



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.64 OF 2013

BETWEEN

EUNICE CECILIA MWIKALI MAEMA.....PETITIONER

AND

THE COUNCIL OF LEGAL EDUCATION.....1ST RESPONDENT

THE KENYA SCHOOL OF LAW.....2ND RESPONDENT

THE HON.ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

Introduction

1. The Petition herein relates to a complaint by the Petitioner, Eunice Cecilia Mwikali Mwema, that although she was lawfully qualified to join the Kenya School of Law in January 2013, the Respondent refused to admit her to the school thus occasioning her undue loss and injury.

Petitioner's case

2. In the Petition, Supporting Affidavit and Submissions by her advocate, the Petitioner's case can be summarised as follows;

3. That she holds an LL.B degree from Coventry University in the United Kingdom which she obtained in July 2010. She proceeded on to enroll for further studies in the United Kingdom and when in September 2012, the 1st and 2nd Respondents called for application to the post-graduate Advocates Training Program (ATP), she duly applied for the same and submitted her application on 20th September 2012. She received no response to the said application and it was only after frantic enquiries that on 30th January 2013 she received a letter dated 10th January 2013 informing her that her Application was unsuccessful because her LL.B degree did not meet the threshold for 16 core subjects prescribed by Law for admission to the Kenya School of Law. By 30th January 2013, the programme had commenced and so she was prejudiced by the delay in responding to her application.

4. In Submissions, learned advocate for the Petitioner has stated that by the time she graduated with her LL.B degree in 2010, the applicable law to the ATP programme was Legal notice No.169 of 2009 i.e.

The Council of Legal Education (Kenya School of Law) Regulations, 2009 and not Act No.27 of 2012. (the Legal Education Act).

That the said Regulations had not been repealed by the time she made her application and that Regulations 4 and 5 thereof entitled the Petitioner to admission based on the applicable criteria and she had acquired a substantive right and was eligible for admission under that existing Legal criteria. Further that the provisions of the Legal Education Act, No.7 of 2012 did not apply to the Petitioner. The final prayers sought and for reasons aforesaid are the following;

“a) This Honourable Court be pleased to issue a declaration that the Legal Notice in force at the time the Petitioner attained her LL.B Degree and submitted her Application for admission to the Kenya School of Law was Legal Notice No.169 of 2009.

b) This Honourable Court be pleased to issue a declaration that the Petitioner duly complied with requirements of Legal Notice No.169 of 2009 which was the law in force at the time of the invitation for Applications for admission and when she lodged her Application for admission.

c) This Honourable Court be pleased to issue a declaration that Legal Education Act, No.27 of 2012 which commenced operation on 28th September did not apply to the Petitioner's Application for admission and by seeking to rely on the said provisions in rejecting the Petitioner's Application, the 1st and 2nd Respondents acted ultra vires and that their decision contained in the letter dated 10th January 2013 is therefore invalid.

d) This Honourable Court be pleased to bring into this Honourable Court an order of certiorari to quash the said decision of the 1st and 2nd Respondents contained in the letter dated 10th January 2013.

e) This Honourable Court be pleased to grant an order or mandamus to compel the 1st and 2nd Respondents to admit the Petitioner to the Advocates Training Programme for the academic year 2013/2014.

f) This Honourable Court be pleased to order the 1st and 2nd Respondents to pay the Petitioner costs incidental to these proceedings on a full indemnity basis.

g) This Honourable Court be pleased to order the 1st and 2nd Respondent to pay damages to the Petitioner for infringing her constitutional rights.

h) This Honourable Court be pleased to make any other or further order as it deems just in the circumstances.”

Respondents' case

5. None of the Respondents filed any Replying Affidavit to the issues of fact raised by the Petitioner, and I will say something about that issue later.

6. The 1st and 2nd Respondents however filed grounds of objection which are as follows;

“1) The insistence that the Petitioner satisfies the 16 core courses requirement is a requirement of the Law.

2) Certiorari does not issue in absence of infracting reasons/grounds.

3) Mandamus does not issue to compel a public authority to act contrary to statute.

4) The Petitioner's fundamental rights have not been violated as alleged.

5) The Petition is, with respect, grossly misconceived.”

6. The 3rd Respondent, similarly filed only grounds of objection which are as follows;

“1) The Petitioner has not complied with the provisions of part 6 of the Council of Legal Education Act, 2012 more particularly Section 31 of the Act.

2) The mechanisms provided for under the Legal Education Act have not been exhausted to warrant the intervention of this Court.”

7. In Submissions, learned advocate for the 1st and 2nd Respondents stated that at the time the Petitioner made her Application, Legal Notice No.170 of 2009 was still applicable and Para B of the said Notice (The Council of Legal Education (*Accreditation of Legal Education Institution*) Regulations, 2009) covered and applied to the Petitioner who was required to comply with the 16 core subjects rule. That since she had not sat 8 of those core subjects, she was not entitled to admission as claimed and there is no law being applied in retroactivity.

In any event, that since qualification to admission is a matter of law, the Court cannot substitute the decision of the 1st Respondent without declaring the applicable law as either irrational or unconstitutional and the Petition ought to be dismissed.

8. The advocate for the 3rd Respondent on his part relied entirely upon his grounds of opposition which are elsewhere clearly set out.

Determination

9. The advocate for the Petitioner in his Submissions raised a number of issues of Law applicable to the Petition. They include retrospective application of Law, the saving and transitional provisions in the Legal Education Act, (No.27 of 2012), the Petitioner's right to access education and training, national values and principles of good governance, right to fair administrative action, right to hearing, unreasonableness, irrationality and breach of legitimate expectation and the unique circumstances of the Petitioner's case. All these matters are important and a number of authorities were cited in support of each of them. I mean no disrespect but the exigencies of time and the urgency of the Petition would necessitate that I should first begin by addressing the issues that are core to the dispute.

10. In my reading of the record, it is obvious that by choosing the surprising path of not filing any Replying Affidavit, the Respondents are not disputing the facts as set out by the Petitioner. In any event, I take the view that whereas generally, he who alleges must prove, there is also a commensurate duty upon every Respondent to give its factual side of the story in answer to any factual complaints addressed towards it. Where none is given, the Court cannot look to conjecture and speculate on what the facts may or may not be. I will therefore accept the narration of facts as pleaded by the Petitioner and which I have summarised elsewhere above.

11. The next issue to address is this; since it is agreed that the Petitioner made her application on 20th September 2012 while the **Legal Education Act** was assented to by the President on 21st September 2012, only a day after the application, what law was to be applied to that application for admission?

12. The advocate for the Petitioner repeatedly made reference to Legal Notice No.169 of 2009 as applicable to the Petitioner and particularly **Regulation 5** which provides as follows;

“A person shall not be eligible for admission for the Post Graduate Diploma (Advocate Training Programme) unless that person has;

a) passed the relevant examination of any recognised university in Kenya, he holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) of that university,

b) *passed the relevant examinations of a university, university college or other institutions prescribed by the Council, he holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) in the grant of that university, university college or other institution, had prior to enrolling that university, university college or other institution-*

(i) *attained a minimum entry requirements for admission to a university in Kenya; and*

(ii) *a minimum grade B(plain) in English Language and a mean grade of C(plus) in the Kenya Certificate of Secondary Examination or its equivalent;*

c) *A Bachelor of Laws Degree (LL.B) from a recognised university and attained a minimum aggregate grade of C (plain) in the Kenya Certificate of Secondary Examination, holds a higher qualification e.g. “A” levels, “IB”, relevant “Diploma”, other “undergraduate degree” or has attained a higher degree in Law after the undergraduate studies in the Bachelor of Laws Programme; or*

d) *A Bachelor of Laws Degree (LL.B) from a recognised university and attained a minimum grade of C- (C minus) in English and a minimum of an aggregate grade of C- (C minus) in the Kenya Certificate of Secondary Examination sits and passes the Pre-Bar Examination set by the Council of Legal Education as a per- condition for admission.*

13. A casual reading of the above Regulation would not give one a sufficient answer to the question i posed above without looking at the Notice issued by the 1st Respondent calling for applications for admission to the Advocates Training Programme. That Notice states in part as follows;

To be considered for admission, the LL.B degree MUST comprise all the following 16 core subjects as per Legal Notice 169 of 2009 which includes inter-alia an LL.B degree.

1. <i>Legal Research and Writing</i>	9.	<i>Commercial Law (including Sale of Goods, Hire-Purchase and Agency)</i>
2. <i>Law of Torts</i>	10.	<i>Law of Business Associations (to include Insolvency)</i>
3. <i>Law of Contracts</i>	11.	<i>Administrative Law</i>
4. <i>Legal Systems and Methods</i>	12.	<i>Jurisprudence</i>
5. <i>Constitutional Law</i>	13.	<i>Equity and the Law of Trusts</i>
6. <i>Criminal Law</i>	14.	<i>Public International Law</i>
7. <i>Family Law and Succession</i>	15.	<i>Property Law</i>
8. <i>Law of Evidence</i>	16.	<i>Labour Law</i>

14. What is the basis for the above criteria? It cannot be Legal Notice No.169 of 2009 alone that must be looked at as submitted by the Petitioner but Legal Notice No.170 of 2009 as correctly submitted by

learned advocate for the 1st and 2nd Respondents must be read together with the former. I say so because the Third Schedule to that Legal Notice has a part II headed, “*curriculum standards*” which states that at the degree level every student must study and pass the following units;

- 1. Legal research and writing**
- 2. Law of torts**
- 3. Law of contracts**
- 4. Legal systems and methods**
- 5. constitutional law**
- 6. Criminal law**
- 7. Family Law and Succession**
- 8. Law of evidence**
- 9. Commercial law (including sale of goods, hire-purchase and agency)**
- 10. Law of business associations (to include insolvency)**
- 11. administrative law**
- 12. Jurisprudence**
- 13. Equity and the law of trusts**
- 14. Public international law**
- 15. Property law and**
- 16. Labour law**

15. What I gather from the above is that whereas Regulation 5 of Legal Notice No.169 of 2009 sets the minimum criteria for admission which includes *inter-alia* an LL.B degree, there is also the need that apart from having an LL.B degree from a recognised university, that LL.B degree must specifically comprise of certain core units set out by Legal Notice No.170 of 2009. The latter looks to the content of the LL.B degree which is only one of the components necessary for one to meet the criteria set by the former. To read one without reference to the other would be akin to selective interpretation of law to reach a set end. I refuse to countenance such an approach because it would mean that Legal Notice No.170 of 2009 would have no meaning in our Law books.

16. But this is not the end of the matter; what is the place of the Legal Education Act, No.27 of 2012 to these proceedings? In its preamble, it is said to be “*An Act of Parliament for the establishment of the Council of Legal Education; the establishment of the Legal Education Appeals Tribunal; the regulation and licensing of legal education providers and connected purposes*”

17. In its **Second Schedule**, part II thereof provides that the core courses a student must study at degree level are the following;

- “1) Legal Research**
- 2) Law of Torts**

- 3) *Law of Contract*
- 4) *Legal systems and Methods*
- 5) *Criminal Law*
- 6) *Family Law and Succession*
- 7) *Law of Evidence*
- 8) *Commercial Law (including Sale of goods, Hire Purchase and Agency)*
- 9) *Law of business Associations (to include Insolvency)*
- 10) *Administrative Law*
- 11) *Constitutional law*
- 12) *Jurisprudence*
- 13) *Equity and the Law of Trusts*
- 14) *Property Law*
- 15) *public International Law*
- 16) *Labour law”.*

18. The above courses are word by word, the same as appearing in Legal Notice No.170 of 2009. The criteria in the Second Schedule of the Act is word by word, the same as in Legal Notice 169 of 2009. I have not heard either the 1st and 2nd Respondents to be saying that the 1st Respondent actually invoked the Act to deny admission to the Petitioner and even if such an argument had been made, as the 3rd Respondent casually did, as at the date of commencement of the act, it is not clear whether **Section 29(2)** of the Act would apply to the Petitioner. That Section provides for saving and transitional activities of the “former school” and little argument was made on this issue by either party although the advocate for the Petitioner referred to the issue in his Submissions.

19. In any event, once I have held that whether or not the Act was applied, the Petitioner was still obligated to have been tutored in and had to have passed the 16 core subjects elsewhere reproduced above before conclusion of her LL.B degree programme, then all her arguments will fail.

20. If fact the Act seemed to have harmonized all the provisions of the two Legal Notices together with the prior provisions of Act No.12 of 1995 into one wholesome Act dealing with legal Education in Kenya.

21. Having so held, there are only two more issues I would like to address;

22. Firstly, the decisions in Municipality of Mombasa vs Nyali Ltd, [1963] E.A 371 and Samuel Kamau Macharia & Anor vs KCB & 2 Others, - S.C. Appl. No.2/2011 were cited as expressing the law on retractivity of Laws. One of the principles expressed therein is that “*where legislation affects substantive rights it will not be construed to have retrospective application.*” I agree but sadly in the instant case, once the Petitioner admitted that Legal Notice No.169 of 2009 was the applicable law then by dint of Legal Notice No.170 of 2009, no substantive right due to her was affected. Had the converse been true, this Court would have happily enforced those rights without much ado but the law as I understand it is that the Council for Legal Education acted within the law and there is no prayer made that the law should be declared unconstitutional. This is the position as expressed by Mumbi Ngugi J. in dismissing the Petition in Susan Mungai vs The Council for Legal Education Petition No.152/2011 where she approved

the position taken by Nyamu J. in Republic vs Council of Legal Education ex-parte James Njuguna & 14 Others, Misc. Civil Case No.137/2004 (V.R.) where the learned judge stated as follows;

“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.”

I wholly agree.

23. Secondly, I agree with the Petitioner that it would have been best if the decision not to admit her had been communicated in good time and not only after other students had already been admitted on 14th January 2013 and months after her application had initially been submitted. But that issue alone cannot sway my mind to grant the orders sought.

24. Lastly, I see no reason to go into all other issues raised in the Petition once I have addressed the substantive issue in contest.

Conclusion

25. When one studies law, goes on to obtain a Masters degree in the same discipline and gets in the hurdle of personal expectations by operation of the law, the pain is obviously immense. However, this Court mindful of that fact is still obligated to interpret that law in the manner it thinks it should be interpreted.

26. It is with tremendous sympathy therefore that I cannot accede to the Petition which I must and I hereby dismiss. As to costs let each party bear its own costs.

27. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 15TH DAY OF MARCH, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Karuri for Petitioner

Mr. Echesa for 1st and 2nd Respondents

Miss Mwangi for 3rd Respondent

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE

Further Order

Certified copies to be supplied.

Leave to appeal is granted.

ISAAC LENAOLA

JUDGE

15/3/2013