REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 261 OF 2018

IN THE MATTER OF AN APPLICATION FOR ORDERS OF *CERTIORARI* & *MANDAMUS*

AND

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

AND

IN THE MATTER OF KENYA SCHOOL OF LAW ACT, NO. 26 OF 2012

AND

BETWEEN

REPUBLIC.....APPLICANT

AND

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

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

ATTORNEY GENERAL.....3RD RESPONDENT

AND

EX PARTE APPLICANT.....MITCHELLE NJERI THIONGO NDUATI

JUDGMENT

The Parties.

1. The applicant, Michelle Njeri Thiongo Nduati is an adult of sound mind residing in Nairobi.

2. The first Respondent is the Council of Legal Education (hereinafter referred to as the Council) established under section 4 of the Legal Education Act.[1] It is a body corporate with perpetual succession and a common seal. It is capable of suing and being sued in its corporate name; taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property; borrowing or lending money; and, doing or performing any other things or acts for the furtherance of the provisions of the Act which may be lawfully done or be performed by a body corporate. It is the successor of the Council of Legal Education established under the Council of the Legal Education Act, 1995 (Cap 16A), (now repealed).

3. The second Respondent, the Kenya School of Law (herein after referred to as the KSL) is a body corporate with perpetual succession and a common seal established under section 3 of the Kenya School of Law Act[2] (herein after referred to as the KSL Act). In its corporate name it is capable of suing and being sued, taking, purchasing or otherwise acquiring, holding or disposing of movable and immovable property, entering into contracts and doing or performing such other things or acts necessary for the proper performance of its functions under the Act. KSL is the successor of the Kenya School of Law established under the Council of Legal Education Act.[3]

4. The third Respondent is the Hon. Attorney General. Under Article **156(4)** of the Constitution, the Attorney General is the principal legal adviser to the Government. He represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. He performs any other functions conferred on the office by an Act of Parliament or by the President. Pursuant to section 4 (5) (d) of the Council of Legal Education Act, the Honourable Attorney General is a Member of the Council.

5. Pursuant to section 8 of the Council of Legal Education Act,[4] the functions of the Council include regulating legal education and training in Kenya offered by legal education providers; licencing legal education providers; supervising legal education providers; and advising the Government on matters relating to legal education and training.

6. Pursuant to section 4 of the KSL Act, the School is a public legal education provider responsible for the provision of professional legal training as an agent of the Government. Without the generality of the forgoing, it trains persons to be advocates under the Advocates Act;[5] it ensures continuing professional development for all cadres of the legal profession; it provides para-legal training and other specialized training in the legal sector; it develops curricular, training manuals, conduct examinations and confer academic awards; and undertakes projects, research and consultancies.

Factual Matrix.

7. The applicant sates that she holds a Bachelor of Arts in Law from Keele University, United Kingdom. She states that by a letter dated 6th July 2015, Keele University confirmed that she was admitted at the University on 26thAugust 2011 and completed on 6thJuly 2015.

8. She further states that on 22ndAugust 2016 she applied to the first Respondent seeking recognition of her Bachelor of Arts in Law Degree, with a view to be admitted at the second Respondent's Advocates Training Programme (hereinafter referred at as the ATP).

9. However, by a letter dated 21stOctober 2016, the first Respondent informed her that it had declined to approve and recognize her Degree for the purposes of admission into the ATP, on grounds that it cannot recognize or approve her Bachelor of Arts in law Degree qualification or degree of any other nomenclature.

10. The applicant states that despite being in possession of a LLB Degree, the Respondent has declined to recognize or approve her LLB Degree program thus denying her admission into the ATP even though having a letter from Riara University confirming that she had successfully completed the preferred remedial classes.

11. In addition, the applicant states that she is ready to and willing to pursue studies on the core units, which are not comprised in her LLB Degree program as shall be identified to her by the Respondent, but prior to her undertaking the remaining units, she requires recognition or approval of her LLB Degree by the first Respondent.

12. Further, the applicant states that the decision declining to recognize or approve her Bachelor of laws Degree will have serious and far reaching consequences since it denies her an opportunity to pursue the AT P, and, that, her desire to pursue a career in the legal profession shall remain unfulfilled.

Legal foundation of the application

13. The applicant states that Regulation 6 of the Third Schedule to the Legal Education (Quality Assurance and Accreditation) Regulations provide that the minimum requirements for admission to the ATP shall be a Bachelor of Laws (LLB) Degree from a recognized University. She referred to the Second Schedule to the KSL Act, which provides that a person shall be admitted to the school if having passed the relevant examination of any University, University Colleague or other Institution prescribed by the Council, holds or becomes eligible for the conferment of the Bachelor of Laws (LLB) degree of that university, University College or other Institution.

14. The applicant further cited Regulation 7(4) and (5) of the Legal Education Accreditation and Quality Assurance Regulations, 2016, which stipulates that the Respondent may decline to recognize or approve foreign qualifications in law, or recommend an applicant to undertake a remedial programme at a legal education provider in Kenya.

15. The applicant stated that no reasons were given for declining her application, and, that, the impugned decision is discriminatory because a student by the Name Eunice Cecilia Mwikali Maema who obtained a Bachelor of Laws and Business by Coventry University, England had her LLB degree recognized by the first Respondent.

16. She also stated that the impugned decision was made in bad faith, that it is *ultra vires*, and, that, it is an abuse of discretion. In addition, the applicant stated that the decision was undertaken in excess of jurisdiction, and, that, it violates her legitimate expectation.

17. In addition, the applicant contends that the impugned decision is unreasonable, irrational and that the first Respondent failed to take into account the fact that the applicant holds a Bachelor of Laws Degree from a recognized University. Further, she stated that the impugned decision is unreasonable and irrational for stating that her Bachelor of Arts in law degree is not an LLB degree for the purposes of admission into the ATP. Fu

18. The applicant further states that the decision violates her right to legitimate expectation that his degree will be recognized and approved, since, the first Respondent has recognized and approved degree for other persons in similar circumstances.

19. Lastly, the applicant states that the impugned decision violates Regulations 7(4) & (5) of the Legal Education (Accreditation and Quality

Assurance) Regulations, 2016, and, that, it has far reaching consequences to her since she is denied the opportunity to pursue a career in the legal profession.

Applicant's Supplementary Affidavit

20. At the *ex parte* stage, I observed that the decision under challenge was made more than 6 months prior to filing the application seeking leave and nevertheless directed that the application be served and scheduled for mention *inter partes* on 9th July 2018.

21. On 9th July 2019, the applicant filed a supplementary affidavit deposing that her application for admission to the ATP was declined by the Respondents on 1st December 2016, and, that a decision on her appeal to the Respondents was communicated on 11th January 2018, hence, time began to run from the said date. She annexed a copy of the letter communicating the said decision.

The Reliefs sought.

22. The *ex parte* applicant seeks the following orders:-

> *a. An order of **Certiorari** to quash the first Respondent's decision contained in the letter dated 18th December 2016 declining to recognize or approve her Bachelors of Laws Degree from Keel University for purposes of the Advocates Training Programme at the second Respondent.*
>
> *b. An order of Mandamus compelling the first Respondent to recognize or approve her Bachelor of Laws Degree for purposes of the Advocates Training Programme at the second Respondent.*
>
> *c. The costs this application be provided for.*

First Respondent's Notice of Preliminary Objection

23. The first Respondent filed a Notice of Preliminary Objection on 12th September 2018 stating that this court lacks jurisdiction to entertain this case. It also stated that the leave to institute the judicial review was granted contrary to Order 53 (2) of Civil Procedure Rules. In addition, it stated that there is no flexibility and or provision for extension of time in judicial review proceedings under section 8 & 9 of the Law Reform Act[6] and Order 53 Rule 2 of the Civil Procedure Rules, 2010.

Second respondent's Replying Affidavit

24. **Fredrick Muhia,** the second Respondent's Academic Services Manager swore the Replying Affidavit dated 10th September 2018. He averred that the basic minimum for joining the second Respondent ATP is a Bachelor of Laws Degree, and that the applicant does not meet the said requirement.

Applicant's Supplementary Affidavit

25. The applicant swore a supplementary Affidavit dated 26th October 2018 in reply to the first Respondents Notice of Preliminary Objection and the second Respondents Replying Affidavit. She averred that her suit is not statute barred since the final decision was made on 11th January 2018 and, that, this court has jurisdiction to hear this matter having obtained leave under Order 53(2) of the Civil Procedure Rules.

26. She averred that the degree conferred upon her is a Bachelor of Arts in Law, and, that, her studies covered all the relevant areas of law as required by the University.

27. Lastly, she averred that by a letter dated 7th September 2015, the Respondent directed her to attend the pre-school remedial programme at Riara University in order to meet the requirements for admission to the Keya School of Law. However, upon completion the Respondent wrote to her on 21st October 2016 stating that the Respondents do not recognize her degree.

28. In addition, in her further affidavit dated 12th July 2019, she deposed that she successfully completed her studies at Riara University. She annexed copies of her academic transcripts

The Third Respondent

29. The third Respondent did not file any pleadings nor did it participate in these proceedings.

Issues for determination

30. Upon analyzing the facts presented by the parties, I find that the following issues distill themselves for determination:-

> *a) Whether this suit offends the provisions of Order 53 of the Civil Procedure Rules and section 8 & 9 of the Law Reform Act and the first Respondents right to be heard*

b) Whether the Respondents violated the ex parte applicant's right to legitimate expectation.

c) Whether the impugned decision is unreasonable, irrational, made in bad faith and or ultra vires.

d) Whether the impugned is illegal on grounds that the ex parte applicant was not provided with reasons.

a. Whether this suit offends the provisions of Order 53 of the Civil Procedure Rules and section 8 & 9 of the Law Reform Act and the first Respondents right to be heard

31. The *ex parte* applicant's counsel did not address this particular issue in her submissions. However, in her supplementary Affidavit referred to above in reply to the first Respondent's Notice of Preliminary Objection, she averred that her suit is not statute barred since the final decision was made on 11th January 2018 and, that, this court has jurisdiction to hear this matter having obtained leave under Order 53(2) of the Civil Procedure Rules.

32. The first Respondent's counsel, to fortify the grounds of opposition referred to above, submitted that the *ex parte* applicant's pleadings and the entire proceedings offend the first Respondent's right to a fair trial. It was his submission that the applicant obtained leave to quash a decision dated 1st December 2016, but in the substantive motion the applicant sought to quash a decision dated 18th December 2016. He added that in her supplementary affidavit dated 26th October 2018, the applicant introduced yet another letter dated 11th January 2018 while in her statutory statement refers to a letter dated 21st October 2016. Counsel pointed out that in the verifying affidavit the applicant only annexed one letter dated 7th September 2015. He argued that the applicant is seeking orders for which no leave was granted. He added that failure to annex the other letters puts the first Respondent in a precarious position since it is confronted with a case, which it cannot adequately answer.

33. Counsel further argued that the applicant's application was filed out of time contrary to section 9(3) of the Law Reform Act[7] and Order 53 Rule 2 of the Civil Procedure Rules, which are couched in absolute terms. To buttress his argument, he cited *Ako v Special District Commissioner* and *Re an application by Gideon Waweru Gathunguri*.[8]

34. The second Respondents counsel did not address this particular issue.

35. The issue under consideration presents an opportunity to this court in a subtle fashion to consider the question whether under the 2010 Constitution; leave to commence Judicial Review proceedings is still a prerequisite. Differently put, is the requirement for leave to commence Judicial Review proceedings consistent with the dictates of the 2010 Constitution.

36. I will start from the uncontested premise that Order 53 of the Civil Procedure Rules is borrowed from sections 8 and 9 of the Law Reform Act[9] which provisions are borrowed from common law judicial Review principles. I am alive to the provisions of section 12 of the Fair Administrative Action Act,[10]which import common law judicial review principles to the act. With the above in mind, I will first address the question on the importance of leave in judicial review proceedings under common law principles. The importance of obtaining leave in a Judicial Review application was eloquently stated in *Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others*[11] thus:-

> *" is to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the court is satisfied that there is a case for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived.."(Emphasis added)*

37. In *Meixner & Another vs A.G,*[12] it was held that the leave of court is a prerequisite to making a substantive application for Judicial Review with a view to filtering out frivolous applications and the grant or refusal involves an exercise of judicial discretion and the test to be applied is whether the applicant has an arguable case. Thus, the first step in the Judicial Review procedure involves the mandatory **"leave stage."** At this stage, an application for leave to bring Judicial Review proceedings must first be made. The leave stage is used to *identify* and *filter* out, at an early stage, claims which may be *trivial* or without *merit*.

38. The above cases including the cases cited by counsel for the first Respondent were determined long before the promulgation of the 2010 Constitution. A pertinent question arises. That, is, whether under the 2010 Constitution, a person requires leave to approach the court. The entrenchment of the right to access the court in the Constitution opened the doors to access justice, a position best explained by the phrase *"Justice is open to all, like the Ritz Hotel"*[13]attributed to a 19th Century jurist.

39. Article 47(1) of the Constitution guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Flowing from Article 47 is the Fair Administrative Action Act.[14] Section 4 (1) of the act replicates the provisions of Article 47(1). Section 7(1) of the act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-a court in accordance with section 8; or (b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

40. Article **22** of the Constitution guarantees the right to institute court proceedings to enforce the Bill of Rights. Article **23** grants the court the authority to uphold and enforce the Bill of Rights. Article **48** guarantees the right to access court. Article **258** provides that every person has a right to institute court proceedings claiming that the Constitution has been contravened or is threatened with contravention. Also relevant is the supremacy of the Constitution over all other laws and its binding nature decreed in Article **2.**

41. Section **2** of the Fair Administrative Action act[15] defines an **"administrative action"** to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

42. Article **23 (3)** provides the remedies the court can grant in cases for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. It also provides that in proceedings brought under Article **22,** the court can grant appropriate relief including a declaration of rights, an injunction, a conservatory order, and invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the bill of rights, an order of compensation and *an order of Judicial Review*.

43. Considering the above constitutional provisions and in particular the right to access justice, the question that arises is whether a citizen citing violation of constitutional rights or challenging an administrative action or a decision of a tribunal requires the leave of the court to apply for Judicial Review Orders. Section **7 (1)** of Part two of the sixth schedule to the Constitution provides that:-

> *(1) "All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution."*

44. The position that all law must conform to the Constitutional edifice remains unchallenged. It follows that the provisions of sections **8** and **9** of the Law Reform Act[16] and Order **53** of the Civil Procedure Rules must conform to the Constitution or be construed with such adaptations, alterations, modifications so as to conform with the Constitution. As the Supreme Court of Appeal of South Africa observed[17] *"All statutes must be interpreted through the prism of the Bill of Rights."*

45. Judicial Review in now entrenched in the Constitution. The concept of Judicial Review under our Constitution is similar to that under the Constitution of South Africa; hence, jurisprudence from South Africa on the subject may be useful. In *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others,*[18] it was held that, the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution. The court proceeded to hold that insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. It added that in the Judicial Review of public power, the two are intertwined and do not constitute separate concepts. The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

46. It is useful to point out that the entrenchment of the power of Judicial Review, as a constitutional principle expanded the scope of the remedy. *First,* parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. *Second,* the right to access the court is now constitutionally guaranteed. This makes the requirement for leave unnecessary. *Third*, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article **23(3) (f).** *Fourth,* section **7** of the FAA Act provides that "any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision. Section **7 (2)** of the act provides for grounds for applying for Judicial Review.

47. This court has severally opined that court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a *constitutional supervision* of public authorities involving a challenge to the legal validity of the decision.[19] Time has come for our courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

48. The *ex parte* applicant has explained that in the application seeking leave, it cited the original decision, subsequently, there was a further communication declining her appeal. The impugned decisions have been annexed. What is important is for the applicant to demonstrate that an administrative decision within the definition in section 2 of the FAA act is the subject of the challenge in this case. I have severally stated that time has come for Parliament to consider the relevancy and constitutionality of the sections 8 and 9 of the Law Reform Act[20] and Order 53 of the Civil Procedure Act, 2010. This is because our Constitution guarantees access to justice. The right to approach the court received a seal of constitutional approval, courtesy of Article **48** of the Constitution. This in my view rendered provisions of the law that require a litigant to seek courts leave to commence Judicial Review proceedings obsolete.

b. Whether the Respondents violated the ex parte applicant's right to legitimate expectation.

49. The *ex parte* applicant/s counsel submitted that the Respondent's violated the applicant's right to legitimate expectation. To buttress her argument counsel relied *Eunice Cecilia Mwikali Maema v The Council of Legal Education and Two Others.*[21]

50. Counsel for both Respondents did not specifically address this issue.

51. On record is a letter dated 7th September 2015 from the first Respondent addressed to the *ex parte* applicant. The reference to the letter is "Recognition and approval of Foreign Qualifications." It reads:-

> *"Reference is made to your application for recognition and approval of foreign qualification which we acknowledge receipt.*
>
> *After reviewing your qualifications and examining the course content covered, Council recommends that you attend the Remedial Programme in order to satisfy the provision of Part 11 of the Second Schedule to the Legal Education Act, 2012.*

Kindly attend the Remedial Programme in the following Units:-

a) Labour Law.

b) Public International Law.

c) Jurisprudence.

d) Law of Business Associations (including insolvency).

e) Commercial Law.

f) Family Law & Succession.

52. The above letter was signed by Prof. W. Kulundu- Bitonye, Secretary/Chief Executive Officer Council of Legal Education.

53. Annexed to the *ex parte* applicant's supplementary affidavit dated a letter dated 4th February 2016 from the first Respondent addressed to the second Respondent's Director/ Chief Executive Officer, stating that:-

"This is to confirm that the course content of the unit Legal Research and Writing was covered by

the applicant at the University in the Module Styled "Law 10021 Legal Skills."

We have attached a copy of the Module as provided by the University, for ease of reference. Any

assistance to the applicant is appreciated"

54. The second Respondent wrote a letter dated 1st December 2016 addressed to the *ex parte* applicant informing her that her application was not successful because her LLB degree did not meet the threshold of 16 core subjects prescribed by the Legal Education Act, 2012 for purposes of admission to the ATP. The letter informed her that the missing course is Public International Law.

55. The applicant in her Statutory Statement states that her Degree comprises of the following units:-

a) Psychology and Crime.

b) Legal Skills.

c) Legal Systems.

d) Torts 1-Foundations.

e) Torts 2- Development.

f) Public Law 1- Constitutional Law.

g) Public Law 2- Administrative Law.

h) Applied Psychology.

i) Criminal Law 1.

j) Criminal Law 11.

k) Contract Law 1.

l) Contract 2- When things go wrong.

m) Land Law 1.

n) Land Law 2.

o) Land and Ethics.

p) Law and Economics.

q) Equity 1.

r) Equity 2.

s) Evidence.

t) Law of the European Union 1.

u) Law of the European Union 2.

v) International Human Rights.

w) Dissertation (Single Module)-ISP.

x) Commercial Law

56. Regulation 16(2) of the Third Schedule to the Legal Education (Quality Assurance and Accreditation) Regulations provides that an undergraduate programme in law shall comprise of the following core units —

(a) Legal Research;

(b) Law of Torts;

(c) Law of Contracts;

(d) Legal Systems and Methods;

(e) Criminal Law;

(f) Family Law and Succession;

(g) Law of Evidence;

(h) Commercial Law including (Sale of Goods, Hire-purchase and Agency);

(i) Law of Business Associations (to include Insolvency);

(j) Administrative Law;

(k) Constitutional Law;

(1) Jurisprudence;

(m) Equity and the Law of Trusts;

(n) Property Law;

(o) Public International Law; and

(p) Labour Law

57. The Academic Transcripts from Riara annexed to the *ex parte* applicant's further Affidavit dated 12th July 2019 confirms that she completed the Pre-Kenya School of Law Programme. It shows that she undertook the following subjects-Constitutional Law 11, Commercial Law, Law of Business Associations 1, Labour Law, Insolvency Law, Jurisprudence, Law of Business Associations 11, Family Law, Law of Succession, Legal Research & Writing 11.

58. A notable omission in the list of subjects covered at Riara University is Public International Law. This unit is one of the subjects listed in the first Respondents letter dated 7th September 2015. This is the course the *ex parte* applicant was informed vide the letter dated 1st December 2016 was "missing" because of which her application was not successful. More fundamental is the fact that Public International Law is among the core subjects listed in Regulation 16(2) of the Third Schedule to the Legal Education (Quality Assurance and Accreditation) Regulations reproduced above.

59. A procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims, the court follows a two-step approach. *First,* it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. *Second,* if the answer to this question is

affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation.

60. The first step in the analysis has both an objective and a subjective dimension. *First*, it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not.[22] Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation.

61. The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty.[23] Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law.[24] Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows:-

> *"Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public's fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices."**[25]***

62. Legal certainty is not, however the only principle at play in legitimate expectation doctrine. The counter value of legality is especially important in the context of the substantive protection of legitimate expectations.[26] The fear in protecting legitimate expectations substantively is that administrators may be forced to act *ultra vires.* That would be the case where an administrator has created an expectation of some conduct, which is beyond his authority or has become beyond his authority due to a change of law or policy. If the administrator were consequently held to that representation, he would be forced to act *contra legem.* It is clear that such representations will not be upheld by the court.[27] The value of legality in law has led to the requirement that the expectation must be one of lawful administrative action before it can be either reasonable or legitimate. Legality therefore seems to take precedence over legal certainty in law. As stated above, there can be no reasonable expectation where the representation is of unlawful conduct and hence the question of legitimacy does not arise.

63. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in *National Director of Public Prosecutions v Philips*.[28] These include:- **(i)** that there must be a representation which is "clear, unambiguous and devoid of relevant qualification," **(ii)** that the expectation must be reasonable in the sense that a reasonable person would act upon it, **(iii)** that the expectation must have been induced by the decision-maker and **(iv)** that it must have been lawful for the decision-maker to make such representation. If such an expectation exists it will be incumbent on the administrator to respect it and afford the individual holding that expectation due procedure before the expectation is disappointed. Failing such procedure, the individual may approach a court to review the administrator's actions on the ground of procedural unfairness. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

64. Addressing the subject of legitimate expectation, ***H. W. R. Wade & C. F. Forsyth****[29]* at pages 449 to 450, thus:-

> *"It is not enough that an expectation should exist; it must in addition be legitimate….**First** of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation….. **Second**, clear statutory words, of course, override an expectation howsoever founded….. **Third,** the notification of a relevant change of policy destroys any expectation founded upon the earlier policy…."*

> *"An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."* (Emphasis added)

65. It follows that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet ones expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute.

66. Regulation 16 (2) of the Third Schedule to the Legal Education (Quality Assurance and Accreditation) Regulations lists the core units which must be covered in the undergraduate programme in law. The word shall, which in legal parlance is construed to import a mandatory prescription appears in the said provision. As pointed out above, the *ex parte* applicant was given a list of subjects to cover in her remedial classes. She completed the remedial classes but her own documents from Riara University do not show that she studied Public International Law. The letter from the KSL refereed to earlier lists this one unit as the missing core subject.

67. I have in sufficient detail pronounced the law and tests for the doctrine of legitimate expectation to apply. At the risk of repeating myself, I point out that the doctrine of legitimate expectation cannot operate against clear provisions of the law and that it must be devoid of relevant qualification. The applicant herein has not demonstrated that studied the "the missing core unit," that is Public International Law. This being an express requirement of the law, the doctrine of legitimate expectation cannot apply in the circumstances of her case, the test being, the said doctrine does not operate against clear provisions of the law.

c. Whether the impugned decision is unreasonable, irrational, made in bad faith and or ultra vires.

68. The applicant's counsel submitted that the impugned decision is unreasonable, irrational, made in bad faith, *ultra vires* the Regulations and was arrived at in abuse of power. To buttress her argument, she relied *Eunice Cecilia Mwikali Maema v The Council of Legal Education and Two Others*[30] and *Monica Wamboi Nganga & Others v The Council of Legal Education.**[31]***

69. The first Respondent's counsel submitted that the applicant seeks to be exempted from mandatory requirements of the law, that is, the Legal Education Act,[32] the attendant Regulations and the Kenya School of Law Act.[33] He argued that section 16 of the KSL Act[34] read together with the second schedule lists the requirements for admission to the ATP to be a LLB Degree. In addition, he argued that the applicant possess a Bachelor of Arts Degree in Law, which is not a LLB Degree within the prescription of the law. He submitted that a similar position was determined by the Court of Appeal in *Muamar Nabeel Onyango Khan v Council of Legal Education*[35] which held that a degree in politics and law is not a degree in law for purposes of admission to the Kenya School of Law. He submitted that excusing the applicant from the legal requirements would be illegal and would set a bad precedent for the future. He maintained that the first Respondent acted within the law.

70. The second Respondent's counsel cited section 16 of the KSL Act and paragraph 1 (a) of the second Schedule to the Act and argued that the applicant's degree is not a Bachelor of Laws Degree as contemplated in the said provisions. He submitted that the applicant does not meet the stipulated requirements for admission into the ATP. He relied on *Republic v Kenya School of Law and Council of Legal Education ex parte Daniel Mwaura Marai*[36] and *Peter Githaiga Munyeki v Kenya School of Law*[37] for the holding that the requirements to be considered are those in the KSL Act. In addition, counsel cited the Court of Appeal in *Muamar Nabeel Onyango Khan v Council of Legal Education and 2 Others.*

71. The submissions by both the first and second Respondents advocates are diametrically opposed to the position taken by their respective clients. In the letter dated 7th September 2015 referred to above, Prof. Kulundu- Bitonye, the first Respondents Secretary/ Chief Executive Officer was explicit that he reviewed the *ex parte* applicants qualifications and had examined the course content she covered. He proceeded to request her to attend remedial programme for the units listed in his letter.

72. Similarly, the second Respondent, through its Director, Chief Executive and Secretary Prof. PLO Lumumba in his letter dated 1st December 2016 informed the *ex parte* applicant that she had only one missing unit, that is Public International Law. In fact, the letter dated 26th February 2018 dismissed the applicant's appeal citing the reasons stated in the letter dated 1st December 2026.

73. It is clear that the Respondents in their previously mentioned letters never stated that the basic requirement is a LLB Degree. It is for this reason that I find that both Respondents' Advocates submissions materially differ with the positions taken by their respective clients. It is important to point out that the above letters are not denied.

74. However, in my view, the impugned decision cannot be said to be legally frail on the grounds of unreasonableness, irrationality, bad faith, *ultra vires* or abuse of office because the decision is supported by Regulation 16(2) of the Third Schedule to the Legal Education (Quality Assurance and Accreditation) Regulations, which prescribes the core units which must be covered. To the extent that the *ex parte* applicant has not demonstrated that she sat for and passed Public International Law, which is a core subject, the decision cannot be assailed on any of the above grounds. Differently stated, the decision has a basis in law.

d. Whether the impugned is illegal on grounds that the ex parte applicant was not provided with reasons

75. The applicant's counsel argued that the impugned decision is illegal because it failed to provide reasons for the decision, and also, the first Respondent failed to recommend to her to pursue remedial classes as provided under Regulation 7(4)(5) of the Legal Education (Accreditation and Quality Assurance Regulations) 2016. Counsel placed reliance on *Kelvin Mwiti & Others v Kenya School of Law and 2 Other**[38]** Jonnah Tusasirwe & 10 others v Council of Legal Education & 3 others**[39]*** and *Eunice Cecilia Mwikali Maema v The Council of Legal Education and Two Others*.

76. Counsel for the Respondents did not expressly address this issue.

77. Section **4(2)** of the Fair Administrative Action Act[40] provides that "every person has the right to be given written reasons for any administrative action that is taken against him." This position was reiterated by the Court of Appeal in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 other**[41]*** in the following words:-

> *"Under **Article 47 (2) of the Constitution** as read with the provisions of the **Fair Administrative Actions Act of 2015**, the common law position that there is no duty to give reasons for administrative decision is no longer a general principle of law in Kenya. A shift has taken place and there is requirement to give reasons for administrative decisions... In **Judicial Service Commission -v- Hon. Justice Mutava Mbalu, Civil Appeal No. 52 of 2014,** Githinji JA in considering the duty to give reasons for administrative action in light of **Article 47 (2) of the Constitution** expressed that reasons for decision should be given as a matter of right where a right under the Bill of Rights has been or is likely to be adversely affected by the administrative action and not otherwise; that the right to be given written reasons for the decision can be limited by law for a reasonable and justifiable cause."*

78. However, cases are context sensitive. The *ex parte* applicant attached several letters from the Respondents. I have referred to the said letters and even produced excerpts from the said letter. The letters clearly state that her admission was declined because she has not studied all the core subjects. The subjects were listed for her. She attended remedial classes, but she has not shown that she has studied one core unit. It not clear what other reason she wants. The allegation that the *ex parte* applicant did not provide her with reasons must fail.

Conclusion.

79. The applicant prays for an order of *Certiorari*. *Certiorari* is used to bring up into the High Court the decision of some inferior tribunal or authority in order that it may be investigated. If the decision does not pass the test of legality, it is quashed – that is to say, it is declared

invalid. The underlying policy is that all inferior courts and authorities have only limited jurisdiction or powers and must be kept within their legal bounds.

80. I have already concluded that the *ex parte* applicant has not demonstrated that she studied one core unit, namely, Public International Law. The said unit is listed as a core subject in the Regulations. As stated above, the Regulations are couched in mandatory terms. It follows that the decision has not been shown to be illegal for the court to issue a quashing order.

81. The applicant prays for an order of *Mandamus.* An order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.[42] *Mandamus* is a judicial command requiring the performance of a specified duty, which has **not been** performed. Originally, a common law writ, *Mandamus* has been used by courts to review administrative action.[43]

82. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. vs. Canada* (*Attorney General*),[44] and, was also discussed in *Dragan vs. Canada* (*Minister of Citizenship and Immigration*).[45] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. *The Applicants have satisfied all conditions precedent; and*

b. There must have been:

I. *A prior demand for performance;*

II. A reasonable time to comply with the demand, unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv*) No other adequate remedy is available to the Applicants;*

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

83. The applicant has not demonstrated that she sat for Public International Law, which is one of the core units prescribed in the Regulations. It follows that the *ex parte* applicant has not satisfied the above tests to qualify for an order of *Mandamus.*

84. In view of my analysis and conclusions herein above, the conclusion becomes irresistible that the applicant has not established grounds to warrant the court to grant judicial review orders sought. Consequently, the applicant's Notice of Motion dated **18th** July 2018 must fail. The application is hereby dismissed with no orders as to costs.

Signed, Dated and Delivered at Nairobi this 23rd day of July, 2019

John M. Mativo

Judge

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[1]Act No. 27 of 2012.

[2] Act No. 26 of 2012.

[3] Act No. 9 of 1995.

[4] Act No. 27 of 2012.

[5] Cap 16, Laws of Kenya.

[6] Cap 26, Laws of Kenya.

[7] Cap 26, Laws of Kenya.

[8] {1962} 1 EA 520 .

[9] Cap 26, Laws of Kenya.

[10] Act No. 4 of 2015.

[11] Mombasa HCMISC APP No 384 of 1996.

[12]{2005} 1 KLR 189

[13] Sir James Matthew, 19th Century jurist.

[14] Act No. 4 of 2015.

[15] Act No. 4 of 2015.

[16] Cap 26, Laws of Kenya.

[17]Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and [2000]

[18] *2000 (2) SA 674 (CC) at 33.*

[19] See *Republic vs Commissioner of Customs Services Ex parte Imperial Bank Limited* {2015} eKLR.

[20] Cap 26, Laws of Kenya.

[21] {2013} e KLR.

[22] Case C-80/89, Behn v Hauptzollamt Itzehoe, 1990 E.C.R. I-2659.

[23] SØREN SCHØNBERG, LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW 118 (2003); *C.f.* Forsyth, *The Provenance and Protection of Legitimate Expectations*, 47 CAMB. L. J. 238, 242-244 (1988). The protection of legitimate expectations are in fact still stronger in German law today than is the case in EU law, *see*, ADMINISTRATIVE LAW OF THE EUROPEAN UNION, ITS MEMBER STATES AND THE UNITED STATES 285 (Rene

Seerden & Frits Stroink eds., 2002).

[24] Ibid.

[25] Ibid.

[26] Joined Cases 205-215/82, Deutsche Milchkontor GmbH et al. V Germany, 1983 E.C.R. 2633.

[27] SØREN SCHØNBERG, LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW 118 (2003).

[28] 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in South African Veterinary Council and another v Szymanski 2003 (4) BCLR 378 (SCA) at paragraph 19 and in Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another [2003] 2 All SA 616 (SCA) at paragraph 65.

[29] Administrative Law, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000.

[30] {2013} e KLR.

[31] {2017}e KLR

[32] Act No. 27 of 2012.

[33] Act No. 26 of 2012.

[34] Ibid.

[35] {2015} e KLR.

[36] {2017} e KLR.

[37] {2017} e KLR.

[38] {2015}e KLR.

[39] {2017} eKLR

[40] Act No. 4 of 2015.

[41] {2016} eKLR.

[42] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[43]W. G. & C. Byse, Administrative & Review Law, Cases and comments 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[44] 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

[45] 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233).