not in breach of the Constitution or any other written law by holding the position of Chairman of the Betting Control and Licensing Board.

(f) Costs of the Petition.

2. According to the petitioner, he is a distinguished Association Professor of Law at the University of Nairobi School of Law, an advocate of the High Court of Kenya and the Chairman of the Betting Control and Licensing Board (hereinafter referred to as the BCLB) and that he commences these proceedings on his own behalf and on behalf of all part time permanent and/or full time Lecturers and Professors in Public Universities in Kenya under the provisions of Article 22(2) of the Constitution of Kenya, 2010.
3. The Respondent is the principal legal adviser to the Government of the Republic of Kenya mandated to represent the national government in court under the provisions of Article 156 (4).
4. The Interested Party is the registered association for the Human Resource Practitioners of Kenya.

The Petitioner's Case

5. According to the Petitioner, he was retained as a Pert time Lecturer of Law at the University of Nairobi, in February 2000 and was transferred to the Permanent list pensionable members of staff in March 2004 under payroll number MC10/184950. On or about 3rd January 2013 he was appointed the Chairman of BCLB vide Gazette Notice No. 203 of 11th January 2013 which appointment was largely due to the Petitioner's distinguished experience as Associate Professor of Law, his vast experience in matters of Public Governance and Public Service and more so as a Lecturer of law of long standing.
6. Prior to the appointment as the Chairman of BCLB, he had been appointed as Associate Dean in Charge of Kisumu Campus on 29th March 2011 for a period of three years ending on 28th March 2014 which appointment was made when he was on sabbatical leave from the university and during which time he also served as a visiting professor of Law at the National University of Rwanda and as Dean of Kabarak University School of Law.
7. According to the petitioner, he has at all times strived to uphold the national values and principles of governance in line with the provisions of Article 10 of the Constitution of Kenya, 2010 and in particular that of sustainable development recognizing the role of education on promoting social/socio-political and cultural arms of sustainable development.
8. However, on or about 11th October 2013 the Interested Party herein, through its Advocates; ***M/s Ngonyo Munyua & Company Advocates***, wrote to the Petitioner on the matter of his appointment as Chairman of BCLB aforesaid which letter made inter alia various allegations, claims and demands as follows:

(a) That the Petitioner was appointed Chairman of BCLB aforesaid while serving as a public officer at the University of Nairobi, Parklands Law School holding the title of Associate Dean.

(b) That the said appointment was in disregard of the provisions of Section 3(1)(a) of the Act (Betting Lotteries and Gaming Act, Chapter 131 of the Laws of Kenya) which excludes public officers from appointment.

(c) That the appointment aforesaid was the product of collusion between the Petitioner and the then Vice President and Minister for Home Affairs, the latter supposedly being and continuing to be a partner in the law firm of Musyoka Wambua and Katiku Advocates.

(d) That the Petitioner immediately vacates the office of Chairman of the BCLB despite rightly noting, that it is within the province of the Petitioner to choose either to retain the Chairmanship of BCLB or resign as Associate Dean aforesaid.

9. The Petitioner subsequently responded, through his advocates on record, to the Interested Party's material mischaracterization, misrepresentation of facts, innuendos and insinuations contained in its said letter and stated *inter alia* as follows:

(a) The Petitioner was duly appointed as Chairman of BCLB as at the time of the said appointment the Petitioner was not occupying the position of Associate Dean as alleged and he was on sabbatical leave from the University of Nairobi.

(b) The then Vice President and Minister for Home Affairs ceased being a partner in the firm of **M/s Musyoka Wambua and Katiku Advocates** in 1993 upon his appointment to the Cabinet

(c) The Petitioner was appointed Chairman of BCLB on merit more so being a distinguished Professor of Law of many years standing, well experienced in matters of public governance and whose track record in public service is beyond reproach.

(d) The foregoing notwithstanding, the Petitioner resolved to relinquish the position of Associate Dean forthwith as he wishes to concentrate on and is determined to continue with overseeing and concluding the far reaching reform process initiated at the BCLB.

10. Subsequently, the Interested Party herein changed tack and now demands that pursuant the Petitioner's continued employment as a lecturer at the University of Nairobi, School of Law whilst being the Chairman of BCLB, the Petitioner takes steps to account for loss of public funds in terms of double payments presumably in reference to the modest honorarium due to the Chairman of BCLB.
11. The Petitioner contended that he had not received his due honorarium payment in full as the Chairman of BCLB as he was only paid for the months of January and February 2013 since his appointment aforesaid largely due to the fact that he viewed his appointment as an opportunity for Public Service and in a bid to espouse the national values and principles of good governance prescribed by the Constitution.
12. According to him, Article 260 of the Constitution distinguishes between a State Officer to the extent that whereas a State Officer is a person holding any of the prescribed State Offices, a Public Officer is either a State Officer or any person other than a State Officer who holds a public office. He contended that Article 77 of the Constitution limits full-time State Officers only from participating in any other gainful employment. In other words not only does the said Article relate to full-time State Officers only as opposed to part-time State Officers as well, the said Article does not apply to Public Officers who are not State Officers.
13. It was pleaded that the Petitioner is Public Officer by virtue of the definition prescribed under Section 2 of the ***Public Officer Ethics Act***, Chapter 183 of the Laws of Kenya in respect to his employment as a lecturer at a public university. To him, the constitution guarantees every person

freedom from discrimination by any person whether directly or indirectly on any ground whatsoever. Further, the Constitution under the provisions of Article 24 therein envisages a situation where a right or fundamental freedom in the Bill of Rights may be limited by law only. However, the said Article goes further and qualifies this exception and states *inter alia* that the said limitation is only to the extent that it is reasonable and justifiable in an open and democratic society taking into account all relevant factors including *inter alia* the importance of the purpose of the limitation and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

14. It was his view that the provisions of Section 3(1)(a) of the ***Betting Lotteries and Gaming Act*** (hereinafter referred to as the Act) aforesaid is discriminatory to the extent that it precludes a public officer from appointment as Chairman of BCLB, and in particular it may be construed that the Petitioner by virtue of being a lecturer employed by a public university is thus not eligible for appointment as Chairman aforesaid. It was his contention that a Lecturer at any institution of higher learning particularly at a public university holds a significant and pivotal role in the society and as such his position is instrumental towards the promotion of sustainable development. Indeed the economic impact of public universities is undeniable. He averred that in recognition of the situation noted in the foregoing paragraph, the Commission for University Education (CUE) commissioned a team of education professionals to conduct capacity audits on public universities which made up the Institutional Audit Reports, 2013 received on 8th February 2013 which report revealed shocking details to the extent that Kenya's public university education is being undermined by a glaring lack of adequate academic staff with doctorate degrees with the number being at an all-time low which state of affairs particularly applies to the University of Nairobi, the foremost public university in Kenya.
15. The Petitioner avers that Section 3(1)(a) of ***Betting Lotteries and Gaming Act*** aforesaid is unconstitutional in as much as it seeks to limit the fundamental freedom from discrimination by precluding all public officers, in this particular case lecturers, from appointment as Chairman of BCLB. In his view, the said limitation is not reasonable, justifiable and fails to take into account all relevant factors to the extent that despite distinguished lecturers such as the Petitioner being public officers their involvement in various other public service duties ought to be encouraged for purposes of tapping into their special skills rather than requiring them to relinquish their teaching positions at the university despite the glaring shortfall of qualified lecturers aforesaid. He opined that precluding and/or limiting certain public officers such as lecturers aforesaid from appointment as Chairman of BCLB vide a blanket provision without taking into account all relevant factors including the relation between the limitation and its purpose and more so whether there are less restrictive means to achieve the purpose is manifestly unconstitutional.
16. It was contended that the constitution does not include Public Officers under the ambit of the Article 77 of the Constitution but rather it restricts the activities of full-time State Officers only, perhaps in recognition of the significant mandate borne by the holders of the respective State Offices only rather than all public officers. He asserted that Article 77 of the Constitution does not apply in any way whatsoever to public officers who are not state officers and in any case, the appointment of the Petitioner as Chairman of BLCB and continued holding of the said position cannot be construed to amount to gainful employment in reference to the provisions of Article 77 of the Constitution.
17. He explained that the ***Leadership and Integrity Act***, 2012, an Act of parliament enacted to give effect to Chapter Six of the Constitution, at Section 26 thereof clearly defines the term "gainful employment" to mean *inter alia* work that a person can pursue and perform for money or other form of compensation or remuneration which is inherently incompatible with the responsibilities of the state office or which results in the impairment of the judgment of the state officer in the execution of the functions of the state office or results in a conflict of interest. It was therefore the Petitioner's position that from the definition of 'gainful employment' aforesaid it is clear that *inter alia* first and foremost the person must be a holder of a state office and the work pursued for money form of compensation must be inherently incompatible with the lecturer in a public university from the application of Article 77 of the constitution in as far as he neither holds a state office nor is the work of a lecturer inherently incompatible with the responsibilities of the supposed state office.
18. It was contended that the ***Betting Lotteries and Gaming Act*** preceded the promulgation of the

Constitution, 2010 and as such there is need to ensure that it is amended accordingly so that its provisions and in particular Section 3(1)(a) thereof does not offend Articles 24 and 27 of the Constitution.

19. In support of the averments in the petition the Petition swore a supporting affidavit on 11th November, 2013 in which the averments in the petition were repeated.

Respondent's Case

20. In reply to the application the respondent filed the following grounds of opposition:

> **1. That the Petitioner has not explored the alternative legal administrative avenues available to him to do reparation of his claims if at all;**
>
> **2. That the constitutional principle/right of access to justice before constitutional commissions and the court is a fundamental right which does not necessarily amount to a witch-hunt.**
>
> **3. That the averments as contained in the Petition are selective both in facts and the constitutional and legal principles applicable to the trite jurisprudence on the harmonized and purposive interpretation of the constitution; and**
>
> **4. That this honourable court is enjoined by dint of Article 23(3) of the Constitution to issue appropriate reliefs taking into consideration the totality of the factual circumstances and all the applicable and relevant laws as read in conformity with the Constitution of Kenya 2010.**

21. It was submitted on behalf of Respondent that the allegations made in the petition were not precise hence no cause of action was disclosed. In support of this position the Respondent relied on **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** and **Paul Kiplagat Birgen and 2 Others vs. IEBC and 2 Others [2011] eKLR**.
22. It was further submitted that letters having been addressed and copied to competent constitutional and statutory bodies to deal with the issues raised therein, in the absence of an averment on ostensible lack of mandate, the issues should be conclusively determined by the respective institutions and only if aggrieved with their findings should the jurisdiction of the Court be invoked otherwise it would amount to usurpation of the powers of the said institutions. In support of this submission the Respondent relied on **Michael Wachira Nderitu and Others vs. Mary Wambui Munene and Others Constitutional Petition No. 549 of 2012**.
23. It was submitted that one such institutions is the Ethics and Anti-Corruption Commission established pursuant to Article 79 of the Constitution as an independent Commission not subject to direction or control by any [person or authority. It was further submitted that pursuant to Article 80 of the Constitution which mandates Parliament to enact legislation to operationalised the leadership and integrity chapter in the Constitution, Parliament enacted the ***Leadership and Integrity Act*** with clear substantive and procedural mechanisms for dispute resolutions. Based on the authority of **Ndyanabo vs. Attorney General [2001] 2 EA 485**, it was submitted that the presumption of the constitutionality of section 3(1)(a) of the ***Betting Lotteries and Gaming Act*** has not been discharged. In support of this submission reliance was placed on **National Conservative Forum vs. Attorney General High Court Petition No. 438 of 2013**.
24. It was therefore submitted by the Respondent that the Petitioner having held more than two public office posts, by dint of section 3 of the said Act, his appointment to the Chairmanship of the BCLB was null and void.

2nd Interested Party's Submissions

25. On the part of the 2nd interested party, the Commission on Administrative Justice, also known as the Ombudsperson, it was submitted that, the mandate of the 2nd interested party pursuant to Article 59 of the Constitution is to investigate any conduct in state affairs in both the national and

county government.

26. According to the 2nd interested party, the court should address itself on whether the Petitioner was pursuant to the definition of a "public officer" in the Constitution and the ***Public Officer Act***, Cap 183 of 2003 a public officer at the time of his appointment to the position of the Chairman of the BCLB. It was submitted that at the time of his appointment to the Board, the petitioner served as an Associate Dean of the University of Nairobi, a public office and subsequently n his appointment to the BCLB, held two public offices. Based on Busia Election Petition No. 3 of 2013 – **John Okelo Nagafwa vs. IEBC & 2 Others [2013] eKLR** it was submitted that the Chairman's engagement with the BCLB amounts to gainful employment as anticipated under section 26(1) of the ***Leadership and Integrity Act***. In further support of this position, the 2nd interested party relied on the African Charter on Values and Principles of Public Service and Administration. It was therefore submitted that a public officer cannot be employed to serve in another public office whose functions do not correlate to is duties and that the only instance when a public officer can serve in another public office is when such officer is required by law and by virtue of his/her office to serve in two or more public offices subject to the condition that the officer will not draw additional salary or allowances.
27. It was submitted that a public officer who by virtue of his/her office is required by law or any other regulation to sit in the Board or otherwise serve in another public institution should not be paid any salary or allowance. Such service should be construed as public service and services rendered being within the normal course of the duties of the public office.

Determinations

28. I have considered the Petition herein, the affidavits filed and the submissions.
29. What triggered this petition was a letter dated 11th October, 2013 addressed by the firm of **Ngonyo Munyua & Company Advocates** to the Petitioner on behalf of their clients, the 1st interested party herein in which it was alleged that the petitioner's holding of two positions of Associate Dean at the University of Nairobi and the Chairmanship of the BCLB was an affront to the Constitution. The said interested party therefore put the Petitioner on notice that it was intending to move Court for appropriate orders.
30. It is on the basis of the said notice that he Petitioner has now moved this Court seeking the orders sought in the plaint. One does not need to be a magician to see that the petition was meant to pre-empt the action which the 1st interested party had threatened to take.
31. In the letter dated 11th October, 2013, the 1st interested party requested the 2nd interested party and the Ethics and Anti-corruption Commission to commence investigations as to the constitutionality and legality of the Petitioner's holding of two public offices. Including determination of abuse of office and non-prudent use of public funds. It has not been contended that the said institutions which are Constitutional Commissions had no such mandate.
32. According to **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

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

33. I am also mindful of the decision of this Court in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

"**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge**

the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."

34. Whereas every person is pursuant to the provisions of Article 3 and 22 under an obligation to respect, uphold and defend the Constitution and a right to right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, it is my view that those provisions ought not to be abused. As was held in **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743; [2005] 1 KLR 787**:

"Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner…The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore the Court does have the inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside *ex parte* orders, which by their very nature are provisional."

35. As was held in **Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235:**

Nothing can take the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process… A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action… The notion that wherever there is a failure by an organ of the Government or a public authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals is fallacious. The Right to apply to the High Court under the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the

appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.

36. Therefore it is my view and I so hold that to institute a Constitutional Petition with a view to circumventing a process by which institutions established by the Constitution are to exercise their jurisdiction is an abuse of the Court process. To allow entertain such a course would lead to the Courts crippling such institutions rather than nurturing them to grow and develop.
37. Accordingly I find that in so far as prayers a), c) and e) of the petition are concerned this Court ought not to entertain the same at this stage.
38. With respect to prayer b) in the petition, I associate myself with the holding of **Mumbi Ngugi, J** in **National Conservative Forum vs. Attorney General [2013] eKLR** where the learned Judge expressed herself as follows:

"…if I may borrow the words of the dissenting opinion in the United States Supreme Court case of U.S. v. Butler 297 U.S. 1 (1936):

> **'Courts are concerned only with the power to enact statutes, not with their wisdom….For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government'.**

Should a need to reconsider the presence of the International Crimes Act in our statute books arise, assuming that the good and cogent reasons that one hopes informed its enactment no longer exist, that is something that lies within the power and mandate of the legislature which, at the time of its enactment, thought it a wise and necessary legislation to enact. One may have serious reservations about the wisdom of enacting or removing legislation from the statute books to suit the exigencies of the moment, but our democratic processes, as enshrined in the Constitution, have vested in the legislature the power to do that should it be so minded."

39. The reason advanced by the Petitioner for seeking to declare section 3(1)(a) of the Act as unconstitutional is that the said section is discriminatory to the extent that it precludes a public officer from appointment as Chairman of the BCLB. According to the Petitioner a lecturer at any institution of higher learning particularly at a public university holds a significant and pivotal role in the society and as such his position is instrumental towards the promotion of sustainable development. According to the petitioner, distinguished lecturers such as the Petitioner being public officers their involvement in various other public service duties ought to be encouraged for purposes of tapping into their special skills rather than requiring them to relinquish their teaching positions at the University despite glaring shortfall of qualified lecturers.
40. Whereas this Court may well agree with the position taken by the Petitioner on the role of lecturers in the development agenda of the nation, as clearly stated hereinabove, Courts are concerned only with the power to enact statutes, not with their wisdom. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government. Accordingly this Court is not entitled to find that section 3(1)(a) of the Act as unconstitutional is unconstitutional simply because it precludes the Petitioner from being the chair of the BCLB.
41. It must always be noted that discrimination *per se* is not unconstitutional. In **Nyarangi & 3 Others vs. Attorney General [2008] KLR 688**, it was held:

"The *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." *Wikipedia, the free encyclopedia* defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. *The Bill of Rights Handbook, Fourth Edition 2001*, defines discrimination as follows:- "A particular form of differentiation on illegitimate ground."…

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 US case of *Griggs vs. Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications was found "to disqualify Negroes at a substantially higher rate than white applicants".

42. I further associate myself with the decision in **John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others [2011] eKLR** where it was held that:

"we need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case will therefore require will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one contest may not necessarily be unfair in different context. At the heart of this case, therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyse a claim of discrimination has both a subjective and an objective component...In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context...It is only by examining the larger context that a court can determine whether differential treatment results in equality."

43. I also agree with the decision in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarstheth [1985] LRC** in which 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."

44. I have considered the grounds upon which the Petition relied and I am not satisfied that the Petitioner's case rebuts the presumption of Constitutionality of section 3(1)(a) of the Act as espoused in **Ndyanabo vs. Attorney General** (supra).
45. With respect to the prayer for a declaration that section 3(1)(a) of the Act ought to be construed *mutatis mutandi* with the Constitution to ensure that it does no offend Articles 24 and 27 of the Constitution, 2010, section 7 of the Sixth Schedule to the Constitution provides:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

46. Accordingly nothing turns on that prayer since it is just a declaration of the provision in the Constitution.
47. As properly appreciated by the 2nd interested party, some of the issues dealt with in its submissions were properly not issues in this petition. Accordingly I do not feel called upon to pronounce myself thereon.

Order

48. In the circumstances, the inescapable conclusion I come to is that this petition is unmerited. It is accordingly dismissed with costs.

G V ODUNGA

JUDGE

Dated at Nairobi this 23rd day of January 2015

E OGOLA

JUDGE

Delivered in the presence of:

Mr. Kamau for the Respondent

Cc Teresia