



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO.12 OF 2012

BETWEEN

TIMOTHY WAFULA MAKOKHA.....1ST PETITIONER

JAIRUS OTIENO.....2ND PETITIONER

ROY
KAGURE.....
.....3RD PETITIONER

FRANK
WALUKWE.....
.....4TH PETITIONER

SHEILA
NYAYIEKA.....
.....5TH PETITIONER

THEOPHILUS
KAMWARO.....
.....6TH PETITIONER

JORAM WAMBUGU
GACHANJA.....7TH

PETITIONER

**JOAN
ATIENO.....
.....8TH PETITIONER**

AND

**COUNCIL FOR LEGAL
EDUCATION.....
1ST RESPONDENT**

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

**SECRETARY/CHIEF EXECUTIVE
OFFICER,**

**KENYA SCHOOL OF
LAW.....3RD
RESPONDENT**

MINISTER FOR JUSTICE AND

**CONSTITUTIONAL
AFFAIRS.....4TH
RESPONDENT**

**THE
HON. ATTORNEY
GENERAL.....5TH
RESPONDENT**

J U D G M E N T

Introduction

1. The Petitioners are all students at the Kenya School of Law, (the 3rd Respondent) and their complaint is straightforward; that they are not happy with the decision contained in Legal Notice No.196 of 2011 to increase fees payable for the Advocates' Training Programme from Kshs.145,000/- to Kshs.190,000/-. In their Amended Petition dated 21st December 2011, they have stated as follows;

(i) *That they represent themselves and all other students admitted to the Kenya School of Law for the academic year 2012-2013.*

(ii) *They all applied for admission to the School in October 2011 or thereabouts and by a letter dated 22nd November 2011, the 2nd Respondent accepted the Applications and then invited the Petitioner's to take up the admissions "on certain terms and conditions"*

(iii) *One of the conditions was that the Applicants would be required to pay Kshs.190,000/- as fees for the duration of the Training Programme.*

(iv) *A further condition was that the deadline for admission would be two weeks from Monday, 9th January 2011.*

They then add that;

(v) *The decision to increase fees was ratified by the 4th Respondent on 14th December 2011 by which time the Petitioners had already been offered admission on the basis inter-alia of the increased fees.*

(vi) *The fees payable for the academic year 2010-2011 was Kshs.145,000/- while for the academic year 2009-2010, it was Ksh.96,000/-*

(vi) *That there was no change in curriculum to justify an increase of fees and since the letters of admission were dated 22nd November 2011, the ratification on increment in fees was done retroactively and to the detriment of the Petitioners.*

2. It is the Petitioners' further case that all the actions above violated their right to equal opportunity in economic spheres contrary to **Article 27(3)** of the **Constitution**. Further, that **Article 43(1)(f)** was contravened by denial of the right to education on the basis of financial incapacity as opposed to

merit. Discrimination is also alleged contrary to **Article 27(4)** and the Kenya School of Law is also accused of not abiding by the Values and Principles enshrined in **Article 10** of the **Constitution**.

3. The Petitioners also argued that **Articles 27**, and **55** of the **Constitution** were infringed because the Kenya School of Law has failed to protect the disadvantaged and has also failed to ensure that the youth have access to relevant education and training as well as employment.

4. Reliance has also been placed on **Article 2(6)** of the **Constitution** as read with **Articles 2(2)** and **(6)** of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which provide for non-discrimination of any kind and **Articles 7** and **26** which provide for the right to protection of the Law and the specific right to education on the basis of merit.

5. Lastly, **Article 21** of the **Constitution** has been invoked to buttress the argument that the Kenya School of Law has failed to observe, protect, promote and fulfill the Bill of rights.

6. The specific Prayers sought by the Petitioners are the following;

“(i) A declaration that the notice period of two weeks given by the 2nd Respondent to the Petitioners to take up placement with the 2nd Respondent and upon the precondition to pay fees in the sum of Kshs.190,000/- is arbitrary, unreasonable and unfair and is likely to violate the Petitioners’ rights to education and fair administrative action.

(ii) A declaration that the decision by the 1st Respondent to increase and/or fix the fees payable to the 2nd Respondent at Kshs.190,000/- and payable upfront amounts to a violation of right to education and fair administrative action.

(iii) A declaration that the decision by the 1st Respondent to increase and/or fix the fees payable to the 2nd respondent at Kshs190,000/- and approval thereof by the 4th Respondent amounts to discrimination including discrimination on the basis of financial ability and equality.

(iv) A declaration that the decision to increase the fees vide Legal Notice No.196 of 2011 is ultra vires and illegal and is of no Application ab initio.

(v) A declaration that failure by the 4th Respondent to put in place mechanisms for continued financial support for the petitioners until fulfillment of all requirements for admission to the Bar amounts to discrimination which includes the Petitioners discrimination on the basis of financial background, equality and participation.

(vi) A declaration that the decision by the Council of Legal Education to unjustifiably increase the fees for 2012 Kenya School of Law prospective students is arbitrary, in bad faith, unreasonable, unconstitutional, unlawful, null and void.

(vii) A declaration that those students who have registered and paid any amount more than what the Court will find reasonable and lawful be refunded the amount that they have paid in excess.

(viii) An order of Mandamus under Article 23(3)(f) of the constitution of Kenya compelling the 2nd Respondent to extend the deadline for admission of the Petitioners by a further period to be set by the Court or pending the inter parties hearing of the application for preservative orders filed herewith.

(ix) An order of Certiorari under Article 23(3)(f) of the Constitution of Kenya quashing the decision by the 1st and/or 4th Respondents increasing and/or fixing the fees payable by the Petitioner to the 2nd respondent at Kshs.190,000/-.

(x) The costs of the Petition be borne by the State in any eventuality and/or such other Orders as the Court shall deem just to grant.”

Responses to the Petition

7. Mr. Gichira Kibara, Acting Permanent Secretary, Ministry of Justice, Constitutional Affairs and National cohesion by an Affidavit sworn on 1st February 2012 deponed as follows;

8. That the Petition is frivolous and premature, bad in Law and made in bad faith because the increment was made for good and legitimate reasons. He has further argued that the Petitioners have given no proof that they are financially handicapped or that they undertook their University education through government sponsorship.

9. Further, that the fee payable per unit has not been changed since 2008 and the resolution by the Council for Legal Education that was passed at its meeting of 18th November 2011 was based on the need to introduce and administer an Examination’s Unit at the Council to manage examinations at the School of Law. The fee payable was therefore set at Kshs.5,000/- per unit and was aimed at cushioning the school against the high cost of administering examinations.

10. It is also the case for the Respondents that of the 1,200 students who had been admitted for the academic year 2011-2012, 915 had already fully paid the Ksh.190,000/-required of them and the rest were in discussions with a view to an agreement on a clear payment structure. That the school management has tried to get the Higher Education Loan Board to include it in its loan programme to assist needy students pay for their training and therefore the Petitioners cannot claim that they have been discriminated against, in any way.

11. In an Affidavit sworn on 30th January 2012, Prof. Kulundu Bitonye raised the same issues as above but added as follows;

12. That the Jurisdiction to set fees payable at the Kenya School of Law is by dint of the Council of **Legal Education Act, Cap.16A**, and the Council of Legal Education (Kenya School of Law) Regulations, Legal Notice No.169 of 2009, the sole preserve of the Council of Legal Education, subject to approval by the Minister for the time being responsible for legal affairs. Further, that the contested increment was necessitated by the fact that due to the steady increase of students being admitted to the school, there was need to professionalize the management of examinations therein and the decision to do so was neither arbitrary, unreasonable nor unfair.

13. It is also Prof. Kulundu's contention that a comparison with the Law School of Tanzania, the Law Development Centre, Uganda and the Law Development Centre, Zambia would show that the fees payable at the Kenya School of Law are comparably much lower.

14. Regarding the argument that the Petitioners had no notice of the increment, he has deponed that all students were notified of the fees payable by November 2011 and since most students had already paid the fees, it would be disruptive of the programme to interfere with it midway. That therefore the Petition generally lacks merit and should be dismissed.

Issues raised and Resolution thereof;

15. It is my humble view that the issue that must be addressed is whether the decision to increase the fees payable for admission to the Kenya School of Law from Kshs.145,000/- to Kshs.190,000/- was *illegal, arbitrary, discriminatory* and *ultimately unconstitutional*. It has been admitted by the Respondents that the increment has indeed made and that by a letter dated 22nd November 2011, all the Petitioners were informed of the fee payable prior to admission and infact exhibit "**TM 3**" is a prototype letter addressed to Makokha Timothy Wafula, (*the 1st Petitioner*), informing him that the fees must be paid "*in full on registration at the beginning of the academic year*" and he was further informed that the "*registration shall commence on Monday 9th January 2012 and shall last for a period of two weeks.*" He was also informed that if he failed to report within that period then "*the offer shall automatically lapse unless deferment is sought within the said period.*"

16. The fees payable are one of the conditions for admission to the school and **Rule 5(1)** of the **Council of Legal Education (Kenya School of Law) Regulations, 2009** specifically provides that "*any person who wishes to be admitted to any course of study at the school, shall ... pay the fees set out in the fourth*

schedule to these Regulations.” The Fourth Schedule was thereafter promulgated pursuant to **Rule 5(1)** aforesaid and it is headed, “*fees and charges*” and was made on 12th August 2009 and approved by the Minister on 10th September 2009. The contested item is titled, “*Examination fees for pre bar examinations per course unit – Kshs.5,000/-*” which was introduced by Legal Notice No.196 of 2011 as an amendment to Legal Notice No.169 of 2009. The approval by the Minister is dated 14th December 2011.

17. The question that I must now address with all the above facts in mind, is whether the amendment aforesaid was lawful. No doubt it was because under **Section 14** of the **Act**, the Council, with the approval of the minister, may make regulations including those to “*authorize the charging of fees.*” Neither the Council nor the Minister therefore acted outside the law in that regard.

18. The next question is whether the basis given for the increment is reasonable and/or justifiable. It is not in doubt that the student population at the Kenya School of Law has risen steadily over the years. I have no doubt that the figures given by Prof. Kulundu are correct i.e. in 2005 – 250 students, and in 2012 – 1,291 students. No doubt the facilities of the school would be stretched in the circumstances and I do not find that when an institution that receives no Government funding makes a move to improve its standards particularly with regard to the management of its examinations, it is acting in bad faith. It was in fact a necessity and for the benefit of the Petitioners who would otherwise be negatively affected by poor management of bar examinations. The legal profession and the wider public would also benefit from a credible examination system.

19. Having so said, the Petitioners have raised serious issues of a constitutional nature that require me to resolve. The first is whether by the increment in fees they have been discriminated against. **Article 27** of the **Constitution** provides as follows;

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

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

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in Clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under Clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in Clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.”

20. **What is the evidence tendered by the Petitioners that they have been discriminated against?** I gather that their argument is that the previous class (2010-2011 academic year) paid Kshs.145,000/- for their training and so they too ought to pay the same or in fact Kshs.96,000/- as is their case in a Petition to the Minister (*the date is unclear*). I am unable to accede to that argument because I have already stated that the increment is in fact for the benefit of the Petitioners and there is no direct gain that the Respondents would have by their action. If the Petitioners were saying that some students in their lot were being favoured as against them, then the Article would have squarely been of benefit to them.

21. Regarding the argument that they are from poor backgrounds and that they are marginalized, sadly that issue was merely mentioned in passing by the Petitioners and none bothered to develop the issue beyond that mention. I would have expected their parents or guardians to state on oath that they are unable to pay the Kshs.190,000/- at once or in installments. In fact during the hearing, I specifically interviewed each of the Petitioners and save for the 6th Petitioner, all the others had paid the said sum and had been admitted to the Kenya School of Law. I made orders in favour of the 6th Respondent to extend his time for admission and by the conclusion of the hearing, he too had fully paid the admission fee. I have also read correspondence between the Director/Principal, Kenya School of Law imploring the Higher Education Loans Board to advance loans to its students and the request was made long before the Petitioners applied to join the school and the failure by the Higher Education Loans Board to help, cannot be blamed on the Respondents. Had the latter been acting in bad faith or in a discriminating manner, they would not have taken that action.

22. In President of the Republic of South Africa & Anor vs. John Philip Hugo 1997(4) SAICC para 41, it was stated as follows;

“We need to develop a concept of unfair discrimination which recognizes 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, therefore 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 context may not necessarily be unfair in different context.”

23. Further, in Republic vs. Turpin [1989] I.S.C.R. 1926 at 1331 – 1332, it was held as follows;

“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 ...”

24. Looking at the above authorities, the circumstances of the Petitioners, the purpose of the increment of fees and the wider intention that the examinations to be set for the Applicants will create the highest standards in all students at the Kenya School of Law, it would be impossible to sustain a claim based on discrimination as defined in the Constitution.

25. Turning to the right to education, I wish to state as follows;

Article 43 of the Constitution provides as follows;

“(1) Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing, and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food of acceptable quality;

(d) *to clean and safe water in adequate quantities;*

(e) *to social security; and*

(f) *to education.*

(2) *A person shall not be denied emergency medical treatment.*

(3) *The State shall provide appropriate social security to persons who are unable to support themselves and their Dependants.”*

26. The right to education is one of the new generation of rights under the Constitution. In the Universal Declaration of human rights and in ICESR (*supra*) the right is recognised as directed to the full development of the human personality and the sense of its dignity. In the ICESR Committee General Comment 13 (21st Session, 1999 “The Right to Education Article 13” it was stated as follows;

“Education is both a human right in itself and an indispensable means of realising other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalised adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitation and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognised as one of the best financial investments States can make. But the importance of education is not just practical; a well educated, enlightened and active mind, able to wander freely and widely, is one of the joys and regards of human existence”.

27. The above statement is a good basis for asking the question; have the Petitioner been denied their right to education?

28. I am unable to make such a holding. In Governing body of the Juma Masjid Primary School & anor vs. Ahmed Asruff Essay & others [2011] ZACC 1, such a holding could properly be made where students were evicted from their school and the Education Department did not take precipitate and reasonable action to secure alternative placements of the learners for the 2011 school – year.

29. In the instant case, all the Petitioners and those they claim to represent are admitted at the Kenya School of Law and not one of them has been sent away for failure to pay Kshs.190,000/- Each one of

them is presently attending classes and having the same tuition and training as each other.

30. I have held elsewhere above that I see no evidence of discrimination against the Petitioners and I also see no evidence that they have been denied access to education. They went through High School and University and I am unable to tell who paid for their way there.

31. In any event, in their circumstances it is impossible to find that they have been arbitrarily and unreasonably denied the right to education. The increment, for their own benefit, in the sum of Kshs.45,000/- cannot by any stretch of imagination lead to such decision.

32. On the declarations sought, in Hood Phillips and Jackson Constitutional and Administrative Law, 8th Edition it is stated as follows;

“An action for a declaration asks for a “declaration of right.” It may be brought in the High Court even though no damages or other relief is claimed. The claim is often brought together with a claim for an injunction, and similar rules apply with regard to suing in the Plaintiff’s own name or at his relation by the Attorney General. There must be a justifiable issue, and this remedy cannot be brought in order to ask hypothetical questions. The Court, in its discretion, will not grant a declaration unless the remedy would be of real value to the Plaintiff. The Court will not grant declarations “which are academic and of no practical value”. A declaratory judgment cannot be directly enforced, but it may be assumed that a public authority will observe the Law when the High Court declares what it is.

The action for a declaration has been used to test the validity of delegated legislation, and the vires of decisions of tribunals whether statutory or voluntary. But a declaratory judgment cannot quash a decision, and the remedy may not be appropriate where the decision was within jurisdiction but there is error on the face of the record. Since the adoption of the Application for Judicial review it is not, of course, be possible to apply for a declaration by writ if the issue is one of public Law.”

I wholly agree and I have shown, I think, that the Petitioners do not deserve the Declarations that they seek as the same serve no reasonable or practical purpose.

Conclusion

33. Further the above exposition of the Law should guide parties when seeking declarations. The repetitive and verbose nature of declarations sought never helps a Petitioner but merely convolutes what would otherwise be a simple and straight forward issue to address. I begun by stating that the claim by the Petitioners is straight forward but the verbosity of their Petition left me baffled. I digress.

34. The Amended Petition dated 21st December 2012 is without merit and is best dismissed. I see no basis for, obvious reasons, to make any order as to costs.

35. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY, 2012

ISAAC LENAOLA

JUDGE

In the presence of:

LENAOLA – JUDGE

Irene – court clerk

Mr. Ojwang for 5th Respondent

Mr. Abidha for 1st Respondent

Order

Judgment duly delivered.

Copies to be supplied to Parties.

ISAAC LENAOLA

JUDGE

