REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 318 of 2012

BETWEEN
THE LAW SOCIETY OF KENYA.....PETITIONER
AND

THE ATTORNEY GENERAL .....1ST RESPONDENT

THE JUDICIAL SERVICE COMMISSION.....2ND RESPONDENT

THE CHIEF JUSTICE.....3RD RESPONDENT

JUDGMENT

Background

1. The petitioner, the Law Society of Kenya ("LSK") is a body corporate established by the ***Law Society of Kenya Act (Chapter 18 of the Laws of Kenya)***whose objects are as follows;

(a) to maintain and improve the standards of conduct and learning of the legal profession in Kenya,

(b) facilitate the acquisition of legal knowledge by members of the legal profession and others,

(c) assist the Government and the courts in all matters affecting legislation and the administration and practice of the law in Kenya

(d) represent, protect and assist members of the legal profession in Kenya in respect of conditions of practice and otherwise and protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law.

2. By a petition dated 25th July 2012, the LSK is challenging the constitutionality of various sections of the ***Statute Law Miscellaneous (Amendments) Act, 2012, No. 12 of 2012*** which amended certain sections of the ***Advocates Act***, ***(Chapter 16 of the Laws of Kenya)*** with some consequential amendments being made to the ***Law Society of Kenya Act***. The petitioner in particular takes issue with **sections 13(1)(e)**, **32A**, **32B**, **55** and **57(1)** of the ***Advocates Act*** which were amended. The ***Statute Law Miscellaneous (Amendments) Act, 2012,*** which according to its long title is "*An Act of Parliament to make minor amendments to statute law"*was assented to on 6th July 2012 and came into force on 12th July 2012.

General Principles and issues for determination

3. As there were no contested facts, I directed the parties to frame and agree on specific issues for

determination.On 3rd October 2012, the parties filed the following issues for determination:

i. Whether the amendments contained in the ***Statute Law (Miscellaneous Amendments)Act, 2012***, particularly those enumerated in paragraph 19(b)-(d) and 20(b)-(d) of the petition, are inconsistent with **Articles 27, 41** and **261(4)**and therefore null and void to the extent of their inconsistency.

ii. Whether the amendments contained in the ***Statute Law Miscellaneous Amendment) Act, 2012***, seek to introduce substantive amendments to the law.

iii. Whether there was public participation as enshrined in **Article 10(2)** as read together with **Article 118** before the enactment of the ***Statute Law (Miscellaneous Amendment) Act, 2012***.

iv. Whether the petitioners are entitled to the prayers and relief sought in the petition.

4. The parties have filed written submissions which I have considered. Before I proceed to deal with the issues framed by the parties, I find it necessary to lay bare the role of this court in declaring a statute or provision of a statute unconstitutional.

5. There is a general presumption of law that statutes enacted by Parliament are constitutional and the burden falls on the person who alleges otherwise to rebut this presumption. In this respect I would adopt the words of the Supreme Court of India in ***HambarddaWakhana v Union of India Air*** **[1960] AIR 554** where the learned Judges observed that,*"In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore, in favour of the constitutionality of an enactment."* Thus, this court will start from the presumption that a statute as enacted by Parliament is constitutional and fair unless the contrary is proven (see also ***Ndyanabo v Attorney General of Tanzania*** **(2001) 2 EA 485,** ***Joseph Kimani and Others v Attorney General and Others*** **Mombasa Petition No. 669 of 2009 [2010] eKLR,** ***Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others*** **Nairobi Petition No. 3 of 2011 (Unreported)***), Samuel G. Momanyi v Attorney General and Another* **Nairobi Petition No. 341 of 2011 (Unreported)**).

6. It is now well settled that in determining the constitutionality or otherwise of legislative provisions, regard must be had to the purpose and effect of the legislation in question. If an authority were required for this proposition, the case of ***Olum and Another v Attorney-General of Uganda*** **[2002] 2 EA 508, 518** is illuminating. It was held that, *"To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the court has to go further and examine the effect of its implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional."*

7. I must also emphasize that it is not for the courts to decide what is the 'appropriate' or 'right' or 'wise' legislative policy to govern various matters for which the legislature is called upon to legislate. This power squarely falls upon the legislature which casts policies into statutes which are then executed by the executive. This is not in any way to suggest that the courts are powerless in the face of claims that a particular statute or part thereof contravenes the Constitution. The Court does not in doing so infringe on what is purely legislative prerogative, that of deciding which legislative policy is right for its people but by enforcing the sovereign will of the people expressed in the Constitution(See ***Commission for the Implementation of the Constitution v Parliament of Kenya and Another,*** **Nairobi Petition No. 454 of 2012 (Unreported)**).

8. The Court will as such not nullify legislation merely because it is thought that such law is in 'bad taste' or 'unconscionable' or 'inconvenient.'As Justice Lenaola stated in ***Mount Kenya Bottlers Limited Others v Attorney General Others,*** **Nairobi Petition No. 72 of 2011(Unreported),** the Courts cannot act

as “regents” over what is done in Parliament because such an authority does not exist.

9. The petitioner, in the petition dated 25th July 2012, has attacked four broad provisions of the ***Statute Law (Miscellaneous Amendments) Act, 2012*** whichI shall now proceed to consider separately.

Amendment to the Vetting of Judges and Magistrates Act

10. The tenor of this amendment to the ***Vetting of Judges and Magistrates Act (No. 2 of 2011)*** was to transfer the vetting of magistrates from the Vetting of the Judges and Magistrates Board to the Judicial Service Commission (JSC). The amendment to **section 23(2)** of the ***Vetting of Judges and Magistrates Act(No. 2 of 2011)*** provided as follows;

23(2) the Board shall be divided into three panels for purposes of vetting, and the three panels shall vet the judges simultaneously while the Judicial Service Commission shall vet the Magistrates.

11. The LSK condemns such an amendment as unconstitutional as it undermines independence of the judiciary. It also argues that by allowing sitting judges and magistrates who are members of the JSC to sit in their own vetting or that of their colleagues undermines the spirit of vetting of the judicial service and violates the rules prohibiting conflict of interest under **Articles 73** and **75** relating to leadership and integrity. It argues that the amendment is discriminatory in as far as it is likely to give unequal standards, process and differentiated outcomes in the vetting process.

12. I take judicial notice that this submission has now been overtaken by events as the amendment has since been repealed by **section 8** of the ***Vetting of Judges and Magistrates (Amendment) Act, No. 43 of 2012.*** The amended section now reads as follows:

23. *(1) The vetting process once commenced shall not exceed a period of one year, save that the National Assembly may, on the request of the Board, extend the period for not more than one year.*

(2) The vetting process, once commenced, shall be concluded not later than the 31St December, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.

(3) Despite subsection (2), the Board shall conclude the process of vetting all the judges, chief magistrates and principal magistrates not later than the 28th March, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.

Advocates Disciplinary Tribunal

13. The amendment to the Act replaced the word “Committee” and replaced it with “Tribunal.” The effect of the amendment was to convert the Advocates Disciplinary Committee established under **section 57** of the ***Advocates Act*** to the Advocates Disciplinary Tribunal.**Section 57** as amended provides in part;

57. *(1)There is established a tribunal to be known as the Disciplinary Tribunal (in this Part referred to as “the Tribunal”) which shall consist of –*

(a) the Attorney-General;

(aa) the Director of Public Prosecutions;

(b)the Solicitor-General or a person deputed by the attorney-General; and

(c) six advocates (other than the chairman, vice-chairman or secretary of the Society), of not less than ten years standing, one of whom shall be an advocate who does not ordinarily practise in Nairobi, all of whom shall be elected and shall hold office for three years and be eligible for re-election.

(d) three other persons, not being advocates appointed by the Attorney-General on the recommendation

of the Society.

14. The LSK contends that the amendments replacing the Advocates Disciplinary Committee with Tribunal is an affront on the independence of the legal profession and is tantamount to unlawfully creating a subordinate court within the Judiciary, without the judiciary providing for funds for the envisaged tribunal.

15. The LSK further submits that converting the Committee into a Tribunal means that Parliament created a subordinate court within the meaning of the word "Tribunal" in **Article 159**. Thus, a new court was created without providing sufficient funding and staff. The effect of creating the court, Mr Chigiti, counsel for the LSK argued, was to bring the tribunal within the authority of the JSC which would have to take responsibility for recruitment of its members and funding its operations. He further submitted that the practice all over the world reveals that the issues of professional misconduct and regulation of the conduct of lawyers is left to the legal profession itself and is not a judicial function. In essence, the LSK contends that the amendment *"judicializes"* the role of the LSK in dealing with issues of professional misconduct.Counsel maintained that as long as the Tribunal continued to sit without its members being appointed, sworn in and absorbed by the JSC then it's existence was illegal and unconstitutional.

16. The LSK also raises the spectre of conflict of interest engendered by the participation of advocates who are elected members of the Tribunal. Are they accountable to the bar or to the Judiciary? Counsel also submitted that the members of the Tribunal will have privileges that the members of the judiciary enjoy yet they have not joined the judiciary like other members who are recruited on competitive basis.

17. In response to this, argument, the 1st respondent contended that the conversion of the Committee to a Tribunal does not amount to the creation of a subordinate court under the judiciary and that the amendments were minor in nature.

18. The Disciplinary Committee was established under the provisions of **section 57** of the ***Advocates Act*** which deal with the discipline of advocates. The amendment introducing the change did not change or interfere with the statutory architecture and powers of the Tribunal previously constituted as a Committee.

19. The petitioner anchors its argument on **Article 159** which provides as follows;

Part 1—Judicial Authority and Legal System

Judicial authority.

159. *(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.*

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted.

(3) Traditional dispute resolution mechanisms shall not be used in a way that—

(a) contravenes the Bill of Rights;

(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

(c) is inconsistent with this Constitution or any written law.[Emphasis mine]

20. I think the purpose of **Article 159** is to emphasise that judicial authority of the State, that is authority given to courts and tribunals by the Constitution, emanates from the people and must be exercised for the benefit of the people. Judicial authority implies authority to settle disputes and determine the rights of parties and in so far as the Tribunal exercises the judicial authority it is bound by the provisions of **Article 159**. Whether or not the body constituted under the ***Advocates Act*** is termed as a Tribunal or Committee, it is required to observe the prescribed constitutional standards and nothing turns on the name of the body.

21. **Article 159** does not deal with the organization of the judiciary. It does not convert a body termed as a tribunal under statute to a subordinate court or require such a body to be part of the judiciary. What the provision sets out are essential and foundational principles for the exercise of judicial authority by any court or tribunal exercising judicial authority. **Article 161 (1)** specifically deals with organisation of the Judiciary; it states that, *"The Judiciary consists of the judges of the superior courts, magistrates, other judicial officers and staff."* **Article 169** clearly undermines the petitioner's argument that the amendment to the ***Advocates Act*** to provide for the Tribunal, converted it to a subordinate court within the Judiciary.

22. The change of the name of the Committee engendered by the amendment did not change the substance of the ***Advocates Act*** nor interfere with the powers of that body. The name was cosmetic and within the legislative authority and the use of the word "Tribunal" only established the fidelity of that body to the principles set out in **Article 159**. I find and hold that this ground of attack lacks merit and is dismissed.

23. Mr Chigiti expressed concern over the amendment of **section 57** which introduced the Director of Public Prosecutions ("DPP") as member of the tribunal urging that it did not see the need for the introduction of such an office whose primary role is to deal with criminal matters under **Article 157**.This argument does not have merit as the membership of any statutory body is a matter for the legislature to determine unless the Constitution directs otherwise. This argument also ignores the fact that prior to the promulgation of the Constitution, the office of the Attorney General, established under **section 26** of the former Constitution, was charged with the responsibility of prosecuting criminal offences yet he was a member of the Committee. The Attorney General's duties regarding the enforcement of criminal law were transferred to the office of the DPP under **Article 157**. One of the requirements for appointment of the DPP is that one must be qualified to be a judge of the High Court hence there is nothing in the Constitution that disqualifies the DPP from being a member of the Tribunal particularly given that the holder of that office is required in law to be a qualified advocate and a member of the profession.

Market Access for foreign advocates

24. The amendments to **section 12** and **13** of the ***Advocates Act*** introduced were as follows;

Qualification for admission as advocates

12. *Subject to this Act, no person shall be admitted as an advocate unless-*
(a) he is a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania; and

(b)he is duly qualified in accordance with section 13.

Professional and academic qualifications

13 *(1) A person shall be duly qualified if -*

(a) having passed the relevant examinations of any recognized university in Kenya he holds, or has

become eligible for the conferment of, a degree in law of that university; or

(b) having passed the relevant examinations of such university, university college or other institution as the Council of Legal Education may from time to time approve, he holds, or has become eligible for conferment of, a degree in law in the grant of that university, university college or institution which the Council may in each particular case approve;

and thereafter both -

(i) he has attended as a pupil and from an advocate of such class as may be prescribed, instruction in the proper business, practice and employment of an advocate, and has attended such course or tuition as may be prescribed for a period which in the aggregate including such instruction, does not exceed one year; and

(ii) he has passed such examination as the Council of Legal Education may prescribe; or

(c) he possesses any other qualifications which are acceptable to and recognized by the Council of Legal Education.

(d) he is an advocate for the time being of the High Court of Uganda, the High Court of Rwanda, the High Court of Burundi or the High Court of Tanzania.

(e)he is for the time being admitted as an advocate of the superior court of a country within the Commonwealth and-

(i) has practised as such in that country for a period of not less than five years; and

(ii) is a member in good standing of the relevant professional body in that country:

Provided that the Council may, in addition, require that a person to whom this paragraph applies undergo such training, for a period not exceeding three months, as the Council may prescribe for the purpose of adapting to the practice of law in Kenya.

(2) The Council of Legal Education may exempt any person from any or all of the requirements prescribed for the purposes of paragraph (i) or paragraph (ii) of subsection (1) upon such conditions, if any, as the Council may impose.[Amendments underlined]

25. The Act is impugned on the ground that opening Kenya's market for trade in legal services in favour of advocates and judges to non-Kenyans without reciprocal market access for Kenyan lawyers and judges in the countries is an abuse of the legislative authority. It is contended that this provision is in violation of the public good expressed in the Constitution and the relevant World Trade Organisation (WTO) Agreements and other trade agreements applicable to Kenya which call for market access for trade in services on the basis of reciprocity. The petitioner argues that these agreements are now part of the law of Kenya by virtue of **Article 2(6)**.

26. Mr K. Mwangi, appeared in this matter as an interested party in support of the petition. His interest was to support the position of young lawyers who feel aggrieved by the amendment permitting foreign lawyers to practice in Kenya. Mr. Mwangi submitted that the admission of foreign lawyers to practice in Kenya affected the young lawyers as the move would limit opportunities which could lead to brain drain. Counsel emphasised the fact the opening the market for legal services must be accompanied by reciprocity from the other countries whose lawyers are entitled to practice in Kenya.

27. The interested party contends that different countries have different legal standards for legal education, training and practice of the law and those standards are different from those required from Kenyan Advocates. Thus opening an avenue for foreign advocates to practice in Kenya will institutionalize discrimination as otherwise unqualified persons will be admitted to practice in Kenya. Mr

Mwangi contended that this situation is untenable as it will diminish the opportunities for young lawyers.

28. Mr Mwangi further contended that the State has an obligation under **Article 55** to take measures including affirmative action to ensure that the youth access employment, relevant education and training and that they are protected from exploitation. According to him, the amendment undermines this objective as the majority of young advocates are currently below the age of 35 years and opening the legal practice to foreign advocates will only diminish the opportunities for young advocates.

29. The Attorney General, in response to these arguments, contends that the amendment has not introduced the practice of foreign advocates appearing before Kenyan Courts as **section 11** of the ***Advocates Act*** had already allowed the practice. Indeed, the requisite qualifications for foreign advocates are still regulated by the Council for Legal Education as set out in **section 13** of the ***Advocates Act***.

30. The Attorney General also submits that the amendments in relation to foreign advocates are in relation to advocates who are citizens of Rwanda, Burundi, Uganda and Tanzania and are consistent with Kenya's treaty obligations under the ***Treaty Establishing the East African Community***.

31. Bearing what I have stated above regarding the role of this Court, I have not been shown what constitutional provision is infringed by this provision or how the treaties which are applicable in Kenya limit legislative authority to provide for the practice of non-citizen advocates. I agree with the Attorney General's submission that **section 11** of the ***Advocates Act*** already provided for the practice and regulation of foreign advocates.

32. **Section 12** of the ***Advocates Act*** is a consequence of Rwanda and Burundi joining the East African Community hence the inclusion of the citizens of Rwanda and Burundi in addition to those of Uganda and Tanzania being entitled to be admitted as advocates. The amendment is clear that the citizens of the Partner States of the East Africa Community must be duly qualified as advocates in accordance with **section 13** thus the issue of different standards and entrenching discrimination against Kenyan advocates does not arise.

33. ***The Treaty for the Establishment of the East African Community("the Treaty")***, signed at Arusha on 30th November 1999 and incorporated into Kenyan law by the ***Treaty for the Establishment of the East African Community Act (Act No. 2 of 2000)***, states, among its goals, the realization of rapid and balanced regional development among the Partner States and the creation of an enabling environment in the Partner States *"to attract investments and allow the private sector and civil society to play a leading role in . . . socio-economic development activities."* One of the principles governing the Community according to **Article 7(1)** of the Treaty is the *"the establishment of an export oriented economy for the Partner States in which there shall be free movement of goods, persons, labour, services, capital, information and technology*". **Article 76** provides for the establishment of a Common market while**Article 104** of the Treaty lays the foundation for the eventual, "*free movement of persons, labour and services and . . . the enjoyment of the right of establishment and residence of (Member State) citizens within the Community"*

34. **Article 23** of the ***Protocol on the Establishment of East African Community Common Market*** commits the partner states to implement free movement of services in a progressive manner. According to the schedule of Commitments on the Progressive Liberalisation of Services contained in **Annex V** to the ***Protocol,*** Kenya has committed to provide market access to Legal Advisory and Representation Services in Judicial Procedures concerning other fields of law and national treatment to other citizens of the community by the year 2010. In addition to the original three Partner States, being Republics of Kenya, Uganda and Tanzania, the Republics of Burundi and Rwanda became full members of the Community in July 2007. I therefore find and hold that the amendments to **sections 12** and **13** of the ***Advocates Act*** are consistent with Kenya's treaty obligations and are not unconstitutional in the manner alluded to by the petitioner.

35. Before I proceed to consider the next ground of attack, I would like to clarify the position of the eligibility of advocates who are qualified to practice in superior courts within the Commonwealth as

provided by **section 31(1)(e)** of the ***Advocates Act*. Section 13** dealing with professional qualifications is subject to **section 12**. In essence, citizenship of the East African countries is a prerequisite for admission as an advocate. Any person, whatever his or her qualifications is not entitled to be admitted as an advocate unless the person is a citizen of the East Africa Community partner states. Thus a person qualified to practice in any superior court in the Commonwealth will only be admitted to practice in Kenya if he or she is a citizen of Uganda, Tanzania, Rwanda and Burundi in accordance with Kenya's treaty obligations.

Regulation of remuneration of In-house Counsel

36. The ***Statute Law (Miscellaneous Amendments)Act, 2012*** introduced section **32A** and **32B** to the ***Advocates Act*** which provide as follows;

Employment as in-house advocate

32A. *(1) A person who is qualified to act as an advocate under this Act may be employed as an in-house advocate.*

(2) A person who is employed as an in-house advocate shall—

(a)be an independent professional legal advisor to his or her employer; and

(b)not charge fees for services rendered below the minimum prescribed fees under section 44.

Standards of work and remuneration

32B. *(1) The Chief Justice shall, on the recommendation of the Council of the Society, prescribe—*

(a) the standards of work that may be performed by a person employed as an in-house advocate under this Act; and

(b) the criteria for determining the remuneration payable to an in-house counsel by an employer.

(2) The employer of an in-house advocate shall not determine the remuneration of such advocate otherwise than in accordance with the criteria prescribed under subsection (1) (b).

(3) Notwithstanding subsection (2), the employer of an in-house advocate may, in making a determination under subsection (2), offer the advocate remuneration which is higher than that prescribed.

(4) Subject to subsection (3), a person who contravenes subsection (2) commits an offence.

37. The gravamen of the LSK in respect of the amendment respecting in-house counsel is that permitting the Chief Justice to prescribe rules on the remuneration of in-house lawyers undermines the scheme of labour relations established in **Article 41** and in various labour related legislation where determination of pay is a contractual matter to be agreed upon by employees, either directly or through their trade unions and their employers.

38. The petitioner's position is that the relationship between the employer and employee is a privately negotiated contract and introduction of the Chief Justice into the equation simply amounts to interference with the private sector contractual relationships between in-house lawyers and their employers. According to the petitioner, the word "Chief Justice" is not inserted in **Article 41(2)(a)** for a specific reason. The LSK contends that this amendment will expose in-house lawyers to inequality given that the remuneration of other professions like teachers and doctors is not regulated by the Chief Justice or other arms of government and this position threatens their right to equality before the law in contravention of **Article 27**.

39. The LSK is concerned that the ***Advocates Act*** does not define the term "in-house advocate" as introduced by the new **section 32A** and this would apply to a wide range of advocates leading to confusion as to its application. It is also argued that the term purports to create a category of advocates not contemplated by the Act based on their nature of work and clientele. That this classification neither justified nor warranted and amounts to treating a class of advocates differently particularly having regard to the fact that the provisions dealing with the in-house advocates fall within the part of the Act dealing with, *"Provisions with respect to unqualified person acting as advocates and offences by advocates."* This unwittingly implies that the in-house advocates become lesser individuals when they join the corporate world.Therefore the act of singling out of one category of advocates for regulation of their standards of work and remuneration is in breach of the principle of equality contrary to **Article 27(1)**.

40. According to the Attorney General, the Chief Justice has always prescribed remuneration in respect of professional business under **section 44** of the ***Advocates Act*** and that the amendments only made provisions for cadre of Advocates engaged in professional business with more specificity. The Attorney General also denied the fact that the amendment undermined labour relations as alleged or at all.

41. **Article 41** deals with labour relations and it provides as follows;

41. *(1) Every person has the right to fair labour practices.*

(2) Every worker has the right—

(a) to fair remuneration;
(b) to reasonable working conditions;

(c) to form, join or participate in the activities and programmes of a trade union; and

(d) to go on strike.

(3) Every employer has the right—

(e) to form and join an employersorganisation; and

(f) to participate in the activities and programmes of an employersorganisation.

(4) Every trade union and every employers' organisation has the right—

(a) to determine its own administration, programmes and activities;

(b) toorganise; and
(c)to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.

42. Quite apart from the fact that the petitioner did not particularise or elucidate on the laws that provide for the scheme of labour relations which it alleges would be undermined by the amendments. I do not see how the provision of **sections 32A** and **32B** of the ***Advocates Act*** infringe on the provisions of **Article 41**. Nothing in the ***Advocates Act*** infringes the right of any advocate, either as an employer or employee, to organize and engage in collective bargaining and there is nothing to support any breach the provisions of **Article 41(2)(a)** and **(b)**.

43. The purpose of the ***Advocates Act*** is to regulate the conduct of advocates and prior to the enactment of **sections 32A** and **32B,** the remuneration of advocates was governed **Part IX** of the Act. **Section 44** provides that the Chief Justice may make orders, prescribe and regulate remuneration of advocates in respect of professional business upon recommendation by the Council of the LSK. In-house

advocates, as advocates, are subject to regulation under the Act and the introduction of **sections 32A** and **B** is within the competence of the legislature prescribe the regulations of Advocates and more particularly to regulate a particular aspect of remuneration. The regulation of remuneration or the prescription of standards of work is not inconsistent with **Article 41** as long as the prescribed remuneration is fair. Under **section 32B** of the ***Advocates Act***, the Chief Justice acts on recommendation of the Council of the LSK in prescribing standards of work and remuneration. On this score I agree with the counsel for the Attorney General that the purpose of the amendment was to provide for the regulation of remuneration and standards of work for a specific sub-set of advocates.

44. The LSK has placed much emphasis on the freedom of parties to contract and the fact that market forces should determine the contractual relations between an advocate and the client based on commercial exigencies. This freedom of contract in matters of labour relations is neither unlimited nor absolute. **Article 41(2)(a)** and **(b)**with its emphasis on **"fair"** and **"reasonable"** implies that that State may intervene where appropriate to balance contractual relations in order to meet Constitutional objectives. Furthermore, regulation of remuneration and standards of work dealt with by the impugned provisions are the kind of matters contemplated in **Article 41(2)(a)** and **(b)**to ensure that an in-house advocates receives fair remuneration and enjoy reasonable working conditions.

45. I now turn to consider whether the term 'in-house advocate' is discriminatory. While **Article 27(1)** provides for equality, the same provision does not prohibit differentiation or classification based on different requirements. What the Constitution requires is that any classification or differentiation based on prohibited grounds set out in **Article 27(4)** must bear a rational connection to a legitimate purpose. As was stated in the case of ***State of Kerala and Anor v. N. M. Thomas and Others*** **[1976] AIR 490, [1976] SCR (1) 906** where Khanna, J. stated as follows; *"The principle of equality does not mean that every Law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its Laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds…"*

46. The legislative intent of **sections 32A** and **32B** of the ***Advocates Act*** is clear from the provisions of **section 32A.** The purpose is to protect the independence of advocates who are employed by other parties other than advocates and whose independence may be compromised by the nature of work demanded and remuneration offered by the employer. Independence of an advocate has always been identified as one of the defining principles of the legal profession. These provisions recognise that advocates in employment may be placed in circumstances where there independence is undermined. This, in my view, is a legitimate purpose for differentiating advocates based on their employment status.

47. Before I segue into another part of this decision, I note that the determination of remuneration and standards of work are not the preserve of the Chief Justice; the Chief Justice acts on the recommendation of the Council of the LSK which promulgates the standards and the criteria for determining remuneration. It is through this process that the term "in-house advocate' may be defined and the nature and extent of regulation determined. The constitutionality of these regulations cannot be determined *a priori*. Such a process is intended to be consultative and must be done taking into account the values of the Constitution.

<u>Legislative procedure and public participation</u>

48. Apart from the specific attack on the amendments, the petitioner argued the ***Statute Law (Miscellaneous Amendment) Act, 2012*** was enacted without following the prescribed procedure for legislation whose effect was to amend the Constitution and without public participation required by the national values and principals of governance set out in **Article 10**. Mr Chigiti, counsel for the petitioner, urged the court to annul the law in the event it found that there was no public participation noting that in view of the magnitude of the amendments, there ought to have been public consultation.

49. Mr Chigiti cited the case of ***Doctor's for Life International v The Speaker National Assembly and Others*** **(CCT12/05) [2006] ZACC 11** to support the petitioner's position**.** The South Africa Constitutional Court stated, *"[208] It is trite that legislation must confirm to the constitution in terms of*

both content and the manner in which it is adopted. Failure to comply with the manner and form requirements in enacting legislation renders the legislation invalid. And courts have the power to declare such legislation invalid."

50. The amendments to the ***Advocates Act***, as I have found, are within the legislative competence of Parliament and do not violate the Constitution in the manner alleged by the petitioner. They do not amount to an amendment of the Constitution hence the procedure for the amendment of the Constitution provided under **Article 261** is not applicable.

51. In order to determine whether there has been public participation, the court is required to interrogate the entire process leading to the enactment of the legislation; from the formulation of the legislation to the process of enactment of the statute. I am entitled to take judicial notice of the ***Parliamentary Standing Orders*** that require that before enactment, any legislation must be published as a bill and to go through the various stages in the National Assembly. I am entitled to take into account that these ***Standing Orders*** provide for a modicum of public participation, in the sense that a bill must be advertised and go through various Committees of the National Assembly which admit public hearings and submission of memoranda.

52. The burden of showing that there has been no public participation or that the level public participation within the process does not meet the constitutional standards is on the petitioner. I have scrutinised the affidavit of Mr Apollo Mboya, the Secretary of the LSK, sworn on 25th July 2012 and there is nothing to show or demonstrate that there was no public participation in the whole process. It has not been alleged that the LSK was denied or lacked an opportunity to provide input into the legislation by the Attorney General in coming up with the legislation or the legislative process was ineffective and contrary to the objects of the Constitution. There is also no allegation by Mr Mboya that the LSK was not consulted or that it did not participate in the formulation of the amendments to the ***Advocates Act***. In the circumstances, I find no basis to hold that there was no public participation in formulation and enactment of the ***Statute Law (Miscellaneous Amendment) Act, 2012***. As I stated recently in the case of ***Commission for the Implementation of the Constitution v Parliament of Kenya and Another*** **(Supra)**, *"I must state that although the Act was condemned on the basis of lack of public participation, the parties who impugned the Act on the basis did not demonstrate to the Court how the National Assembly had failed to achieve public participation within the constitutional parameters taking into account the process from the time the bill was initiated by the CIC upto its enactment. The parties did not address me on the standard to apply in order to assess the level of public participation in the legislative process. I am therefore unable to find and hold that the Act is unconstitutional for want of public participation."*

Conclusion and disposition

53. The 2nd and 3rd respondents opposed this petition on the basis that the Chief Justice and the Judicial Service Commission lack legislative authority under **Article 94**. I agree that this matter does not question anything done by the Chief Justice or the Judicial Service Commission and as such they are not necessary parties to these proceedings.

54. I have come to the conclusion that the provisions of the ***Statute Law (Miscellaneous Amendments) Act, 2012*** amending the ***Vetting of Judges and Magistrates Act, the Law Society of Kenya Act*** and the ***Advocates Act*** are not inconsistent with the Constitution as alleged by the petitioner.

55. For the reasons given in the judgment, I decline to grant the reliefs sought by the petitioner. The petition dated 12th July 2012 be and is hereby dismissed but with no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this 19th day of **March 2013**

D.S. MAJANJA
JUDGE

Mr Chigiti instructed by Kindiki and Mburu Advocates for the petitioner.

Mr Kaumba, Litigation Counsel, instructed by the State Law Office representing the 1st respondent.

Ms Mutua instructed by Issa and Company Advocates for the 2nd and 3rd respondents.

Mr K. M. Mwangi, Advocate, in person as interested party,