



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
PETITION NO 57 OF 2015

GODWIN MWANGI MAINA.....1ST PETITIONER

SUSAN NJERI MWANGI.....2ND PETITIONER

VERSUS

THE KENYA SCHOOL OF LAW.....RESPONDENT

JUDGMENT

Introduction

1. In their petition dated 18th February 2015, the petitioners challenge the decision of the respondent not to admit them to the Advocates training programme for the 2014/2015 academic year on the basis that they had not met the requirements that are set for such admission. They assert that due to a representation made by the respondent in a public notice, they qualify for admission and seek orders to quash the decision of the respondent denying them admission and orders to compel it to admit them.
2. The petition is supported by two affidavits, sworn by each of the petitioners, in which they set out the facts of their case and the alleged violation of their constitutional rights by the respondent. The crux of their claim is that the respondent has violated their right to non-discrimination and fair administrative action guaranteed under Articles 27 and 47 of the Constitution respectively as a result of the failure to admit them despite their having qualified with degrees in law from the University of London; as well as their legitimate expectation in light of the respondent's representation in the public notice.
3. The petition is opposed. The respondent has filed an affidavit sworn by its Director, Prof. PLO Lumumba. The parties also filed written submissions which they highlighted at the hearing of the matter.

The Petitioners' Case

4. The petitioners' case is set out in their petition and the affidavits sworn in support, as well as their written submissions.
5. The petitioners contend that they have successfully completed the relevant examinations of the University of London and obtained LLB degrees in August 2013. They commenced their degrees in September, 2009, and after successful completion, applied to the respondent for the Advocates training programme. Both applications were rejected, but for different reasons.

6. The 1st petitioner, Godwin Mwangi Maina, received a letter from the then Principal of the respondent to the effect that he had not taken two of the core subjects required as part of University training, namely family law and labour law.
7. The 2nd petitioner, Susan Njeri Mwangi, received a similar letter, informing her that she had not undertaken three of the required courses, namely labour, family and public law. She also had a problem with her minimum grade in the Kenya Certificate of Secondary Education (KCSE) having obtained a B minus instead of a B plain. There was also a problem with her minimum grade at KCSE. According to the petitioners, the requirements that they were said to have failed to meet were as prescribed by statute.
8. They contend, however, that the respondent had, by a notice carried in the Daily Nation of January 17 2014, published certain criteria for persons who had commenced their studies prior to the promulgation of the relevant legislation, the Kenya School of Law Act and the Council of Legal Education Act 2012. Their contention is that the respondent published the criteria as it had recognized the problem with regard to the non-discrimination provisions at Article 27 and legitimate expectations.
9. The petitioners aver that they appealed to the respondent's Board against the decision not to admit them to the programme. In the case of the 1st petitioner, by a letter dated 20th January 2014. The basis of his appeal was that the respondent's decision was based on the provision of the Third Schedule part 111(2) of the Accreditation Regulations 2009, which do not apply to him as he obtained his degree from an institution outside Kenya to which, in accordance with regulation 3(1), the Regulations do not apply.
10. The 1st petitioner further argues that the decision was also based on section 22(1) and 23(1) of the Legal Education Act 2012 read together with the Second Schedule to the Act. His argument is that the Act came into force long after he had begun his university studies and could not therefore be applied to him retrospectively.
11. The 1st petitioner argues that he had satisfied the criteria set out in Clause 11 of the public notice published on 17th January 2014. It is also his contention that the respondent had, on the basis of the criteria in section 11 of the notice, admitted two other applicants, a Lilian Nyaga and Charles Irungu who, like the petitioners, had graduated from the University of London with qualifications similar to his.
12. By its letter dated 29th January 2014, the respondent informed him that his appeal was unsuccessful on the basis that he had not met the requirements of the 16 core units set out in the Second Schedule to the Legal Education Act 2012 and the Third Schedule of the Accreditation Regulations 2009. He avers that his advocates on record then wrote to the respondent on 28th March 2014 asking it to reconsider its decision. The letter indicated that the basis for seeking reconsideration of the decision was that the 1st petitioner had met the requirements of Clause 11 of the public notice, and to deny him admission would be contrary to the representations made in the notice.
13. Further correspondence, a meeting with the Director of the School, and a second appeal, did not yield the required results, hence this petition.
14. The 2nd petitioner makes similar averments to those made by the 1st petitioner, including the steps she took in an effort to have the respondent reconsider the decision not to admit her to the training programme.
15. The petitioners contend that they are aggrieved by the decision of the Board denying them admission to the school, and assert that they were confident, based on the representation made by

the Board in the public notice published on 17th January 2014, that they would be admitted to the School as they had met the requirements of Clause 11 and 111 of the notice.

16. They also claim that had it not been for the public notice, they would have taken steps to satisfy the 16 subjects requirement to expedite their admission to the school. They allege that they relied on the respondent's representation, to their detriment, and the decision of the respondent, which is contrary to its representation, procedurally and substantively unfair, is in breach of Article 47(1) of the Constitution, is unreasonable and ultra vires the scope of the Board's authority, and also breaches their right to legitimate expectation.
17. The petitioners state that they realized that they qualified in terms of the notice published by the respondent. They therefore re-applied for admission under the terms of the notice, but their applications were again rejected on the basis that they had not met the initial criteria. Their contention is that the respondent did not consider the petitioners' renewed application on the basis of its own criteria to consider persons who found themselves in the position of the petitioners but rather on the basis of statute. They contend therefore that the respondent violated Article 47 and unreasonably exercised its discretion with regard to them.
18. The petitioners claim that the respondent has not addressed the core of their case but has proceeded on the basis that the notice of January 17, 2014 was never published. They ask that the Court allows the petition and grants them the following orders:

a) An order of certiorari quashing the decision of the Board to deny the applicants admission to the School.

b) An order of mandamus compelling the Board of the Kenya School of Law or admit the first and second applicants to the School for the Advocates Training Programme for the 2015/2016 academic year.

c) The costs of this petition be awarded to the petitioners.

The Respondent's Case

19. The respondent is described as an independent statutory body established under section 3 of the Kenya School of Law Act, No. 26 of 2012, as a public legal education provider responsible for the provision of professional legal training as an agent of the Government. It has the mandate, inter alia, to train persons to be advocates under the Advocates Act, Cap 16 Laws of Kenya.
20. In his affidavit sworn on 20th February 2015 in opposition to the petition, Prof. PLO Lumumba, the Director/Chief Executive and Secretary of the respondent concedes the factual averments by the petitioners with respect to their qualifications, applications to the respondent and rejection of such applications.
21. With regard to the petitioners' grievances, Prof Lumumba makes various averments with respect to the law governing the admission of students to the advocates training programme. He states that prior to the coming into force of the Kenya School of Law Act No 26 of 2012 admission to the Advocates Training Programme was governed by the Council of Legal Education Act, Cap 16A together with the Council of Legal Education (Accreditation) Regulations, 2009 and the Council of Legal Education (Kenya School of Law) Regulations 2009. The primary admission criteria to the programme are contained in the second schedule of the Kenya School of Law Act No 26 of 2012 as read together with the Second Schedule parts II and III of the Legal Education Act, No 27 of 2012.
22. According to the respondent, section 29(2)(a) and (3)(a) and (b) of the Kenya School of Law Act 2012 saves the Council of Legal Education (Accreditation) Regulations, 2009 and the Council of Legal Education (Kenya School of Law) Regulations, 2009 to the extent that they are not

- inconsistent with the letter and the spirit of the provisions of the Kenya School of Law Act, 2012. This Act does not, however, provide a transition period within which students who have been admitted into the university system prior to its enactment are allowed to complete their programmes on the basis of the legitimate expectations undergirded by the then existing law, a matter which is left to the discretion of the Respondent.
23. The respondent avers that section 23 of the Legal Education Act, No 27 of 2012 requires that a course for the award of a degree in law shall, in addition to any other courses offered, provide instruction and examination for each of the core courses set out in the second schedule. It contends that it exercised its discretion to require that, as part of their admission requirements, the petitioners' LLB degree meet the requirements of the said section 23 of the Legal Education Act, No 27 of 2012.
 24. The respondent states that the 1st petitioner did not, as a consequence of this requirement, meet the criteria as his LLB degree omitted family law and succession, as well as labour law, which are core subjects under the said section. The 2nd petitioner's LLB degree also fell short in that it also omitted the same subjects.
 25. The respondent takes the position that its decision denying the petitioners admission is not *ultra vires* the respondent's authority and was an exercise of discretion within the applicable legal provisions. It asserts that the retrospective application of the new laws and regulations (if at all), being matters entirely within the discretion of the respondent, are not amendable to an order of mandamus. It is its further contention that it is a well-recognized legal principle that where a statute which imposes a duty leaves discretion as to the mode of performing that duty in the hands of the party on whom the obligations is laid, a mandamus order cannot issue to command the duty in question to be performed in a specific way.
 26. In its submissions in response to the petition, the respondent observes that the petitioners have conceded that the initial decision to reject their applications was correct, based on the prevailing legal provisions. Its submission, however, is that while the petitioners allege that they re-applied for admission, they had not done so, but had appealed against the initial decision.
 27. The respondent states that the notice in the newspaper acknowledged the relevant legal provisions guiding admission to the Advocates training programme, which provisions had been distilled and placed in the notice as the criteria to be followed in the admission process. Its contention is that, contrary to the petitioners' allegation, the criteria was not different from what was provided in legislation; rather, the legal provisions relevant to the admission process are what guided the criteria set out in the advertisement.
 28. The respondent submits that in the case of the 2nd petitioner, she did not meet the specific requirements of the legal provisions. In particular, she had a grade B- in English at KCSE while the requirement for law is a B plain. She also had an overall mean grade C plain while the requirement in law is a C+.
 29. The respondent submits that the notice carried in the *Daily Nation* acknowledges that there are discretionary areas left to the respondent, such discretion to be exercised on the basis of legal provisions, which, according to the respondent, is how it exercised its discretion with respect to the petitioners.
 30. According to the respondent, under Regulation 19 of the **Council of Legal Education (Accreditation of Legal Education institutions) 2009**, the Council of Legal Education was required to equate qualifications from foreign institutions against its own standards, which is why it required the petitioners to have met the core subject requirements. As part of their degree requirements, they were required to have undertaken the core courses set out at point 11 of the Schedule to the Legal Education Act 2012.
 31. The respondent argues that it would be discriminatory if the students who undertake their degrees

in Kenya are required to meet these requirements, but those who do so outside are not.

32. The respondent relied on the decision in **R vs Registrar of Trade Marks ex parte Suny Holdings Ltd & Another Nairobi Misc No. 165 of 2012** with respect to the principle of legitimate expectations, noting that none of the criteria in that case applies to this case.
33. Its case was that the administrative and legal environment relating to admission to the respondent school has since changed following the enactment of the Kenya National Qualifications Framework Act No. 22 of 2014, which makes provisions for national qualifications, *inter alia* for admission to the School of Law, and the Statute law Miscellaneous Amendment Act No. 8 of 2014 which has also made amendments to qualify for admission to the School of Law including making it mandatory to undertake pre-bar exams.
34. Their submission is that for the Court to issue the orders sought would be to enter a legal mine field. The respondent places reliance in this regard on the decision in **Newton Gikaru Githiomi & Another vs AG and Public Trustee Nairobi HC JR 472 of 2014** in which the Court held that courts should not issue orders that would cause administrative chaos and public inconvenience. It was its prayer that the petition should be dismissed with costs.

Petitioners' Submissions in Reply

35. The petitioners denied that they had lodged an appeal against the initial decision rejecting their application for admission to the respondent. Mr. Amoko submitted on their behalf that an appeal is a request to a higher authority challenging a decision of a lower authority. According to Mr. Amoko, what the petitioners had done is to request the same authority to consider their application in light of the notice of January 17 2014. Their request was not an appeal but was essentially a re-application.
36. To the respondent's contention that the notice of 17th January 2014 was an application of the criteria set in legislation, the petitioners counter that it was a qualification of the legal criteria, and they had qualified, not under statute, but under the notice.
37. They contend further that there would be no discrimination between students who studied locally and those in foreign institutions if the notice was applied to them as the notice applied to all, regardless of institutions, and related to when, not where, one studied.
38. The petitioners distinguished the decision of the Court in **R vs Registrar of Trade Marks ex parte Suny Holdings Ltd & Another** (supra). Their contention was that the decision is not the definitive expression of how and when legitimate expectation arises. Mr. Amoko's submission with respect thereto was that the decision was correct in its context, but in the context of the present case, the petitioners were entitled to rely on it.
39. With respect to the new legislation regulating admission to the respondent, the petitioners' case was that such legislation could not render it inapposite for the Court to issue orders. It was their submission that the legislation came into force in January 2014 and December 2014 respectively, the respondent did not refer to the said legislation in its replying affidavit, nor did it refer to specific provisions and demonstrate how they would bring chaos. In the petitioners' view, the said legislation had no application to the present case.

Determination

40. I have read the pleadings of the parties in this matter, and considered their respective submissions, written and oral. Essentially, the facts of the matter are not in dispute. First, the 1st petitioner has a Bachelor of Laws Degree (LLB) from the University of London, which he obtained in August 2013. He then applied to the Kenya School of Law for admission into the Advocates Training Programme for the 2014/2015 academic year by his letter dated 30th October 2013. His

application was unsuccessful, as was communicated to him in the letter from the respondent dated 6th January 2014. This was because he had not met the requirement of the 16 core subjects prescribed by section 23(1) of the Legal Education Act No 27 of 2012 as read with the Second Schedule to the Act, as well as the Third Schedule Part 111 (2) of the Council of Legal Education (Accreditation of Institutions) Regulations 2009.

41. The 2nd petitioner also obtained her LLB degree from the University of London in August 2013. She also applied for admission to the respondent for the Advocates Training programme for the 2014/2015, but was also unsuccessful. This was because, according to the letter from the respondent dated 18th December 2013, she had not met the requirements of the Second Schedule (a)(1)(b)(ii) of the Kenya School of Law Act No 26 of 2012 with regard to Kenya Certificate of Secondary Education (KCSE) grades, and neither had she met the requirement of the 16 core subjects prescribed by Section 23(1) of the Legal Education Act No 27 of 2012 read together with the Second Schedule to the Act and the Third Schedule Part 111(2) of the Council of Legal Education (Accreditation of Institutions) Regulations 2009.
42. The petitioners concede that they had not met the criteria set in the law and the regulations set out above. The point of disagreement relates to the notice published by the respondent in the *Daily Nation* newspaper on 17th January 2014.
43. As I understand the petitioners' case, this notice varied the statutory requirements, they qualified in terms of its requirements, and for the respondent to fail to admit them to the training programme is to discriminate against them, to exercise its discretion unreasonably in breach of the petitioners' right to fair administrative action, and to violate their legitimate expectation that they would be admitted to the programme.
44. There is also some disagreement between the parties, which emerged in the course of submissions before me, as to whether the petitioners applied for admission under the criteria set in the notice, or whether they appealed against the initial decision not to admit them.
45. I believe the issues for determination in this matter are fairly straightforward. One relates to the question whether the notice published in the *Daily Nation* on 17th January 2014 constituted a representation that gave rise to a legitimate expectation on the part of the petitioners that they qualified for admission to the Advocates training programme. If it did, whether the respondent, by rejecting their application, violated Articles 27, 47 and their legitimate expectation, and thereby acted unreasonably and abused its discretion. A second, probably preliminary question is whether the petitioners applied for admission in terms of the notice, or whether their appeal was in respect of their initial application.
46. Let me first deal with the question whether the petitioners' letters were an appeal against the first decision rejecting their applications for admission, or was for consideration under the criteria set in the notice of 17th January 2014.
47. I have considered their respective letters dated 20th January 2014. The letter from the 1st petitioner, addressed to the Director/Chief Executive Officer of the respondent and copied to its Board, states as follows:

ADMISSION TO THE KENYA SCHOOL OF LAW – 2014/2015 ACADEMIC YEAR

Thank you for your letter dated 6th January 2014 in which I was informed that my application for admission was not successful as my LLB does not meet the threshold of 16 core units.

I also refer to the advertisement on 17th January 2014 in the Daily Nation by the

Kenya School of Law a copy of which is attached hereto, where the school outlined the criteria to be used for admission into the ATP in the 2014/2015 academic year. The principle to guide admissions was stated;

“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.”

As the advertisement pointed out, prior to the Kenya school of Law Act 2012, the school used the Council of Legal Education (Accreditation) Regulations, 2009 and Council of Legal education (Kenya School of Law) Regulations 2009. The regulations provided that one was required to undertake all the 16 core units outlined therein to qualify for admission into the ATP.

However, the school went ahead and admitted students who had not met this requirement in the years of 2010, 2011 and 2012. It is only after the Legal Education Act 2012 and Kenya school of Law Act 2012 were enacted that the school stopped the admission of graduates who were missing any of the core units.

May I also point out that as indicated in my academic transcript from the University of London which is attached hereto, I was admitted into the university in September 2009 before the advent of the 2009 regulations which were gazette on 20th November 2009 and long before the enactment of the Legal Education Act 2012 and the Kenya School of Law Act 2012. At the point of admission, I had a legitimate expectation undergirded by the existing law that I would be admitted into the ATP without the introduction of new and onerous requirements after I had commenced my studies.

In light of this, I call upon the school to reconsider my application for admission and to exercise its discretion in my favour by excluding me from the requirement of having an LLB that has all the 16 core units and admitting me just like it did to other applicants in 2010, 2011 and 2012.

Yours sincerely

GODWIN MAINA

Cc: Prof Patricia Kameri-Mbote

Chairperson

Kenya School of Law Board

48. In its letter in reply dated 29th January 2014, the respondent stated that upon evaluation of the petitioner's academic documents, it had found that no new evidence was adduced with respect to the missing LLB core units, and his appeal was therefore unsuccessful.

49. The 2nd petitioner received a similar response to her letter which states, verbatim, as follows:

Director

Prof W. Kulundu Bitonye EBS

Kenya School of Law

Nairobi

January 20, 2014

Dear Sir,

**RE: APPLICATION FOR ADMISSION TO THE
ADVOCATE TRAINING PROGRAMME**

I refer to your letter dated 18th December 2013 being the response to my application for admission at Kenya School of Law for the ATP and would be grateful if you would review my application in line with the advertisement that appeared in the press on the 17th January 2014.

One of the reason stated why I would not be admitted was because I had a B- in English and Mean grade of C stand. Kindly note I have a Diploma in Law from Kenya School of Professional studies and also before I was admitted at the University of London for the degree I had to undertake part 1 Membership at the institute of Legal Executives all this documents were attached to my application.

Also among the core units I am supposed to sit for I had done Public Law and Family Law see my transcripts.

The other point which I would be grateful if you consider is that I was re-registered for the degree in the year 2008 this is before the Council of Legal Education (Kenya School of Law) Regulations 2009 Act come into force I would have finished the degree earlier but many other things come up financial problems, my husband passed away and left me with two young children attached is the death certificate and copies of the birth certificates therefore I took longer to complete the degree.

I would be grateful if your reconsider my application and admit me for the ATP. I am a legal clerk with more than 17 years experience having work in the law firm of Hamilton Harrison & Mathews.

Yours faithfully

SUSAN NJERI MWANGI

(Emphasis added)

50. Thus, even after the petitioners had applied, as their letters clearly state, for re-consideration of their applications in light of the advertisement by the respondent, the position of the school was that they needed to meet the qualification with respect to the core units. Evidently, therefore, the petitioners could only gain admission to the school upon undertaking and being examined on the core units that they had not undertaken, namely labour law and family law and succession in the case of the 1st petitioner, and labour law, public law and family law and succession in the case of the 2nd petitioner.

51. Was it to breach the petitioners' right to fair administrative action, non-discrimination and to breach their legitimate expectation for the respondent to insist on their meeting these qualifications?

52. Article 27 of the Constitution states, so far as is relevant for present purposes, as follows:

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3)....

53. At Article 47, the constitution provides that **“47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

54. With respect to the principle of legitimate expectation, the petitioners submit that it arises where a person responsible for taking a decision has induced in someone who may be affected by the decision a reasonable expectation that he will receive or retain a benefit, and that such expectation should not be summarily disappointed. They have relied on various decisions, among them **Republic vs Attorney General & Another ex parte Waswa & 2 Others [2005] 1 KLR 280 at 288.** They further argue, in reliance on the decision in **Keroche Industries vs Kenya Revenue Authority & 5 Others Miscellaneous Civil Application 743 of 2006 [2007] eKLR** that Courts will enforce legitimate expectations on which reliance has been placed. They cite the words of Nyamu J in the said decision as follows:

“...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.”

55. The respondent takes the position that they have not violated either the petitioners' right to non-discrimination, or their right to fair administrative action. They argue, further, that the petitioners have not met the criteria for the application of the legitimate expectations principle.

56. Their submissions revolve around the statutory criteria for admission to the respondent. They submit that such criteria is as contained in various legislation and regulations, and at paragraph 6 of his affidavit sworn in opposition to the petition, Prof. Lumumba identifies such legislation and the criteria it establishes as follows:

a. Prior to the coming into force of the Kenya School of Law Act No 26 of 2012 admission to the Advocates Training programme (ATP) was governed by the Council of Legal Education Act, Cap 16A together with the Council of Legal Education (Accreditation) Regulations, 2009 and the Council of Legal Education (Kenya School of Law) Regulations 2009;

b. The primary admission criteria to the ATP are contained in the second schedule of the Kenya School of Law Act No 26 of 2012 as read together with the second schedule parts II and III of the Legal Education Act, No 27 of 2012. Section 29(2)(a) and (3)(a) and (b), of the Kenya School of Law Act 2012 saves the Council of Legal Education (Accreditation) Regulations, 2009 and the Council of Legal Education (Kenya School of Law) Regulations, 2009 to the extent that they are not inconsistent with the letter and the spirit of the provisions of Kenya School of Law Act, 2012.

c. However the Kenya School of Law Act No 26 of 2012 does not provide a transition period within which students who have been admitted into the university system prior to its enactment are allowed to complete their programmes on the basis of the legitimate expectations undergirded by the then existing law; and

d. Accordingly, this is a matter left within the discretion of the Respondent.

57. The respondent submits that the petitioners' argument that they were admitted to their respective degree courses prior to the advent in November 2009 of the **Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009** does not advance their case as the same admission requirements were contained in the **Council of Legal Education (Admission) Regulations, 2007 (Legal Notice No. 400 of 2007)**.

58. It is therefore its case that the petitioners cannot allege to have had a legitimate expectation in respect of their qualifications. It relies on the words of Warsame J (as he then was) in **Republic vs. Registrar of Trade Marks Ex-parte Sony Holdings Limited & Anor Nairobi HC Misc. Application No. 165 of 2012** in which he quoted with approval the words of Diplock L J in **Council of Civil Unions vs. Minister for the Civil Service [1983]3 All ER 935** that in order to found legitimate expectation, the decision in issue:

“.....must affect the other 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 doing until there has been communicated to him some rational grounds for withdrawing it in which he has been given an opportunity to comment, or

(ii) He has received assurance from the decision maker that it will not be withdrawn without giving him first an opportunity to advance reasons for contending that they should not be withdrawn.”

59. The petitioners conceded, both in their submissions before me and tacitly in their pleadings and correspondence with the respondent, that they had not qualified under the criteria set for admission to the Advocates Training Programme at the respondent. They had not undertaken and passed all the 16 core subjects set in the legislation and regulation, and in the case of the 2nd petitioner, had not met the KCSE qualifications for admission to the respondent. However, as I understand it, their claim is not based on a legitimate expectation founded on the legislation and criteria for admission in the regulations. Rather, the crux of their claim is the notice dated 17th January 2015, which was in the following terms:

ADMISSION TO THE ADVOCATES TRAINING PROGRAMME AT THE KENYA SCHOOL OF LAW FOR ACADEMIC YEAR 2014/2015

“Admission to the Advocates Training Programme (the ATP) at the Kenya School of Law for the academic year 2014/2015 is governed by the Kenya School of Law Act No 26 of 2012 which was promulgated by Parliament in September 2012 and came into force on 15th January 2013. Prior to the coming into force of this new law, admission to the ATP was governed by the Council of Legal Education Act, Cap 164, Laws of Kenya with its attendant Regulations vide the Council of Legal Education (Accreditation) Regulations, 2009 and Council of Legal Education (Kenya School of Law) Regulations, 2009.

The primary admission criteria to the ATP are contained in the Second Schedule of the Kenya School of Law Act, No 26 of 2012 as read together with the Second Schedule Parts II & III of the Legal Education Act, No 27 of 2012. Section 29(2)(a) and (3)(a) and (b) of the Kenya School of Law Act, 2012 saves the Council of Legal Education (Accreditation) Regulations 2009 and the Council of Legal Education (Kenya School of Law) Regulations to the extent that they are not inconsistent with the letter and the spirit of the provisions of Kenya School of Law Act, 2012. We are also cognizant of the equality and non-discrimination provisions outlined in Article 27 subsections (1)(2)(4) and (6) of the Kenya Constitution, 2010. It is to be noted however that the Kenya School of Law Act does not provide a transition period within which students who have been admitted into the university system prior to its enactment are allowed to complete their programmes on the

basis of the legitimate expectations undergirded by the then existing law.

At a meeting called to interpret the admission criteria given the foregoing scenario, the Kenya School of Law Board in consultation with the Council of Legal Education resolved that the following principle will guide the admission process into the ATP for the academic year 2014/2015.

“The Second Schedule to the Kenya School of Law Act will be followed subject any (sic) 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 (sic) with the anti-discriminatory provisions of Article 27 of the Kenya Constitution , 2010”

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

(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 (LLB) 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 the Bachelor of Laws Degree (LLB) in the grant of that university, university college or other institution, and had prior to enrolling at 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 B (plain) in English Language or Kiswahili and a mean grade c (plus) in the Kenya Certificate of Secondary Examinations or its equivalent;

(III) Having passed the Bachelor of Laws (LLB) examinations of a recognized university and having attained minimum of a C+ (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, “B”, relevant “Diploma” other “undergraduate degree” or have attained a higher degree in law after the undergraduate studies in Bachelor of Laws (LLB) Programme.

(IV) Having passed the relevant bachelor of Laws (LLB) examinations of a recognized university and having attained a minimum of C- (C minus) in English and a minimum of an aggregate grade of C- (C minus) in the Kenya Certificate of Secondary Examination 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 the 15th 2013 to allow applicants who had joined the University system before the coming into force of the Kenya School of Law Act, 2012 to complete their study programmes.* Emphasis added.)**

60. The respondent has not, either in the affidavit in reply or in its submissions, addressed itself to the notice, save to concede, in general terms, that it issued the said notice. The question is, what was the intent and purpose of issuing the notice, and what was a party, in the position of the petitioners, to make of it?

61. The respondent is a public body, responsible for the training of persons who wish to become

advocates in Kenya. It does not wake up one day and publish a pointless notice with regard to admission of Advocates, which sets out what are clearly variations to the statutory criteria, and yet which is not supposed to be acted upon. A person who is interested in becoming an Advocate is entitled to read the notice, apply for consideration in accordance with its terms, and expect that should he or she meet its requirements, he or she will, at the very least, receive consideration in terms of the notice, and receive reasons should he or she still be denied admission on the basis that he or she still does not qualify for admission.

62. The petitioners say that they qualified under condition II and III of the notice. They say that other persons who have similar qualifications have been admitted by the respondent, and they name two such persons, namely a Lilian Nyaga and Charles Irungu.

63. In my view, in the circumstances of the petitioners before me, a legitimate expectation did arise that they would receive consideration under the terms of the notice, and to fail to give their request any consideration at all, while allegedly admitting others with similar qualifications as the petitioners, is to violate not only their legitimate expectation, but also their right to non-discrimination and fair administrative action.

64. The respondent has argued that the orders sought by the petitioners are in the nature of judicial review. They submit that the remedy of judicial review is concerned with reviewing, not the merits of the decision under challenge, but the decision making process itself. They have relied on the decision of the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** with respect to the parameters of judicial review in which the Court stated as follows:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

65. I agree with the respondent in this regard. However, as is evident from the pleadings and submissions, the respondent failed to make a decision at all with respect to the petitioners *vis a vis* its notice of 17th January 2014. Unless its argument is that the notice was not intended to be acted upon, which, as I have observed elsewhere, it could not have been, then it was under a duty, in light of the criteria set in the said notice, to act in accordance with the notice and reconsider the petitioners’ applications for admission in terms of their letters dated 20th January 2014. That it did not do so, while it considered that of others, an allegation that it has not disputed, and that it reverted to its old reasons for denying the petitioners admission is, in my view, a violation of their rights as alleged, and entitles them to a remedy.

66. I am fortified in this view by the words of the Court in the case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** relied on by the respondent, in which the Court cited the decision in **Council of Civil Servants Unions vs. Minister for the Civil Service (supra)** and held as follows:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee,

when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.....Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

67.It cannot be disputed, in my view, that for a public entity to totally fail to act in accordance with its own notice, and to ignore its own criteria as has happened in this case, would amount to such procedural impropriety as would justify the issuance of orders of judicial review against it.

68.The petitioners have sought orders to quash the decision of the respondent denying them admission to the school, an order of mandamus to compel the respondent to admit them to the school for the Advocates Training Programme for the 2015/2016 academic year, and for the costs of the petition.

69.The mandate to determine whether or not the petitioners qualify for admission under the criteria set in the notice of 17th January 2014 still lies with the respondent. It would be to place itself in the respondent’s shoes were the Court to issue an order compelling it to admit the petitioners as prayed. However, the respondent does have a duty to consider, on the basis of its own criteria set in the notice of 17th January 2014, whether the petitioners qualify for admission, and if they do, admit them to the programme. If they do not, it has a duty to inform them, and give them reasons why they do not qualify, in which event they can take such action as is necessary to obtain the requisite qualifications.

70.In the circumstances, the orders that commend themselves to me, and which I hereby issue, are as follows:

- i. ***I hereby quash the decision of the respondent not to admit the petitioners to the Advocates Training Programme.***
- ii. ***I direct the respondent to re-consider the petitioners’ applications for admission to the Advocates Training Programme against the criteria set in its notice dated 17th January 2014.***

71.With respect to costs, which are within the discretion of the Court, I direct each party to bear its costs of the petition.

Dated, Delivered and Signed at Nairobi this 28th day of October 2015.

MUMBI NGUGI

JUDGE

Mr. Amoko instructed by the firm of Hamilton Harrison & Mathews & Co. Advocates for the petitioner

Mr. Thiga instructed by the firm of Waruhiu K’owade & Ng’ang’a & Co. Advocates for the respondent