



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 36 OF 2018

IN THE MATTER OF: ARTICLES 2, 3, 19, 20, 21, 22, 23, 48, 50, 165, 258 AND 259 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 10, 73 AND 232 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 41, 43 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE TREATY FOR THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY

AND

IN THE MATTER OF: THE PROTOCOL ON THE ESTABLISHMENT OF THE EAST AFRICAN COMMUNITY COMMON MARKET

AND

IN THE MATTER OF: THE ADVOCATES ACT, CHAPTER 16 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE LEGAL EDUCATION ACT, ACT NO. 27 OF 2012

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, ACT NO. 4 OF 2015

BETWEEN

ELIAKIM BUNDE OKAYO.....PETITIONER

AND

COUNCIL OF LEGAL EDUCATION.....RESPONDENT

JUDGMENT

The Petition

1. The petition herein is dated 20th March, 2018 and is supported by affidavit of the Petitioner sworn on 19th March, 2018 and a Supplementary Affidavit sworn on 28th May, 2018.

2. The Petitioner is an adult male citizen of the Republic of Kenya while the Respondent, Council of Legal Education, is a body corporate established under Section 4 of the Legal Education Act, 2012.

3. The Petitioner states that he is an Advocate of the High Court in the Republic of Rwanda and holds a postgraduate Diploma in Legal Practice awarded by the Institute of Legal Practice and Development (ILPD), the only bar school of the Republic of Rwanda which is a Partner State of the East African Community (EAC), and a graduate from Kampala International University with a Bachelor of Laws (LL.B.) Degree. The Petitioner avers that his studies at the Institute of Legal Practice and Development (ILPD) and Subsequently admission to the Rwanda Bar were informed by the ongoing East African Community (EAC) integration process and the law on professional and academic qualifications for admission to the Bar in Kenya, being Section 12(a) (b) 13(1) (b) 13(1) d of the Advocates Act Chapter 16 of the Laws of Kenya. The Petitioner avers that upon being admitted as an Advocate of High Court and being conferred with his Diploma in Legal Practice, at a ceremony held on 12th January, 2017 at the Supreme Court of the Republic of Rwanda, he sought to have his professional qualifications recognised and approved for purposes of admission to the Roll as provided for under Section 12 and 13 of the Advocates Act aforesaid. The Petitioner avers that he was turned away by the Respondent's on account that he was not eligible to be admitted to the Kenyan Bar as he had not practiced in Rwanda for at least 5 years and therefore should join the Advocate training programme, sit and pass the Bar exams. The Petitioner avers that his application to the Respondent to be Cleared/or approved for admission to the Kenyan Bar is premised under Section 13(1) d of the Advocate Act Cap 16 that only requires an applicant to be an Advocate in any of the five (5) East African Community Member States, and as such his application cannot be subjected to the two provision as both Section 13(1) d and 13(1) e are disjunctive in nature. The Petitioner avers that persons who seeks admission to the Kenyan Bar under Section 13(1)(d) of the Advocates Act Cap 16 only needs to prove that:-

(i) He or she is a citizen of Uganda, Tanzania, Rwanda, Burundi and Kenya.

(ii) He is an Advocate for the time being of the High Court in the Republic of Rwanda, Burundi, Tanzania, Uganda, and Kenya.

4. The Petitioner avers that the Republic of Rwanda is not only part of the Commonwealth, but is also a member state in the East African Community and as an Advocate from a Member State the Petitioner is exempted from the requirement of 5 years practice as required by Section 13(1)(e) of the Advocates Act. The Petitioner states that the Respondent's duty is only limited to confirming that the Applicant's academic qualification pursuant to Section 13(1)(b) of the Advocates Act are met.

5. The Petitioner avers that by dint of the provisions of Section 8 (e) (f) of the Council of Legal Education Act No. 27 of 2012 the Respondent's mandate was only extended in offering professional examination and approval of foreign qualifications but not clearing a person who is already admitted as an Advocate in any East African Community Member state in pursuant to Section 13(1) (d) of the Advocate Act Cap 16 Laws of Kenya. The Petitioner contends that by their deliberate actions and/or omissions the Respondent has breached the Petitioner's legitimate expectations. The Petitioner had, among others, the following legitimate expectations:

a) That the Respondent would not act contrary to the provisions of the Constitution of Kenya, 2010, the Treaty Establishing the East African Community , Advocates Act Cap. 16, the Fair Administrative Action Act, No. 4 of 2015, and any other related laws in addition to the principles of public policy and rules of natural justice.

b) That the Respondent would exercise its statutory powers and discharge their functions by strictly adhering to all lawful procedures including compliance with the provisions of Articles 10, 43, 47, 73 and 232 of the Constitution of Kenya 2010.

c) That the Respondent would treat all persons seeking confirmation or clearance of their professional and Academic qualifications fairly and not act in any manner that is discriminatory or aimed at achieving a collateral purpose.

d) That the eligibility criteria stipulated under Section 13 of the Advocates Act would not be arbitrarily and whimsically departed from.

e) That the Respondent would not impose a more stringent test of eligibility than as stipulated in Section 13 of the Advocates Act Cap 16.

f) That upon creation of this common market as established by the Treaty Establishing the East African Treaty there was legitimate expectation that any East African citizen was now free to pursue legal education in any of the legal bodies within East Africa, acquire professional academic qualification and be admitted to the respective Roll of Advocates and thereafter apply to be enrolled in other Partner states Roll of Advocates in compliance with the member State's relevant Statutes and in the Petitioner's case the Advocates Act Cap 16 Laws of Kenya.

6. The Petitioner prays for the following orders:

(a) A Declaration that the Respondent's conduct/or decision in a letter dated 2nd November 2017 is contrary to and inconsistent with the provisions of Articles 10, 73 and 232 of the Constitution of Kenya, 2010.

(b) A Declaration that the Respondent has violated the constitutional rights of the Petitioner guaranteed and protected under Articles 27, 41, 43, and 47 of the Constitution of Kenya,2010.

(c) An order of certiorari to remove into this Court for purpose of quashing forthwith and to quash the Respondent's decision in a

letter dated the 2nd November, 2017.

(d) An order of mandamus compelling the Respondent to recognise and approve the Petitioner's professional and academic qualifications and for purposes of Section 12(a) (b) 13(1) (b) and 13(1) (d) of the Advocates Act Chapter 16 of the Laws of Kenya.

(e) An order that the Respondent do pay the Petitioner general damages for breach of his constitutional rights and loss of opportunities, at Kenya shillings Fifty Thousand (50,000/=) per Month from the date when the Petitioner applied to be cleared of his professional and academic qualification for purpose of admission as an Advocate of High Court of Kenya until the Respondent clears the Petitioner.

(f) Costs of this Petition.

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

The Response

7. The 1st Respondent raised Grounds of Opposition dated 24th September, 2018 stating that admission of candidates to the Roll of Advocates as Advocates of the High Court of Kenya is guided by the provisions of Section 8 of the Legal Education Act, Section 12, 13 and 15 of the Advocates Act Cap 16 Laws of Kenya. The council of Legal Education has a role to play in the admission of a candidate as an advocate of the High Court of Kenya pursuant to the provisions of Section 8 (1) (e) of the Legal Education Act as read together with Section 15 of the Advocates Act, Cap 16 Laws of Kenya. Section 8 (1) (e) of the Legal Education Act provides for the functions of the Council of Legal Education as follows:

(1) The functions of the council shall be to –

(a) regulate legal education and training in Kenya offered by legal education providers;

(b) licence legal education providers;

(c) supervise legal education providers, and

(d) advise the Government on matters relating to legal education and training

(e) Recognize and approve qualifications obtained outside Kenya for purposes of admission to the Roll.

(f) administer such professional examinations as may be prescribed under Section 13 of the Advocates Act

8. Section 15 of the Advocates Act at pertinent part reads as follows:

(1) Every person who is duly qualified in accordance with this Part may apply for admission as an advocate, and the application shall be made by petition in the prescribed form, verified by oath or statutory declaration addressed to the Chief Justice, and filed with the Registrar together with a notice intimating that the petition has been so filed together with such other documents as may be prescribed and the applicant shall also deliver a copy of the petition and of any document delivered therewith to the secretary of the Council of Legal Education and to the secretary of the society.

(2)

(3) Every petition made under this section shall be heard

by the Chief Justice in chambers within ninety days of the expiry of the period referred to in subsection (2), and the Council of Legal Education and the Society shall have the right to be heard thereon; and if the Chief Justice is satisfied as to the qualifications, service and moral fitness of the petitioner, he shall adjourn the hearing into open court and shall order that the petitioner be admitted as an advocate...

(4)

(5)

9. The Respondent submitted that the function of the Respondent in terms of approval of foreign qualification for purposes of admission to the Roll of Advocates starts upon the Respondent being served with an application for admission in form of a petition in accordance with 15 (1) of the Advocates Act and subsequently making presentations before the Chief Justice in accordance with Section 15 (3) of the Advocates Act, Cap 16 Laws of Kenya. The Respondent submitted that it followed the law in making its decision not to approve the qualifications of the Petitioner before him making his application to the Chief Justice by way of a petition. The Respondent avers that the petition is premature as the Petitioner is yet to lodge an application in form of a petition with the Chief Justice and serve it on the Respondent who will then render itself on the qualifications of the Petitioner in accordance with Section 15 of the Advocates Act. The Respondent avers that the

petition does not disclose any violation of the constitutional rights and freedoms of the Petitioner, and prays that the petition dated 20th March, 2018 and filed on the same day be dismissed with costs to the Respondent.

10. The 1st Respondent also filed a Preliminary Objection dated 18th April, 2018. However, the same was heard and dismissed by court on 25th June, 2018.

Submissions

11. Parties filed submissions which were highlighted in court on 8th November, 2018. I have considered the submissions and the petition. In my view the only issue for determination is whether or not the Ex parte Applicant has followed the lawful procedure so as to be granted admission to the Roll of Advocates of the High Court of Kenya.

The Determination

12. **Section 12 of the Advocates Act provides as follows:-**

Subject to this Act, no person shall be admitted as an advocate unless—

(a) he is a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania; and b) he is duly qualified in accordance with Section 13

Section 13 of the Advocate Act provides as follows:-

Professional and academic qualifications

(1) A person shall be duly qualified if—

(a) ...

(b) ...

(c) ...

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

Section 15 of the Advocates Act provides as follows:-

Admission as an advocate

(1) Every person who is duly qualified in accordance with this Part may apply for admission as an advocate, and the application shall be made by petition in the prescribed form, verified by oath or statutory declaration addressed to the Chief Justice, and filed with the Registrar together with a notice intimating that the petition has been so filed together with such other documents as may be prescribed and the applicant shall also deliver a copy of the petition and of any document delivered therewith to the secretary of the Council of Legal Education and to the secretary of the Society.

(2) The notice referred to in subsection (1) shall be publicly exhibited by the Registrar for one month before any order shall be made on the petition.

(3) Every petition made under this section shall be heard by the Chief Justice in chambers within ninety days of the expiry of the period referred to in subsection (2), and the Council of Legal Education and the Society shall have the right to be heard thereon; and, if the Chief Justice is satisfied as to the qualifications, service and moral fitness of the petitioner, he shall adjourn the hearing into open court and shall order that the petitioner be admitted as an advocate: Provided that any period during which the High Court is on vacation shall be excluded when calculating the period of ninety days referred to in subsection (3).

Section 8 of the Legal Education Act provides as follows:

(1) The functions of the Council shall be to:

(a) ...

(b) ...

(c) ...

(d) ...

(e) recognize and approve qualifications obtained outside Kenya for purposes of admission to the Roll.

13. From the foregoing it is evident that admission to the Bar in Kenya is a process controlled by law which must be strictly adhered to. The Respondent here pursuant to Section 8 of the Legal Education Act oversights the process in two ways: Firstly it verifies the qualification of the Applicant to be correct. Secondly, under Section 15(3) of the Advocates Act the Applicant must petition the Chief Justice for admission. A copy of that petition is to be availed to the Council of Legal Education and the Law Society of Kenya, both of which bodies have a right to be heard on the petition.

14. I have looked at the petition. There is no evidence that the Petitioner has complied with Section 15 of the advocates Act. The Petitioner has not petitioned the Chief Justice for admission, with a copy to the Council of Legal Education. The council in the letter dated 25th July, 2017 demanded the following documents from the Petitioner so as to verify the Petitioner's qualifications:

(a) Certified copies of all High School qualifications ('O' and 'A' level qualifications as applicable);

(b) Certified copies of University LL.B. Degree Certificates and transcripts;

(c) Certified copy of admission certificate as an Advocate in the relevant jurisdiction;

(d) A statement from the relevant Bar Association or Professional Body confirming that you are a member in good standing and confirming the period which you have practiced in that county; and

(e) For applicants whose law qualifications were obtained outside Kenya, evidence of accreditation status of the LL.B. Programme in the country of award.

15. Those documents were required pursuant to Section 8(e) of the Legal Education Act.

(e) "recognize and approve qualifications obtained outside Kenya for purposes of admission to the Roll."

There is no evidence that those documents were availed to the Council by the Petitioner.

16. The upshot of the above findings is that the petition before the Court is premature and lacks merit until the Petitioner fully complies with the law.

17. For those reasons the petition is dismissed. Parties to bear own costs.

Dated, Signed and Delivered in Mombasa this 2nd day of April,

2019.

E. K. OGOLA

JUDGE

In the presence of:

Mr. Wambani holding brief Odongo for Petitioner

Ms. Kisingo holding brief Oduor for Respondent

Mr. Kaunda Court Assistant