REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC APPLICATION NO. 260 OF 2015

IN THE MATTER OF THE APPLICATION BY THOMAS OTIENO ORIWA FOR JUDICIAL REVIEW (CERTIORARI PROHIBITION AND MANDAMUS ORDER)

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

AND

IN THE MATTER OF THE KENYA SCHOOL OF LAW ACT (NO. 256 OF 2012)

AND

IN THE MATTER OF THE LEGAL EDUCATION ACT (NO.27 OF 2012)

AND

IN THE MATTER OF ULTRA VIRES

BETWEEN

REPUBLIC.....……..…… APPLICANT

AND

KENYA SCHOOL OF LAW…….……..……. RESPONDENT

EX-PARTE: THOMAS OTIENO ORIWA

JUDGEMENT

Introduction

1. By a Notice of Motion dated 19th August, 2015 the *ex parte* applicants herein, **Thomas Otieno**

Oriwa, seeks the following orders:

1. **This Honourable court be pleased to remove into this court the Respondent's decision issued on the 3-8-2015 that the same may be quashed.**
2. **This Honourable court be pleased to issue specific orders of mandamus directed upon the respondent to immediately gazette and issue the applicant with a Compliance certificate for purposes of petitioning the chief justice for admission to the roll of advocates.**
3. **This Honourable court be pleased to issue an order of prohibition restraining the respondent from taking any further proceedings, execution or enforcement of its decision dated 3.8.2015.**
4. **That the cost of this application be provided for.**

***Ex Parte* Applicants' Case**

2. According to the applicant, his pupillage term was for the period between 4th November 2014 and 4th May 2015 both dates inclusive and it is a mandatory requirement under the rules governing the pupillage program that a pupil has to be supervised during the subsistence of the pupillage term in the chambers or station of serving of the pupillage exercise.
3. However, his assigned supervisor neither visited his pupillage station to carry out the said supervision nor explained to his pupil master and himself the reasons for her failure to carry out the supervision exercise during the subsistence of his pupillage term as is required by the rules. Having completed the stipulated six (6) months term of pupillage HIS pupil master signed all the necessary documents required by the respondent for purposes of the clearance and issuing of the certificate of compliance by the respondent as well as those needed for petitioning the chief justice for admission to the roll of advocates. Further to the above documents his pupil master prepared and posted to the respondents postal address a Confidential Pupillage Report in compliance with Clause 16 of the pupillage deed.
4. The applicant averred that he contacted the respondent's manager in charge of Legal Clinics, **Mr. Simiyu Murambi** on the 21st May, 2015 informing him that e had since finished his pupillage term without being supervised and that he needed guidance on the way forward. However the said Manager insisted that he must be supervised by his assigned supervisor, **Ms. Anastasia Otieno** and even sent the applicant her mobile phone number. On the 25th May 2015 the applicant called his assigned supervisor and told her that he had since completed his pupillage term unsupervised and that he needed her to sign his workbook for purposes of confirming the completion of the exercise and the applicant duly furnished her with his official full names and the physical address of the office where he had served the pupillage term being Okulo & Company advocates, situated on the 13th floor Landmark Plaza opposite Nairobi Hospital. He was however informed by the said supervisor to call her back after a week so that she could give him an appointment to meet her.
5. Unhappy with this response, the applicant conveyed his unhappiness to the manager in charge of the Legal Clinics and on the same date of 25th May, 2015 the said manager advised him to write him an email and copy the same to the assigned supervisor a requested which the applicant acceded to on the 26th May, 2015. On the 28th May, 2015 at 4.35p.m the applicant received a call from the said assigned supervisor in which she instructed him to take his workbook to a secretary at her office at Development House along Moi Avenue in Nairobi which request the applicant complied with and on the 29th May 2015 and informed her that he had acted on her instructions. After failing to hear from his assigned supervisor he once again on the 3rd June 2015 informed the manager in charge of Legal Clinics program of the developments. The next day (4**th** June, 2015) at 9.58 a.m. in the morning the applicant received a call from one of the respondent's secretary called **Rhoda** instructing him to be at the office of his assigned supervisor at Kenya school of law in Karen on the same day between 12.30pm and 1.00pm for a meeting with his assigned supervisor and he went as instructed by 12.30pm but had to wait up to about 1.30pm when the appeared and raised two (2) issues namely that his workbook had unauthorized cancellation of dates and that she visited the floor receptionists at his pupil masters office where the receptionists told her upon inquiry that they did not know the applicant and that she then sent one of the said receptionists to his pupil masters office to inquire whether he was known in the office whereupon she returned

with a message that the person she talked to answered that she did not know the applicant. To the supervisor, the applicant appeared to be a man who carries his weight around and there is no way the said receptionists could not know him.

6. Despite the applicant's verbal response to the issues raised, the assigned supervisor maintained that based on the two (2) issues she was not and would never sign his workbook and that she would consult the manager in charge of the Legal Clinics to ensure that the latter recommends disciplinary action against him. After waiting for a whole week to be updated on his fate he called her on the 11th June, 2015 but she hanged up the call. On consulting the manager in charge of Legal Clinics, the applicant was advised to follow up the matter with the respondent's director and pursuant thereto on the 11th June, 2015 he wrote a letter and sent the advance copy by email to the director and copied the same to the said assigned supervisor and the manager in charge of the Legal Clinics pointing out the illegalities of the conduct of and the issues raised by the supervisor and also delivered a hard copy to them.
7. On the 17th June, 2015 the applicant made a personal visit to the offices of the respondent and after a whole day shifting from one office to another the manager in charge of Legal Clinics informed him that he had forwarded his matter to the academic manager who is the secretary of the disciplinary committee.
8. To the applicant, the respondent's agent (his assigned supervisor) committed a further illegality by taking away his workbook as the same should only be availed to a supervisor for purposes of conducting the supervision exercise and should never be taken away from the custody of a pupil save that a pupil shall surrender the same upon completion of the pupillage term to the respondent for purposes of clearance.
9. It was the applicant's case that since the charge against the applicant was a non-existent charge of alteration of dates without the authority of the respondent it was uncalled for, that his assigned supervisor would proceed to confiscate his pupillage workbook in violation of the rules governing the pupillage exercise as it was not logically possible for him to un-alter the already altered dates. It was therefore contended that the supervisor's actions were carried out in bad faith, with ulterior motives, in violation of the rules of natural justice and ultra vires her mandate and that the respondent sanctioned the unreasonable, arbitrary, and biased acts of the supervisor and the manager in charge of Legal Clinics thus abusing its powers.
10. In a meeting held between the applicant and the Respondent's director on 2nd June, 2015, the applicant averred that the said Director pointed out to him that he merely acts on the advice of and relies squarely on the information of his staff. Subsequently on 7th July, 2015, the applicant received a phone call from the respondent's secretary named **Grace Kaburu** inviting him for a disciplinary committee hearing on the 15th July, 2015 at 10.00am in the forenoon on which date the respondent's secretary hand delivered to him the formal letter signed by the respondent's academic manager, inviting him for the disciplinary meeting just moments before he was called in for the meeting. In the said letter, it was contended by the applicant that the respondent left out the first issue raised by the supervisor and proceeded with only one ground namely that of unauthorized alteration of dates. At the said meeting the said supervisor met and sat with the members of the Disciplinary committee before the applicant was ushered in to the meeting and they passed each other at the door as she walked out of the meeting and the applicant entered into the meeting room.
11. It was the applicant's case that the quorum of the disciplinary meeting violated the requirements set out by the respondent's rules in part IV of the **Legal Notice No. 169 of 2009,** as it was short of the required quorum and the meeting was carried out in a procedure that violates the respondent's rules and regulations on the following grounds:

a. That in the meeting was **Mr. Fredrick Muia**, the academic manager, **Mr. Samuel Mwaniki** a senior lecturer, **Mr. Paul Gathara**, alleged student representative and **Grace Kaburu** who acted as the secretary for the meeting in violation of the rules for such disciplinary hearing.
b. That there was no evidence or proof that **Mr. Paul Gathara** was duly elected by the students as a student representative neither was there proof that he was indeed a student.
c. The respondent failed to enlighten and / or provide the applicant with its internal rules of procedure set in place for conducting such a disciplinary hearing which is within its sole mandate

to come up with.

d. The applicant was not given opportunity to sign or acknowledge on the minutes taken during the disciplinary committee hearing that indeed the same were a true and authentic representation of the said meeting, neither was he allowed a look at the same and provided with a copy thereof for future reference.
e. The respondent having separated from the Council of Legal Education by dint of the ***Kenya School of Law Act*** (No. 26 of 2012) and the ***Legal Education Act*** (No. 27 of 2012), is yet to comply with section 28(f) of the ***Kenya School of Law Act*** (No. 26 of 2012) which provides that it should come up with regulations on the discipline of students and staff member. As such the meeting on the 15th July, 2015 was carried out without the required rules.

12. It was disclosed that thereafter, the respondent then delivered its ruling against the applicant on the 3rd August, 2015 signed by the respondent's director who was not present during the disciplinary committee hearing which decision is the subject of this application in which no reasons were given therefor. To the applicant, alteration of dates on the pupillage workbook is neither a misconduct nor pupillage malpractice and that there is no requirement that a pupil must apply and get the respondent's permission to do so. To him, he has met all the other requirements for the respondent to issue him with Compliance certificate and gazette him as a prerequisite for Petitioning the Chief Justice for admission to the roll of advocates. It was therefore his case that the recommendation by the respondent on the 3rd August, 2015 is ultra vires its mandate and authority as the qualification and disqualification of an advocate to take on a pupil is not the prerogative of the respondent's disciplinary committee nor is it at the discretion of the respondent but is specifically provided for under the ***Advocates Act*** Chapter 16, Laws of Kenya and at Clause 11 of the Pupillage deed. He asserted that **Mr. Anthony Okelo Okulo** is an advocate of over five years of practice having been admitted to the roll of advocates on the 21st May, 1992 and having taken out practicing certificate for all the subsequent years as he has consistently been in practice to date. He further disclosed that to intimidate the applicant to comply with its illegal recommendations and actions the respondent has threatened to suspend/ expel the applicant should he challenge the unlawful acts of the respondent. It was disclosed that the respondent has caused the applicant to repeat the pupillage exercise four times since September, 2012 each time citing technicalities with the first one which commenced on or about 3rd September, 2012 being cancelled by the respondent midway giving reasons that there would be no supervisor to supervise the applicant during the pupillage term. To him, it is ironically the respondent failed to supervise the applicant as he repeated the exercise for the fourth time and thereafter proceeded to use abuse its powers as evidenced in the preceding paragraphs to frustrate the applicant.
13. It was therefore his case that the respondent's actions were unjust and unfair for the following reasons-:

a. The respondent became a judge in its own cause having failed to carry out the supervision in the manner stipulated under the pupillage deed then proceeded to carry out bias, ill intended and unreasonable investigation before charging the applicant with a non-existing ground of misconduct.
b. The respondent's investigations was actuated with malice, bad faith, and wrought with illegalities and is against the principles of natural justice.
c. The respondent's action is biased against the applicant as it took into consideration extraneous and irrelevant matters during its investigations.
d. The respondent's actions amount to an abuse of the authority entrusted upon it.
e. The respondent's action is against public policy and *ultra vires* the principles of natural justice.
f. That the respondent has misapplied its authority.
g. That the respondent's action is arbitrary, malicious, oppressive and illegal.
h. That the respondent's actions are both substantially and procedurally ultra vires the principle of natural justice and amounts to an abuse of its authority
i. That the respondent's actions lack reasonableness and accountability in law.
j. The respondent is yet to make public its regulations pertaining to the supervision and discipline of students as envisaged under section 28(f) of the ***Kenya School of Law Act*** No. 26 of 2012 which is prejudicial to the students and the public at large.

14. It was the applicant's case that unless the orders sought herein are granted he stood to be prejudiced by the respondents malicious, and ultra vires actions.
15. It was submitted by the applicant that the application herein is against the respondent's Disciplinary Committees decision dated 3rd August, 2015 ordering him to serve a fresh pupillage term under a different advocate having successfully served the required six months pupillage term between the period of 4th November, 2014 and 4th May, 2015 both dates inclusive and that the effect of the recommendation is that it denied him his legal right to the award of the Post Graduate Diploma in Law under regulation 8(2) of the First Schedule of Legal Notice 169 of 2009 yet he have met all the requisite requirements. Further by unlawfully refusing to issue him with a Certificate of Compliance under Sec. 15 of the ***Advocates Act*** and regulation 8(1) of the First Schedule of Legal Notice 169 of 2009, and to gazette him as prerequisite for Petitioning the Chief Justice for Admission in to the Roll of Advocates the Respondent acted arbitrarily without good cause abdicated its duty to the public which is to train him as an advocate and award him with the above mentioned award, issue him with a Certificate of Compliance and gazette him as a requirement for admission in to the Roll of Advocates.
16. It was submitted that the Respondent charged the applicant with a non-existent charge hence its decision was illegal and ultra vires and was based on extraneous and irrelevant mattes. Further, contrary to section 28(f) of the ***Kenya School of Law Act*** **(No. 26 0f 2012)** the respondent has not come up with new rules and regulations governing its disciplinary procedure and that the respondent carried out the disciplinary hearing on the 15th July, 2015 without any such rules backing their action. In addition, the Disciplinary Committee hearing carried out against him lacked the requisite quorum stipulated under **Legal Notice No. 169 of 2009**, which formed the basis of the respondent's letter inviting him for the disciplinary committee hearing. Since the invitation letter for the disciplinary committee hearing, informing him of the charge against him was handed to him by the respondent on the same day of the hearing, i.e. 15th July, 2015 moments before the hearing, the applicant contended that this was in a clear breach of the principles of natural justice since he was not sufficient time and notice to prepare his defence**.** Neither was he granted the respondent's internal rules of procedure governing the disciplinary committee's hearing was granted to him neither was he enlightened on the same before the hearing as a requirement of a fair hearing. It was contended that the presence of **Grace Kaburu** who acted as the secretary during the disciplinary committee hearing was in violation of the requirement under Legal Notice No. 169 of 2009. At the end of the meeting he was not allowed to peruse the minutes of the meeting and append his signature thereon to authenticate and confirm the same as a true representation of the hearing proceedings and neither was he supplied with a true copy of the minutes taken at the hearing. In the same vein, no reason was given for the respondent's arbitrary decision issued on the 3rd August, 2015.
17. By permitting the respondent's agent, who was the applicant's assigned supervisor to sit in the Disciplinary Committee hearing held on the 3rd August 2015 which meeting came up with the impugned recommendations, the applicant contended that the respondent acted as a judge in its own cause. It was contended that the decision had no legal basis and was meant to perpetuate the Respondent's agent's vendetta against the applicant.
18. It was submitted that the punishment meted by the Respondent in disqualifying the applicant's pupil master was ultra vires the powers of the Respondent. This submission was based on regulation 3 of the Second Schedule of Legal Notice 169 of 2009 which according to the applicant provides for sanctions in form of reprimand, warning, restitution, suspension and expulsion.
19. To the applicant, the Disciplinary Committee cannot arbitrarily qualify or disqualify an advocate's competence to take on a pupil since the disqualification and qualification for advocates to take pupils is expressly provided for under the ***Advocates Act*** and the Pupillage Deed and therefore the recommendation disqualifying the applicant's former Pupil master from taking him on in the recommended repeat pupillage exercise is beyond the Disciplinary Committee's powers and is a confirmation that they indeed took into consideration irrelevant and extraneous factors during the Disciplinary Committee hearing held on the 15th July, 2015 and during their subsequent deliberations.
20. To the applicant, the respondent's action breached several of his constitutional and fundamental rights namely:-

a. Right to and protection of his inherent dignity and social justice and the realization of his potential as human being (under Art. 19 (2) and Art. 28 of the Constitution)
b. Right to a fair trial under Art. 25(c) of the Constitution
c. Right to equality and freedom from discrimination under Art. 27 of the Constitution.
d. Right to freedom and security of person which includes the right not to be subjected to torture of any manner, whether physical or psychological, and the right not to be treated or punished in a cruel, inhuman or degrading manner.
e. Right to exercise my freedom of expression under Art. 33(1) of the Constitution.
f. Right to fair administrative action under Art. 47 of the Constitution
g. Right to fair hearing under Art. 50 of the Constitution.

21. In support of his submissions the applicant relied *inter alia* on **Nairobi HCCC 491 of 2009, Rev Prof. Zablon John Nthamburi vs. Rev. Dr. S.K Mimpwi & Ors** , **Nairobi Miscellaneous Application No. 182 of 2012, Baraza Limited t/a Kenya Television Network (KTN), Kisumu Civil Appeal No. 217 of 2003, John Onyancha Zurwe vs. Oreti Atinda alias Olethi Atinda,** ***Halsburys Laws of England*** 4th Edition Vol. 12 , **Swiqippharm Ltd vs. Awuondo & Anor (2003) KLR at page 199**, **Nairobi Civil Appeal No. 217 of 1986, David Oloo Onyango vs. The Attorney General, Nairobi Misc. Application No. 155 of 2013, Zechariah Wagunza & Anor. Vs. Kenyatta University, Mombasa Civil appeal No. 314 of 2009, Serah Njeri Mwobi vs. John Kimani Njoroge, Nairobi Industrial Cause No. 769 of 2012, Sophia Wanjiku Ngugi vs. Saida Ali, Kathambi Kinoti, Nelly Kamau (As Trustees of Young Women's Leadership Institute), Nairobi Court of Appeal No. 108 of 2015, Nelson N. Ogombo vs. Halima Shaiya, Nairobi Industrial Cause No. 125 of 2013, Howard Andrew Nyerere vs. Kenya Airways Limited, Nairobi Civil Appeal No. 90 of 1989 , Nyongesa & 4 Ors vs. Egerton University, Nairobi H.C Petition No. 97 of 2010, Aids Law Project-vs- the Hon. A.G and 3 Others, Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] 2 KLR 240, Burnaby Properties Limited v. Kiambu Land Control Board, Nairobi Miscellenous No. 1488 of 2005**, and **Nairobi Misc. Appli. No. 711 of 2006, Daniel Kago Macharia v. Kiambu District Land Tribunal** or.

Respondent's Case

22. In opposition to the application, the Respondent relied on the replying affidavit sworn by **Albert Simiyu Murambi**, the Respondent's Manager, Legal Clinics.
23. According to the Respondent, Applicant was first admitted to the Kenya School of Law on 24th November, 2010 to commence residential training in the Advocates Training Programme with effect from 21st January, 2011. His admission and subsequent clearance from the school was preconditioned upon him finishing the aforesaid residential training and complying with the requirements of section 13 of the ***Advocates Act***, Cap 16 as to pupillage and related obligations which pupillage the applicant was to commence in January, 2012 but failed to do so until August, 2012 when he requested to commence rejected on grounds that since the official pupillage term had ended on 30th June, 2012, he would have had no supervisor. He was therefore instructed to commence pupillage in January 2013.
24. It was averred that the Applicant ignored the same and still went ahead and commenced his pupillage despite being instructed not to and on 30th January 2013, the Applicant requested to be allowed to resubmit his previous pupillage documents, filed in 2012 for him to be allowed to commence pupillage with effect from February 2013 which request was allowed subject to him filing his pupil master's practicing certificate for the year 2013. Since then, it was averred the Applicant went into a state of silence until 8th September 2013 when he submitted a letter from one **Anthony Okulo** purporting to certify that the Applicant had undertaken pupillage under his supervision. To the Respondent, for a period of about 20 months, the Applicants whereabouts were not known to the school and the alleged pupil master's practising certificate for the year 2013 was never submitted as required in order for the school to approve his commencement of pupillage as promised in his letter of 30th January 2013.
25. On 1st August 2014 the school received a letter from the firm of **Okong'o Wandago & Company**

Advocates in which it was acknowledged, on the Applicant's behalf, that he "forgot" to notify the school of his pupillage firm. On 1st September 2014 the Applicant submitted the practising certificates of **Amos Ogutu Wandago** and **Anthony Okulo** for the year 2013. However in the respondent's view, this late submission of the documents was in contravention of paragraph 20(b) of the Pupillage Deed and had the effect of denying the school a chance to assign the Applicant a supervisor to evaluate his pupillage. As a result, the Applicant submitted a new pupillage deed on 22nd September 2014 and the school, in its attempt to accommodate the Applicant's special circumstances, offered to assign the Applicant a supervisor outside the usual pupillage supervision cycle on condition that the practicing certificate of his pupil master for the year 2014 would be submitted. However,, the practicing certificate was not availed and the Form D thereof was incomplete, which the Applicant was promptly reminded to comply with and on 3rd November, 2014, the Applicant submitted the relevant documents as was required and called for by the school. Since the Applicant's pupillage would traverse two (2) practice years (2014 and 2015), he was reminded to avail his pupil master's practising certificate for the year 2015 by the 31st of January 2015.However, the Applicant wrote to the school contesting the commencement date for his pupillage.

26. According to the respondent, due to the Applicant's failure to submit his pupil master's practicing certificate for the year 2015, and there was uncertainty as to the competence of his pupil master, **Mr. Anthony Okulo**, to keep him in chamber as a pupil, his pupillage was suspended, suspension which the applicant appealed which appeal was disallowed. Thereafter the Applicant, once again went silent until 20th May 2015 when **Mr. Anthony Okulo** wrote to the school purporting to confirm that the Applicant had served the pupillage term. Notwithstanding the Applicant's failure to comply with the said paragraph 20(b) of the pupillage deed, **Ms. Anastacia Otieno**, his school assigned supervisor called on his chambers on 29th May 2015 and the Applicant on 11th June 2015 wrote a letter in an attempt to explain away issues raised by his supervisor.
27. It was averred the Applicant was invited to appear before a Disciplinary Committee on 15th July 2015 to answer to the charges of unauthorised alteration of dates in the pupillage workbook and upon hearing the disciplinary committee rendered its verdict to the effect that the Applicant was to commence pupillage. To the Respondent therefore to this day, the Applicant is not a pupil, having had his pupillage suspended on 5th February 2015 and to this date, the applicant has never submitted **Mr. Anthony Okulo's** practicing certificate for the year 2015 and cannot therefore be said to have served pupillage at any time after the said 5th February 2015.
28. In its submissions the respondent contended based on the relevant legal provisions it can be clearly and straight-away seen that pupillage is a core unit in the ATP (Post Graduate Diploma in Law) programme and the Board of the Respondent has the mandate to determine the academic calendar for all course units. Further, a student must submit to the authority of the Director of the Respondent in the course of study; and must pass all core units, including pupillage, for them to qualify for the Certificate of Compliance under section 15 of the ***Advocates Act***. However, the *ex-parte* Applicant has not fulfilled the requirement for successful completion of the pupillage core unit in that the various pupillage sessions undertaken have not been completed.
29. It was further submitted that since the applicant did not comply with the requirements in the Pupillage Deed. It was further contended that since paragraphs 8 and 12 of the Pupillage Deed prohibit a pupil from making any variations to the Deed, the action of the Respondent's Disciplinary Committee is well within the provisions of law cited above as follows;
30. It was reiterated that Pupillage that a student needs to satisfactorily undertake and complete is a crucial element of the Advocates Training Programme for the award of the Post Graduate Diploma in Law enroute to admission as an advocate under the ***Advocates Act***. The *ex-parte* Applicant, in this case, did not properly fulfil the requirement of pupillage as a basic requirement needed in order to allow him to obtain the certificate of compliance under the ***Advocates Act,*** a position that is self evident from the documentary evidence before the court.
31. Based on **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2**, **An Application by Bukoba Gymkhana Club [1963] EA 478 at 479**, **Timotheo Makenge vs. Manunga Ngochi (1979) KLR 53** and **R vs. Nat Bell Liquors Ltd (1992) 2 A.C 192, 156**, it was

submitted that the court can only interfere with the decision of the Respondent, only if it acted *ultra vires* or its decision was affected by irrationality or procedural impropriety. To the contrary the Respondent, in the circumstances herein, demonstrably acted within the powers accorded to it by the ***Kenya School of Law Act No. 26 of 2012*** as read together with the ***Legal Education Act, No. 27 of 2012*** and the ***Council of Legal Education (Kenya School of Law) Regulations, 2009***.

32. The Respondent relied on In the case of **The Republic v. Director – General of East African Railways Corporation, ex parte Kaggwa (1997) KLR 194,** in which **Chesoni, J** (as he then was) stated:

"Mandamus is neither a writ of course neither a writ of right but a discretionary remedy which the court will grant only if there is no more appropriate remedy. In other words, if there is a satisfactory alternative remedy available to the applicant, the court will not grant mandamus. Adequate alternative remedy is an important limitation to the availability of an order of mandamus. The purpose of Mandamus is to compel the performance of a public duty or an act contrary to, or evasive of, the law; and it does not lie against a public officer as a matter of course and where one or more, of the bars or limitations exists, the court will, usually, not exercise its discretion in favour of the applicant. These bars are: that there is an alternative specific remedy at law; that there is no possibility of effective enforcement, or performance will be impossible by reason of the circumstances, like lack of power or means to obey on the part of the Respondent; and that it will result in interference by the judicial department with the executive arm of the government…All in all, these bars are discretionary; but there has to be a good reason for them not to apply to a particular case where they exist."

33. According to the Respondent, **the *ex-parte* Applicant has the option of fulfilling the prerequisites needed in order for him to be eligible for the Certificate of Compliance; a clear indication that the *ex-parte* Applicant has no good reason to warrant the court to grant the Certiorari, Mandamus and prohibition orders sought in the Motion. To the respondent by granting the orders sought herein, the Court would be interfering with the decisions and powers of the Respondent conferred on it by the abovementioned Acts. Further based on Newton Gikaru Githiomi & Anor vs AG/Public Trustee Nairobi HC JR 472 of 2014 it was submitted that:**

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

34. It was therefore the Respondent's position that **the *ex-parte* Applicant, in the circumstances, has not shown why the decision of the Respondent's Disciplinary Committee to direct that he undertakes pupillage afresh should not be upheld. T**he ***ex-parte* Applicant** was duty bound to demonstrate that the Respondent's action was affected by illegality, irrationality or procedural impropriety. As he has demonstrated this, the judicial review orders ought not to issue in the circumstances. It was contended that **demonstrably, it is the *ex-parte* Applicant who has not fulfilled the mandatory requirements of pupillage under the direction of the Respondent. If indeed the *ex-parte* Applicant genuinely wishes to obtain a Post Graduate Diploma in law**

under the Advocates Training Programme and the subsequent Certificate of Compliance, it is only prudent for him to endeavour to, at the very least, meet the basic requirement of pupillage necessary for him to do so.

35. **The Court was therefore urged to dismiss the application with costs.**

Determinations

36. I have considered the application, the statement, the verifying and further affidavits and the documents exhibited thereto, the replying affidavit, the submissions and authorities cited in support thereof.
37. It is important to note that the decision which the applicant seeks to quash is the one dated 3rd August, 2015. By the said decision, the Respondent ordered the applicant to serve a fresh pupillage term under a different advocate. While there seem to have been other decisions made earlier than that date, in these proceedings, the Court is only concerned with the propriety of the decision made on 3rd August, 2015.
38. It is trite that where a discretion is donated to a particular body the Courts ought to exercise restraint in and ought not to readily accede to invitation to interfere with the exercise of such powers and discretion. I therefore associate myself with the Court of Appeal's view in as propounded in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** to the effect that:

    "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…"

39. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
40. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See **R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.**
41. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an

ordinary appeal, the court may not set about forming its own preferred view of the evidence. See **Reid vs. Secretary of State for Scotland [1999] 2 AC 512.**

42. However, according to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority or power.
43. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.
44. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** the learned Judge expressed himself as follows:

"On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are... essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…Certainty of law is an important pillar in the concept of the rule of law. As is no doubt clear in the findings in this case, it is an essential prerequisite of business planning and survival as well. Yes, the rule of law is a lifeline of the economy as is illustrated in the emerging and thriving economies of the world. The courts in my view have a responsibility to uphold the rule of law for this reason. The ability of businesses to plan stems from the bedrock of the rule of law. "

45. It was in appreciation of this that judicial review was recognised in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** as the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.

46. To hold therefore that the executive is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary, it has been held, is the first victim. Accordingly the Courts are empowered to and are under a duty to investigate allegations of abuse of power and improper exercise of discretion. I therefore associate myself with the holding in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**, that:

"When litigants come to the courts it is the core business of the courts and the courts' role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance."

47. The circumstances under which the Court would be entitled to interfere with discretion even where it appears to be unfettered are now well known. The Court can interfere (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**
48. It must however be appreciated that the Respondent is the institution specially tasked with providing professional training to and examining those who intend to be advocates. To unduly curtail its powers in carrying out that onerous mandate would amount to usurping the powers of the School and substituting the Court's discretion for that of the School. There is nothing inherently wrong or unreasonable in the School setting reasonable guidelines for the attainment of its statutory mandate as long as such guidelines are lawful and are geared towards ensuring that those whom its unleashes on the public are those who have the necessary professional and ethical qualifications necessary in carrying out their mandate as advocates. The role of an advocate in society is that of trust as between the advocate and the client as opposed to that of a businessman. He or she is expected to possess certain standards as expected from him or her by the society. The client entrusts him or her with execution of the client's lawful instructions in accordance with certain standards and also expects him or her to be a safe repository of the client's confidential information as well as the client's funds. The need for proper training both theoretically and practically cannot be overemphasised.
49. The decision of what constitutes proper guidelines necessary for the proper breeding of advocates ought to be left for the wise counsel of the Respondent. This Court cannot decide for the School which guidelines are appropriate for it to administer on its students even if the Court was of the view that such guidelines are not suitable or unnecessary as long as they are geared towards the attainment of the School's objectives. In other words it is not the Court's view on the suitability of the guidelines that should determine whether or not the Court would interfere with the School's choice. Where it is not shown that the decision was unreasonable, I associate myself with the decision of the Court of Appeal in **Eunice Cecilia Mwikali Maema vs. Council of Legal Education and 2 Others Civil Appeal No. 121 of 2013** that:

"the Council has the power to set standards to ensure that the highest professional standards are maintained in the profession and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the Regulations."

50. I also wish to associate myself with the decision in **Susan Mungai vs. The Council of Legal Education & 2 Others Constitutional Petition No. 152 of 2011 in which Mumbi Ngugi, J expressed herself as follows while citing with approval the case of Republic –vs- The Council**

of Legal Education ex parte James Njuguna and 14 Others, Misc Civil Case No. 137 of 2004 (unreported):

"The Council of Legal Education followed to the letter the purpose and objects of the Act including the applicable regulations and this Court has no reason to intervene in a way that interferes with the merit of the decisions clearly falling within the relevant regulations and which have been applied by the Council of Legal Education without any procedural irregularity or for an improper purpose. I decline to do so. The Council of Legal Education has the power and duty to insist on the highest professional standard for those who wish to qualify as advocates. The Regulations are aimed at achieving this. The decision was made on merit and this Court has no reason to intervene. The Regulations and the policy behind the rules were properly made pursuant to the Act and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the regulations...*The Council of Legal Education is the best judge of merit pertaining to academic standards and not the courts. Parliament clearly vests the power of formulating policy of training and examining of advocates on the Council of Legal Education and it would be wrong in the view of this court to intervene with the merits of the decision by the Council of Legal Education..... a Court of law would only be entitled to inquire into the merits of a decision in circumstances where the decision maker abused its discretion, exercised its decision for an improper purpose, acted in breach of its duty to act fairly, failed to exercise its statutory duty reasonably, acts in a manner which frustrates the purposes of the Act which gives it power to act, exercises its discretion arbitrarily or unreasonably, or where its decision is irrational or unreasonable as defined in the case of Associated Provincial Picture Houses Ltd. –v- Wednesbury Corporation [1947] 1 KB 223*. In the case before me, there is no evidence to suggest that the 1st respondent, in dealing with the application for admission by the petitioner, acted in any of the ways set out above that would justify interference by this Court with its decision." [Emphasis mine].

51. The learned Judge continued:

"I find and hold that it would not be proper or right for the court to veto powers conferred by Parliament on a public authority or body such as the Council of Legal Education and for the court to substitute its own view from that of the Council of Legal Education to which discretion was given except where the discretion has been improperly exercised as enumerated in the ten situations above. In judicial review, the courts quash decision made by public bodies so that these same bodies remake the decisions in accordance with the law. It is not proper for the court to substitute its decision which is what this court is being asked to do by issuing a mandamus to compel a re-sit. I reiterate my earlier findings on this point in the case of *R v JUDICIAL SERVICE COMMISSION ex-parte PARENO Misc Civil Application No.1025 of 2003* (now reported) that it is not the function of the courts to substitute their decisions in place of those made by the targeted or challenged bodies."

52. This was a reflection of the position taken in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarstheth [1985] LRC** in which it was held:

"so long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of the efficaciousness of such rules and regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary,

reasonable, just and fair."

53. The applicant contended that since the invitation letter for the disciplinary committee hearing, informing him of the charge against him was handed to him by the respondent on the same day of the hearing, i.e. 15th July, 2015 moments before the hearing, this was in a clear breach of the principles of natural justice since he was not sufficient given time and notice to prepare his defence. Further, he was neither furnished with the respondent's internal rules of procedure governing the disciplinary committee's hearing nor was he enlightened on the same before the hearing as a requirement of a fair hearing. Section 4(3) of the ***Fair Administrative Action Act*** provides that 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. This was the position in **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** where the Court held:

"I would at this stage adopt the observations made in the *Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77* where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; "1.if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best…; 4.The person accused must know the nature of the accusation made; 5.A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi–lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it."

54. As was held in **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194** in which **O'reilly vs. Mackman [1982] 3 All ER 1129** was cited with approval:

"Wherever any person or body of persons has authority conferred by legislation to make decisions affecting the rights of the subjects, it is amenable to the remedy of an order to quash its decisions either for an error of law in reaching it, or for failure to act fairly towards the person who will be adversely affected if the decision maker fails to observe either one or other to the two fundamental rights accorded him of the rules of natural justice or fairness, viz: to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made..."

55. In this case, however, the applicant has not contended that he asked for time to enable him adequately prepare for the proceedings. The reason for adequate notice is meant to enable the person facing administrative proceedings time to adequate prepare for the same not only in terms of addressing the allegations against him but also to enable him marshal his evidence in order to controvert those allegations. Where therefore the notice though prima facie short, the person charged feels that he or she is properly armed to deal therewith the Court will not interfere. It is therefore for the applicant to show that the period of the notice given taking into account the circumstances was not adequate for him to adequately rebut the same. In this case the issue of alteration of the workbook was first raised on 4th June, 2015 according to the applicant and that he

dealt with the same. From the minutes attached, the applicant gave his explanation for the alterations and a decision was made thereon. It is not for this Court in these kinds of proceedings to find that the decision was correct or not.

56. It is however clear that the decision was based on alleged breach of clause 8 and 12 of the Pupillage Deed. A perusal of the said two clauses however seem not to deal with alterations made in the WORKBOOK but in the DEED. The charge however related to alterations in the WORKBOOK and not in the DEED. It was therefore clear that the charge as purported to have been proved was not supported by the provisions relied upon. There needs to be a strict observance of the procedure in any disciplinary proceedings and that leads to consequential quashing of the disciplinary action on account of non-compliance with the laid down procedure. See **Joseph Mulobi vs. The Attorney General Nairobi HCCC No. 742 of 1985.**

57. It was further contended that by permitting the respondent's agent, who was the applicant's assigned supervisor to sit in the Disciplinary Committee hearing held on the 3rd August 2015 which meeting came up with the impugned recommendations, the respondent acted as a judge in its own cause. It was contended that the decision had no legal basis and was meant to perpetuate the Respondent's agent's vendetta against the applicant.

58. From the minutes attached it is apparent that **Ms Anatacia Otieno** was one of the members, who sat when the disciplinary proceedings were being conducted on 15th July and 3rd August, 2015. At the end of the proceedings the Committee observed that the alterations were intentionally made to hoodwink the School. It was this same **Ms Anastacia Otieno** who vide her letter dated 3rd June, 2015 recommended that the matter be referred to the Disciplinary Committee for action. In my view it was most inappropriate to permit the very person who had recommended that disciplinary action be taken against the applicant and against whom the applicant had bitterly complained to be part of the panel hearing the same complaint which she herself had recommended be the subject of disciplinary proceedings. Implicit in the concept of fair adjudication lie two cardinal principles namely that no man shall be a Judge in his own cause and that no man shall be condemned unheard. These two principles of natural justice must be observed by the Courts and Tribunals save where their application is expressly excluded or by necessary implication. See **Prime Salt Works Ltd. vs. Kenya Industrial Plastics Ltd. Civil Appeal No. 186 of 2000 [2001] 2 EA 528.**

59. In **Kenya Commercial Bank Ltd vs. Kenya National Commission on Human Rights Nairobi HCMA No. 688 of 2006 [2008] KLR 362** a three judge bench of this Court while citing **Hannan vs. Bradford City Council [1970] 2 ALL ER 69** and **R vs. Sussex Justices ex parte Cay (HLC 1924)**, expressed itself as follows:

"Section 17 (b) and (d) of the Act requires the Commission to observe the principle of impartiality and rules of natural justice. One of the tenets of natural justice is that no man can be judge in his own cause. S 25 of the Act allows the respondent, after completing an enquiry, to commence proceedings in the High Court under s 84(1) of the Constitution. Having made up their mind that the applicant had contravened the 1st interested Party's rights, the respondents should have proceeded under s 25 (b) and not taken part in the adjudication. It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done. We find that in the circumstances of this case, a right thinking man would have formed the impression that there was likelihood of bias and justice would not have been done. The proceedings attract the order of *certiorari* for purposes of their being quashed...The applicant complaints that their legitimate expectation of a fair trial has been thwarted because of all the reasons raised by them that there is a real likelihood of bias by the Commissioner sitting as a judge in his own cause; because the Panel as constituted is unlawful, and because the regulations are uncertain, defective and unenforceable. As we pointed out earlier, s 17 of the Act provides that Rules of Natural Justice will be observed by the respondent in the performance of its functions which include investigation of human Rights Violations. The applicant expected to be given a fair hearing and all tenets of natural justice to be observed but from our observations above, we find that the same have been flouted by the respondent by their own conduct of prejudging the applicant, being a judge in its own cause; by regulation 14 breaching Rules of Natural Justice; by the Commissioner committing errors of precedent fact. We also find that the

applicant's Legitimate Expectation that they would get a fair hearing from the respondent was breached."

60. It is my view that **Ms Anastacia Otieno** ought not to have sat at any stage of the disciplinary proceedings in question.
61. Having so found the issue is not whether she was in actual fact bias but whether a right thinking man [or woman] would have formed the impression that there was likelihood of bias and justice would not have been done. This was the position taken by the Court of Appeal in its majority judgement in **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge Civil Appeal No. 79 of 1998 [1995-1998] 1 EA 134** in which **Lakha, JA** it expressed himself as hereunder:

In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit…There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; "The judge was biased."

62. In **Omolo, JA**'s view, once it is accepted that a judge was in fact biased against a party then the question of any notional fairness in the eventual outcome of the dispute becomes merely academic.
63. My view is informed by the sentiments expressed in **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** in which the Court expressed itself as follows:

"The petitioner also challenges the inclusion of the Vice Chancellor in the committee to sit on appeal of the petitioner's case having been a judge of first instance. As earlier noted s 14 provides for the composition of the Senate and the chairman of the said Senate is the Vice Chancellor. The letter of 11th September 2006 allowed an appeal to be made to the Vice Chancellor but the appeal was dismissed. A second appeal was made on 5th April 2007 but the same was rejected on 19th July 2007. The petitioner has faulted the decision of the Vice Chancellor who is supposed to chair the Students Disciplinary Committee for sitting on appeal. I do agree that the Vice Chancellor cannot be a judge at first instance and also on appeal. However, in the instant case the Vice Chancellor did not take part in the Disciplinary Committee proceedings and his sitting on appeal in the matter cannot be said to be prejudicial to the petitioners' case in any way. Had the Vice Chancellor sat on the 1st Committee then he would have lacked capacity to sit on appeal. Ordinarily I would agree that the provision that the Vice Chancellor sits both at 1st instance on the case and on appeal would be contrary to rules of natural justice and unconstitutional. The regulation authorizing the Vice Chancellor to sit as a judge in the 1st instance and on appeal should be relooked at. In this case however I find that rules of natural justice were not flouted by the Vice Chancellor sitting on appeal."

64. Although in the above case the Court found that the Vice Chancellor did not participate in the proceedings in question, in the subject proceedings it was not alleged by the Respondent that **Ms Anastacia Otieno** did not participate in the proceedings before the Committee in which she was clearly indicated as having been a member of.
65. It was contended that the presence of **Grace Kaburu** who acted as the secretary during the disciplinary committee hearing was in violation of the requirement under Legal Notice No. 169 of

2009. According to Regulation 17(1) of ***The Council of Legal Education (Kenya School of Law) Regulations, 2009***, Legal Notice No. 169 of 2009, the Disciplinary Committee is supposed to be appointed by the Director comprising of the following:

(a) the Assistant Director of the Post Graduate Diploma (Advocates Training Programme), who shall be the chairman;

(b) the Assistant Director of Continuing Professional Development, Research and Projects;

(c) senior member of the academic staff;

(d) the Human Recourses and Administration Manager;

(e) a student representative; and

(f) the Academic Manager, who shall be Secretary.

66. According to the minutes, the role of **Ms Grace Kaburu** was indicated as that of "recording". It has not been purported that she sat in the Committee as a member or that she participated in any way in the deliberations. Based on the decision in **Gathigia vs. Kenyatta University** (supra) nothing turns on that issue.
67. It was contended that the punishment meted by the Respondent in disqualifying the applicant's pupil master was ultra vires the powers of the Respondent. This submission was based on regulation 3 of the Second Schedule of Legal Notice 169 of 2009 which according to the applicant provides for sanctions in form of reprimand, warning, restitution, suspension and expulsion.
68. To the applicant, the Disciplinary Committee cannot arbitrarily qualify or disqualify an advocate's competence to take on a pupil since the disqualification and qualification for advocates to take pupils is expressly provided for under the ***Advocates Act*** and the Pupillage Deed and therefore the recommendation disqualifying the applicant's former Pupil master from taking him on in the recommended repeat pupillage exercise is beyond the Disciplinary Committee's powers and is a confirmation that they indeed took into consideration irrelevant and extraneous factors during the Disciplinary Committee hearing held on the 15th July, 2015 and during their subsequent deliberations. According to Regulation 17(8) the Disciplinary Committee may impose such disciplinary sanctions ***including*** suspension and expulsion from the School as it considers fit in the given circumstances. It is therefore clear that the sanctions enumerated in the said regulation are not exclusive. The applicant has not contended that the sanction was otherwise unlawful or unreasonable. I do not understand the sanction to mean that the said advocate was disqualified generally. The disqualification in my view was only applicable in so far as the applicant was concerned.
69. The applicant complained that at the end of the meeting he was not allowed to peruse the minutes of the meeting and append his signature thereon to authenticate and confirm the same as a true representation of the hearing proceedings and neither was he supplied with a true copy of the minutes taken at the hearing. The applicant was not a member of the Committee and whereas he was no doubt entitled to a copy of the minutes under Article 47 of the Constitution as read with section 4 and 6 of the ***Fair Administrative Action Act,*** the applicant has not contended that he sought for and was denied a copy of the minutes and the reasons for the decision.
70. The applicant accused the Respondent's Director of having signed the recommendations though he did not sit in the proceedings. What the applicant terms the recommendations however is a transmission of the recommendations. I accordingly find no merit in this contention.
71. Having considered the issues raised herein I am satisfied that the disciplinary procedure adopted by the Respondent fell short of what constitutes a fair hearing. The Committee comprised a person who ought not to have sat therein. The provision relied upon in arriving at the decision in question were clearly inapplicable.
72. In **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,** the Court held:

"The Disciplinary Committee as a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute…Secondly, the Disciplinary Committee has no authority to expand its ambit beyond what has been referred to it by the Council. The terms of section 30(1) say that where the Council has reason to believe that a member has been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee, which shall inquire unto the matter. Under section 31(1), on the completion of an inquiry under section 30 into the alleged professional misconduct of a member of the Institute, the Disciplinary Committee shall submit to the Council a report of the inquiry put the matters beyond question or doubt. The Disciplinary Committee can only conduct an inquiry into the actual matters referred to it for inquiry by the Council. In unilaterally expanding the said inquiry into something called "conduct short of expected standards of professionalism", and thereby expanding the said inquiry beyond its terms of reference, the Disciplinary Committee acted unlawfully…Thirdly, there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers Disciplinary Committee or indeed the Respondent, to delegate its Ad-judicatory functions to unnamed person under Section 28(1) of the Accountants Act. The Committee's findings of the Applicant guilty of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations. If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a 'determination' within the meaning of empowering legislation was accordingly a nullity…Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law…It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."

73. In **Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629**, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language. See **London County Council vs. Aylesbury Dairy Company Ltd [1899] 1 QB 106 at 109; Muini vs. R through Medical Officer of Health, Kiambu [2006] 1 KLR (E&L) 15; Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**
74. That being the position the decision made by the Respondent's Disciplinary Committee cannot be allowed to stand. Once that decision falls by the wayside all subsequent decisions which were made pursuant to it must similarly give way. Accordingly it is not necessary to grant the order of prohibition in the manner sought.
75. The Respondent however contended that since the applicant has the option of complying with the questioned decisions, the Court ought not to grant the reliefs sought. With due respect compliance with the decision under challenge cannot be termed as alternative remedy in order to justify the grant of otherwise merited reliefs.
76. The applicant however sought an order of *mandamus* directed upon the respondent to immediately gazette and issue the applicant with a Compliance certificate for purposes of petitioning the Chief Justice for admission to the roll of advocates. In **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572** the Court of Appeal expressed itself as follows:

"The learned judge had jurisdiction to quash the University decision but whether he was right or wrong in exercising that jurisdiction in the manner he did is not and cannot be a matter for the Court's consideration in the application for stay of execution pending appeal. It is doubtful whether the university could be prohibited from instituting further

disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law…Under section 8(2) of the Law Reform Act, the High Court has power to issue the orders of *certiorari,* prohibition and *mandamus* in circumstances in which the High Court of Justice in England would have power to issue them. The point to be canvassed in the intended appeal being whether, in the exercise of his admitted jurisdiction, the learned judge was in fact entitled to, in effect, issue an order of *mandamus* against the University when neither the applicants nor the University had asked for such an order, is clearly arguable. If the superior court had no jurisdiction to order a retrial, then the validity of the subsequent proceedings held pursuant to such an order would themselves be highly questionable."

77. It is trite an order of *mandamus* direct the Respondent to exercise its discretion in a specific manner. See **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 (CAK) [1997] eKLR**

78. *Mandamus* can however issue to compel the Respondent to comply with the law. Under Article 47 of the Constitution:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

79. The Respondent is under both Constitutional and Statutory obligation to expeditiously determine the applicant's case in accordance with the law in a fair, efficient and reasonable manner**.**

Order

80. Accordingly the orders which commend themselves to me and which I hereby grant are:
    1. **An order of certiorari removing into this Court the Respondent's decision issued on the 3rd August, 2015 which decision is hereby quashed.**
    2. **An order of mandamus compelling the Respondent to proceed and determine of the applicant's case as provided under Article 47 of the Constitution as read with the provisions of the *Fair Administrative Action Act.***
    3. **The applicant will have the costs of these proceedings.**
81. Those shall be the orders of the Court.

Dated at Nairobi this 18th Day of December, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Olando for Mr Thiga for the Respondent

Cc Muriuki