



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW MISC. APPLICATION NO.215 OF 2014**

**IN MATTER OF APPLICATION TO FILE JUDICIAL REVIEW PROCEEDINGS IN THIS COURT**

**AND**

**IN THE MATTER OF APPLICATION FOR ORDERS OF CERTIORARI AND MANDAMUS AGAINST THE RESPONDENTS**

**AND**

**IN THE MATTER OF SECTIONS 8 & 9 OF THE LAW REFORM ACT CAP 26 LAWS OF KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**AND IN THE MATTER OF THE KENYA SCHOOL OF LAW ACT NO. 26 OF 2012 LAWS OF KENYA**

**AND**

**IN THE MATTER OF PRINCIPLES OF PROPORTIONALITY AND LEGITIMATE EXPECTATION**

**AND**

**IN THE MATTER OF THE DOCTRINE OF REASONABLENESS IN THE EXERCISE OF POWER AND RATIONALITY**

**AND**

**IN THE MATTER OF THE DOCTRINE OF ULTRA VIRES**

**REPUBLIC……...…….APPLICANT**

**VERSUS**

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

**COUNCIL OF LEGAL EDUCATION……...……2ND RESPONDENT**

***EX PARTE*: IBRAHIM MAALIM ABDULLAHI**

# JUDGEMENT

## Introduction

1. By a Notice of Motion dated 7th June, 2014 the *ex parte* applicants herein, **Ibrahim Maalim Abdullahi**, seeks the following orders:

> **(a) An order of Certiorari do issue to remove to this court and quash the decision of the board of the 1st Respondents of placing a three year transitional period for the application of the minimum requirements for admission to the Advocates Training Programme under the Council of Legal Education Act Cap 16A (repealed) as read together Council of Legal Education (Kenya School of Law) Regulations Legal Notice No. 169 of 2009.**
>
> **(b) An order of Mandamus do issue directing the Respondents to allow the Applicant to sit for the pre-bar exams**
>
> **(c) Costs**

## *Ex Parte* Applicants' Case

2. The application is based on the following grounds:

> **(a) The 1st Respondent's decision to deny the Applicant direct entry into the Advocates Training Programme due to his grades in the Kenya Certificate for Secondary Education is discriminatory. This is irrespective of the fact that the Applicant has a LL.B from a recognized university.**
>
> **(b) Furthermore, the decision by the 1st Respondent to deny the Applicant an opportunity to sit the pre-bar Examination due to his grades in Kenya Certificate of Secondary Examination is in breach of the Applicant's right to non-discrimination. This is irrespective of the fact that the Applicant has an LL.B from a recognized university.**
>
> **(c) The Applicant contends that the decision to deny him entry into Kenya School of Law because of his grades his grades in Kenya Certificate of Secondary Examination is unfair and unreasonable.**
>
> **(d) The Applicant further contends that the decision by the 1st and 2nd Respondent to extend the application of the Council of Legal Education (Kenya School of Law) Regulations 2009 is unlawful. The provisions of the council of Legal education (Kenya School of Law) Regulations 2009 on the minimum requirements to sit the pre bar examinations are contrary to the provisions outlined in the second schedule of the Kenya School of Law Act.**
>
> **(e) The Applicant notes that the 1st and 2nd Respondent are keen to include the minimum requirement of a B in English or Kiswahili for direct entry under the Kenya School of Law Act but omitted the minimum requirements to sit the pre-bar examinations under the second schedule to the Kenya School of Law Act.**
>
> **(f) The 1st and 2nd Respondents selective application of the minimum requirement to join Kenya School of Law under the repealed Council of Legal Education Act and the Kenya School of Law Act is in breach of the Applicant's legitimate Expectation.**
>
> **(g) The Applicant who wants to join the legal profession has the legitimate expectation to access the Kenya School of Law Advocates Training Programme by sitting the pre-bar**

**examination which should be administered without consideration to his grades in high school.**

**(h) The Applicant further contends that the decision by the 1st and 2nd Respondent to deny him entry into Kenya School of Law is in violation of his right to education. The right to education includes the right to access institutions of higher education.**

**(i) The Applicant notes with apprehension that the effect of the three year transition for applying the minimum requirements to join Kenya School of Law under the Council of Legal Education Act will exclude him from enjoying the benefits of the minimum requirements under the second schedule of the Kenya School of Law Act.**

**(j) The Applicant is apprehensive that unless the application is expeditiously heard and the orders sought granted, the application will be rendered moot, further trampling upon his fundamental rights.**

**(k) This Honourable Court endeavors that any person whose rights are violated shall have an effective remedy, and in this regard this Honourable Court is entreated to intervene and grant such orders.**

3. The said application was supported by a verifying affidavit sworn by the applicant on 4th June, 2014.
4. According to the applicant, he sat for his Secondary Certificate in 1992 at Sheikh Ali High School within Mandera County and obtained a grade of D+ and is a police officer attached to the Nairobi Criminal Investigations Department Head Office where he has served for the past 16 years as an investigator and prosecutor having been appointed as Police Prosecutor in 1988. He served as such police prosecutor until the year 2002 when he was relieved of his duties as a prosecutor based on the decision of the court of Appeal in the case of *Wanjau v Republic*, which held that a police prosecutor of below the rank of inspector was incompetent to conduct a trial.
5. He deposed that due to the pronouncement and major changes proposed by the Attorney General's Office in training Police Prosecutors, he was granted leave by the government to pursue an LLB. However, he was bonded as condition for his leave of study. Before he could enrol for University Degree he undertook and was in 2006 awarded a diploma in law from the Kenya School of Professional Studies and thereafter enrolled for an LLB programme at Makerere University in 2007 and completed in August of 2011. He then applied to the 1st Respondent to pursue the Advocates' Training Programme but his application was rejected on the basis that he did not meet the minimum requirements for direct entry as set out under the repealed ***Council of Legal Education Act*** Cap 16A Laws of Kenya. He was therefore advised to make fresh application for consideration for the Pre-Bar examinations that were scheduled for September 2011 which application was however verbally rejected.
6. According to him, one year later he was made to understand from the Attorney General's Office that there are changes to be made to the Legal profession and that a new law namely ***The Kenya School of Law Act, 2012*** (hereinafter referred to as the Act) would be enacted which law (No. 26 of 2012), according to him, granted him relief as the Act streamlined the Entry requirement for admission to the Kenya School of Law. However, instead of the new law coming into force immediately, the 1st Respondents in consultation with the 2nd respondents advertised in the Daily Nation that it resolved and granted a three year transitional period for the New Act to take effect.
7. It was averred by the applicant that on the 4th of April 2014 he wrote a letter to the 1st Respondent requesting for confirmation on whether he was eligible to sit for the year's pre-bar exams and the response he got on the 14th of May 2014 was that his grades in Secondary School fell short of the admission criteria hence not eligible for admission under the law.
8. It was therefore contended that the Respondents have decided to refuse the applicant entry into Kenya School of Law based on the Act, the same Law they said had a three year transitional period to take effect. According to the applicant, the contents of the said letter are unreasonable because he is entitled to sit the pre-bar exams under the Act. In his view, since he completed his

Secondary Education programme in 1992, his O levels performance should not be used to debar him from joining Kenya School of Law.

9. He therefore considered this move illegal and ultra vires as the respondent are trying to come up with ways of locking out qualified applicants from sitting for the Pre-Bar exams scheduled for July of the said year. He clarified that he was not seeking for a direct entry into the Advocates Training Programme but was requesting to be allowed to sit for the pre-bar exams as he is eligible for the same since he is a holder of a Bachelor of Laws Degree from Makerere University and his grades in Secondary School should not be used to disqualify him from sitting for the Pre-Bar exams as he held a diploma which was considered when he was applying to join University. The applicant therefore contended that it was absolutely unreasonable and malicious for the Respondent to try and sneak in the contents of the repealed law instead of using the current Act that is in force hence this Court should prevail upon the wheels of justice and compel the Respondents to allow him sit for the pre-bar exams.

**Respondents' Case**

10. In opposition to the application, the Respondents filed he following grounds of objection:

**i. The Applicant does not qualify for either admission to the Advocates Training Programme directly or for sitting Pre Bar Examinations. The Applicant obtained a mean grade D plus (+) and grade D Plain in English in the Kenya Certificate of Secondary Examination.**
**First Schedule, Regulation 5 of the Council of Legal Education (Kenya School of Law Regulations) 2009, saved and operates through Section 49(1)(a) of the Legal Education Act, 2012 and Section 29(3)(a) of the Kenya School of Law Act, 2012, read together with second schedule to the Kenya School of Law Act, limit admission and subjection to Pre Bar exams to persons who, at pertinent part.**

**"a. ……..**

**b. …….**

**c. ……**

**d. A Bachelor of Laws Degree (LL.B) from a recognized university and attained a minimum grade C- (Minus) in English and a minimum of an aggregate grade C- (C Minus) in the Kenya Certificate of Secondary Examination sits and passes Pre Bar Examination…as a Precondition for admission".**

**ii. The provisions of the Second Schedule to Kenya School of Law do not repeal the Council of Legal Education (Kenya School of Law Regulations) 2009, they supplement them, the two instruments are read together.**

**iii. Reading Rule 2 of the Second schedule to the Kenya School of Law Act, 2012 without reading in the supplementing provisions of First Schedule, Regulation 5 of the Council of Legal Education (Kenya School of Law Regulations) 2009, leads to an absurd result, which was not the intention of Parliament, that is why; firstly the new law does not expressly nor by implication repeal the Council of Legal Education (Kenya School of Law Regulations) 2009. Secondly Sections 49(1)(a) of the Legal Education Act, 2012 and Section 29(3)(a) of the Kenya School of Law Act, 2012 save the 49(1)(a) of the Legal Education Act, 2012 and Section 29(3)(a) of the Kenya School of Law Act, 2012.**

**iv. The decision of the Respondents to give a transition grace period does not dis-operationalize the Kenya School of Law Act, or the Second Schedule thereof;**

**v. The application as drawn and filed is not tenable without first challenging and**

**striking down the legal provisions for admission to the Kenya School of Law, aforesaid;**

**vi. The order of mandamus does not issue to compel a party to act contrary to law. Admitting the Applicant to Pre Bar Examinations in light of his qualifications above shall be contrary to the law, cited above.**

**Applicant's Submissions**

11. It was submitted on behalf of the applicant that the law requires that an authority does only those things they are authorised to do and that every action taken by an authority in excess or in absence of its lawful mandate is ultra vires, null and void and will be quashed by the courts. Relying on ***De Smith's Judicial Review***, it was submitted that an administrative decision is flawed if it is illegal and that a decision is illegal if it contravenes or exceeds the terms of power which authorises the making of the decision and is not authorised by law. The task of the court in evaluating whether a decision is illegal, it was submitted, is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker and the courts when exercising this power of construction are enforcing the rule of law by requiring administrative bodies to act within the "four corners" of their duties and powers. Reliance was also placed on **Kasereka vs. Gateway Insurance Company Limited [2003] 2 EA 506**.
12. It was submitted that from a reading of section 16 of the Act as read with the second schedule to the Act, it is clear that the intention of the legislature is that the admission requirements to a course of study at the Kenya School of Law is as prescribed in the second schedule by virtue of which the applicant qualifies to sit the Pre-Bar Exams. While section 29(2)(a) and 29(3)(a) and (b) of the Act saves the ***Council of Legal Education (Kenya School of Law) Regulations, 2009*** and the ***Council of Legal Education (Kenya School of Law) Regulations, 2009*** to the extent that it is not inconsistent with the letter and the spirit of the provisions of the Act, the said sections do not save the ***Council of Legal Education (Accreditation) Regulations, 2009*** and the ***Council of Legal Education (Kenya School of Law) Regulations, 2009***.
13. It was submitted that section 29(2)(a) saves contracts of which the former school was a party to and not any rules governing the operations of the former Kenya School of Law while section 29(3) (a) and (b) does not refer to any rules and regulations affecting the Kenya School of Law or its admission requirements hence the attempt by the 1st and 2nd Respondents to save the ***Council of Legal Education (Kenya School of Law) Regulations, 2009*** is illegal as it is contrary to sections 16 and 29 of the Act.
14. On the basis of Article 43 of the Constitution, Article 13(2) of the ***International Covenant on Economic, Social and Cultural Rights*** and Article 26 of the ***Universal Declaration of Human Rights***, it was submitted that the right to education extends to institutions of higher education and the 1st Respondent is, under section 4(2) of the Act, such an institution established by the State with the mandate to provide professional legal training as an agent of the government and is under an obligation to ensure that it is accessible to those who want to train as advocates and on the authority of the case of **Leyla Sahin vs. Turkey European Court of Human Rights Application No. 44774/98 at para 137**, it was submitted that although the Article does not impose a duty to set up institutions of higher education, any State doing so will be under an obligation to afford effective access to facilities without discrimination and that pursuant to the General Comment 13 on the Right to Education prepared by the Committee on Economic, Social and Cultural Rights, while secondary educations "shall be made generally available and accessible to all', higher education is not to be "generally available" but on the basis of capacity which capacity should be assessed by reference to all their relevant ability, expertise, and experience.
15. It was submitted that the impugned action excludes the Applicant from accessing the Kenya School of Law and grossly undermines his right to education and as the Act enable the Applicant to sit the pre-bar examinations, it is improper for the 1stand 2nd Respondents to refuse the applicant the right to sit the same.
16. It was submitted in the alternative that by prescribing the minimum requirement of C (minus) in English and a C (minus) in the Kenya Certificate of Secondary Examination the applicant was left with no alternative solution yet Article 24(2)(c) of the Constitution of Kenya provides that a provision in legislation limiting a right or fundamental freedom shall not limit the right or

fundamental freedom so far as to derogate from its core or essential content. To the applicant the exclusion of the applicant from sitting pre-bar examinations renders the applicant's right to education ineffective and therefore, impairs the very essence of the right.

17. On the authority of **Captain Murungi vs. Attorney General Application No. 293 of 1993** and **Republic vs. Chief Magistrate's Court Nairobi ex parte Beth Wanja Njoroge [2013] KLR**, it was submitted that the Respondent's actions to suspend the ex parte applicant is unprocedural, illegal and in violation of the rights and fundamental freedoms of the Applicant and in order to remedy the defects of justice and to ensure the ends of justice are attained, the orders sought ought to be issued.
18. In his oral highlights, **Dr Khaminwa**, learned Senior Counsel submitted that it was ridiculous for the Respondents to contend that there was a need to find out the Applicant's performance in English in KCSE when the applicant had obtained University Degree from Makerere University. Such a decision it was submitted was tantamount to the Wednesbury unreasonableness and undermined the principles of proportionality and legitimate expectation.
19. Learned Counsel submitted that having considered comparative systems of legal education in other jurisdictions the concept of the Kenya School of Law does not exist. It was submitted that although this Court sits as a judicial review court, it cannot ignore the Constitution.

**Respondent's Submissions**

20. On the part of the Respondents it was submitted that the provisions of the Second Schedule to the Act do not real the ***Council of Legal Education (Kenya School of Law) Regulations, 2009*** but supplement them and the two should be read together. Placed in context, it was submitted that since the enactment of Regulation 20 of the ***Council of Legal Education (Kenya School of Law) Regulations, 2009*** expressly repealed **Council of Legal Education (Kenya School of Law) Regulations, 2007,** if the legislation intended to repeal the Regulations, then the Act or Subsidiary Legislation would have repealed the said Regulations and in the same manner, the ***Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009*** still apply presently, through the saving of section 48 of the Legal Education Act. Save for schedule 1 and 2 thereof, the Act carries no other subsidiary legislation and therefore by contemplation centrally relies on the substance of the ***Council of Legal Education (Kenya School of Law) Regulations, 2009***.
21. It was submitted that reading rule 2 of the second schedule to the Act without reading in the supplementing provisions of the First Schedule, Regulation 5 of the ***Council of Legal Education (Kenya School of Law Regulations), 2009*** leads to an absurd result not intended by Parliament since it would mean that any person even a holder of a standard Eight Certificate or holder of KSCE only is eligible to sit pre-bar examinations yet the Legal profession is a regulated profession and as such entry therein is completely regulated and there are cut off points.
22. It was submitted that pre-bar exams only test selected subjects and not all round competency of a student hence not the ultimate test for competency of a student's masterly of the core matters of law.
23. According to the Respondents the application as drawn and filed is not tenable without first challenging and striking down the legal provisions for admission to the Kenya School of Law as provided under Regulation 5 of the ***Council of Legal Education (Kenya School of Law) Regulations, 2009*** which limit admissions and subjection to pre-bar exams. According to the Respondents the Respondent's decision to give a transition grace period does not dis-operationalise the ***Kenya School of Law Act***, or the Second Schedule thereof. It was further submitted that the order of mandamus does not issue to compel a party to act contrary to law and that admitting the Applicant to pre-bar examinations in light of his qualifications shall be contrary to the law.
24. In his oral submissions, **Mr Bwire**, learned counsel for the Respondents submitted that a subsidiary legislation is an instrument since a law passed by Parliament is an instrument so that section 29 of the Act imports the previous framework in which the Kenya School of Law operates today. Relying on **Kasereka vs Gateway** (supra) it was submitted that that the interpretation that the instruments go together should be the correct one and that the provisions carry minimum qualifications beyond the degree hence the qualifications in KSCE cannot be wished away. In

support of the submissions, learned counsel relied on **Eunice Cecilia Mwikali Maema vs. The Council of Legal Education and 2 Others Civil Appeal No. 121 of 2013** at page 13.

25. This being a judicial review process, it was submitted that the attack on the Respondents is not tenable because the decision is neither ultra vires nor unreasonable since this is the body installed by law to implement the Regulations. According to learned counsel the orders sought could upset the system of organisation which sets standards.
26. On the plea of legitimate expectation, it was submitted that at the time of the application in 2007 the Regulations were clear that a person of the Applicant's mean grade could not qualify for admission hence the principle is inapplicable.
27. According to learned counsel it is not sought that the Regulations be struck out and since the pre-bar exams are in paragraph 10 of the 1st Schedule.

**Determinations**

28. I have considered the application, the statement, the verifying affidavit and the documents exhibited thereto, the grounds of opposition, the submissions and authorities cited in support thereof.
29. Section 29(2) and (3) of the Act provides:

***(2) Upon the coming into force of this Act—***

***(a) every agreement, whether in writing or not, and every deed bond or other instrument to which the former School was a party or which affected the former School, and whether or not of such a nature that the rights, liabilities and obligations thereunder could be assigned, shall have effect as if the School were a party thereto or affected thereby instead of the former School, and as if for every reference (however worded and whether express or implicit) therein to the former School there were substituted in respect of anything to be done on or after such date of coming into operation a reference to the School;***

***(b) any proceedings, to which the Council of Legal Education was a party to on behalf of the former School, pending immediately before such date of coming into operation to which the former School was a party shall be continued as if the School was a party thereto in lieu of the former School;***

***(c) all officers of the former School shall become the corresponding officers of the School and, subject to the provisions of any rules made under this Act, shall continue in office for the period for which they were appointed or elected as officers of the former School.***

***(3) Notwithstanding subsection (2)—***

***(a) nothing in this Act shall affect any other instrument or thing done in relation to the former School and every such instrument or thing shall continue in force and shall, so far as it would have been made or done under this Act, have effect as if made or done under this Act;***

***(b) nothing in this Act shall adversely affect the terms and conditions on and subject to which any person held office or served immediately before the commencement of this Act***.

30. It is noteworthy that under section 29(2)(a) above the words "other instrument" which is a general phrase comes after such specific words as "agreement and deed bond". The principle of *ejusdem generis* provides that where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified. To invoke the application of the rule there must however be a distinct genus or category. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply, but the mention of a single species does not constitute a genus. See Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board **Nairobi HCMC No. 89 of 1969 [1971] EA 289; [1970] EA 631.**

31. In my view "agreement" and "deed bond" clearly fall within a class or kinds of objects. In other words they are properly speaking a distinct genus or category since they can properly be termed as contractual in nature. It follows that the words "other instrument" which comes after that class can only be interpreted with references to "agreements" or "deed bond" and cannot be interpreted to include subsidiary legislation.
32. This however is not the same position with respect to section 29(3)(a) which in my view is clearly worded in very wide terms and talks of ***any other instrument or thing done in relation to the former School.*** That a subsidiary legislation is an instrument is not in doubt. It is therefore my view that without an express revocation of the existing subsidiary legislation, section 29(3)(a) reserves the same since it is trite under section 24 of the ***Interpretations and General Provisions Act***, Cap 2 Laws of Kenya that even in cases where an Act or part of an Act is repealed, legislation under subsidiary legislation under or made by virtue thereof, unless contrary intention appears remains in force, so far as it is not inconsistent with the repealed Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder. See **Okova vs. Nyarangi, (Returning Officer Lurambi South Constituency) & Another Nairobi HCEP No. 3 of 1970 [2008] 1 KLR 23 (EP).**
33. Similarly, the Court of Appeal of Uganda in **David Sejjaka Nalima vs. Rebecca Musoke Civil Appeal No. 12 of 1985** while citing with approval **Henry De Souza Figueredo vs. George Blacquire, Talbot and Another [1959] EA 167** held *inter alia* that a general provision must be read subject to the specific provision.
34. Therefore as long as the existing instruments were not inconsistent with the new Act, it is my view that section 29(3)(a) reserved the existing instruments in the form of subsidiary legislation.
35. In this case, it is contended that by the Respondents that t**he** Applicant does not qualify for either admission to the Advocates Training Programme directly or for sitting Pre Bar Examinations since he obtained a mean grade D plus (+) and grade D Plain in English in the Kenya Certificate of Secondary Examination and that in the First Schedule, Regulation 5 of the ***Council of Legal Education (Kenya School of Law Regulations) 2009***, which was saved and operates through Section 49(1)(a) of the ***Legal Education Act, 2012*** and Section 29(3)(a) of the ***Kenya School of Law Act, 2012***, read together with second schedule to the ***Kenya School of Law Act***, limit admission and subjection to Pre Bar exams to persons who, possessed Bachelor of Laws Degree (LL.B) from a recognized university and attained a minimum grade C- (Minus) in English and a minimum of an aggregate grade C- (C Minus) in the Kenya Certificate of Secondary Examination and sits and passes as a Precondition for admission.
36. A reading of Rule 2 of the Second schedule to the ***Kenya School of Law Act***, 2012 would seem to indicate that a person who has sat and passed the Pre-Bar examination set by the School fulfils Admission Requirements into the Advocates Training Programme. A pre-bar examination on the other hand is to be administered to students who hold a Bachelor of Laws Degree (LL.B) from a recognized University but do not qualify for direct admission under ***the Council of Legal Education (Kenya School of Law Regulations) 2009,*** in which category the Applicant falls.
37. The impugned decision published in the ***Daily Nation*** Newspaper of 17th January, 2014 was clearly dealing with the criteria for admission to the Advocates Training Programme at the Kenya School of Law for Academic Year 2014/2015 and the same is substantially a reproduction of Regulation 5 of the ***Council of Legal Education (Kenya School of Law Regulations) 2009***. These proceedings however do not challenge the legality or the constitutionality of the said Regulations. Whereas **Dr Khaminwa** urged this Court to look into the constitutionality thereof in light of the provisions of our Constitution as well as the relevant International Instruments, that course may not be feasible in these proceedings for two reasons. Firstly, it would be contrary to the provisions of Order 53 rule 4 of the ***Civil Procedure Rules*** which provides that "*no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement*." Secondly, it is my view that to do so in these proceedings without affording the Respondents adequate notice to address the Court on the issue would itself be unconstitutional as it would violate the provisions dealing with the right to fair hearing.
38. Suffice it say however that this Court held in **Republic vs. Commission For Higher Education Ex-Parte Peter Soita Shitanda [2013]eKLR** that:

**"Article 43(1)(f) of the Constitution provides that every person has the right to education. The right to education would make no sense if a person's academic qualification is not recognised by the State on unreasonable grounds."**

39. Therefore it behoves the supplicant for the order for annulment of the provisions of Regulation 5 of the ***Council of Legal Education (Kenya School of Law Regulations) 2009*** to prove that the same ought to be quashed on the grounds that justify the taking of such a course. 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. The Council of Legal Education and 2 Others** (supra) where it cited with approval the decision appealed from to the effect that:

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

40. 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].

41. The same position was taken in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarstheth [1985] LRC** in which was held:

**"so long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of the efficaciousness of such rules and regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court**

**to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair."**

42. However where it is shown that the applicant's qualifications to join the Advocates Training Programme is not recognised on unreasonable grounds this Court would not hesitate to nullify the offending provisions. The applicant or petitioner must nevertheless petition the Court for the annulment of the same so as to give all the parties affected an opportunity to address the Court on the issue. In this case Regulation 5 of the ***Council of Legal Education (Kenya School of Law Regulations) 2009*** is not the subject of challenge in these proceedings and I wish to say no more on the issue.
43. With respect to discrimination **Mumbi Ngugi, J** in the above cited case expressed herself as follows:

**"...it is clear that, rather than the respondents having acted in a manner that was discriminatory against the petitioner, it was the petitioner who was seeking what can only be viewed as preferential treatment from the respondents. The Admission Regulations applicable to all those seeking admission to the Kenya School of Law in 2006 when the petitioner made her application were the *Council of Legal Education (Kenya School of Law) Regulations, 1997*. There is nothing before this Court to show that all other applicants were not required to meet these qualifications. What the petitioner was asking was for the 1st respondent to waive these requirements with regard to her; and what she is asking this Court to do is to find that even if she was not qualified under those regulations, they were against the requirements of the Advocates Act anyway, and she should not have been required to meet them."**

44. Similarly in **John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others [2011] eKLR,** it was held that:

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

45. In **Nyarangi & 3 Others vs. Attorney General [2008] KLR 688**, it was held:

**"The *Blacks Law Dictionary* defines discrimination as follows: "The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured." *Wikipedia, the free encyclopedia* defines discrimination as prejudicial treatment of a person or a group of people based on**

**certain characteristics. *The Bill of Rights Handbook, Fourth Edition 2001*, defines discrimination as follows:- "A particular form of differentiation on illegitimate ground."… The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of *Griggs vs. Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications was found "to disqualify Negroes at a substantially higher rate than white applicants".**

46. The issue whether the applicant has been discriminated against in my view cannot be properly determined without determining the reasonableness, legality or constitutionality of Regulation 5 of the ***Council of Legal Education (Kenya School of Law Regulations) 2009*** and as I have held hereinabove that provision is not under challenge in these proceedings.
47. It was further contended that the impugned decision is contrary to the applicant's legitimate expectations and goes against the principle of proportionality. In **Republic vs. Commission for Higher Education Ex-Parte Peter Soita Shitanda** (supra) it was held:

**"Therefore if the Respondent had given assurance to the applicant that the applicant's degree certificate was recognised by the Respondent it would be against the applicant's legitimate expectation for the Respondent to suddenly turn round and disown the said certificate. Whereas it is not correct to hold that a public authority is bound by its earlier decisions or promises even if mistaken or illegal, fairness demands that a reasonable notice be given to persons who relied on the said promise and organised their affairs in accordance therewith so that they may alter their positions accordingly."**

48. In this case however, the issue of legitimate expectation cannot be properly adjudicated without impugning the aforesaid Regulations since as I have held, the newspaper advertisement was substantially a reflection of the said Regulations.
49. Therefore even if I were to find that the impugned Newspaper advertisement was ultra vires, it is my view that the grant of the order quashing the same leaving the said Regulations intact would not be efficacious. It is however trite that the decision whether or not to grant the remedy of judicial review is discretionary and as was held in **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209,** the said orders are not guaranteed and 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. Since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles hence the court does not issue orders in vain even where it has jurisdiction to issue the prayed orders.
50. It is therefore my view that it would serve no tangible purpose to quash the decision of the board of the 1st Respondents of placing a three year transitional period for the application of the minimum requirements for admission to the Advocates Training Programme without quashing Regulation 5 of the ***Council of Legal Education (Kenya School of Law Regulations) 2009.***
51. With respect to the order of mandamus it has been held that the order must command no more than the party against whom the application is made is legally bound to perform. In other words, mandamus cannot issue to compel a public body to perform an action which is prohibited by law for the simple reason that an order of mandamus cannot quash a decision or a null legislation. In that event it would be necessary to seek an order of certiorari to quash the decision or the offending legislation. In the instant case, for this Court to grant the order of mandamus in the manner sought in the instant application it would be necessary to annul Regulation 5 of the ***Council of Legal Education (Kenya School of Law Regulations) 2009*** as well otherwise the grant of the order of mandamus would be unlawful.

52. In the final analysis I agree that the provisions of the Second Schedule to Kenya School of Law do not repeal the ***Council of Legal Education (Kenya School of Law Regulations) 2009***, but supplement them, and that the two instruments are to be read together since Section 29(3)(a) of the ***Kenya School of Law Act, 2012*** saved Regulation 5 of the ***Council of Legal Education (Kenya School of Law Regulations) 2009***.

**Order**

53. Having considered the Notice of Motion dated 7th June, 2014, I find no merit in the Notice of Motion dated 7th June, 2014 which I hereby dismiss but with no order as to costs taking into account the manner in which Rule 2 of the Second schedule to the ***Kenya School of Law Act***, 2012 is couched, which would have given the applicant the impetus to institute these proceedings and also taking into account the fact that the legality, reasonableness and constitutionality of Regulation 5 of the ***Council of Legal Education (Kenya School of Law Regulations) 2009*** remains moot.

**Dated at Nairobi this day 23rd of October, 2014**

***G V ODUNGA***

***JUDGE***

***Delivered in the presence of:***

***Dr Khaminwa for the Applicant***

***Cc Patricia***