



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 435 OF 2018

IN THE MATTER OF: THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: ARTICLES 2(1), 3(1), 10(1), (2), a, b, & c, 27 & 73 OF THE CONSTITUTION AND IN THE MATTER OF ARTICLE 20(1), (2), (3), a & b, ARTICLE 21(1), (2), & 23 (1) & (3) a, b, c, d, & c OF THE CONSTITUTION

AND

IN THE MATTER OF: IN THE MATTER OF THE RIGHT TO PROPERTY

AND

IN THE MATTER OF: THE CONTRAVENTION OF ARTICLES 27, 28, 30 & 40 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: THE ARCHITECTS AND QUANTITY SURVEYORS ACT CAP 525, LAWS OF KENYA

AND

IN THE MATTER OF: THE ARCHITECTS AND QUANTITY SURVEYORS ACT CAP 525, LAWS OF KENYA

AND

IN THE MATTER OF: IN THE MATTER OF ARTICLE 165 a, b, d, i & ii & (4) OF THE CONSTITUTION AS READ WITH SECTION 20 AND 21 OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FUNDAMENTAL FREEDOMS, PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

- 1. DENNIS TSENGA**
- 2. PAUL ODHIAMBO OKICH**
- 3. MARTIN OCHIENG ATER**
- 4. RICHARD BEJA MAJIMBO**
- 5. MABIA GODFREY**
- 6. DAVID E.A. OMOLLO**
- 7. PATRICK GEORGE JUMA OTIENO**

8. KAMAU N. JOSEPH
9. IDRIS BONGO BARASA
10. MICHAEL OTECHI NYANGWESO
11. MICHAEL KAMUNGE
12. WILLIAM SHISIA
13. ALLAN MWANGI
14. DENNIS KIBUCHI
15. ANTONY WAMBUA.....PETITIONERS

-VERSUS-

THE BOARD OF REGISTRATION OF ARCHITECTS

AND QUANTITY SURVEYORS (BORAQS)1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

ARCHITECTURAL ASSOCIATION OF KENYA (AAK).....INTERESTED PARTY

JUDGEMENT

Petitioners Case

1. The Petitioners' through a Petition dated 3rd December, 2018 and filed on the even date seek the following reliefs:

a) A declaration that the Board of registration of Architects and Quantity Surveyors (Boraqs) decision not to register the Petitioners herein who are licentiate members of the Architectural Association of Kenya as Architects in its totality is unconstitutional and against the provisions of Articles 27, 28, 30 and 40 of the Constitution of Kenya 2010.

b) A declaration that Section 7 the Architects and Quantity Surveyors Act Cap 525, Laws of Kenya is unconstitutional as it violates Articles 27, 28, 30 and 40 of the Constitution of Kenya 2010.

c) An Order of Mandamus compelling the Board of Registration of Architects and Quantity surveyors (Boraqs) to register, regulate and recognize the Petitioners as Architects.

d) Costs of this Petition.

2. The Petitioners' case is that as Licentiate Members of the Chapter of Architects as elected under the Interested Party's Constitution they are entitled to use the affix **L. A. A. K (A) (Licentiate Member of the Architectural Association of Kenya – Architects Chapter)** in accordance with their Chapter and are thus allowed under provisions of **Section 3(1) ii of the Architects and Quantity Surveyors Act** to display after their name the affix "Architect".

3. Obviously the Respondents are of a contrary opinion and claim that **Section 7 and 8 of the Architects and Quantity Surveyors Act (the Act)**, provides for the criteria of qualification of any person who wishes to practice as an Architect, which is a minimum of five (5) years of approved training followed by at least one year of practical experience in the work of an Architect to the satisfaction of the Board, and has passed a prescribed examination.

4. The Petitioners claim is anchored in the provisions of Articles 27, 28, 30 & 40 of the Constitution. In particular, the Petitioners contend that the provisions of Section 7 of the Act that oust them from the registration purview of the 1st Respondent are contrary to the above cited provision of the Constitution.

5. The Petition just spell that Article 2(4) of the Constitution provides that any law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of the Constitution is invalid. Article 259 of the Constitution provides that the Constitution shall be interpreted in a manner that promotes it's purposes, values and principles; advances the rule of law, and human rights and fundamental freedoms in the Bill of Rights and permits the development of the law; and contributes to good governance. Consistently wit this, when the constitutionality of legislation or any act or omission is in issue, the Court is under a duty to examine the objects and purport of the legislation, the act or omission and to read the provisions of the legislation, the conduct or omission so far as to

possible, in conformity with the Constitution.

6. It is Petitioners contention that the Constitution should be given a purposive, liberal interpretation and that the provision of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other. It is important to bear in mind that the spirit of the constitution must, preside and permeate the process of judicial interpretation and judicial discretion.

7. The Petitioners forth urge that this court has been called upon to determine the constitutionality or otherwise of Section 7 of the Architects and Quantity Surveyors Act and as a basis for so doing the Petitioners wish to state some crucial guiding principles. First, statutory interpretation is the process by which courts interpret and apply legislation. The court interprets how legislation should apply in a particular case as no legislation unambiguously and specifically addresses all matters. Legislation may contain uncertainties for a variety of reasons such as:-

- a. Words are imperfect symbols to communicate intent. They can be ambiguous and change in meaning over time.
- b. Unforeseen situations are inevitable, and new technologies and cultures make application of existing laws difficult.
- c. Uncertainties may be added to the statute in the course of enactment, such as the need to compromise or catering for certain groups.

8. It is Petitioners averment that a court must try to determine how a statute should be enforced, and in constructing a statute the court can make sweeping changes in the operation of the law, so this judicial power should be exercised carefully. There are numerous rules of interpreting a statute, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. In any event, one possible suggestion of the indeterminacy of canons is that statutory construction should be a narrow pursuit, not a broader one:-

“Canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.”

9. The Petitioners are of the view that a limiting legislation must expressly state intention to limit a right and the nature and extent of limitation, be clear and specific about the right affected, and the nature and extent of limitation, and the limitation must not go as far as to wholly destroy the essential content of the right, emphasis being on limit rather than derogate.

THE RESPONDENTS CASE

10. That 1st and 2nd Respondents are opposed to the orders sought by the Petitioners and have filed a Replying Affidavit dated 7th May 2019 by George Charles Omondi the Registrar of the Board of Registration of Architects and Quantity surveyors (thereinafter referred to “the Board”). It is further contended that through Petitioners Further Affidavit to the Petition, though served no exhibits were attached to the copy served upon the Respondent’s.

ANALYSIS AND DETERMINATION

11. I have considered the Petition, Supporting Affidavit, Replying Affidavit and rival submissions and from the above the issues arising for considerations are as follows: -

- a) Whether the Board of Registration of Architects and Quantity Surveyors (BORAQS) decision not to register Licentiate Members of the Architectural Association of Kenya and Architects is unconstitutional and against the provisions of Article 27, 28, 30 and 40 of the Constitution of Kenya, 2010?***
- b) Whether Section 7 of the Architects and Quantity surveyors Act (Cap 525) Laws of Kenya is unconstitutional and violates Articles 27, 28, 30 and 40 of the Constitution of Kenya 2010?***
- c) Whether an order of Mandamus can issue compelling the Board of Registration of Architects and Quantity Surveyors (BORAQS) to register, regulate and recognise the Petitioners as Architects?***
- d) Whether the Petitioners are entitled to costs of this Petition?***

A. Whether the Board of Registration of Architects and Quantity Surveyors (BORAQS) decision not to register Licentiate Members of the Architectural Association of Kenya and Architects is unconstitutional and against the provisions of Article 27, 28, 30 and 40 of the Constitution of Kenya, 2010?

12. The Petitioners contention is that the impugned Section is discriminatory as despite extensive training in the Architectural field the 1st Respondent has refused to register and regulate them. The Petitioners contend that as regards what constitutes discrimination, that it is not all differentiated treatment is discrimination but differentiation in treatment must have a legitimate purpose in accordance with the Constitution. The Petitioners referred to the case of ***Hersi Hassan Gutale & another V. Principal Registrar of Persons & Another [2004]***, where ***P. J. Kamau, Ag. J. (as then was)*** cited an Indian author on Discrimination as follows:-

“The above South African experience on differentiation and categorization has broadly also been analysed in Introduction to the Constitution of India by Durga Das Basu at pp. 82 – 89. On equal protection to the laws the said writer opines at page 85:

“None should be favoured and none should be placed under any disadvantage, in circumstances that do not admit of any reasonable justification for a different treatment”.

In the same page he continued:

“The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstance in the same position as the varying needs of different classes of persons often require separate treatment. The principle does not take away from the State the power of classifying persons for legitimate purposes. A Legislature which has to deal with diverse problems arising out of an infinite variety of human relations must of necessity, have the power of making special laws to attain particular objects; and for that purpose it must have large powers of selection or classification of persons and things upon which such laws are to operate.”

13. The Petitioners further referred to the Constitutional Court of South Africa in **Jacques Charl Hoffmann Vs. South African Airways, CCT 17 of 2000** where the Court stated:-

“This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provisions under attack makes differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of Section 9 (1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.”

14. It is submitted by the Petitioners that our constitution contemplates that there could be different treatment of different persons for purposes affirmative action under Article 27(6) of the constitution or where discriminations is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. It is contended that there is total prohibition on unjustifiable discrimination as provided under Article 27(4) of the Constitution that the state shall not discriminate directly or indirectly against any person on any ground including those set out in the Article.

15. The Petitioners urge that Section 3 of the Act provides a way for the registration of the Petitioners. While on the other hand this right is taken away by Section 7 of the Act, which Section the Petitioners urge that the 1st Respondent has applied to discriminate against the Petitioners. They contend a purposive application of the Act which have obligated the 1st Respondent to give effect to the provisions of Section 3 of the Act is for the Petitioners not to be unreasonably and unjustifiably be left out and discriminated against.

16. The Petitioners aver that they have presented evidence through further affidavit of Dennis Tsenga that others before them, who had held similar qualifications (at least a Diploma in Architect) have previously been registered by the 1st Respondent and allowed to practice; under the provisions of Section 3 of the Act and inspite of Section 7 of the Act. It is further asserted that there has been no change in legislation hence there is a clear case of discrimination without reasonable and justifiable cause for the 1st Respondent to refuse to register the Petitioners.

17. The 1st Respondent submit that its refusal to register Licentiate Member of the Architectural Association of Kenya as Architect is not unconstitutional. It refers to **Section 7(b) (i) and (ii) of Cap 525** which clearly delineates the criteria recognised under the law for registration with the minimum qualification of five years of afforded training and a follow up of at least one year of practical experience in the work of an architect or has been admitted as a corporate member of an approved professional institution whose qualifications for such admission are not less than those set out on sub-paragraph (5) of Section 7(b) of the Act.

18. Section 8(b)(ii) of the Act further provides that to qualify and be registered as a Quantity Surveyor, one must have passed a prescribed examination or has been admitted as a corporate member of an approved professional institution whose qualifications for such admission include equivalent of such prescribed examination and has had a minimum of one year of professional experience in Kenya, to the satisfaction of the Board or has satisfied the Board that he has acquired an adequate knowledge of Kenya building contract procedures.

19. It is clear that pursuant to provisions of **Sections 7 and 8 of the Act (Cap 525) Laws of Kenya**; the applicant must pay the prescribed registration fees and in addition, for one to be qualified as a corporate member within the meaning of **Section 7(b) (ii) and 8(b) II of the Act (Cap 525)**, they must be registered by the Board.

20. In the instant petition the Petitioners are only licentiate member of the Architectural Association of Kenya (Interested Party) and are not corporate members and therefore not registrable by the Board within the meaning of the **Section 7 (b)(ii) and 8(b), (ii) of the Act (Cap 525) Laws of Kenya**.

21. It is trite law that the Law should be read as a whole, every Section to the Act complimenting the other. The Court cannot construe a proviso of a Section to the Act without reading the entire Section and other provisions in the Act in totality.

22. Section 3(1), of the Act states thus:-

“Subject to the provisions of this Act ...” meaning that before the Petitioners can rely on the Section they must have complied with the other Sections of the Act. The Section clearly provides that no provision shall practice under any name, title or style containing any words or phrases “architect” “architecture”, “architectural” “quantity surveyor” or “quantity Surveying” unless he is registered under the Act as an architect or a quantity surveyor.

23. **Section 3 (i) (ii) of the Act** which the Petitioner seek to rely on appears not to be applicable to the Petitioners. Section 3 of the Act allows the Board to restrict the use of the word or phrases as stated hereinabove unless a person is registered under the Act as an architect or a quantity surveyor. The Sections only allows a member of an approved institution to display under his name any affix which includes the word “architect” “architecture” or “architectural” or any abbreviations thereof whether that member is registered or not. The use of the affix therefore does not confer registration status under the Act.

24. It should also be noted that the admission of a corporate member from an approved professional institution is subject to the provisions of Section 7 (b) (i) of the Act which demand that one must possess five years of approved training in architecture; followed by at least one year of practical experience in the work of architect to the satisfaction of the Board and has passed the prescribed examination.

25. I find therefore contrary to the allegations by the Petitioners, the Interested Party has no powers and / or jurisdiction to confer the Petitioners any such benefits since they are recognised by the Interested Party as ordinary technicians and holder of diploma certificates who under the Act are not registerable by the Board. It should further be noted that under the Constitution of the Interested Party, all technicians including Licentiate Members do not qualify as corporate members and therefore the Interested Party have no mandate to register corporate members. It is only the Board which has the mandate to registered corporate members and those who meet registration criteria threshold. The interested party is not an approved professional institution within the meaning of Section 3, 7, and 8 of the Act. However, the Interested Party is a recognised professional association in Kenya for architects, quantity surveyors and other related disciplines.

26. It is noted that the 1st Respondent is governed by the Architects and Quantity Surveyors Act (Cap 525) Laws of Kenya. It is neither subordinate to the constitution or by law of any professional Association and as such it is not subject to any activities being undertaken by the said professional association(s) including Interested Party. In view of the above the Petitioners and other diploma holders in Architecture or Quantity surveying ordinarily have no option but to consider upgrading their qualifications to a degree in architecture to be able to qualify to the Board examination to enable their being registered by the Board as architects or quantity surveyors in Kenya. The Petitioner’s training does not entail the minimum qualification as recognized under the Act and allowing them to practice as such will only amount to violating the rights of persons practicing as such and who have qualified under Section 7 and 8 of the Act.

27. **Article 27 of the Constitution** provides for rights of equality and freedom from discrimination; **Article 28 of the Constitution** deals with right to human dignity and right to have the dignity protected; **Article 30 of the Constitution** deals with right not to be held in slavery or servitude and **Article 40 of the Constitution** deals with protection of right to property.

28. The Petitioners impugn to constitutionality of Section 7 of the Act on the ground that it subjects the Petitioners to forced labour. **The International Convection on Forced Labour 1930 (No. 29)**, which is part of our law by dint of **Article 2(5) of the Constitution**, and which defines forced labour at **Article 2(1)** as ‘all work or services which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.’ When analysing the question of forced labour there are two tests that should guide the court. These are; whether there is the *menace of penalty and whether there is voluntary acceptance*. These concepts form part of our domestic law by virtue of Article 2 of the Constitution. The prohibition against slavery and forced labour has attained the force of *jus cogens* and is therefore part of general principles of international customary law due to the operation of the principle of universality.

29. The Petitioners argue that the 1st Respondent has unequivocally pronounced that it has directed the DPP to institute criminal proceedings, against the Petitioners as per letter dated 14/11/2018 and that the 1st Respondent has resorted to plastering the names of the Petitioners on local dailies with national subscription and in effect pronouncing them as unqualified and quacks. The Petitioners therefore contend that the forgoing meets the definition of forced labour as defined under the law and thus contrary to Article 30 (2) of the Constitution.

30. On the right to the property it is asserted by the Petitioners property as defined under the interpretation of General Act includes money, goods, land and any description of property, whether movable or immovable and also obligations, assessments and any description of estate, interest and profit or future vessel or contingent, arising out of or incident to property as herein defined. In the Petitioners view the definition apply to beneficial interest in property and is not confined to direct ownership as argued by the Respondents.

31. It is urged by the Petitioners under Article 40 (2) of the Constitution it is provided that:-

“ Protection of right to property -

(2) Parliament shall not enact a law that permits the State or any person—

a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).”

32. It is therefore Petitioners contention that **Section 7 of the Act** seeks to take away the right of the Petitioners to practice and earn thus depriving them off their property.

33. The 1st Respondent on the violation of the Petitioners rights and freedom under Article 27, 28, 30 and 40 aver that the petitioners have not demonstrated to the required threshold how that 1st Respondent violated their rights under the aforementioned Articles. In *Anarita Karimi Njeru Vs. Republic (No.1) [1979] 1 KLR 154* and *Meme Vs. Republic & Another [2004] KLR* the Court stated that: -

“if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provision said to be infringed, and the manner in which they are alleged to be infringed.”

34. It is urged the rights the Petitioners claim to have been violated are not absolute rights and can be limited under *Article 24 of the Constitution* which provides-

“Limitation of rights and fundamental freedoms

1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

a) the nature of the right or fundamental freedom;

b) the importance of the purpose of the limitation;

c) the nature and extent of the limitation;

d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

35. The Petitioners have not shown that they can be given a preferential treatment as opposed to all other practicing architects who have attained the minimum qualifications in Kenya and undertook a six years Architectural training curriculum as opposed to the Petitioners three years training.

36. On whether the decision of the 1st Respondents not to register Licentiate members of the Architectural Association of Kenya as Architects is against *Article 27 of the Constitution* is clearly answered by the fact that the Petitioners are not qualified to be treated as architects within the meaning of the Act and cannot claim to have been discriminated as they are not entitled to similar treatment with persons who are architects within the meaning of the Act (Cap 525) Laws of Kenya.

37. In the case of *Peter Waweru Vs. Republic [2006] eKLR* the Court defined discrimination as follows: -

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions by ...sex whereby persons of one such description re subjected to ...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such descriptionDiscrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex ...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

38. I find that the Petitioners not being qualified architects cannot claim that their right to equality and freedom from discrimination not Article 27 of the Constitution was violated since they are not qualified to be treated as architects within the mercy of the Act (Cap 525) as they do not meet the minimum requirements.

39. Further, under By-Laws 45A of the Architects and Quantity Surveyors By-Laws it is prescribed that the Board may oppose the entry into partnership of a registered persons with an unregistered persons. This therefore means that the Petitioners who are registered licentiates under the Interested Party can practice through a registered person as firm that is registered under Section 7 and 8 of the Act (Cap 525) Laws of Kenya.

40. The by Law 45A of the Architects and Quantity Survey on By-Laws under the Act provides that :- **“...the Board may oppose the entry into partnerships of a registered person into an unregistered persons.”** It is in view of this that the Respondents contend that the Petitioners are misguided in their paragraphs of further affidavit to the Petition dated 24th May 2019, since where diploma holders upgrade their academics to meet the minimum set qualification, under Section 7 and 8 of the Act, the Board is at liberty to register them as architects as provided by the law.

41. The Petitioners urge the Respondents have made extensive averments on the Architectural and Quantity Surveying Practitioners Bill. It is Petitioners contention that they have led in the enactment of the Bill into law, but the same do not in their view address their immediate difficulties. The Petitioners urge that the Respondents acknowledge the gaps in the Law and the obvious violations of the Petitioners rights but they expect them to sit right, face criminal sanctions while unable to fed for themselves as they await the enactment of a bill which has been pending for years on end.

42. From the above it is clear that the Petitioners can only be enrolled once the proposed Bill is enacted into law but presently the Petitioners cannot be registered under the Act strict service. This court as it deals with this matter is alive and appreciative of the doctrine of separation of powers. The court as clothed lacks jurisdiction to issue orders to the effect that Petitioners be registered by the Board. That can only be done by the Parliament who are not even a party to these proceedings and it is only parliament which can amend the law.

43. From the evidence on record I am not satisfied that the 1st Respondent has violated the rights of the Petitioners in any way but are in the process of taking all necessary steps to ensure that they are recognised so as to be able to practice in their field as soon as Parliament okeys the purported Bill.

B. WHETHER SECTION 7 OF THE ARCHITECTS AND QUANTITY SURVEYORS ACT (CAP 525) LAWS OF KENYA IS UNCONSTITUTIONAL AND VIOLATES ARTICLES 27, 28, 30 AND 40 OF THE CONSTITUTION OF KENYA 2010?

44. The Petitioners aver that Section 7 of the Architects and Quantity Surveyors Act (Cap 525) Laws of Kenya (hereinafter the Act) is unconstitutional and violates Articles 27, 28, 30 and 40 of the Constitution.

45. Section 7 of the Act delineates the criteria recognised under the law for registration with the minimum qualifications of five years of approved training and a follow up of at least one year of practical experience in the work of an architect or on having been admitted as a competent member of an approved professional institution whose qualifications for such admission are not less than those set out in sub paragraph (1) of Section 7 (b) of the Act.

46. The 1st Respondent urge Section 7 of the Act is not unconstitutional and that it does not violate **Articles 27, 28, 30 and 40 of the Constitution**. It is urged that the 1st Respondent has not violated on the rights of the Petitioners under **Article 21 of the Constitution** and in effect the repealing of law would further enhance the said right by ensuring that they get recognition they seek under the Act.

47. In *Olum & another v. Attorney General [2012] EA* the Court stated:

“To determine the Constitutionality of a section of a statute or an 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 the 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.”

48. Further to the above in the case of US Supreme Court in *U.S vs Butler, 297 U.S. 1[1936]* the Court expressed itself as follows:

“When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former, all the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends.”

49. The purpose of Section 7 of the Architects and Quantity Surveyors Act (Cap 525) Laws of Kenya is to provide the criteria for qualifications of any person who wishes to proceed as an architect and its objects and effect of implementation does not in anyway breach, contrast or contravene the Constitution.

C. WHETHER AN ORDER OF MANDAMUS CAN ISSUE COMPELLING THE BOARD OF REGISTRATION OF ARCHITECTS AND QUANTITY SURVEYORS (BORAQS) TO REGISTER, REGULATE AND RECOGNISE THE PETITIONER AS ARCHITECTS?

50. The 1st Respondent as the regulator in the Industry in efforts to improve the practice in the Industry and upon realizing that there are work gaps in the industry which the Act (Cap 525) could not address for instant the issue of recognition of the licentiate members, and technicians it proposed to the Cabinet Secretary Ministry of Transport, Infrastructure, Housing and Urban Development and Public Works, a legislature proposal to repeal and re-enact the Act (Cap 525) Laws of Kenya. In the memorandum of the proposed Bill, it was noted that there was need to regulate non-registered persons in the practice like the petitioners who are licentiate members.

51. The Registrar of the Board wrote to the Chairman of the Interested Party, inviting them for stakeholders consultative meeting on renew of the Act. The consultative meeting was attended by the Interested Party as a representative of the Petitioners and was presented with a draft of the Architecture and Quantity Surveying Practitioners Bill 2018, which is seeking to accommodate the training, registration and licensing of architects, quantity surveyors, landscape architects; interior designers, construction projects managers and their related paraprofessionals.

52. It is provided under clause 4 of the proposed Bill, that the Board will exercise supervision and controlling the training, registration and practice of architecture, quantity surveying, interior designing and construction project management, once the Bill is enacted into law by Parliament.

53. It is proposed under clause 9(vi) of the proposed Bill, that if Petitioners will be incorporated under the technicians' Chapter and their issues will be addressed and they will be given recognition as opposed to the current Act (Cap 525), which only recognises architects and quantity surveyors as per Section 7 and 8 of the Act. Once the proposed Bill is enacted, the Petitioners who are technicians will not only be recognized but also benefit from constant training from the Regulatory Board and under clause thereof, if the proposed Bill is enacted by Parliament, incorporations will have representation in the Board and their further interest will be taken into account.

54. From the above I find that the 1st Respondent has demonstrated that it has discharged its mandate as provided by law and having forwarded the proposed Bill to the Cabinet Secretary Ministry of Transport, Infrastructure, Housing, and Urban Development for onward transmission to the Cabinet, to allow the cabinet to look into its contents and give its approval before it is forwarded to the Attorney General and thereafter to the Parliament to further undertake the consultative process as regard by the law before the Bill is enacted into law.

55. In view of the action and steps so far taken and in view of the law in force I find that it would be prejudicial for this Court to grant as sought the orders of mandamus allowing the Petitioners to be registered as architects because they as per Section 7 and 8 of the Act ineligible for registration as architects and quantity surveyors.

56. The Court of Appeal set out the circumstance under which Judicial Review Order of Mandamus are issued when the court addressed itself in the case of **Republic v. Kenya National Examination Council ex parte Gathenji & 8 Others Civil Appeal No.234 of 1996**, the Court of Appeal cited, with approval, **Halsbury's Law of England, 4th Edn. Vol. 7p. 111 paragraph 89** thus:

“The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. ...”

57. An order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. In the instant petition it has been demonstrated by the 1st Respondent that it does not have a duty to register, regulate and recognise the petitioners as architects or quantity surveyors under section 7 and 8 of the Act as they do not possess the minimum qualifications to be registered as architects or quantity surveyors. I therefore find that an order of mandamus should not issue compelling the 1st Respondent to register, regulate and recognise the Petitioners as they are not architects or quantity surveyors recognised by the Act and the 1st Respondent does not have a duty under the Act to register them.

D. WHETHER THE PETITIONERS ARE ENTITLED TO COSTS OF THIS PETITION?

58. The Respondents urge that the Petitioners contrary to their allegations and in particular 1st, 4th and 8th Petitioners have been involved in the stakeholders meeting on review of the Act. It is urged that the Petition is therefore premature since the Petitioners at all times have been involved in the consultative process and have failed to appreciate that once the Bill is enacted into law, their concerns which are the concerns of the Board will be taken care of. It has further been submitted since the Petitioners are not architects or quantity surveyors within the meaning of the Act, they cannot claim immunity or preferential treatment under the Act, that does not govern them.

59. It is Respondents contention that in view of the above, this Petition is made in bad faith, that it has no merit and the Petitioners are only interested in the gain from an illegality from their nefarious activities and like any other Kenyan, the Petitioners are required to abide by the law. The Respondents pray that petition be dismissed with costs to the Respondents as it is frivolous and / or abuse of the Court process.

60. To the extent of my finding, in this Petition, I find the Petition to be without merit. It is frivolous and an abuse of the court process. The petition is accordingly dismissed with costs to the Respondents as costs always follow the event.

Dated, Signed and Delivered at Nairobi on this 21st day of May, 2020.

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J. A. MAKAU

JUDGE