REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 120 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF *CERTIORARI, MANDAMUS* & *PROHIBITION*

AND

IN THE MATTER OF ARTICLES 10 (1) (A) (B) AND (C) AND 2 (B), 27, 28, 43(1) (F), 47 (1) AND (2) AND 50 (1), 55 (A) AND 56 (B) OF THE CONSTITUTION

AND

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

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES

BETWEEN

THE REPUBLIC.....APPLICANT

AND

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

THE COUNCIL FOR LEGAL EDUCATION.....2ND RESPONDENT

AND

KITHINJI MASEKA SEMO.....1ST *EX PARTE* APPLICANT

AGAGLIATE SYLVIA GLADYS.....2ND *EX PARTE* APPLICANT

JUDGMENT

The Parties

1. The *ex parte* applicants are female adults of sound minds and holders of Bachelor of Laws Degrees from Riara University.

2. The first 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[1] (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 KSL Act. KSL is the successor of the Kenya School of Law established under the Council of Legal Education Act.[2]

3. 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; [3] 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.

4. The second Respondent, the Council of Legal Education (herein after referred to as the council) is a body corporate with perpetual succession and a common seal established under section 4 of the Legal Education Act.[4] 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. The council is the successor of the Council of Legal Education established under the Council of the Legal Education Act, 1995 (Cap 16A), (now repealed).

5. As provided under section 8 of the Legal Education Act, the functions of the Council include regulating legal education and training in Kenya offered by legal education providers. It also licences legal education providers; supervises legal education providers; advises the Government on matters relating to legal education and training; recognizes and approves qualifications obtained outside Kenya for purposes of admission to the Roll and administers such professional examinations as may be prescribed under section 13 of the Advocates Act.[5]

Factual Matrix

6. The *ex parte* applicants undertook International General Certificate of Secondary Education (IGCSE) in Kenya. It is not in dispute that they studied, qualified and obtained Bachelor of Laws Degrees from Riara University.

7. They applied for admission at the KSL to undertake the Advocates Training Programme (herein after referred to as the ATP). They were admitted for the academic year 2018/2019, they paid tuition fees, they were issued with KSL identification cards and they attended classes and other academic programmes offered by the KSL.

8. They state that the KSL purported to revoke their admission to the ATP vide letters dated 15thFebruary 2018 at the behest and advise of the council alleging that they did not meet the admission criteria for the said programme. They stated that the said decision jeopardized their hopes to train as advocates and that the KSL is the only institution, which offers the ATP. They also stated that their appeal against the said decision was ignored.

Legal foundation of the application

9. The *ex parte* applicants maintain that the impugned decision was administrative in nature and that it was contrary to the Constitution, the Fair Administrative Action Act[6] (herein after referred to as the FAA Act) and the principles of natural justice. In particular, the *ex parte* applicants state that the impugned decision violated Article 47 of the Constitution and sections 4 and 5 of FAA Act.

10. The applicants also state that no prior communication or notice was given to them in contravention of section 4 (3) of the FAA Act. Further, they state that they were not neither heard prior to making the said decision, nor were they provided with the information, materials and evidence that the Respondents relied on while making the said decision.

11. The *ex parte* applicants also state that the said letter was final and it never gave them the option to appeal in violation of section 4(3) of the FAA Act, nor were they given the opportunity to cross-examine any person who gave adverse evidence against them.

12. The applicants also state that the criteria in the letter communicating the decision does not apply to them since upon being admitted to the ATP, they ceased being applicants, and, that, the KSL has unlawfully delegated its mandate to the council.

13. The *ex parte* applicants also assail the impugned decision on grounds of unreasonableness, stating that the KSL admitted and registered them to the ATP and accepted fees from them only to arbitrarily and unilaterally turn around and discontinue them without following the laid down procedure.

14. In addition, the *ex parte* applicants state that the decision violated their right to legitimate expectation because after being admitted to the ATP, registering and paying fees, they hoped to undertake the training. Further, that, they state that they had legitimate expectation that they would only be discontinued for a lawful reason and after due process. Lastly, they stated that such revocation could only be done after hearing them in line with the rules of natural justice.

The Reliefs sought.

15. 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 15thFebruary 2018.*
>
> *b. An order of prohibition prohibiting the Respondents from barring the applicant's from registering, attending and undertaking the bar examinations or generally participating in the Advocates Training Programme for the academic year 2018/2019.*

c. The costs this application be borne by the Respondents.

First Respondent's Replying Affidavit

16. Fredrick Muhia, KSL's Academic Manager swore the Replying Affidavit dated 4thApril 2018 deposing that it was a requirement that applications to the ATP be accompanied by supporting documents including a letter of equation from the Kenya National Examinations Council (KNEC) where an applicant does not possess KCSE qualifications. He averred that the purpose of the equation is to ascertain if non-KCSE qualifications meet the minimum requirements of a B plain in English or Kiswahili and a mean grade of a C plus as provided in the second schedule to the KSL Act.

17. He also deposed that KNEC, the only body mandated to equate secondary school qualifications in Kenya refused to undertake the equation placing the applicants and the KSL in a quagmire. In addition, he averred that the *ex parte* applicants applications were assessed based on their Bachelor of Laws degrees, since, their degrees were obtained from a recognized University, hence, they were provided with provisional letters of admission and they were registered as students in January 2018.

18. Mr. Muhia further averred that the KSL cognizant of the council's role in the regulation of legal education in Kenya sought the council's opinion on the admissibility of applicants who possess IGCSE "O" level qualifications without an "A" level certificate. He deposed that the council's response was that an "O" level without an "A" level qualification is not a qualification for purposes of entry into an undergraduate programme. He added that the KSL was obliged to comply with the council's decision; hence, it was obliged to withdraw the ex parte applicants' admission. He denied that the impugned decision violated the *ex parte* applicant's constitutional rights or the right to a Fair Administrative Action.

The second Respondent's grounds of opposition

19. The council filed grounds of opposition dated 16th July 2018 stating that the application discloses no reasonable cause of action against it and that its decisions was made within the provisions of section 8(1)(a)(c) of the Legal Education Act.[7]

First Respondent's further Affidavit

20. Mr. Fredrick Muhia swore the further affidavit dated 27th September 2018 annexing a letter dated 27thAugust 2018 from Kenya National Qualifications Authority stating that it is not possible for the authority to issue a blanket recognition and or equation of qualifications and advised that students are required to make their applications for recognition and equation of their qualifications.

Issues for determination

21. I have carefully analyzed the facts presented by the parties. I have also considered the submissions rendered by the parties. I find that the interests of justice will be served by addressing the following issues.

a. Whether the ex parte applicants satisfied the legal requirements for admission to the ATP.

b. Whether the doctrine of implied repeal applies in the circumstances of this case.

c. Whether the provisions of Legal Education (Accreditation and Quality Assurance) Regulations, 2016 can override express statutory provisions.

d. Whether the impugned decision is tainted with illegality.

e. Whether the impugned decision violates the Applicant's Right to legitimate expectation and the Right to education guaranteed under Article 43 (1) (f) of the Constitution.

a. Whether the ex parte applicants satisfied the legal requirements for admission to the ATP.

22. Even though this case may stand or fall on this issue, regrettably, the *ex parte* applicant's counsel did not address it all. This omission is despite the fact that the crux of the revocation of the letters of admission was that the *ex parte* applicants did not meet the admission requirements to the ATP.

23. The counsel for the first Respondent submission was that the *ex parte* applicants had been registered on provisional basis, and, that, the clarification provided by the council "rendered them ineligible to join the LLB programme." This line of argument is rather perplexing as it is confusing. Counsel seems to question the eligibility of the *ex parte* applicants to study law, yet, they already had law degrees. The University admitted them to study law on the basis of their IGCSE certificate. The issue before the court was whether they qualified for admission to the ATP by virtue of their LLB Degrees.

24. The first Respondents Replying Affidavit is rather clear on the reasons why their admission were revoked. Mr. Fredrick Muhia in his Replying Affidavit deposed that it was a requirement that applications to the ATP be accompanied by supporting documents including a letter of equation from the Kenya National Examinations Council (KNEC) where an applicant does not possess KCSE qualifications. He averred that the purpose of the equation is to ascertain if non-KCSE qualifications meet the minimum requirements of a B plain in English or Kiswahili and a mean grade of a C plus as provided in the second schedule to the KSL Act. My understanding of this averment is that the KSL the KNEC to equate the *ex parte* applicants IGCSE qualification.

25. On his part, the second Respondents counsel relied on section 16 of the KSL Act as read with section 1 of the second schedule to the Act. He further cited Regulation 5 Part II of the Third Schedule of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 and maintained that the *ex parte* applicants did not meet the requirements prescribed in the above provisions. I will discuss the said Regulations under the next issue.

26. I have had the occasion to address similar issues as raised in this case in *Republic v Kenya School of Law*[8] a case, which incidentally involved the same Respondents herein. The dispute in the said case was substantially the same as in this case. Inevitably, I will usefully refer to the said decision from time to time in this judgment.

27. At the center of this issue is section 16 of the KSL Act. The section bears the short title "admission requirements." It provides that a person shall not qualify for admission to a course of study at the School, unless that person has met the admission requirements, set out in Section 1 of the Second Schedule to the KSL Act. The said section provides that a person shall be admitted to the School if—

> *a. having passed the relevant examination of any recognized university in Kenya, or of any university, university college or any 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 institution; or*
>
> *b. having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) in the grant of that university, university college or other institution—*
>
> > *i. attained a minimum entry requirement for admission to a university in Kenya; and*
> >
> > *ii. obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent; and*
> >
> > *iii. has sat and passed the pre-Bar examination set by the school.*

28. I find if fit to start by stating that words, spoken or written, are the means of communication. Where they are possible of giving one and only one meaning there is no problem. However, where there is a possibility of two meanings, a problem arises and the real intention is to be sorted out. The Legislature, after enacting statutes becomes *functus officio* as far as those statutes are concerned. Legislature enacts and the Judges interpret. Judges cannot say that they do not understand a particular provision of an enactment. They have to interpret in one way or another. They cannot remand or refer back the matter to the Legislature for interpretation. That situation led to the birth of principles of interpretation to find out the real intent of the Legislature. Consequently, the Superior Courts had to give the rules of interpretation to ease ambiguities, inconsistencies, contradictions or lacunas. The rules of interpretation come into play only where clarity or precision in the provisions of the statute are found missing.[9]

29. 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.[10] It is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it, which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The court of course adopts a construction, which will carry out the obvious intention of the legislature but cannot legislate itself.[11]

30. In *Republic v Kenya School of Law* (supra) interpreting the same provisions now under consideration I observed as follows:-

> *"In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the court has to see at the very outset is what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. Nevertheless, the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning, which cannot be warranted by the words employed by the Legislature.*[12]
>
> *In interpreting the provisions of a statute, the court should apply the golden rule of construction. The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction, the words of a statute must be given their ordinary, literal and grammatical meaning. If by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless, it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction. Examples include where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.*[13] *As the Supreme Court of India in Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others*[14] *stated:-*
>
> > *"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."*

31. The touchstone of interpretation is the intention of the legislature. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[15] Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[16] If the words of a statute are clear and unambiguous, the court need not inquire any further into the

meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.

32. While the object is to determine the meaning to be given to the words used, it remains the primary function of the court to gather the intention of the legislature by reference to those words. This can only occur if the object and purpose of the legislation (in which case it would include the mischief sought to be remedied) are brought into consideration when examining the words used in the context of both the document as a whole and the context or factual matrix in which the document came to be produced.

33. As we interpret a statutory provision, it is also important to bear in mind the contextual scene. Since grammar and dictionary meanings are merely principal (initial) tools rather than determinative tyrants, we should also examine the context in which the words are used. Schreiner JA underlined the importance of context in statutory interpretation.[17] He said:-

> *"Certainly no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that "the context," as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background. The second point is that the approach to the work of interpreting may be along either of two lines. Either one may split the inquiry into two parts and concentrate, in the first instance, on finding out whether the language to be interpreted has or appears to have one clear ordinary meaning, confining a consideration of the context only to cases where the language appears to admit of more than one meaning; or one may from the beginning consider the context and the language to be interpreted together."*

34. Schreiner JA went on to point out that whatever approach is adopted, the court must be alert to two risks. The first is that the context may receive an exaggerated importance so as to strain the language used. The second is "the risk of verbalism and consequent failure to discover the intention of the law-giver."[18] He emphasised that "the legitimate field of interpretation should not be restricted as a result of excessive peering at the language to be interpreted without sufficient attention to the contextual scene."[19]

35. It is necessary to add that the contextual scene has an even deeper significance in our constitutional democracy. All law must conform to the Constitution and be interpreted and applied within its normative framework.[20] The Constitution itself must be understood as responding to our painful history and facilitating the transformation of our society. Account must be paid to the structure and design of the Constitution, the role that different organs of government and law enforcement must play and the value system articulated in Article **10** of the Constitution and the Bill of Rights.

36. Interpreting statutes within the context of the Constitution will not require the distortion of language so as to extract meaning beyond that which the words can reasonably bear. It does, however, require that the language used be interpreted as far as possible, and without undue strain, so as to favour compliance with the Constitution. In addition, it will be important to pay attention to the specific factual context that triggers the problem requiring solution.

37. As if reading the script from Schreiner JA discussed above, in *Republic v Kenya School of Law,* (supra) I observed that at the center of this issue is the meaning of the word *"or"* in legal parlance. The said word appears immediately after the semi-colon at the end of section 1 of the Second Schedule to the KSL Act reproduced above. In searching for its meaning in the above case, I inevitably consulted dictionaries and judicial pronouncements alive to the fact that the practice of appealing to dictionaries as memory aids was deemed a function of judicial notice.[21] Words must receive their ordinary meaning. Of that meaning the court is bound to take judicial notice, as it does in regard to all words in our own tongue; and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court.[22]

38. In the same case I also observed that dictionaries also serve an instantiating function, that is, they may be used by the court to confirm that a contested meaning has been employed in either speech or literature, and has thus been recognized as a valid meaning by lexicographers. Of this instantiating function, Professors Hart and Sacks said, "Unabridged dictionaries are historical records (as reliable as the judgment and industry of the editors) of the meanings with which words have in fact been used by writers of good repute. They are often useful in answering hard questions of whether, in an appropriate context, a particular meaning is linguistically permissible."[23]In using a dictionary to instantiate a contested meaning, a judge searches the dictionary to determine what meanings have attained currency in the language at large and are thus linguistically permissible in a given context.[24]

39. In the said case, I observed that the word "or" is defined in *dictionary.com*[25] *as a word used to connect words, phrases, clauses representing alternatives, it's used in correlation such as* ***either or.*** The *Longman Dictionary of Contemporary English*[26] defines *"or"* as - *"Conjunction used between two things or before the last in a list of possibilities, things that people can choose from, either… or…* "The *New Choice English Dictionary*[27] defines **"or"** as- *'Conjunction denoting an alternative, the last in a series of choices' Conjunction* is defined in the same dictionary as *"a word connecting words, clauses or sentences…"* The *Oxford Advanced Learner's Dictionary of Current English*[28] defines ***'or'*** as a word *"used to introduce another possibility".* The *Concise Oxford English Dictionary defines*[29]**"or"** as a *'conjunction used to link alternatives.'* The same dictionary defines the word *'conjunction'* as *a word used to connect clauses or sentences or to coordinate words in the same clause.*

40. The use of the word *"or"* in a statutory provision has also received judicial construction. The Supreme Court of India[30] expressed the view that "the word *'or'* is normally disjunctive and the word *'and'* is normally conjunctive. However, at times they are read as *vice-versa* to give effect to the manifest intent of the legislature as disclosed from the context. It is permissible to read *'or'* as '*and'* and *vice-versa* if some other part of the same statute, or the legislative intent clearly spelled out, require that to be done."[31]

41. In *Natarajan K.R. vs Personnel Manager, Syndicate Bank, Industrial Relation Division*[32] the apex Court of India construed the word **"or"** as follows:-

> *"In ordinary use the word 'or' is a disjunctive that makes an alternative which generally correspondents to the word 'either'. In face of this meaning, however, the word 'or' and the word 'and' are often used interchangeably. As a result of this common and careless use of the two words in legislation, there are occasions when the Court, through construction, may change one to the other. This cannot be done if the statute's meaning is clear, or if, the alteration operates to change the meaning of the law..."*

42. Further, the Supreme Court of *India in J. Jayalalitha vs Union of India*[33] held that the term *"or"* which is a conjunction, is normally used for the purpose of joining alternatives and also to join rephrasing of the same thing but at times to mean "and" also. It stated:-

> *"The dictionary meaning of the word `or' is : "a particle used to connect words, phrases, or classes representing alternatives". The word `or', which is a conjunction, is normally used for the purpose of joining alternatives and also to join rephrasing of the same thing but at times to mean `and' also. Alternatives need not always be mutually exclusive. Moreover, the word "or' does not stand in isolation and, therefore, it will not be proper to ascribe to it the meaning which is not consistent with the context.... It is a matter of common knowledge that the word `or' is at times used to join terms when either one or the other or both are indicated…. In our opinion, the word `or' as used… would mean that the … the power to do either or both the things…"*

43. Back at home, a Bench of five Judges in High Court in *Bernard Ndeda & 6 Others v Magistrates and Judges Vetting Board & 2 Others*[34]and *Wilson Kaberia Nkuja v Magistrates and Judges Vetting Board & another*[35] adopted a similar construction. In addition, the High Court differently constituted in *Edward Njoroge Mwangi v Francis Muriuki Muraguri & Anther*[36] also counsel arrived at the same reasoning.

44. The Supreme Court of Kenya in *Raila Amolo Odinga v Independent Electoral and boundaries Commission and 42 Others*[37]construed the word *"or"* as used in a statutory provision as being disjunctive and making two limps. This reasoning is well enunciated in *Crawford on Statutory Construction*[38] where it is stated at page 322 thus:-

> *"In ordinary use the word 'or' is a disjunctive that marks and alternative which generally corresponds to the word 'either.' In face of this meaning however, the word 'or' and the word 'and' are often used interchangeably…"*

45. The wisdom flowing from the above jurisprudence and dictionary meaning is that in its elementary sense the word *'or'* is a disjunctive particle that marks an alternative, generally corresponding to *'either,'* as 'either this or that.[39] But there are also some exceptions, situations "in which the conjunction *'or'* is held equivalent in meaning to the copulative conjunction *'and*.'[40] Normally, of course, *"or"* is to be accepted for its disjunctive connotation, and not as a word interchangeable with *"and."* However, this canon is not inexorable, for sometimes a strict grammatical construction will frustrate legislative intent. In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings.[41]

46. This contextual approach is the rule of lenity. It remains that the intention of a statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted for courts to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute. The implied intention of Parliament is adequate to overcome the express words of the statute. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, but the words should be taken in such a sense as will best manifest the legislative intent.

47. Lenity does not always require the "narrowest" construction. Decided cases have recognized that a broader construction may be permissible on the basis of contextual factors that make clear the legislative intent where it is within the fair meaning of the statutory language.[42]

48. Since no legislature ever intends to give two simultaneous inconsistent commands, every statute must if possible be reduced to a single, sensible meaning before it is applied to any case. When Lord Brougham said that we must ascertain the ". . . intention from the words of the statute and not from any general inferences to be drawn from the nature of the objects dealt with by the statute ...." he must have been referring to statutes susceptible of but one sensible meaning that is plain and explicit. But, if a statute is susceptible of another interpretation - a contextual or implied meaning - which is derived from the whole text itself with or without the use of extrinsic aids and if such contextual meaning is a fair one in that it accords with the ordinary use of language and with the object and purpose of the statute, it is clearly superior to any obvious or literal meaning which does not fulfil these demands.[43]

49. From the dictionary and judicial precedents discussed above, it is clear that the word *"or"* is ordinarily used to *introduce another possibility or alternative*, that is *either or*. Depending on context, it can also be used interchangeably with the word *"and."* It follows that in construing statutory provisions, the context is important so as to get the real intention of the legislature.

50. Guided by the authorities cited above and the ordinary meaning of the word *"or"* in the context of the provision under consideration, it is my view that the use of the word *"or"* immediately after the semi-colon at the end of the sentence in section 1(a) of the second schedule introduces another possibility, the first possibility being the category referred to in paragraph (a), that is:-

> *"having passed the relevant examination of any recognized university in Kenya, or of any university, university college or any 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 institution."*

51. The *ex parte* applicants hold Bachelor of Laws degrees from a recognized University in Kenya. By dint of the above provision, they qualified for admission to the ATP. To suggest otherwise, is in my view an insult to the above provision, which is framed in a simple and clear language. A contrary interpretation is misguided and unfaithful to the provision. It follows that any decision emanating from such a misguided interpretation cannot be read in a manner that is consistent with the enabling provision.

52. The second possibility is the category provided in section 1 (b) which provides:-

> *"having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) in the grant of that university, university college or other institution—*
>
> *iv. attained a minimum entry requirement for admission to a university in Kenya; and*
>
> *v. obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent; and*
>
> *vi. has sat and passed the pre-Bar examination set by the school."*

53. Parliament in its wisdom provided for the second category. A reading of the second category shows clearly that it applies to those who meet the three conditions stipulated therein. These are having attained a minimum entry requirement for admission to a university in Kenya; and obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent; and has sat and passed the pre-Bar examination set by the school.

54. It is unfortunate that the Respondents have on countless occasions misconstrued and or confused the above two categories to the detriment of innocent applicants.

55. The second category uses the word "and" unlike in the first category which uses ""or." Borrowing from dictionary meaning and judicial precedents, it is my conclusion that the use of the word *"and"* signifies that both conditions are required while *'or'* signifies that only one condition must be met. Differently stated, *'and*' corresponds to a simple addition, meaning, condition "**A"** and condition **"B"** must be reached to achieve the required standard. *'Or'* on the other hand means that only one of the conditions must be reached: condition "**A"** or condition **"B"** must be reached to activate the required standard.

56. In the above-cited case, *I went to great length to illustrate the meaning of "And"* which I argued provides inclusiveness. By saying "A and B," it means BOTH "A" and "B." In addition, *"and"* can be used in positive and negative sentences. On the contrary, 'or' provides exclusiveness between choices. By saying "A or B," it means ONLY ONE between "A" and "B" can be considered. If you choose "A", then it is not "B" and *vice versa*. One may use 'or' in positive and negative sentences. Thus, if Parliament in its wisdom intended both possibilities to apply, then, nothing prevented it from using the word *"and"* immediately after the end of paragraph 1 (a) instead of the word *"or."*

57. The above construction represents the correct interpretation of the provision under consideration, a position best captured by the following passage:-

> *"And the law may be resembled to a nut, which has a shell and a kernel within; the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter."* ***[44]***

58. I am fortified in my finding by the above Supreme Court of Kenya decision interpreting the meaning of the word "or" in a statutory provision. Perhaps I should add that Supreme Court decisions are binding on the High Court by virtue of Article **163 (7)** of the Constitution. [45] Under Article **163 (7)** of the Constitution, the binding nature of Supreme Court decisions is absolute. Article **163 (7)** is an edict firmly addressed to all courts in Kenya, that they are bound by the authoritative pronouncements of the Supreme Court and that where the issues before the court were determined by the Supreme Court, it is not open to that court to examine the same with a view to arriving at a different decision.[46]

b. Whether the doctrine of implied repeal applies in the circumstances of this case.

59. The facts and legal arguments presented in this case bring into sharp focus the doctrine of implied repeal. Just like the first issue discussed above, either party's case can stand or fall on this issue. Unfortunately, despite the importance and relevance of this doctrine and the simplicity with which the doctrine can be distilled from the facts and arguments presented in this case, none of the counsels deemed it fit to address this doctrine even remotely.

60. The second Respondent's counsel, though not addressing this issue directly referred to section 16 of the KSL Act as read with the second schedule to the Act and Regulation 5 Part II of the Third Schedule of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 and maintained that the *ex parte* applicants did not meet the admission requirements.

61. Regulation 5 of Part 11 of the Third Schedule to the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 provides for the requirements for admission to a Bachelor of Laws Degree. The said provision provides that the requirements are - possession of a degree from a recognized University; or a Diploma in law with a credit pass; or three principal passes in the Kenya Advanced Certificate of Education examination.

62. Regulation 6 of Part 11 of the said Regulations stipulates the minimum admission requirements to the ATP. Under this provision, the the minimum requirements for admission to the ATP are — (a) a Bachelor of Laws (LLB) degree from a recognised university; (b) where applicable, a certificate of completion of a remedial programme; (c) proof of academic progression in accordance with paragraphs 3 and 4 of this Schedule; and (d) a certificate of completion of the Pre-Bar Examination.

63. It is evident that there is a variance between the KSL Act and the Legal Education Act[47] on the admission requirements provided in the KSL Act and the above Regulations. To resolve this conflict, since the Legal Education Act[48] commencement date was 28thSeptember 2012 and the KSL Act commencement act was 29thJanuary 2013, the provisions of the later statute prevail.

64. As stated above, none of the parties appreciated the apparent conflict between the two statutes. The Respondents' counsels only maintained that the impugned decision was taken pursuant to section 1 (a) of the Second Schedule to the KSL Act and the Regulations. It is common ground that the *ex parte* applicants do not possess a Kenya Certificate of Secondary Education or an equivalent certificate. They possess IGCSE certificates. I have already made a determination that the *ex parte* applicants do qualify under section 1 of the second schedule by virtue of my interpretation of the word "or" in the said provision.

65. The doctrine of **implied repeal** is a concept in constitutional theory which states that where an Act of Parliament (or of some other legislature) conflicts with an earlier one, the later Act takes precedence and the conflicting parts of the earlier Act becomes legally inoperable. This doctrine is expressed in the Latin phrase *"leges posteriores priores contrarias abrogant"*.

66. When Parliaments repeals legislation, it generally makes its intentions both express and clear. Sometimes, however, Parliament enacts laws that are inconsistent with existing statutes. A. L. Smith J set out the courts' traditional response in cases of this nature in *Kutner v Philips.*[49] He said that "if … the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later."That is, the later statute impliedly repeals the earlier one to the extent of the inconsistency.

67. In *Republic v Kenya School of Law*[50]I stated that for a court to hold that Parliament has repealed one of its own statutes without expressly, saying so is a drastic step. For this reason, courts faced with apparently conflicting statutes should strive to reconcile them, only holding that there has been an implied repeal as a last resort.[51] However, there are a number of ways in which courts may avoid an implied repeal or at least may reduce an implied repeal's effect. For example, where the earlier statute is specific in application and the later one is general, the courts may conclude that Parliament has not intended that the later Act should apply to the circumstances to which the earlier one relates.[52] Conversely, where a later specific rule is inconsistent with an earlier general one, implied repeal operates only *"pro tanto"*, that is, only to the extent that the Acts are inconsistent, with the general rule preserved as much as possible.[53]

68. Regulation 5 of Part 11 of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 provide that (1) The minimum admission requirements for an undergraduate degree programme in law as follows:-

> *(a) a mean grade of C+ (Plus) in the Kenya Certificate of Secondary Education examination or its equivalent with a minimum grade of B Plain in English or Kiswahili;*
>
> *(b) at least three Principal Passes in the Kenya Advanced Certificate of Education examination; (c) a degree from a recognised university; or*
>
> *(d) a Credit Pass in a diploma in law examination from an accredited institution.*

69. Regulation 6 referred to above on the admission requirements to the ATP provides:-

> *(1) The minimum requirements for admission to the Advocates' Training Programme shall be —*
>
> *a) a Bachelor of Laws (LLB) degree from a recognised university;*
>
> *b) where applicable, a certificate of completion of a remedial programme;*
>
> *c) proof of academic progression in accordance with paragraphs 3 and 4 of this Schedule; and*
>
> *d) a certificate of completion of the Pre-Bar Examination.*

70. It is evident that the above Regulation creates different qualifications from those provided in section 1(a) and (b) of the Second Schedule to the KSL Act. It is evident that the two provisions are at variance. Under the above Regulation, an applicant must possess the requirements in paragraphs (a) to (d) above. On the contrary, section 1 (a) and (b) creates two distinct categories by using the word *"or"* instead of *and."*

71. Bennion on Statutory interpretation[54] states that the classic statement of the test for implied repeal was set out by A L Smith J in *West Ham (Churchwardens, etc) v Fourth City Mutual Building Society*[55] as follows:-

> *"The test of whether there has been a repeal by implication by subsequent legislation is this: are the provisions of a later Act are so inconsistent with, or repugnant to, the provisions of an earlier act that the two cannot stand together?"*

72. In *A O O & 6 others v Attorney General & another*[56] the High Court observed that "aaccording to principles of construction if the

provisions of a later act are so inconsistent with or repugnant to those of an earlier act that the two cannot stand together, the earlier act stands impliedly repealed by the latter Act. It is immaterial whether both Acts are Penal Acts or both refer to Civil Rights. The former must be taken to be repealed by implication." This principle was adopted in *Martin Wanderi & 19 others vs. Engineers Registration Board of Kenya & 5 Others,*[57] where the court, rendered itself as follows:-

> *"... Where provisions of one Act of Parliament are inconsistent or repugnant to the provisions of an earlier Act, the later Act abrogates the inconsistency in the earlier one...."*

73. The requirement for a positive repugnancy between the conflicting statutes was explained in *United States vs. Borden Co*[58] where the court rendered itself as follows:-

> *"...There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy'..."*

74. What emerges from decisional law is that the two statutes must be inconsistent to the extent that they cannot stand together.[59] In *Nzioka & 2 Others vs. Tiomin Kenya Ltd,*[60] it was that the more recent act must be construed as repealing the old Act where there is inconsistency , *or* where the provisions of one statute are so inconsistent with the provisions of a similar but later one, which does not expressly repeal the earlier Act. A five-judge bench in *FIDA-Kenya & Others v Attorney General & Others*[61] held a similar position.

75. On the same principle, it correct to say that laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject. Thus, by enacting the later statute, which created the two categories and by carefully using the word *"or"* as opposed to *"and"* Parliament was aware of the other provisions, but expressed its clear intention in the later provisions. It is my finding that the doctrine of implied repeal applies in the circumstances of this case.

c. Whether the provisions of Legal Education (Accreditation and Quality Assurance) Regulations, 2016 can override express statutory provisions

76. Again, just like the first two issues, the parties did not address a fundamental question that arises in this case which warrants consideration. This is the question whether the provisions of Legal Education (Accreditation and Quality Assurance) Regulations, 2016 can override express statutory provisions. The Regulations were promulgated by the Council of Legal Education pursuant to powers conferred upon it by section 46(1) of the Legal Education Act[62] with the approval of the Cabinet Secretary. The Regulations provide for the admission requirements to the ATP which as explained earlier differ from the requirements provided under section 16 of the KSL Act contained in sections 1 (a) (b) of the Second Schedule.

77. Despite the importance and relevancy of this issue, which clearly flows from the material presented to the court, none of the parties addressed it.

78. By subjecting the *ex parte* applicant to the requirements under the Regulations as opposed to the category expressly provided under section 1(a) of the second schedule under which their qualifications fall, the Respondents not only ignored the express provisions of section 16, but also elevated the Regulations above the provisions of the act. As was held in *Republic vs Kenya School of Law & Council of Legal Education ex parte Daniel Mwaura Marai,*[63]the provisions of a subsidiary legislation can under no circumstances override or be inconsistent with any act of Parliament be it the one under which they are made or otherwise. A similar position was held in *Republic v Council of Legal Education & another Ex parte Sabiha Kassamia & another*[64] and *Republic v Council of Legal Education & another Ex-Parte Mount Kenya University.*[65] Also relevant is Section 31 (b) of the *Interpretation and General Provisions Act,*[66]which provides that no subsidiary legislation shall be inconsistent with the provisions of an Act of Parliament.

79. Borrowing from the jurisprudence discussed above, I find no difficulty concluding that the provisions of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 cannot override the express provisions of section 16 of the KSL Act, which prescribe the admissions requirements to the ATP as those stipulated in the Second Schedule to the Act. Specifically, the Regulations cannot override the provisions of section 1(a) of the second Schedule. Had Parliament desired any other qualifications to apply over and above the qualifications held by the *ex parte* applicants, it would have expressly provided so.

d. Whether the impugned decision is tainted with illegality

80. The *ex parte* applicant's counsel assaulted the impugned decision on grounds of procedural unfairness. He relied on *Sceneries Limited v National Land Commission*[67] for the holding that fairness demands that a public body should never act so unfairly that it amounts to abuse of power. The court in the said case also held that if there are express procedures laid down by legislation that a body must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice, and, there must be a fair hearing.

81. To buttress his argument, he cited Article 50 of the Constitution and *Republic v Speaker of the National Assembly & 4 Others ex parte Edward R. O. Ouko*[68]for the proposition that the principles of the right to be heard are geared towards the realization of fair administrative action, which is a fundamental right under Article 47 of the Constitution. He placed reliance on *Chief Constable Pietermaritzburg v Shim*[69]where the court held that it is a principle of common law that no man shall be condemned unheard, and, that, the rule of natural justice and the right to fair administrative action act may be presumed to have been intended by the legislature. He argued that the *ex parte* applicants ought to have been afforded the opportunity to participate in the proceedings that revoked their admission. He also argued that the denial was a violation of Article 50 of the Constitution and section 7(2)(v) and 7(2)(b) of the FAA Act.

82. He also argued that revoking the decision was unreasonable and irrational, in that, the decision renders their University degrees

worthless. He relied on *Nabulime Miriam & Others v Council of Legal Education & 5 Others*[70] for the proposition that the KSL is under a statutory duty to thoroughly vet all institutions offering the law degree to satisfy itself as to the quality. He cited *Republic v Kenya School of Law & 2 Others ex parte Juliet Wanjiru Njoroge & 5 Others* ***[71]*** in support of the argument that the *ex parte* applicants ought to have been notified before the decision was made.

83. The first Respondent's ccounsel argued that the applicants were provided with reasons vide the letter dated 15th February 2018, and, that; the decision was communicated to them within two days. He submitted that the applicants are not entitled to the orders sought. He cited *Cortex Mining Kenya Limited v Cabinet Secretary, Attorney General & 8 Others*[72] where it was held that *certiorari* issues to quash decisions for errors of law in making such decisions; or, for failure to act fairly towards the person who may be adversely affected by the decision while *prohibition* is directed to an inferior tribunal or body forbidding such tribunal or body from continuing in excess of its jurisdiction or in contravention of the laws of the land.

84. The second Respondents position was that it acted within the law in advising the KSL as provided under section 8 of the Legal Education Act,[73] and, that, its letter to KSL clarifying the position was meant to help the KSL to comply with the law.

85. Counsel submitted that granting the orders sought amounts to abrogation of the law. He argued that it would be illegal to exempt the *ex parte* applicants from the legal requirements. To buttress his argument, he relied on *Eunice Cecilia Maema v Council of Legal Education & 2 Others*[74] for the proposition that all applications for admission to the School must be considered against the same standards set by the council.

86. In *Republic v Kenya School of Law* (supra), I stated that the task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring statutory or administrative bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[75]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

87. Safeguarding legality is the most important purpose for the judicial review of administrative actions. Thus, in most administrative law systems, a person seeking judicial review of an administrative decision must be able to persuade the court that there are grounds for review in order for the legality of the administrative decision to be judicially challenged. In one sense, there must always be the premise of "want of legality."

88. An administrative decision is flawed if it is illegal. A decision is illegal if it: - ***(a)*** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* ***(b)*** *pursues an objective other than that for which the power to make the decision was conferred;* ***(c)*** *is not authorized by any power;* ***(d)*** *contravenes or fails to implement a public duty.*

89. Statutes do not exist in a vacuum.[76] They are located in the context of our contemporary democracy. The rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the rule of law and other democratic fundamentals which Parliament has no power to exclude.[77] The courts should therefore strive to interpret powers in accordance with these principles.

90. In response to a challenge to the legality of administrative action, courts generally need to consider the compliance of administrators with both substantive and procedural legal rules. This is because any administrative decision-making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures.

91. The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as administrators comply with these two rules, their decisions are safe. From the perspective of administrators and statutory bodies, this fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision or decisions rendered by statutory bodies can be judicially challenged on grounds that the administrative decision does not comply with the above-mentioned basic requirements of legality.

92. The most obvious example of illegality is where a body acts beyond the powers, which are prescribed for it. In other words, it acts *ultra vires*. Decisions taken for improper purposes may also be illegal. Illegality also extends to circumstances where the decision-maker misdirects itself in law. When exercising a discretionary power, a decision-maker may take into account a range of lawful considerations. If the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court will normally find that the power had been exercised illegally.

93. The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second issue that can be argued under illegality is fettering discretion. This heading for judicial review entails considering whether an administrative body actually exercised the power it has, or whether because of some policy it has adopted, it has in effect failed to exercise its powers as required. In general, terms the courts accept that it is legitimate for public authorities to formulate policies that are 'legally relevant to their powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust. An illegality can also occur where a body exercised a power, which was within its functions but exceeded the scope of power that is legally conferred to it.

94. The exercise of discretionary powers, as the rule of law requires, must be consistent with a variety of legal requirements and subject to judicial control. Consequently, the legality of an administrative decision or a decision of a statutory functionary can be challenged on the

grounds that discretion is abused or improperly exercised by administrator or the Tribunal.

95. Also relevant is the concept 'error of law' which is mainly concerned with the erroneous applications of the law.

96. Two critical issues flow from the foregoing. *First*, whether the impugned decision can be read in a manner consistent with the provisions of law conferring the power to the Respondents. In particular, can the impugned decision be read in a manner that is consistent with section 1 (a) & (b) of the second Schedule to the Act. I have already construed the said provisions as creating two distinct categories. I have already held that the *ex parte* applicants fall under the first category since they hold law degrees from a recognized university. I have also held that the doctrine of implied repeal applies in the circumstances of this case. In addition, it was my finding that provisions of subsidiary legislation cannot override express provisions of a statute. On these grounds, I find and hold that the Respondent failed to appreciate the law governing the *ex parte* applicants' case or misdirected themselves or took into account irrelevant considerations; hence, the impugned decision is tainted by an error of the law. Alternatively, the Respondent acted outside their powers; hence, the decision is *ultra vires*, thus, it is tainted with illegality.

97. Judicial oversight is necessary to ensure that decisions are taken in a manner, which is lawful, reasonable, rational and procedurally fair. [78] What matters is to establish whether the decision was taken in a manner, which is lawful, reasonable, rational and procedurally fair.

98. Rationality, as a ground for the Review of an administrative action is dealt with in Section **7(2) (i)** of Fair Administrative Action.[79] It provides that:-" *A court or tribunal under subsection (1) may review an administrative action or decision, if- (i) the administrative action or decision is not rationally connected to- a) the purpose for which it was taken; (b) the purpose of the empowering provision;(c) the information before the administrator; or (d) the reasons given for it by the administrator*."

99. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the Fair Administrative Action Act.[80] A court has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout was whether the decision in question was one, which a reasonable authority could reach. The converse was described by Lord Diplock[81] as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.'

100. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *"objectively so devoid of any plausible justification that no reasonable body of persons could have reached it*[82] and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[83]This stringent test has been applied in Australia[84] where the Court held that in order for invalidity to be determined, the decision must be one, which no reasonable person could have reached, and to prove such a case required "something overwhelming." It must have been conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt and when "looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them." Given the facts of this case and the express provisions of section 1 (a) (b) of the second Schedule, I am not persuaded that a different body properly addressing its mind to the same facts, circumstances and the law could have arrived at the same conclusion.

101. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes, which are defensible with respect to the facts and the law. Put differently, no argument was advanced before me that the decision falls within the range of possible acceptable outcomes applying the same set of facts and the law.

102. The following propositions can offer guidance on what constitutes unreasonableness. *First*, *wednesbury* unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably. Talking about reasonableness, Parliament was clear when it provided two categories in section 1(a) and (b). The *ex parte* applicants holds a Bachelor of Laws Degrees as provided in the said provision. It was unreadable for the ex parte applicant to arrive at such a flawed decision. Worse still, it was unreasonable for the first Respondents to admit the ex parte applicants, receive their tuition fees, allow them to attend classes and then turn around to purport to revoke the admission.

103. This ground of review will be made out when the court concludes that the decision fell outside the area of decisional freedom, which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ. Confronted with express provisions of the law, any reasonable decision maker would have no difficulty concluding that the applicant's case fell under the first category.

104. The test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it. Differently put, on the face of the provisions of section 1(a) of the second schedule to the act, no reasonable could maker could have arrived at the same decision.

105. If a statute, which confers a decision-making power, is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

106. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[85]

107. In the circumstances of this case, the Respondents failed to give weight to the fact that the applicants met the statutory requirements for admission into the ATP. It was also legal unreasonableness for Respondent to fail to appreciate that the Regulations made under the Legal Education Act cannot pass the test of reasonableness since they purport to disqualify holders of Bachelors of Law Degree contrary to section 1(a) discussed above nor can the Regulations override express statutory provisions.

108. Article **47** (1) of the Constitution provides that *"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."* Briefly, this means that every citizen has a right to fair and reasonable administrative action that is allowed by the law; and to be given reasons for administrative action that affects them in a negative way.

109. Lawful means that administrators must obey the law and must be authorized by law for the decisions they make. Reasonable means that the decision taken must be justifiable - there must be a good reason for the decision. Fair procedures means that decisions should not be taken that have a negative effect on people without consulting them first. Also, administrators must make decisions impartially. To ensure fairness, the Fair Administrative Action Act[86] sets out procedures that administrators must follow before they make decisions.

110. The FAA Act was enacted to give effect to the right to just administrative action guaranteed under Article **47** Constitution. The Act defines 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. [87] To be an administrative action, the decision taken must adversely affect rights. What does this mean? Adversely means that the decision must impose a burden or have a negative effect. This includes decisions that; Require someone to do something, to tolerate something or not to do something; Limit or remove someone's rights; or Decide someone does not have a right to something. This is called an "adverse determination of a person's rights. It is not in dispute that the impugned decision fits the above definitions. What is in dispute is whether it was arrived at in a manner that is consistent with the dictates of Article **47** of the Constitution.

111. As the Supreme Court of Appeal of South Africa observed[88] *"All statutes must be interpreted through the prism of the Bill of Rights."* This statement is true of decisions made by statutory bodies. The governing statute and the resultant decision must be interpreted through the prism of Article **47** of the Constitution. It is beyond argument that Article **47** codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. These are the elements an applicant is required to establish. In fact, absence of one would be sufficient to invalidate the decision. Further, there is a right to be given reasons to any person who has been or is likely to be adversely affected by administrative action.[89]

112. Our constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms, that, generally speaking, when an order or a decision is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[90] Our courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made.[91]

113. Section **4** of the Fair Administrative Act[92] echoes Article **47** of the Constitution and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

114. Subsection **4** further obliges the administrator to accord affected persons an opportunity: - to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him.

115. Section **7 (2)** of the FAA Act provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power. Thus, for the Court to review an administrative decision, an applicant must demonstrate the above grounds. In fact, not all of them must be proved. Even prove of one of the above is sufficient to invalidate the decision.

116. The decision complained of must affect a person's rights. There are two ways that a decision can affect a person's rights:- **(i)**The decision could deprive a person of their existing rights, or **(ii)** It could affect a person's right by determining what those rights are. In other words, decisions that deprive someone of rights, and those that determine what that person's rights will be, are both "administrative action." Rights are understood in law as when one person has a right to claim something against another person and that other person has a duty to do something. Rights can be the rights granted by the Bill of Rights, by contract or by legislation. Rights can even be created by a promise of an administrator.

117. The impugned decision must have a legal effect, the effect must be direct. This is another way of saying that to qualify as administrative action, decisions must have a real impact on a person's rights. Legal effect means that a decision must be a legally binding determination of someone's rights or obligations. In other words, a decision must establish what someone's rights or obligations are, or must change or withdraw them.

118. As stated above, the Constitution says administrative action must be lawful, reasonable and procedurally fair and that reasons must be given for administrative action that adversely affects rights. It is unfair for an administrator to make a decision that adversely affects someone without consulting them first.

119. There are five mandatory procedures that must be followed when performing an administrative action that has a particular impact on a person or persons. These are that the affected person must be given, before the decision is taken, Adequate notice of the nature and purpose of the proposed administrative action, A reasonable opportunity to make representations; After the decision is taken, A clear statement of the administrative action; Adequate notice of any right of review or internal appeal; and Adequate notice of the right to request reasons.[93]

120. "Adequate notice" means more than just informing a person that an administrative action is being proposed. The person must be given enough time to respond to the planned administrative action. The person also needs to know enough information about the proposed administrative action to be able to work out how to respond to the proposed action. They need to know the nature of the action (what is being proposed) and the purpose (why is the action being proposed).

121. A reasonable opportunity to make representations is a key requirement. The length of time a person should be given to make representations will be different in different circumstances. This should include an opportunity to raise objections, provide new information, or answer charges. A "reasonable opportunity to make representations" can sometimes mean that a person affected by administrative action must be given a hearing where that person can make a verbal input. At other times, it may only mean that a person should be allowed to submit written representations to an administrator who must read and think about them.

122. An administrator must clearly state what the administrative action is that will be taken. A person affected by the administrative action must understand what is likely to happen. This will assist the person affected to respond to the action. Using plain and straightforward language will help people to understand exactly what is being planned.

123. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano*[94] the court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature. These are:-

> ***a. Illegality****- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be* ***"illegal".*** *Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.*
>
> ***b. Fairness****- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.*
>
> ***c. Irrationality and proportionality****- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute* ***'irrationality"*** *or* ***'perversity'*** *on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of* ***Lord Green*** *in Associated Provincial Picture Houses Ltd vs Wednesbury Corporation*[95]*:-*
>
> > *"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."*

124. The provisions conferring mandate upon the Respondents must be read in the context of three different imperatives. The *first* is to enable the Respondents to effectively carry out their specially identified statutory mandate. The Constitution and the applicable statutes clearly envisages an important and active decisional role for the Respondents to perform their functions through the application of the law. *Second*, the Constitution declares that everyone is entitled to a Fair Administrative Action. In as much as the Respondents decisions affects the *ex parte* Applicants, the Respondent is obliged **not** to act unfairly. A *third* dimension must also be borne in mind. It could not have been the intention of the legislature to contemplate a situation whereby the Respondent would act in such a manner as to violate, trump, or trivialize citizens' constitutional rights.

125. Put differently, the manner in which the impugned decision was rendered cannot be read in a manner that is consistent with the provisions of Article 47 of the Constitution and the provisions of the FAA Act.

e. Whether the impugned decision violates the ex parte Applicants' Right to legitimate expectation and the Right to education guaranteed under Article 43 (1) (f) of the Constitution.

126. The *ex parte* applicants counsel argued that the impugned decision violated the *ex parte* applicant's right to legitimate expectation. It was his argument that having been admitted to the KSL, and having attended classes, the *ex parte* applicants had legitimate expectation that they would be enrolled into the ATP and subsequently into the bar. To buttress his argument, he cited *Republic v Kenya National Examinations Council & 2 Others ex parte Echesa Abubakar Busalire Chairman Parents Association of Chebuyusi High School & 190 others.*[96]

127. The Respondent's counsel did not address this issue at all.

128. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others*[97] where it was held as follows with regard to similar provisions on just administrative action in Section 33 of the South African Constitution:-

> *"…The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in*

particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"

129. 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. 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 that is enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. It is first asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. 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.

130. With regard to the first test, the *ex parte* applicants were admitted to the ATP, they paid school fees, they were issued with the KSL identification cards and they attended classes. First, they had a reasonable legitimate expectation that the Respondents will comply with the law and let them complete the training. Second, they had legitimate expectoration that they would at all material times be treated fairly, lawfully and in a procedurally fair manner. Third, they had a legitimate expectation that the Respondents will understand the law and correctly apply it. Fourth, they had a legitimate expectation that their rights would not be violated. Differently put, the applicant's expectations were legitimate.

131. Addressing the subject of legitimate expectation, *H. W. R. Wade & C. F. Forsyth*[98] 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)

132. The *ex parte* applicants hold Bachelors Law Degrees. As held above, they met the admission requirements to the ATP as provided under section 1 (a) of the second Schedule to the KSL Act. They had a legitimate expectation that their admission would not be revoked. Such a legitimate expectation cannot be taken away by a fiat grounded on misapprehension of the law and the Regulations. Even if I were to hold otherwise, the doctrine of implied repeal discussed earlier applies.

133. As for the violation of Article 43 (1) (f) rights, aside from guaranteeing the rights set out in the Bill of Rights, the Constitution provides that the Bill of Rights binds all State and state organs. Thus, the Respondent had an obligation to respect the Bill of Rights. Article 19 provides that:-

(1) The Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies.

(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.

(3) The rights and fundamental freedoms in the Bill of Rights—

(a) belong to each individual and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.

134. Article 21 places provides that:-

(1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.

(2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

135. It is thus evident that the *ex parte* applicants have a constitutionally guaranteed right to education under Article 43 (1) (f) of the Constitution. Any action that limits or diminishes this right is a violation of the Constitution, unless it can pass the tests provided in Article 24 of the Constitution. There was no argument before me that the limitation of the *ex parte* applicant's rights meets an Article 24 Analysis test nor do I find any in the circumstances of this case.

Conclusion

136. The *ex parte* 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. As stated earlier, the impugned decision does not fall within the legal boundaries assigned to the Respondents by the enabling statutes.

137. The applicants also seek an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person. A prohibiting order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a prohibiting order acts prospectively by telling an authority not to do something in contemplation.

138. I find that the impugned decision is amenable for review on grounds discussed earlier and that the writs of *Certiorari* and *Prohibition* prayed in this case are warranted. Judicial Review is concerned with testing the legality of a decision. A decision does not 'involve' an error of law unless the error is material to the decision in the sense that it contributes to it so that, but for the error, the decision would have been, or might have been, different.[99]

139. 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.[100] 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.

140. In view of my analysis of the law and the determinations of the issues discussed above, the conclusion becomes irresistible that the *ex parte* applicants have established grounds to warrant the judicial review orders sought. Consequently, I allow the applicant's Notice of Motion dated **23th** March 2018 and make the following orders:-

> *a. An order of **Certiorari** be and is hereby issued quashing the first Respondent's decision contained in the letter dated 15th February 2018.*
>
> *b. An order of prohibition be and is hereby issued prohibiting the Respondents from barring the applicant's from registering, attending and undertaking the bar examinations or generally participating in the Advocates Training Programme for the academic year 2018/2019 and or any other academic year.*
>
> *c. An order of Mandamus be and is hereby issued compelling the Respondents jointly and severally to re-admit the ex parte applicants into the Advocates Training Programme.*
>
> *d. The costs this application be borne by the Respondents jointly and severally.*

Signed, Dated and Delivered at Nairobi this 17th day of September 2019

John M. Mativo

Judge

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[1] Act No. 26 of 2012.

[2] Act No. 9 of 1995.

[3] Cap 16, Laws of Kenya.

[4] Act No. 27 of 2012.

[5] Cap 16, Laws of Kenya.

[6] Act No. 4 of 2015.

[7] Act No. 27 of 2012.

[8] {2019} e KLR.

[9] See *EG & 7 others v Attorney General*; *DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae).*

[10] Ibid.

[11] Ibid.

[12] This position has been appreciated in many decisions of this court including the above cited case of See *EG & 7 others v Attorney General*; *DKM & 9 others (Interested Parties); Katiba Institute & another (Amicus Curiae).*

[13]This rule is restated by Joubert JA in *Adampol (Pty) Ltd vs Administrator, Transvaal 1989 (3) SA 800(A)* at 804BC.

[14] {1987} 1 SCC 424.

[15] Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, "A guide to reading, interpreting and applying statutes" https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf.

[16] Plain meaning should not be confused with the "literal meaning" of a statute or the "strict construction" of a statute both of which imply a "narrow" understanding of the words used as opposed to their common, everyday meaning.

[17] In *Jaga v Dönges, N.O. and Another*, 1950 (4) SA 653 (A)

[18]*Jaga v Dönges , N.O. and Another; Bhana v Dönges*, N.O. and Another **1950 (4) SA 653** (A) at 662G-H.

[19] Ibid

[20] See Article 259 of the Constitution

[21] See Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 270–71 (1999).

[22] Ibid.

[23] Henry M. Hart, JR. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 1375–76 (William N. Eskridge, Jr. & Phillip P. Frickey eds., 1994).

[24] Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 13 (1998).

[25] Therasus.com.

[26] Third Edition, Longman, www.longmam.com

[27] Published by Peter Haddock Limited, Bridlington, England, 1997.

[28] 6th Edition, Oxford University Press.

[29] Eleventh Edition, Oxford University Press.

[30]See *Fakir Mohd vs Sitam* {2002}1 SCC 741 at 747.

[31]See Statutory Interpretation by Justice G.P. Singh, 8th Edition, 2001, p.370.

[32] {2003-I-LLJ-384, 387

[33] {1999} (3) SC 573, 583

[34] {2018} e KLR.

[35] {2018} e KLR.

[36]{2017} e KLR.

[37] {2017} e KLR.

[38] {1940} Edition

[39] See *Pompano Horse Club v. State*, 111 So. 801, 805 (Fla. 1927).

[40] Ibid.

[41] *U.S. v. Hartwell*, 73 U.S. 385, 395 (1868) (analyzing whether the statute's language of "any banker, broker, or other persons not an authorized depository of the public moneys" includes a clerk in the office of the U.S. assistant treasurer so that the clerk is subject to the penalties prescribed in the statute for misconduct by officers).

[42] 503 U.S. 291 (1992) (analyzing whether Congress intended courts to treat upper limit of penalty as "authorized" in case involving juveniles convicted as adults when proper application of mandated sentencing guideline in adult case would bar imposition up to the limit).

[43] Frederick J. De Sloovere, *Contextual Interpretation of Statutes*, 5 Fordham L. Rev. 219 (1936).

[44] *Eyston v. Studd*, 2 Pl. Com. 459, 465 n, 75 Eng. Reprints 688 (C. B. 1574).

[45] See *Woods Manufacturing Co. vs The King* {1951} S.C.R. 504 at page 515 and Youngsam R (oN THE Application of) vs The Parole Board {2017}EWHC 729

[46] See *Justice Jeane W Gacheche & 5 Others vs Judges and Magistrates Vetting Board & 2 Others* {2015}eKLR citing Sir Charles Newbold, P in *Dodhia vs National & Grindlays Bank Ltd & Another* {1970} E.A. 195

[47] Act No. 27 of 2012.

[48] Ibid

[49] *Kutner v Philips* {1891} 2 QB 267 (QB).

[50] {2019} e KLR.

[51] Ibid n 2, 272 A L Smith J? see also Paine v Slater (1883) 11 QBD 120, 122 (EWCA) Brett LJ.

[52] See for example, *Cox v Hakes* (1890) 15 AC 506, 517 (HL) Lord Halsbury? *Bishop of Gloucester v Cunningham* [1943] KB 101, 105 (CA) Lord Greene MR, Scott and MacKinnon LJJ.

[53] *Craton v Winnipeg School Division* (No 1) [1985] 2 SCR 150, para 8 McIntyre J.

[54] Section 6.10.

[55] {1892} 1 Q.B. 654.

[56] {2017} e KLR.

[57] {2014} eKLR

[58] 308 US 188, (1939)

[59] See *Steve Thoburn vs. Sunderland City Council* 2002 EWHC 195.

[60] Mombasa Civil Case No. 97 of 2001

[61] Pet. 266 of 2015.

[62] Act No. 27 of 2012.

[63] {2017} eKLR.

[64] {2018} eKLR.

[65] {2016} eKLR.

[66] Cap 2, Laws of Kenya.

[67] {2017} e KLR.

[68] {2017} e KLR.

[69] 1908 29 NLR 338, at 341.

[70] {2016} e KLR

[71] {2014} e KLR.

[72] {2015} e KLR.

[73] Act No. 26 of 2012.

[74] {2013} e KLR.

[75] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[76] *R. vs Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539 at 587 (Lord Steyn: ‘‘Parliament does not legislate in a vacuum. Parliament legislates for a…liberal democracy based upon the traditions of the common law . . . and . . ., unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law’’).

[77] *Jackson vs Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [120] (Lord Hope), [102] (Lord Steyn), [159] (Baroness Hale suggest that the rule of law may have become ‘‘the ultimate controlling factor in our unwritten constitution’’; and see J. Jowell, ‘‘Parliamentarys' Sovereignty under the New Constitutional Hypothesis’’ [2006] P.L. 262.

[78] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others* {2011} JOL 28061 (ECG) para 11

[79] Act No. 4 of 2015.

[80] Act No. 4 of 2015.

[81] {1976} UKHL 6; {1976} 3 All ER 665 at 697{1976} UKHL 6; , {1977} AC 1014 at 1064.

[82] See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821].

[83] *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.

[84] In *Prasad v Minister for Immigration* {1985} 6 FCR 155.

[85] Justin Gleeson, “Taking stock after Li”, in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.

[86] Act No.4 of 2015

[87] Ibid, Section 2

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

[89] Article 47(2) of the Constitution of Kenya, 201

[90] Kioa v West (1985), Mason J

[91]See *Onyango v. Attorney General, {1986-1989} EA 456*, ***Nyarangi, JA*** asserted at *page 459 that:-“I would say that the principle of natural justice applies where ordinary people who would reasonably expect those making decisions which will affect others to act fairly.”* At *page 460* the learned judge added:-*“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”*

[92] Act No. 4 of 2015

[93] Section 6 of the Act

[94] JR No 17 B of 2015.

[95] {1948} 1 K. B. 223, H.L.

[96] {2018} e KLR.

[97](CCT16/98) 2000 (1) SA 1, at paragraphs135 -136.

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

[99] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 353 per Mason CJ. See also comments by Toohey and Gaudron JJ at 384.

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