REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 420 OF 2018

PETER KIPKEMOI CHEBOSSEH.....PETITIONER

VERSUS

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

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

JUDGMENT

1. The Petitioner, Peter Kipkemoi Chebosseh bases his petition on two letters. The first letter was addressed to him by the 1st Respondent, the Kenya School of Law on 6th January, 2014 and spoke to him as follows:-

> **"Dear Mr. Chebosseh**
>
> **ADMISSION TO THE KENYA SCHOOL OF LAW – 2014/2015 ACADEMIC YEAR**
>
> **Reference is made to you application for admission into the Advocates Training Programme (ATP) at the Kenya School of Law.**
>
> **It is regretted that your application was not successful due to the reason that you have English grade 6 (six) and that your LL.B degree does not meet the threshold of 16 core subjects prescribed by law for purposes of admission to the ATP. The courses missing are:-**
>
> **i. Family Law and Succession**
>
> **ii. Commercial Law**
>
> **iii. Labour Law**
>
> **iv. Equity and the Law of Trusts**
>
> **v. Legal Research and Writing**
>
> **Yours sincerely**
>
> **Prof. W. Kulundu-Bitonye, EBS**
>
> **DIRECTOR/CHIEF EXECUTIVE & SECRETARY,**
>
> **COUNCIL OF LEGAL EDUCAITON KENYA SCHOOL OF LAW BOARD"**

2. The second letter dated 2nd November, 2018 was addressed to the Petitioner's advocates by the 2nd Respondent, Council of Legal

Education in the following words:-

"Mr. Danstan Omari

Musyoki Mogaka & Co. Advocates

Uganda House, 4th Floor,

Suite 19 Kenyatta Avenue,

P. O. Box 57180-00200 NAIROBI.

Dear Mr. Danstan Omari

RECOGNITION AND APPROVAL OF FOREIGN QUALIFICATIONS – LL.B. UNIVERSITY OF LONDON, UK: PETER KIPKEMOI CHEBOSSEH

Reference is made to your letter dated 16th October, 2018 on the above referenced matter.

The documents submitted by your client show that although a substantial number of core units were covered at the University, the following units were not covered as envisaged by Part II of the Second Schedule to the Legal Education Act, 2012:

1. Legal Research & Writing

2. Commercial Law (Incl. Sale of Goods, Hire Purchase & Agency)

3. Equity & Law of Trusts

4. Labour Law

Council's decision is that your client, Peter Kipkemoi Chebosseh undertakes the remedial in the above listed units for Council to recognize and approve his LL.B Degree qualification of the University of London, UK.

Please note however that notwithstanding your client's undertaking of the remedial programme, the Kenya School of Law reserves the right under Sections 4(2)(a) and 16 and the Second Schedule to the Kenya School of Law Act, 2012 to determine whether your client is qualified for admission to the Advocates Training Programme (ATP).

Further, note that your client's academic qualifications do not supersede the provisions of Sections 12 and 13 of the Advocates Act (Cap.16) as relates to admission to the Roll of Advocates in Kenya.

Yours sincerely

SECRETARY/CHIEF EXECUTIVE OFFICER

COUNCIL OF LEGAL EDUCAITON"

3. In his petition dated 26th November, 2019, the Petitioner alleges that the decisions of the respondents as conveyed by the two letters violates his various rights and fundamental freedoms as protected by the Constitution of Kenya. He therefore seeks the following declarations and orders:-

"a) A Declaration that the actions and or omissions by the Respondents are contrary to and inconsistent with the provisions of Articles 10, 73 and 232 of the Constitution, 2010.

b) A Declaration that the Respondents violated and/or are likely to violate the constitutional rights of the Petitioner and in particular Articles 27, 43, 47 and 48 of the Constitution of Kenya, 2010.

c) An Order to set aside and or quash the decision contained in the 1st and 2nd Respondents' letters to the Petitioner dated 6th January, 2014 and 3rd November, 2018 titled "Admission to the Kenya School of Law-2014/2015 Academic Year" and "Recognition and Approval of Foreign Qualifications-LL.B University of London, UK", respectively.

d) An Order Prohibiting the 2nd Respondent from Recognition and Approval or Clearance or Equation of Bachelor of Laws (LL.B) Degree or related qualifications awarded to the Petitioner by the University of London based on retrospective provisions of The Kenya School of Law Act, 2012, Laws of Kenya and the Legal Education Act, 2012, Laws of Kenya.

e) An Order compelling the 1st Respondent to consider the Petitioner for admission into the Advocates Training Programme (ATP) 2019/2020 academic year, under the prevailing circumstances and laws at the time of enrolling into the LL.B. Degree programme at the University of London–UK between the years 2003-2008.

f) General damages for breach of Petitioner's constitutional rights and loss of opportunities.

g) Any other or further relief that this Honourable Court shall deem fit and just to grant in the circumstances.

h) Costs of this Petition."

4. The beautiful thing about this case is that the facts are not disputed. All the parties agree that the Petitioner holds a Bachelor of Laws degree from the University of London in the United Kingdom. He graduated in 2008. He also has a Bachelor of Science degree in Agricultural Engineering awarded to him by the University of Nairobi in 1986.

5. The Petitioner's case is that considering that he graduated in 2008, the Legal Education Act, 2012 is not applicable to him. The respondents on the other hand hold the view that the Legal Education Act, 2012 is applicable to the Petitioner.

6. The only question for the determination of this Court is whether the laws enacted after 2008 are applicable to the Petitioner in respect of his application for admission to the Kenya School of Law for the Advocates Training Programme (ATP).

7. Through the pleadings and submissions dated 14th June, 2019 the Petitioner's counsel submits that the Petitioner applied for and was admitted by the 1st Respondent into the ATP through the letter dated 25th November, 2008 for the academic year 2009/2010. The Petitioner, however, did not take the offer as he was denied study leave by his employer. In 2013, the Petitioner reapplied to join the ATP for the academic year 2014/2015 but his application was rejected. The Petitioner was asked to pursue remedial classes in respect of four units. Counsel for the Petitioner submits that this was not a requirement when the Petitioner completed his studies. He urges that for the respondents to subject the Petitioner's LLB degree transcripts and degree certificate to a law that came into force five years after he had graduated from university was not only illegal but altogether *ultra vires* and actuated by *mala fide* to say the least.

8. It is the submission of counsel that the Petitioner's qualification to be admitted to the ATP was based on the repealed Council of Legal Education Act, Cap. 16A and the Council of Legal Education (Kenya School of Law) Regulations, 2009 ("the 2009 Regulations"). Counsel contends that the Petitioner's academic papers at all levels of education are in conformity with Part A(II) of the First Schedule of the 2009 Regulations.

9. According to counsel for the Petitioner, the Petitioner having obtained one subsidiary and three principals in his Kenya Advanced Certificate of Education and also having graduated with a Bachelor of Science degree in Agricultural Engineering was qualified for enrolment for a Bachelor of Laws degree. Counsel states that the Legal Education Act, 2012 and the Kenya School of Law Act, 2012 could not apply to the Petitioner retrospectively. It is counsel's view that the only laws applicable to the Petitioner were regulations 4 and 5 of the First Schedule of the 2009 Regulations.

10. In support of the arguments counsel for the Petitioner cites the decision in **Kevin K. Mwiti & others v Kenya School of Law and 2 others [2015] eKLR** in which among the orders issued by Odunga, J was an order that:-

"A declaration that the petitioners who were already in the LL.B class prior to the enactment of the Kenya School of Law Act are to be treated in the manner contemplated by the guidelines issued by the school prior to the enactment of the Amendment Act. For avoidance of doubt those who had not been admitted in the LL.B class prior to the enactment of the Kenya School of Law Act are to comply with the provisions of the said Act."

11. Counsel for the Petitioner submits that the 2nd Respondent's action of purporting to recognize and approve the Petitioner's LLB degree certificate was not based on any lawful process and as such breached or violated various principles of law. He states that the 2nd Respondent breached the rules of natural justice, acted *ultra vires*, acted with improper motive, acted unreasonably, acted against the principle of proportionality, acted with *mala fide* and violated the Petitioner's legitimate expectation. The net effect, he submits, was a violation of Article 47 of the Constitution and Section 7(2)(b) of the Fair Administrative Action Act, 2015. Counsel asserts that the 2nd Respondent overstepped its boundaries by purporting to scrutinize the Petitioner's degree. To him, the role of ensuring that a person is qualified for the ATP belongs to the 1st Respondent.

12. In support of his contention that the two Acts of Parliament passed in 2012 could not retrospectively apply to the Petitioner, counsel cited the case of **Pauline Anna Benadette Onyango v Kenya School of Law [2017] eKLR** where E.C. Mwita, J pronounced that:-

"The Respondent's decision that the Petitioner was not qualified to join ATP by virtue of the Kenya School of Law (Act), 2012 was irrational and unreasonable. It was made without justification. The Respondent could not apply the provisions of the Act retrospectively to render qualifications obtained before its enactment irrelevant."

13. Other decisions cited in support of the Petitioner's case are **Republic v Council of Legal Education & another Ex-parte Mount Kenya University [2016] eKLR; Republic v Kenya School of Law & 2 others Ex-parte Juliet Wanjiru Njoroge & 5 others [2015] eKLR; R v Cabinet Secretary for Transport and Infrastructure Principal Secretary & 5 others Ex-parte Kenya County Bus Owners Association & 8 others [2014] eKLR; Republic v The District Land Adjudication & Settlement Suba District & another [2013] eKLR;** and, **Rahab Wanjiru Njuguna v Inspector General of Police & another [2013] eKLR.** According to counsel for the Petitioner, all the cited decisions speak to the need for public bodies to adhere to fair administrative procedures.

14. The 1st Respondent filed submissions dated 12th July, 2019. In brief the 1st Respondent's case is that the Petitioner having obtained his degree from a foreign university required clearance from the 2nd Respondent as per the Legal Education Act, 2012 before joining the ATP. Counsel for the 1st Respondent submits that since there was no clearance from the 2nd Respondent, the 1st Respondent could not admit the Petitioner for the ATP.

15. Counsel for the 1st Respondent further states that the Petitioner admits that he did not take all the sixteen core LLB subjects prescribed by law and was thus not eligible for admission as held by the Court of Appeal in **Eunice Mwikali Maema v Council of Legal Education, Civil Appeal No. 121 of 2013.** According to counsel the Court of Appeal held that the sixteen subjects were mandatory irrespective of the time an applicant for the ATP obtained the LLB degree. Counsel therefore urges that the 1st Respondent did not violate any of the Petitioner's constitutional rights and the claim for damages is therefore unfounded and without merit. The Court is therefore asked to dismiss the petition.

16. The 2nd Respondent's position as expressed through the submissions dated 27th January, 2020 is that it acted within the tenor and letter of Section 8(1)(a), (c) and (e) of the Legal Education Act, 2012 and in particular Part II of the Second Schedule to the said Act. Counsel points out that under Section 8(1)(a) the 2nd Respondent is the regulator of legal education and legal training in Kenya meaning that it is tasked with the responsibility of ensuring that the governing laws are in tandem with the current academic needs of the profession. Further, that under Section 8(1)(c) the 2nd Respondent is the supervisor of all legal education providers in Kenya including the 1st Respondent.

17. It is submitted that the 2nd Respondent's role is therefore to ensure that all legal providers adhere to the applicable and available laws when carrying out their mandate. Also, that Section 8(1)(e) tasks the 2nd Respondent with the responsibility of approving and recognizing qualifications obtained outside Kenya. This, counsel states, is to ensure that all persons with local or foreign qualifications seeking to join the 1st Respondent are subjected to the same standards.

18. Counsel for the 2nd Respondent states that among the qualifications required for admission to the ATP by Part II of the Second Schedule to the Legal Education Act, 2012, is that a candidate must have done and passed the sixteen core courses stated therein. It is counsel's position that these subjects are mandatory and a candidate must possess them before joining the Kenya School of Law. He stresses that the requirements are applicable to any candidate who wishes to join the 1st Respondent after the commencement of the Legal Education Act, 2012 on 28th September, 2012. He states that the law is applicable to the Petitioner as he applied to join the 1st Respondent in 2012. Further, that even the 2009 Regulations at Part III, Paragraph 24 of the Third Schedule of the repealed Council of Legal Education Act, Cap. 16A provided for core subjects. It is counsel's position that the issue raised by the Petitioner was determined by the Court of Appeal in the case of **Eunice Cecilia Mwikali Maema v Council of Legal Education and 2 others [2013] eKLR**. The Court is therefore urged to dismiss the petition with costs.

19. I have careful read the decision of **Eunice Cecilia Mwikali Maema (supra)** upon which the respondents place substantial reliance in urging the Court to dismiss the petition. I must straight away state that the Court of Appeal did not state that the applicable law is the Legal Education Act, 2012 irrespective of the time the law degree was obtained. It is noted that the appellant in that case had obtained her degree in July, 2010. When she applied to join the ATP her application was rejected and she was informed that she had not covered the core subjects. The Court of Appeal was clear that the applicable law was the law in place in 2009. This is confirmed by the statements made by the Court of Appeal in the judgment. At Paragraph 26 the Court of Appeal stated:-

> **"It is common ground that Legal Notice 169 of 2009 applied to the appellant's application for admission to the advocates training program."**

At Paragraph 39 the Court again stated:-

> **"To disregard Legal Notice 170 of 2009, which was operational at the material time, would be to act in disregard of existing Regulations. Yes, the respondents may not have pleaded Legal Notice 170 of 2009 but being a matter of law it could in our view be raised."**

20. The Court of Appeal did indeed hold that the core units were applicable to both local and foreign LLB degrees. I, however, do not see any statement in the judgment that the requirement for the law degree to meet the core units was to apply retrospectively to degrees that had been obtained prior to the enactment of the law. The decision of the Court of Appeal is therefore not of any help to the respondents.

21. Although counsel for the Petitioner appear to suggest that the 2009 Regulations did not provide for core units to be met before one could be admitted to the ATP, the Court of Appeal observed in **Eunice Cecilia Mwikali Maema** (supra) that:-

> **"31. Under Regulation 11 of Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, the standards governing the operation of legal education institutions accredited by the Council were set out in the Third Schedule to those Regulations under the title "Physical, Library and curriculum standards for legal education institutions". Paragraph 20 of Part III of the Third Schedule that dealt with curriculum standards provided that:**
>
> **"20. The Under-Graduate Programme shall comprise of the following core units –**
> **(i) legal research and writing;**
> **(ii) law of torts;**
> **(iii) law of contracts;**
> **(iv) legal systems and methods;**
> **(v) constitutional law;**

(vi) criminal law;
(vii) family law & succession;
(viii) law of evidence;
(ix) commercial law (including sale of goods, hire-purchase and agency);
(x) law of business associations (to include insolvency);
(xi) administrative law;
(xii) jurisprudence;
(xiii) equity and the law of trusts;
(xiiv) public international law;
(xv) property law; and
(xvi) labour law."

22. Nevertheless, my view is that even the 2009 laws are not applicable to the Petitioner's case as his degree was obtained in 2008. The respondents have not stated that there was a law in place in 2008 that provided for certain core units to be met before one could be admitted to the ATP. If there was such a law, then the 1st Respondent could not have admitted the Petitioner for training when he first applied to join the ATP in 2008.

23. The question therefore is whether the 2009 and 2012 laws could retrospectively apply to the Petitioner's LLB degree. The case of **Pauline Anna Benadette Onyango v Kenya School of Law [2017] eKLR** presented very similar facts to the case before this Court. The petitioner therein had been admitted to the Kenya School of Law's ATP for the 2005/2006 academic year. She, however, deferred her studies for lack of school fees. She rejoined the School for the 2010/2011 academic year but again sought to defer her studies. Her request was rejected and she was told she could only defer her studies once. She applied to rejoin the ATP for the 2015/2016 academic year but her application was declined on the ground that she did not meet the requirements of the Kenya School of Law Act, 2012 for admission to the ATP. She sued the Kenya School of Law. Allowing her petition, E.C. Mwita, J held that:-

> **"47. The petitioner having enrolled in LL.B class, and in fact obtained her degree qualifications prior to the enactment of the new law, cannot and must not be subjected to it. Doing so would amount to condemning the petitioner for having gone to school early, and that is the unreasonableness that Article 47 seeks to prevent. She must be treated in accordance with the law that existed when she obtained her qualifications. In short, the petitioner qualifies to apply for admission to ATP at the school."**

24. The learned Judge proceeded to hold that:-

> **"50. From what I have stated herein above, I find that the petitioner was qualified to apply for admission to ATP at the respondent School, and the respondent was wrong in applying the law retrospectively to cover her degree obtained prior to the enactment of the new law."**

25. In **Kevin K Mwiti & others v Kenya School of Law & 2 others [2015] eKLR**, the main issue was whether a 2014 amendment to the Kenya School of Law Act, 2012 would apply to students who were already in university when the Kenya School of Law Act, 2012 came into force. G. V. Odunga, J, allowed the petition and granted, among other reliefs, an order:-

> **"A declaration that the Petitioners who were already in the LLB class prior to the enactment of the Kenya School of Law Act are to be treated in the manner contemplated by the guidelines issued by the School prior to the enactment of the Amendment Act. For avoidance of doubt those who had been admitted in the LLB class prior to the enactment of the Kenya School of Law Act are to comply with the provisions of the said Act."**

26. I indeed find merit in the Petitioner's submission that the respondents cannot measure his LLB degree against laws that did not exist at the time he undertook his course. It is therefore obvious that the 1st Respondent acted in excess of its powers by declining to admit the Petitioner to the ATP. This finding equally applies to the 2nd Respondent's purported attempt to recognize and approve the Petitioner's degree.

27. An administrator who applies a law to a person who does not fall within the purview of that law acts in violation of Article 47 of the Constitution which requires administrative action to be expeditious, efficient, lawful, reasonable and procedurally fair. This statement of the law finds support in the decision of the Supreme Court in **Martin Wanderi & 106 others v Engineers Registration Board & 10 others [2018] eKLR** where it was held that:-

> **"[126] In examining Article 47(1) of the Constitution, the starting point is a presumption that the person exercising the administrative power has the legal authority to exercise that authority. Once satisfied as to the lawfulness of the power exercised, is when the court will delve into inquiring whether in the carrying out of that administrative action, there was violation of Article 47(1). This is the test of legality. So that the question of the unlawfulness or otherwise to act is at the onset of the inquiry. Where the act done was *ultra vires* the mandate of the administrative entity, the act is void *ab initio* and the inquiry stops there as there is an outright violation of the Constitution. The question of legality or the lawfulness of an act lies at the core Article 47(1)."**

28. There is nothing lawful, reasonable or procedurally fair in the respondents' decision to apply to the Petitioner's degree laws that did not exist at the time he went to college. They must treat him in the context of the laws that existed at the time he undertook his law studies.

29. Having found that the respondents violated the Petitioner's right to fair administrative action, it also follows that their actions violated the Petitioner's right to education under Article 43(1)(f) of the Constitution. Their actions unlawfully denied the Petitioner admission to the

ATP even though he was qualified to be admitted to the programme. In doing so, they ended up violating the Petitioner's constitutional right to education.

30. The Petitioner has, however, not placed any evidence before this Court in support of his claim that the other constitutional provisions cited in his petition were violated by the respondents.

31. On the amount of damages to be awarded, the Petitioner relies on the Court of Appeal decision in **Peter M. Kariuki v Attorney General [2014] eKLR** and prays for Kshs. 8 million as general damages. It is, however, noted that the cited decision was about violation of the appellant's rights to fair trial and liberty. The Petitioner has not cited cases similar to his. It is also clear that the Petitioner played a significant role in the state of affairs that faces him. The 1st Respondent made its decision in 2014 and he took no action. He waited until the 2nd Respondent rejected his application for admission in 2008 before taking action. In **Martin Wanderi** (supra) an award of Kshs. 200,000/- was made to engineering students who had been denied registration by the respondent board. In my view that should be the appropriate measurement of the award to be made in a case like the one before this Court. I therefore award the Petitioner Kshs. 200,000/- as general damages against the respondents jointly and severally.

32. In summary the petition succeeds and orders shall issue as follows:-

a) A declaration is hereby issued that the respondents' decision as contained in the letters dated 6th January, 2014 and 2nd November, 2018 violated the Petitioner's rights under Articles 43(1)(f) and 47 of the Constitution.

b) An order is hereby issued calling into this Court and quashing the 1st and 2nd respondents' letters to the Petitioner dated 6th January, 2014 and 2nd November, 2018;

c) An order of mandamus is issued directing the respondents to admit the Petitioner to the ATP;

d) The Petitioner is awarded general damages of Kshs. 200,000/- against the respondents; and

e) The Petitioner is awarded costs of the proceedings against the respondents.

Dated, signed and delivered through video conferencing/ email at Nairobi this 14th day of May, 2020.

W. Korir,

Judge of the High Court