REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL PETITION NO. 377 OF 2015

CONSOLIDATED WITH PETITION NO. 395 OF 2015 AND JR NO. 295 OF 2015

KEVIN K. MWITI & OTHERS……..APPLICANTS

VERSUS

KENYA SCHOOL OF LAW.....1ST RESPONDENT

COUNCIL FOR LEGAL EDUCATION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

RULING

Applicants' Case

1. By a petition dated 27th February, 2015, the Applicants herein who are Law Students of various universities duly accredited by the Council of Legal Education the 2nd Respondent herein (hereinafter referred to as "the Council") aver that in September 2012, Parliament enacted the ***Kenya School of Law Act, 2012*** (hereinafter referred to as "the Act) which provided for the establishment, powers and functions of the 1st Respondent (hereinafter referred to as "the School") and the Act came into force in 2013, by which time the applicants had already been admitted to their respective universities. That Act, however did not provide for a transition period.
2. Recognizing that there were students already enrolled in the University system whose constitutional rights and legitimate expectation to complete their education would be adversely affected by the Act, the 1st and 2nd Respondents published guidelines for admission to the Advocates Training Programme (herein referred as "ATP"). the said guidelines provided inter-alia the following;

"Accordingly, the following categories of persons will be admissible to the ATP at the Kenya School of Law for the academic year 2014/2015:

I. ***Having passed the relevant examinations of any recognized university in Kenya holds, or have become eligible for the conferment of the Bachelor of Laws Degree(L.L.B) of that university; or***
II. ***Having passed the relevant examinations of a university, university college or other institutions prescribed by the council, holds or have become eligible for the conferment of a Bachelor of Laws Degree(L.L.B) in the grant of that university, university college or other institution and had prior to enrolling to that university/university college or other institution:***

i. ***Attained a minimum entry requirements for admission to a university in Kenya; and***
ii. ***Obtained a minimum grade of B(plain) in English language or Kiswahili and a mean grade of C(plus) in Kenya Certificate of Secondary examinations or its equivalent.***

III. ***Having passed the Bachelor of Laws (L.L.B) examinations of a recognized university and having attained a minimum of C (plus) in English and a minimum of an aggregate C (plain) in the Kenya Certificate of Secondary Examination and hold a higher qualification e.g 'A' Levels, 'IB', relevant 'diploma' other 'undergraduate degree' or have attained a higher degree in law after the undergraduate studies in Bachelor of Laws (L.L.B) programme.***
IV. ***Having passed the relevant Bachelor of Laws (L.L.B) examinations of a recognized university and having attained a minimum of C (minus) in the Kenya Certificate of Secondary Examinations sit and pass the Pre-Bar examination set by the Kenya School of Law.***

PROVIDED that persons who were eligible to sit for the Pre-Bar examinations but did not do so in 2013 will be given an opportunity to do so when the examination is next offered.

V. ***This admission criterion will operate for a transitional period of three (3) years from January 2013 to allow applicants who had joined the university system before the coming to force of the Kenya School of Law Act 2012 to complete their study programmes.***

3. The effect of the aforesaid guidelines was to provide for a three year transition period beginning 15th January 2013 to cater for students who had already been admitted to the university system prior to the enactment of the Act and to allow them to complete their programmes on the basis of legitimate expectation undergirded by the then existing law. By the said guidelines the Board appreciated the equality and non-discrimination provisions in Article 27(1), (2) and (6) of the Constitution, 2010 and pursuant thereto provided that the students who had already been admitted into the University prior to the said Act would complete their studies under the existing legal regime.
4. To the applicants, they were already undertaking their programmes and as such at all times protected by the letter and the spirit of the aforesaid guideline which guidelines created a legitimate expectation on the part of the petitioners to be subjected to the then existing law which was guiding admission to the ATP when seeking to join the ATP programme.
5. It was their case the said guidelines have been applied for the last two admission lots to the ATP programme and were expected to govern the third and last lot of admissions to the ATP Programme for the academic year 2016/2017 and to which academic year the applicants belong. The same transition period, it was contended, is still in force and the applicants expected to be subjected to the aforesaid guidelines.
6. It was disclosed that sometime in the year 2014, the Parliament of Kenya enacted the ***Statute Law (Miscellaneous) Amendment Act, 2014*** (hereinafter referred to as "the Amendment Act") which Act amended various Acts including Schedule Two of the Act. The effect of the said amendment was the deleting of the word "or" in the second schedule and substituting therefor the word "and" and creation of the Board of Directors tasked with *inter alia* the responsibility of management of the School.
7. The said amendment changed the eligibility for admission to the ATP programme by making it mandatory for applicants to sit and pass pre bar examinations. To the applicants, the said Amendment Act to the extent that it amended Schedule Two of the Act, the same was done without reasonable public participation especially participation by the Petitioners.
8. Pursuant thereto and without any prior notice or any reference or consultation with the petitioners, the 1st Respondent by way of an advert published in the local dailies on 2nd September 2015 i.e. *The Standard* Newspaper on page 23, and on page 43 of *The Daily Nation* inviting applicants to apply for a 'Pre-bar' examination as a prerequisite for admission to the 1st Respondent's institution to undertake ATP programme which advert listed the eligibility criteria for applicants for the pre bar examinations as follows;

i. **Have attained a mean grade of C+ (Plus) with a minimum grade of B in English or Kiswahili at KCSE.**

ii. **Be holders of an LLB degree from a university recognized in Kenya (or show evidence of eligibility of conferment)**
iii. **Have passed all the 16 core subjects at the university level as provided under the Legal education Act 2012.**

NB. Applicants from foreign universities must provide written evidence of clearance from the Council of Legal Education.

9. It was contended that the said advert by the 1st Respondent requires applicants to have made their applications for Pre bar exams on or before 30th September 2015 which pre bar exam is scheduled to be undertaken on 2nd November 2015.
10. The said notice required the applicants to sit pre-bar examination as a pre-requisite for admission to the School and required as a condition for sitting the said exams the furnishing of a copy of the LLB Certificate (or evidence of conferment), final transcripts and clearance from the Council. It was contended by the applicants that the final transcripts are issued upon graduation and that previously the students have been admitted to the School with provisional transcripts.
11. It was the Applicants' case that the impugned notice did not disclose the pass mark that any of the applicants would score to proceed to their Advocates Training Programme but required them to pay a total of Kshs 7,000/= for admission into the examination which amount was payable in less than a month's period to the date of the examination. To the applicants, the said notice requires them to undertake examination in respect of which they have been taught, examined and passed, by institutions that are regulated and monitored by both the Council and Council of University Education and in any case the applicants will be taught and examined some of those subjects at the School.
12. It was contended that the Amendment Act is unconstitutional to the extent that it unreasonably and unjustifiably perpetuates inequality and discrimination to the extent that it affords equivalent treatment to persons in dissimilar circumstances. Further, having created a legitimate expectation that the Second Schedule will not be applicable to students admitted before the coming into force of the Act, and considering that it is discriminatory to afford different treatment to students whose circumstances are materially the same, the School has acted unfairly and in violation of Articles 27 and 47 of the Constitution. To the applicants, by requiring the Applicants to sit for an examination over subjects they have already been taught and examined at licenced and regulate institutions, the School has acted unreasonably and contrary to Article 47 of the Constitution. With respect to the required sum of Kshs 7,000/- payable within a period of less than a month, it was contended that the same went contrary to section 5(B) of the Act which permits the School to charge reasonable fees and extend loans and other assistance to needy students. The school was further accused of violating Article 35 of the Constitution by failing despite requests to disclose the modalities of the said examination. To insist on final transcripts which are only issued upon graduation, the School was accused of fettering its powers.
13. To the applicants, the above criterion is a total departure from the transition guideline issued by the 1st and 2nd Respondents. Further, the said criterion is discriminative for not equating of other qualifications for example those who undertook other exams other than KCSE.
14. In addition, the same criteria has the effect of locking out some of the applicants even from applying for the pre bar examination as they do not qualify under the same even having obtained other relevant qualifications which were recognized by the existing law covered by the transition guidelines. To expound on this it was contended that the petitioners had made plans and even incurred expenses based on the expectation that having begun their Bachelor of Laws programme with a legitimate and reasonable expectation that the criteria to qualify as an advocate would not change or if changed would not apply retrospectively. Further, the eligibility criteria contained in the said notice published on 2nd September 2015, does not recognize other relevant qualifications for example persons who have acquired a relevant Diploma in law or any other equivalent. It was added that the criteria for pre bar does not recognise the previously recognised qualifications like KCE and KACE administered by the Kenya National Examination Council and offers no alternatives for holders of such qualifications thus shutting them off from qualifying as advocates.
15. To the applicants, they effectively stand to be locked out of the ATP if their qualifications which fell within the then existing law are not considered now as a result of introduction of new

eligibility criteria in the qualifications.

16. To the applicants, the 1st and 2nd Respondents having recognized that the Petitioners had a legitimate expectation to be admitted to the ATP, any intervening legislation passed after the commencement of their studies ought not to affect them adversely.
17. It was reiterated that the said advert by the 1st Respondent is discriminative, unfair, unreasonable, malicious, and irrational and one made in bad faith and is a violation of the applicants' legitimate expectation and which seeks to apply the law retrospectively. That application, it was averred, is a threat to the rule of law and the principle of legitimate expectation and the same constitutes an abuse of power by the Respondents.
18. It was contended that any application of law that does not recognise equivalent qualification violates Article 35 on economic and social rights which includes right to Education.
19. In the premises the Applicants intend to seek orders declaring the impugned legislation unconstitutional to the extent of replacing the word "or" with "and"; that the applicants legitimate expectation have been infringe; that the Respondents' actions violate the Constitution; and that the notices regarding pre-bar exams are invalid and ought to be quashed. They further intend to seek an order prohibiting the Respondents from advertising and administering the said exams and an order compelling the Respondents to admit them based on the criterion in the statute before the coming into force of the Act.
20. Pending the hearing of the petitions and the application for judicial review, the applicants are seeking orders that they be granted leave to apply for the judicial review and that upon the grant thereof, that the same does operate as stay of the ongoing registration for the pre-bar examination and eventual pre-bar examination slated for November, 2015. A similar order was sought by the petitioners in the form of a conservatory order suspending the notification of pre-bar examination and staying all the proceedings relating thereto. It is these applications that are the subject of this ruling.
21. It was contended while reiterating the grounds of the petition that unless the orders sought are granted, a determination in favour of the Petitioners will be merely of intellectual/academic importance as the applicants will be highly prejudiced and many students unfairly locked out of the School.
22. In his submissions **Mr Okubasu** learned counsel for the 1st set of applicants emphasised that the impugned decision was not applied to the applicants' predecessors. Further the said provisions cannot operate retrospectively in order to impose obligations on the applicants which obligations did not exist at the time of the enactment of the Act. It was contended that the said notice introduces certain requirements such as the final transcripts which the applicants who are yet to graduate are not in possession of and hence may lock them from being admitted to the School. The effect of this, it was submitted will be to delay the applicants' admission till November, 2016 which will have the effect of radically altering their circumstances. If the Court was to find in favour of the applicants, it was contended that public funds would have been expended towards invalid ventures. In the meantime the applicants would have endured distress and anxiety for no reason.
23. As for the 2nd set of applicants, it was contended by **Mr Karonji** that though they had graduated, the introduction of the new requirements with respect to minimum qualifications has the effect of locking them out of the School completely.
24. On behalf of the 3rd set of applicants, it was contended by **Mr Ogoti** that since the period of admission is not set out in a Statute the Court has the power to extend the same.

1st Respondent's Case

25. According to the 1st Respondent, the School is established by Section 3 of the Act which came into force on 15th January, 2013 and section 4 thereof sets out the objects and functions of the School. The law provides that the School shall be a public legal education provider responsible for provision of professional legal training as an agent of the Government. One of the key objects of the School is to train persons to be advocates under the ***Advocates Act Cap 16***.
26. Section 5 (b) of the Act gives the School power to charge reasonable fees and other charges for services rendered while section 5(f) gives the School power to make regulations as may be

considered necessary for regulating affairs of the School. Section 16 of the Act provides that "a person shall not qualify for admission to a course of study at the School, unless that person has met the admission requirements, set out in the Second Schedule for that course."

27. It was contended that as a public legal education provider responsible for provision of professional legal training as an agent of the Government, the Respondent is obligated by law to ensure that persons being admitted to the School to train to be advocates under the ***Advocates Act Cap 16*** meet the admission requirements set out in the Second Schedule to the Act and that failure to do so would mean that the School is in breach of the very law governing its operations.
28. Before the Act came into force, admission requirements were contained in the ***Council of Legal Education Act***, Cap 16A (now repealed) as read together with the ***Council of Legal Education (Accreditation) Regulations, 2009*** and the ***Council of Legal Education (Kenya School of Law) Regulations, 2009*** (now revoked).
29. The respondent appreciated that whereas the Act contained transitional provisions to govern various matters, there were none touching on the matter of admission requirement for persons who were at that time pursuing their Bachelor of Laws degrees meaning that such persons would be required to meet the admission criteria set out in the Second Schedule to the Act. However, the very fact that the Act contained transitional provisions to govern various other matters and none touching on the matter of admission requirement for persons who were at that time pursuing their Bachelor of Laws degrees means that Parliament in its wisdom, saw it fit that going forward, all persons seeking admission to the School meet the new requirements set out in the Second Schedule to the Act. In any event, Parliament did not owe the persons who were at that time pursuing their Bachelor of Laws any duty not to review the law governing admission requirements to the Kenya School of Law and as such, no legitimate expectation was created.
30. It was admitted that on 17th January, 2014, the Kenya School of Law together with the Council of Legal Education did put up an advertisement notice that sought to explain the admission criteria that would be applied for persons intending to join the School for the academic year 2014/2015 and that the same set out **in bold** the principle that would guide the admission process into the Advocates Training Programme (ATP) for the academic year 2014/2015 to be as follows:

"The Second Schedule to the Kenya School of Law Act will be followed subject to any discretionary powers which have hitherto been exercised by the Council of Legal Education and the Kenya School of Law prior to 2012 to ensure conformance with the anti-discriminatory provisions of Article 27 of the Kenya Constitution, 2010"

31. To the 1st respondent, the Applicants in all the matters before this Court are erroneously asserting that based on the said notice, they had legitimate expectation that they would be admitted to the ATP based on the admission criterion contained in the notice, which mirror the criterion in the ***Council of Legal Education (Kenya School of Law) Regulations, 2009*** (now revoked), obtaining before the Act came into force. To the contrary, the said notice clearly provided that it is the Second Schedule to the Act that would govern admission into the ATP subject to exercise of any discretionary powers by the Kenya School of Law and the Council of Legal Education.
32. The notice simply reinforced the position that it is the new admission requirements under the Act that would be the principal criterion for admission subject to the discretion of the School and the Council. For this reason, the Respondent denied that the said notice created a legitimate expectation that the Applicants would be admitted to the ATP solely based on the pre-existing law.
33. Moreover, the 1st respondent added, in November, 2014 Parliament passed a number of amendments to the Act contained in the Amendment Act which make it compulsory for all persons seeking admission to the ATP to sit for and pass the pre-bar examination set by the School in addition to the other stipulated academic qualifications. It was therefore averred that there can be no legitimate expectation contrary to a clear statutory provision. Even assuming the said notice created legitimate expectation, which is vehemently denied, the amendments that were undertaken subsequent to the notice had the effect of extinguishing any such legitimate expectations with the result that the Applicants cannot rely on the said notice to urge thwarted legitimate expectation.
34. To the 1st respondent, being a public legal education provider responsible for provision of professional legal training as an agent of the Government, it is obligated to adhere to the law, and

in so doing, cannot be said to be in breach of the Applicants' legitimate expectations claimed to arise from the said notice and the Applicants cannot possibly rely on said notice as the same has been superseded by the express statutory provisions enacted by Parliament.

35. In respect to the application for grant of conservatory orders, it was the 1st respondent's case:

i. The Applicants have failed to demonstrate a *prima facie* case. The notice on which they are relying to plead legitimate expectation clearly stipulated that it is the Second Schedule to the Kenya School of Law Act, 2012 that would govern admission to the ATP programme. The 1st Respondent is applying and seeks to implement that very Second Schedule. Even assuming the notice would have created legitimate expectation, which is vehemently denied, there is no breach of legitimate expectation in the circumstances of this case since the Respondent has not deviated from what it undertook to apply in the said notice.

ii. Generally, laws change from time to time and under Article 94 (1) and (5) and 109 (1) of the Constitution, legislative authority vests with Parliament and shall be exercised through the Bills that they pass. There can be no reasonable undertaking by Parliament that the law relating to any matter will not change in future.

iii. Premised on the foregoing any assertion by the Applicants that they had legitimate expectation that admission requirements to the ATP would remain the same has the effect of restricting the legislative authority of Parliament, and is in itself unconstitutional and against public policy.

iv. The Applicants have not laid any basis, or any valid basis why the Second Schedule to the Kenya School of Law, 2012 which provides for the admission requirement to the ATP is unconstitutional. The Second Schedule is part of a law that was properly enacted by Parliament and it does not breach any Articles of the Constitution as alleged or at all.

v. The Applicants have not demonstrated that they will suffer any irreparable loss if the conservatory orders are not granted. The Respondent's School term runs from mid-January to November. There is ample time for the Court to deal with the substantive Petition and Motion. The Applicants will, depending on the outcome of the case, have an option to join the School before the new term subject to attaining the statutory application criteria or to sit the pre-bar examinations when they are next offered.

vi. The balance of convenience militates against grant of conservatory orders. If conservatory orders are granted, they will greatly jeopardize the planning and scheduling of the School programmes. Hundreds of applicants who are willing to sit for the pre-bar examination and who have already paid for it will be inconvenienced contrasted with the handful of Applicants before Court. It will lead to uncertainty in terms of preparations that have to be undertaken to roll out the exams. A number of pre-paid commitments and work already put in will be lost in the process.

vii. The inconvenience, in the unlikely event that this Honourable Court ultimately finds for the Applicants would be much less as it would be much easier to accommodate Applicants. However, if this Honourable Court were to grant conservatory orders at this stage suspending the scheduled pre-bar examinations and then afterwards find that the pre-bar examinations must proceed the inconvenience of planning and rescheduling the examinations and processing them in time for the new School term would be tremendous.

36. It was averred that the 1st respondent is entitled by law to charge reasonable fees and other charges for services rendered. The Respondent is charging an application fee of Kshs. 2,000 and an examination fee of Kshs. 5,000. The examination fee of Kshs. 5,000 is refundable for those who do not meet the application requirements. In arriving at the fees, the 1st respondent has considered that the pre-bar examination will entail one paper and has also considered the cost of setting, administering and marking the examinations as well as related incidentals. The examination fees are therefore quite reasonable in circumstances of this case.

37. To the 1st respondent, it has also given reasonable notice for preparation for the examination. It is not true as alleged by the Applicants that they have been ambushed. There is at least duration of two months between when the notice was issued and when the examination is scheduled which is reasonable notice by any standards.

38. It was the 1st respondent's case that the requirements to sit for the pre-bar examinations are not

extraneous as alleged by the Applicants. The requirements set out in the notice are reasonable and are all necessary to determine the suitability and eligibility of the Applicants to sit the examination. The requirements are in furtherance to the requirements set out under the Act as well as the ***Legal Education Act, 2012***.

39. The fact that some of the Applicants have not finalized their studies and are unable to obtain all the requirements necessary to apply for the pre-bar examination at the moment does not in any way mean that the requirements unfairly disadvantage them as against their predecessors. The School has the mandate to run its schedule as may be approved by its Board. There is no obligation or requirement on the School that it must call for applications to its programmes at a certain time when the Applicants will have obtained all the requirements and therefore become eligible to apply. The Applicants will have an opportunity to sit for the pre-bar examinations when they are next offered.
40. Section 28 of the Act, it was asserted, gives the School power to make regulations providing for the categories of examinations and the manner in which such examinations shall be administered. Accordingly, the pre-bar examination has been set to examine various subjects which have been determined by the Respondent pursuant to its statutory mandate. The Applicants' allege that the requirement for them to sit pre-bar examination which examine on some of the subjects they have undertaken at the University is unreasonable and in breach of Article 47 of the Constitution or any other Article of the Constitution as alleged or at all. This is not true since the pre-bar is an entrance examination intended to establish suitability of all applicants to the ATP.
41. The 1st respondent denied the allegation that it had not disclosed the particulars relating to the pre-bar examination and averred that all details including the subjects to be examined, the pass mark as well as opportunities for re-sits and other modalities are all contained in the ***Kenya School of Law (Training Programmes) Regulations, 2015***.
42. It was the 1st Respondent's case that since it is charged with a very key object of setting and enforcing standards relating to training persons to be advocates under the Advocates Act Cap 16, this Honourable Court ought to refrain from directing the Respondents on how best to discharge its statutory mandate. To it, the gist of the Applicants' applications is to invite this Honourable Court to supervise the Respondent in the discharge of its statutory mandate which invitation this Honourable Court ought to decline.
43. The 1st respondent therefore prayed that the Applications before this Court seeking for conservatory orders be dismissed with costs to the Respondent and the matters proceed for substantive hearing.
44. The foregoing averments were reiterated by **Mr Kashindi**, learned counsel for the 1st respondent who added that since the provisions of the Act were not being challenged, if the conservatory orders ought herein are granted the Court will be veering into a dangerous territory.

2nd Respondent's Case

45. The 2nd respondent in reply to the application filed the following grounds of opposition.
46. It was submitted by the 2nd respondent that the criteria set out in **Coalition for Reform and Democracy (CORD) & Another vs. Republic of Kenya & Another [2015] eKLR** had not been met. It was contended that the said guidelines were *ultra vires* section 16 of the Act and that legitimate expectation cannot be pleaded or sustained in contravention of the statutory provisions and reliance was placed on **Royal Media Services Limited & 2 Others vs. Attorney General & 8 Others [2014] KLR** and **Republic vs. Kenya Revenue Authority & 3 Others ex parte Five Forty Aviation Limited [2015] eEKLR**.
47. Based on the ***CORD Case*** (supra), it was contended that the conservatory orders sought herein cannot be granted without staying the Act and the Amendment Act.
48. **Mr Bwire**, learned counsel for the 2nd respondent however argued that accommodation can be extended to the applicants in order to avoid prejudice that may be occasioned by certain requirements such as permitting the applicants to apply using provisional transcripts. The Court was also urged to allow those who wish to sit for the pre-bar exams rather than staying the same as that would lead to chaos in the administration of the School so that the Court can make necessary adjustments whose effect would not lead to chaos and issue timelines to fast-track the hearing of

the matter.

49. The 3rd Respondent on his part, through his learned counsel, **Miss Kamende** urged the Court to excuse his participation in these proceedings at this staged.

Determination

50. I have considered the application the subject of this ruling, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited. Under what circumstances ought the Court to grant conservatory orders?
51. The first issue for determination is whether the Petitioner has established a *prima facie* case. A *prima facie* case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a *prima facie* case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law. I will therefore refrain from making any determinations whose effect would be to prejudice the hearing of the main Petitions/Application.
52. Article 23(3)(c) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order. Therefore the first port of call is Article 22 of the Constitution and clause (1) thereof provides that:

Every person has the 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

53. For one therefore to properly bring himself or herself within Article 23(c) one must be claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed. In this case the applicants are contending that the actions of the Respondents are discriminatory in that they have been subjected to differential treatment from their predecessors yet they are in the same position as their predecessors. This position, it is contended was well appreciated by the Respondents when they promulgated Regulations whose effect was to avoid the said discrimination. Under Article 10 of the Constitution, some of the national values and principles of governance which bind State organs, State officers, public officers and all persons when enacting, applying or interpreting any law or making or implementing public policy decision are equality and non-discrimination. If therefore the said guidelines were promulgated with a view to avoiding an interpretation of the Act whose effect would have led to a violation of the said values and principles, then, the decision to do so was clearly in consonance with the Constitution and the School's position that the guidelines went contrary to the Act may not necessarily be correct.
54. That this Court has the power to declare a law which contravenes the letter and/or the spirit of the Constitution to be null and void is not in doubt and that was what the Court did in the ***CORD Case*** (supra). Article 27(4) of the Constitution in particular expressly bars the state from discriminating directly or indirectly against any person on any ground.
55. The applicants' position is that by withdrawing the said guidelines, the Respondents are in fact discriminating against them. If that were the position then the Respondents would not be interpreting the Act in a manner that is compatible with the provisions of the Constitution and may be avoiding to adhere to the Constitutional obligation placed upon them by the Supreme Law of the land. It ought always to be remembered that in making a decision, the starting point of reference is the Constitution.
56. Taking into account the twin issues of discrimination and the legitimate expectation that the Respondents are alleged to have induced on the applicants that they would not be discriminated against, I am of the view and I so hold that the applicants have surmounted the first hurdle and have in fact proved that they have a *prima facie* case warranting further investigation by this Court.
57. However, apart from establishing a *prima facie* case, the applicant/petitioners must further

demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to them. See **Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General**, Nairobi HC Pet. No 16/2011, **Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission,** Mombasa HC Pet. No. 7 of 2011 and **V/D Berg Roses Kenya Limited & Another vs. Attorney General & 2 Others [2012] eKLR.**

58. In this case whereas it is true that some of the applicants are yet to graduate, others have in actual fact graduated. What will happen if the Respondents proceed to implement the impugned decision? That the applicants can proceed to sit for the exams in question is not in doubt and I do not see any loss that the applicants stand to suffer by sitting the said exams since if the petitions and application succeeds, those who may have been left out on the ground of the failure to sit the same would be eligible to be admitted to the School. However, it is alleged that the impugned decision only recognises certain qualifications which some of the applicants herein do not possess and therefore they may not even be qualified to sit the pre-bar exams in the first place. In effect, they have been locked out even before sitting the said exams. Whereas again if the Court were to decide in their favour, they would be eligible to join the school, the issue of whether they would be so admitted remains moot since they would not have made their applications within the time stipulated by the Respondents.
59. What is the respondents' position? If the orders sought herein are granted, it would mean that the respondents' schedule would be interrupted. It would mean that they would have to suspend the notice inviting applications. However, it is clear that the said pre-bar exams are not due till November, 2015 and the actual admission is not due till January, 2016. It has not been alleged that the hearing of these petitions cannot be fast-tracked so as to minimise the span of delay if any. In fact it may well be that the Respondents may well still be within time to admit the students in January the hearing and determination of these matters notwithstanding.
60. It was contended that since some of the applicants herein have not even completed their courses, they are not entitled to the grant of the orders sought. Had that position been true of all the applicants, the applicants would have had an uphill task in convincing this Court to grant the orders sought herein. Whereas under Article 258(1) of the Constitution, every person has the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention, the mere fact that a person is entitled to bring such proceedings does not automatically entitle such a person to grant of conservatory orders. The person is enjoined to go further and show how the refusal to grant the said orders is likely to be prejudicial to him or her.
61. In the Privy Council Case of **Attorney General vs. Sumair Bansraj (1985) 38 WIR 286 Braithwaite J.A**. expressed himself follows:

"Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the "Conservatory Order" in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, … but on the other hand it would be well within the competence and jurisdiction of the High Court to "give such directions as it may consider appropriate for the purpose of securing the enforcement of … the provisions" of the Constitution…In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) "subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have…the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too…The critical factor in

cases of this kind is the exercise of the discretion of the judge who must "hold the scales of justice evenly not only between man and man but also between man and state."

62. The aforesaid principles were adopted by the High Court of the Republic of Trinidad and Tobago in the case of **Steve Furgoson & Another vs. The A.G. & Another Claim No. CV 2008 – 00639 – Trinidad & Tobago**. The **Honourable Justice V. Kokaram** in adopting the reasoning in the case of ***Bansraj*** above stated:

"I have considered the principles of *East Coast Drilling –V- Petroleum Company of Trinidad And Tobago Limited (2000) 58 WIR 351* and I adopt the reasoning of BANSRAJ and consider it appropriate in this case to grant a Conservatory Order against the extradition of the claimants pending the determination of this motion. The Constitutional challenge to the Act made in this case is on its face a serious one. The Defendant has not submitted that the Constitutional claim is unarguable. The Claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect and which will render the matter of the Constitutionality of the legislation academic."

63. Back home, **Musinga, J** (as he then was) in Petition No. 16 of 2011, Nairobi – **Centre For Rights Education and Awareness (CREAW) & 7 Others** stated that:

"...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner's Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."

64. In **The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012**, it was held by a majority as follows:

"In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission."

65. In **Judicial Service Commission vs. Speaker of the National Assembly & Another [2013] eKLR** this Court expressed itself as follows:

"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute *in situ*. Therefore such remedies are remedies in rem as opposed to remedies in personam. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."

66. This position was reinforced by the Supreme Court in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji and 2 Ors [2014] eKLR** where the highest Court in the land held:

"'Conservatory orders' bear a more decided public law connotation: for these are orders to

facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the *public interest*. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success' in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the *inherent merit* of the case, bearing in mind *the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes*."

67. In considering whether or not to grant conservatory order, it is my view that the principle of proportionality plays a not remote role. As was stated by **Ojwang, AJ** (as he then was) in **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589** the Court, in responding to prayers should always opt for the lower rather than the higher risk of injustice. The learned Judge expressed himself as follows:

"…Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant".

68. Dealing with the circumstances under which the Court would grant conservatory orders the Supreme Court in ***Munya's Case*** (supra) expressed itself as follows:

"Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources…These principles dictate that our conscientious sense of proportions, stands not in favour of allowing the conduct of fresh elections for Meru County's gubernatorial office, during the pendency of an appeal. By our sense of responsibility, the Court's contribution to good governance in that context, takes the form of an expedited hearing for the appeal. Just that."

69. It is not in doubt that the intended process of pre-bar examination will be undertaken by funds from the public coffers. Therefore this is not jut a question of inconvenience to the parties but a matter which is likely to impact on the public as well. In my view the lesser injustice would be to suspend the Respondents' action pending the hearing of these petitions and application. To allow them to proceed is likely to complicate the matter further in the event that the petition succeeds, if by that time some of the applicants would had been found incompetent/unqualified to join the School since that would require that that decision itself be set aside and yet such a decision is not the subject of these proceedings. It is better to arrest the situation at this stage so that once a determination is made, the School's operations would run smoothly without risking further legal proceedings.
70. In reaching this decision, I have also considered the fact that although the Amendment Act was passed in 2014, it was not until 2nd September, 2015 that an advert was placed in the media notifying the prospective applicants of the challenged pre-bar exams. Under section 4 of the ***Fair Administrative Action Act, 2015***, where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action. Whereas this consideration may not necessarily influence the course the petition will take, it definitely makes the Respondents' argument that the conservatory orders ought not to be granted based on the School's time table rather shaky.

Order

71.Having considered this matter I hereby grant the following orders:

1. **THAT pending the hearing and determination of the Petition No. 377 of 2015, Petition No. 395 of 2015 and Judicial Review Miscellaneous Application No. 295 of 2015, there be and is hereby issued a conservatory orders suspending the notification of pre-bar examination and staying all the proceedings relating to pre-bar examination.**
2. **The Costs of this application will be in the Cause.**

Dated at Nairobi this 29th day of September, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ogoti for the 3rd applicant and holding brief for Mr Okubasu and Mr Masinde for the 1st and 2nd applicants

Mr Kashindi for the 1st Respondent.

Mr Odhiambo for the 3rd Respondent

Cc Patricia