



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 50 OF 2017**

**WAMBUI SHADRACK KINYANJUL.....PETITIONER**

**VERSUS**

**LAW SOCIETY OF KENYA.....1<sup>ST</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**KENYA SCHOOL OF LAW.....1<sup>ST</sup> INTERESTED PARTY**

**SOCIALASSISTANCE AUTHORITY.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

1. **Wambui Shadrack Kinyanjui**, the Petitioner is an advocate of the High Court but was not at the time of filing this petition admitted to the Roll of Advocates. He filed the petition against the Law society of Kenya, the 1<sup>st</sup> respondent, a corporate body of lawyers in Kenya, established under section 3 of the Law Society of Kenya Act whose membership is drawn from all persons admitted to practice law in the country, and The Hon Attorney General, the 2<sup>nd</sup> Respondent, who is the principal legal advisor to the government of Kenya and the legal representative of the national government in civil proceedings in which it is a party. Kenya School of Law responsible for training persons interested for admission as advocates was named as the 1<sup>st</sup> Interested Party while National Social Assistance authority which is described as body established under section 3 of the Social Assistance Act, 2013 whose mandate to enter into agreements with institutions and other persons for the provision of social services, to inspire and promote the spirit of protecting persons in need of social assistance was named as the 2<sup>nd</sup> Interested Party.

2. The Petitioner averred that law students go through challenges right from the University to their studies at the 1<sup>st</sup> Interested Party while undertaking Advocate Training Programme (ATP). He stated that there is even a bigger problem when law students undertake pupillage at various law firms and government institutions, including the Office of the Director of Public Prosecution. According to the petitioner, there is no regulation of pupillage and students are subjected to various treatments, such as the allowances paid to them which is left at the discretion of the pupil master.

3. The Petitioner further averred that the above notwithstanding, the problems law students face are made worse when they petition for admission and when they are finally admitted as advocates of the High Court given the conditions placed on their way before one can start practicing as an advocate. The petitioner stated that after one petitions for admission, he has to wait for 30 days statutory period before admission and that upon admission, the new advocate cannot start practicing before paying at least **Kshs 21,560/=** for the annual practicing certificate.

4. To demonstrate the difficulty, it is the petitioner's case that by letter dated 30<sup>th</sup> November 2018, the 1<sup>st</sup> Respondent demanded **Kshs 21,560/=** from those advocates who were admitted in 2017 before they could be issued with practicing certificates for the year 2018 and that before admission one is also required to pay **Kshs 400/=** as admission fee. This, he stated is besides the need for money to hiring a gown for purposes of admission.

5. The Petitioner expressed fear that he will not be able to practice as an advocate immediately upon admission because he cannot raise **kshs 21,560/=**. He contended that the amount demanded by the 1<sup>st</sup> Respondent is not only illegal, unreasonable and procedurally unfair but also unconstitutional and is against Articles 24, 43 and 55 of the Constitution. In the Petitioner's view, it infringes the right to access opportunities and therefore, it is neither reasonable nor justifiable in an open and democratic society.

6. The Petitioner further contended that a proper reading of section 22 of the Advocates Act, shows that the only money required before

issuance of a practicing certificate is the practicing certificate fee; Law Society subscription fee and the fee required for the **Advocates Benevolent Association** which cannot exceed **Kshs 11,000/=**. In the Petitioner's view, the extra amount is illegal, exorbitant and exploitative to young advocates since it is not prescribed for under section 22(b) of the Advocates Act. He also contended that levies such as that for the East Africa Law Society is illegal.

7. The Petitioner contended, therefore, that the demand of the money and requirement of payment of the same violates his constitutional rights and those like him who are newly admitted and who cannot immediately practice law or seek employment because they do not have practicing certificates. He therefore sought the following reliefs:

*a. An order for judicial review by way of certiorari be and is hereby issued to bring into this court and quash the entire DEMAND NOTICE FOR FEES made by the 1<sup>st</sup> respondent and communicated vide a letter dated 30<sup>th</sup> November 2017, determining that the petitioner and other individuals desirous at practicing law as advocates upon admission, must pay to it at least Kshs 21,560 as a precondition to the issuance of a practicing certificate for the year 2018.*

*b. A declaration by this Honourable court that the fees demanded by the 1<sup>st</sup> respondent being at least Kshs 21,560 are unreasonable, illegal and inconsistent with the statutory requirement, and that the only amounts payable as a precondition to the issuance of the 2018 practicing certificate as per Section 22(b) of the Advocates Act, Cap 16 is limited to the fees prescribed for a practicing certificate, the annual subscriptions payable for the time being to the Society and to the Advocates Benevolent Association.*

*c. Without prejudice to prayer 2 above, a declaration be made that section 22(b), Cap 16 should be read with the necessary modifications and alterations pursuant to Section 7 of the Sixth Schedule to the Constitution, so as to exclude newly admitted advocates from paying the required fees as a precondition for the issuance of a practicing certificate during their first year of practice.*

*d. That by dint of Article 36(2) of the Constitution 2010, a declaration be made that the membership of Advocates of the East Africa Law Society and its levy of Kshs 4,000 is not compulsory and therefore should not be a precondition for issuance of practicing certificate.*

*e. Without prejudice to prayers 1, 2, 3 and 4 above, a declaration be made that Section 22 (b), Cap 16 is unconstitutional for being inconsistent with Articles 27, 43 and 55 of the Constitution, 2010 so far as it makes it mandatory for all Advocates, without the exception of newly Advocates, to pay the fees demanded therein as a precondition to the issuance of a practicing certificate.*

*f. This Honourable Court be pleased to recommend to the Speakers of the National Assembly and the Senate, and the 2<sup>nd</sup> Respondent to attend with a signal of the utmost urgency, the enactment of a Pupillage Act to secure and safeguard the interest and the dignity of pupils and for the prescription of the minimum/ standard allowance payable to a pupil during pupillage and the minimum salary/ wage payable to a newly admitted Advocate.*

*g. Costs of this petition and interests thereon.*

*h. Any other order that this Honourable Court deems fit and just in the circumstances.*

#### **1<sup>st</sup> Respondent's Response**

8. The 1<sup>st</sup> Respondent filled grounds of opposition dated 26<sup>th</sup> February 2018 contending that the petition does not plead with a degree of clarity, specificity and particularity of any constitutional right infringed and violated by the 1<sup>st</sup> Respondent; that the petition does not plead with reasonable degree of precision which constitutional provisions have been violated, how, when and in what manner and that at the time of filling the petition, the Petitioner was not a member of the 1<sup>st</sup> Respondent not being an advocate.

9. The 1<sup>st</sup> Respondent contended that no evidence had been adduced to support the various claims and therefore, the affidavit is speculative; that the 1<sup>st</sup> Respondent and its members fairly, carefully and correctly convened Annual General meetings and passed resolutions about practicing certificates fee, membership of the East African Law Society and its fees and levies and urged the court not interfere with resolutions of the members of the 1<sup>st</sup> Respondent which exercised their mandate to make resolutions for purposes of managing the legal practice in the country and the East Africa Law Society issues. According to the 1<sup>st</sup> Respondent, the Petitioner is seeking outlandish reliefs which show that there is an ulterior motive in instituting the present petition and it is an abuse of the court process.

10. The 1<sup>st</sup> Respondent also filled a replying affidavit by **Mercy Wambua**, its CEO, sworn on 8<sup>th</sup> March 2018, reiterating their argument that the Petitioner is not an advocate and a member of the 1<sup>st</sup> Respondent; that by virtue of section 22 of the Advocates Act, the Petitioner would pay prescribed fee for a practicing certificate, the annual subscription to the 1<sup>st</sup> Respondent and to the Benevolent Association; that under the advocates practicing rules, 2007, advocates who have been on the Roll for less than 5 years pay **Kshs 3,000/=** and **Kshs 5,000/=** for those who have been on the Roll for more than 5 years; that resolutions have been passed over the years and that **The Law Society of Kenya (Miscellaneous Levies) Regulations, 2012** have set the annual subscription fee for every member.

11. **Miss Wambua** deposed that all levies are prescribed in law; that the 1<sup>st</sup> Respondent's Council has a publication "**The Advocate**" for which each member contributes an annual levy of Kshs 50 or as may be determined from time to time; that there is a building fund for which a levy of Kshs 5,000/= is paid; that members pay the East Africa Law society levy of USD 20 but this was increased to USD 50 by members' resolution and that the issues of compulsory levies can only be decided by the 1<sup>st</sup> Respondent's members.

12. It was also deposed that the East Africa Law Society published a notice of the intentions to reduce the levy in 2019 and all advocates have been informed through a notice from the 1<sup>st</sup> Respondent and therefore the petition is based on misrepresentations to the court; that the 1<sup>st</sup> Respondent is a member and director of East Africa Law Society; that the Advocates Act and the Law Society of Kenya Act make it mandatory for every qualified Kenyan who wishes to practice law to be a member (According to the 1<sup>st</sup> Respondent's amended articles of association) and that due to a statutory requirement to improve practice of law, to assist the court and government in all matters of law as well as protect the public, any decisions taken by the 1<sup>st</sup> Respondent through its various organs and ratified at its general meetings bind all members and the court should not interfere with internal matters of the 1<sup>st</sup> Respondent. It was also deposed that the 1<sup>st</sup> Respondent's 2018 Annual General Meeting suspended the issues of East Africa Law Society levy.

### ***2<sup>nd</sup> Respondent's response***

13. The 2<sup>nd</sup> Respondent filed grounds of opposition dated 9<sup>th</sup> March 2018 and filed in court on 14<sup>th</sup> March 2018. It contended that all statutes have a presumption of constitutionality; that section 22(b) of the Advocates Act provides for the conditions the Chief Registrar of the Judiciary must consider before issuing a practicing certificate; that it has not been shown how the section offends the Constitution; that there was public participation before the enactment of the Act and that the petition is incompetent, misconceived, misplaced and is an abuse of court process.

### ***1<sup>st</sup> Interested Party's response***

14. The 1<sup>st</sup> Interested Party filed a replying affidavit by Lawrence Ndirangu, its admissions officer, sworn on 8<sup>th</sup> May 2018 and filed in court on 21<sup>st</sup> May 2018. He deposed that ATP is a statutory programme provided for under Section 13(b) (i) of the Advocates Act which is undertaken for 1 year; 6 months in pupillage and academic studies for 6 months; that anyone interested in undertaking ATP has to apply for admission on qualifying for such admission and once applicants meet certain admission conditions including the fact that they have a pupil master; that the 1<sup>st</sup> Interested Party does not regulate minimum remuneration or stipend that should be paid to pupils by the Pupil Master and that such stipend or remuneration is based on the pupil master's financial ability.

### ***Petitioner's submissions***

15. The Petitioner submitted, highlighting his written submissions dated 9<sup>th</sup> April 2019, that the petition was triggered by the 1<sup>st</sup> Respondent's demand Notice for fee dated 30<sup>th</sup> November 2017 based on section 22 of the Advocates Act directed at the newly admitted advocates demanding payment of **Kshs 21,560/=** as a pre-condition to issuance of the 2018 Advocates Practising Certificate.

16. According to the Petitioner, the petition raises issue of the legality of the demand notice for fees; constitutionality of Section 22 of the Advocates Act to the extent that it applies to all advocates without exception to the newly admitted advocates and in the alternative, it seeks interpretation of section 22 in a manner that conforms with the Constitution by exempting the newly admitted advocates from paying the fees required before issuance of practicing certificates in the first instance.

17. The Petitioner submitted that the requirement and qualification for advocates are well spelt out in Section 12 of the Advocates Act and further that the advocate must also satisfy the conditions set out in Section 13 of the Act. He urged the court to take judicial notice that the biggest financier of university education is Higher Education Loans Board (HELB) although the 1<sup>st</sup> Respondent runs a programme through which it sponsors needy students.

18. He submitted that for a newly admitted advocate to be required to pay for the practicing certificate will cause them hardship. The Petitioner relied on ***Law Society of Kenya v Kenya Revenue Authority & another*** [2017] e KLR on the use of object and purpose as the basis for determining constitutionality of the impugned section 22 (b) of the Advocates Act.

19. According to the Petitioner, Article 55 of the Constitution requires the state to take action to ensure that the youth access employment and for that reason the significance of a practicing certificate cannot be trivialized as it is the basis upon which an advocate can practice law. However, "to the extent that a young advocate cannot afford fees required for the first practicing certificate means he cannot access opportunities of employment." The Petitioner submitted. In his view, this brings to question the constitutionality of section 22 in its present form. The Petitioner contended that the section cannot pass the constitutionality muster in so far as it applies to all advocates without regard to the newly admitted advocates who do not have money to pay for the Practising certificate.

20. The petitioner went on to submit in the alternative, that should the court find the section constitutional, it should, pursuant to section 6 of the Sixth Schedule to the Constitution, breathe into section 22 an interpretation that conforms to the constitutional structure. He relied on a number of decisions to support his case.

### ***1<sup>st</sup> Respondent's submissions***

21. Mr. Cohen, learned counsel for the 1<sup>st</sup> Respondent, submitted in opposition to the petition, that the issues raised in the petition should have been addressed through the 1<sup>st</sup> Respondent's membership. On whether the 1<sup>st</sup> Respondent can levy the fees the Petitioner challenges, he contended that this can be dealt with the Respondent's internal organs.

22. Counsel submitted that in 2003, the 1<sup>st</sup> Respondent approved the levies and since then subsidiary legislations have been enacted, namely; The Law Society of Kenya (Miscellaneous Levies) Regulations which contains the levies the Petitioner has challenged. Mr. Cohen further submitted that section 4 of the Law Society of Kenya Act is clear on the 1<sup>st</sup> Respondent's functions; that section 30 of the Act deals with ordinary meeting where resolutions are passed and thereafter the resolutions are subjected to members for approval under section 33 as read

with section 41 of the Act.

23. With regard to increase in subscriptions, counsel argued that these are decisions made by either the 1<sup>st</sup> Respondent or the East Africa Law Society. He referred to the East Africa Law Society minutes of a meeting held in October 2006 and the notice increasing levies issued thereafter by the 1<sup>st</sup> Respondent to its members after it had been subjected to its members' annual general meeting and adopted. He also submitted that the same issue was the subject of *Petition No 77 of 2018, Charles Kanjama v Law Society of Kenya* which was however withdrawn because the issue was resolved at the 1<sup>st</sup> Respondent's 2018 annual general meeting.

24. He further submitted that on 24<sup>th</sup> March 2018 during the 1<sup>st</sup> Respondent's annual general meeting, the issue was again raised by way of a motion but members deferred the motion because members had suspended the discussions for 2 years. He argued that the East Africa Law Society sent a notice to the 1<sup>st</sup> Respondent dated 23<sup>rd</sup> February 2018, indicating that subscription fee by newly admitted advocates had been waived and, therefore, the issue of subscription should be decided by members and not the court. He also stated that during the 1<sup>st</sup> Respondent's 2019 Annual general meeting, members agreed to reduce membership subscription to the East Africa Law Society downwards and therefore the petition does not raise a constitutional issue on the subscription fee.

25. In Mr. Cohen's view, section 22 is merely a procedural provision on the issuance of practicing certificates. According to him without challenging section 23 of the Advocates Act which provides for the requirements for one to be a member of the Law Society of Kenya, section 22 cannot be impugned. He urged the court not to interfere with internal mandate of the 1<sup>st</sup> Respondent and relied on the decision in *Nelson Havi v Law Society of Kenya* 2017 e KLR for the submission that courts should not be quick to interfere with the society's internal matters.

26. He also submitted that there is a presumption of constitutionality of Acts of Parliament and relied on *Law Society of Kenya v Kenya Revenue Authority* (supra); that the issue of hardship can be dealt with by the 1<sup>st</sup> Respondent and that sections 13 and 14 of the Advocates Act deal with qualifications after which the 1<sup>st</sup> Respondent comes in.

27. Miss Kiberenge, learned counsel for the 1<sup>st</sup> Interested Party supported the 1<sup>st</sup> Respondent's position and urged the court to dismiss the petition.

#### ***Determination***

28. I have considered this Petition, the responses and submissions made on behalf of the parties. I have also considered the authorities relied on. Three questions arise for determination in this Petition namely: whether the demand for fees by the 1<sup>st</sup> Respondent from newly admitted advocates is illegal unreasonable and unconstitutional; whether the requirement that members of the 1<sup>st</sup> Respondent be members of the East African Law Society is unconstitutional and whether section 22(b) of the Advocates Act is unconstitutional for making it mandatory for all advocates without exception to newly admitted advocates, to pay fees for practicing certificates to the 1<sup>st</sup> Respondent as a condition for issuance of such certificates.

29. The facts of this Petition are straight forward. The Petitioner was at the time of filing this Petition, awaiting admission to the Roll of advocates. In the meantime, the 1<sup>st</sup> Respondent had called for payment of fees and charges in the sum of **Kshs. 21560/=** in preparation for the issuance of the 2018 practicing certificates. The demand notice was dated 30<sup>th</sup> November 2017 and was addressed to those advocates who were admitted in 2017 but had not taken out practicing certificates. According to the demand notice. The amount was made up of various levies including the East African Law Society subscription fees. The Petitioner as one of those expected to be new advocates, felt aggrieved and filed this Petition seeking a raft of reliefs as already highlighted herein above. The Respondents opposed the Petition and argued first, that the Petitioner was not yet an advocate and that some of the charges had already been reduced or suspended all together and therefore, there was no justiciable issue.

30. Looking at this Petition, I think it is important to determine, first, whether section 22(b) of the Advocates Act is unconstitutional to the extent that it relates to newly admitted advocates with regard of charges and levies payable to the 1<sup>st</sup> Respondent before obtaining practicing certificate. This, in my view, will then inform whether the impugned demand notice was unreasonable or illegal. However, before doing so, it is appropriate to highlight some of the mandates of the 1<sup>st</sup> Respondent.

31. The 1<sup>st</sup> Respondent is a body corporate established under section 3 of the Law Society of Kenya Act. The long title to the Act states it is to establish the 1<sup>st</sup> Respondent, to provide for its objects, and the conduct of its affairs; and to provide for the establishment of the Advocates Client Compensation Fund.

32. Section 4 of the Act provides for the 1<sup>st</sup> Respondent's objects and functions. These include; ensuring that all persons who practise law or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya; determine, maintain and enhance the standards of professional practice and ethical conduct, and learning for the legal profession in Kenya among others.

33. A reading of these objects and functions is clear that for the 1<sup>st</sup> Respondent to effectively deal with the issue of practice of law in the country and protect the profession and the public interests, it becomes necessary that all advocates be members of the 1<sup>st</sup> Respondent before it can exercise control and oversight over their conduct and the practice of law. Only then can the 1<sup>st</sup> Respondent also protect the interests of the profession and the public as consumers of the services rendered by its members.

**Whether Section 22(b) of the Advocates Act is unconstitutional**

34. Section 21 of the Act authorizes the Chief Registrar of the Judiciary to issue practicing certificates to advocates. It provides **“that the Registrar, (Chief Registrar), shall issue in accordance with, but subject to, this Part and any rules made under this Act, certificates authorizing the advocates named therein to practise as advocates”**. This means advocates cannot practice law without practising certificates and the certificates are issued as a matter of law and in accordance with any rules that may be in force from time to time.

35. On the other hand, section 22 provides how the certificate is to be issued. It states;

**1) Application for a practising certificate shall be made to the Registrar—**

**(a) by delivering to him an application in duplicate, signed by the applicant specifying his name and place of business, and the date of his admission as an advocate;**

**(b) by producing evidence satisfactory to the Registrar that the**

**applicant has paid to the Society the fee prescribed for a practicing certificate and the annual subscriptions payable for the time being to the Society and to the Advocates Benevolent Association; and**

**(c) by producing a written approval signed by the Chairman of the Society stating that there is no objection to the grant of the certificate.**

**(2) Subject to section 31, the Registrar, if satisfied that the name of the applicant is on the Roll and that he is not for the time being suspended from practice, shall within fourteen days of the receipt by him of the application issue to the applicant a practising certificate.**

**(3) The Registrar shall cause one copy of each declaration delivered to him under this section to be filed in a register kept for that purpose, and any person may inspect the register during office hours without payment.**

36. Section 22 is a procedural section in so far as taking out practising certificates is concerned. The advocate applying for a practicing certificate must be on the Roll of Advocates; must state the year of admission and there must be evidence of payment of subscriptions to the 1<sup>st</sup> Respondent and the Advocates Benevolent Association.

37. The Petitioner has argued that section 22(1) (b) only recognizes subscriptions to the 1<sup>st</sup> Respondent and to The Advocates Benevolent Association and, therefore, any other levies are unlawful. In the Petitioner’s view, the only amount that is due to the 1<sup>st</sup> Respondent is Kshs 5000/= being annual subscription fee and Kshs. 3000/= to the Advocates Benevolent Association and no other charges and or levies.

38. If the Petitioner’s argument was to have sway, it would amount to a narrow interpretation of the law whose effect would lead to some level of absurdity. First section 22(1) (b) cannot be read alone or in isolation. The Act must be read holistically in order to get the intention of the legislature in enacting that statute. As was held in ***The Engineers Board of Kenya v Jesse Waweru Wahome & others***, Civil Appeal No 240 of 2013;

**“One of the canons of statutory interpretation is a holistic approach...no provision of any legislation should be treated as ‘stand - alone’. An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act.**

39. Further, interpretation of section 22(1) (b) must also take into account the provisions of the Law Society of Kenya Act and more so the objects and functions of the 1<sup>st</sup> Respondent which is established as a corporate entity. The 1<sup>st</sup> Respondent’s objectives which, as already stated above, include ensuring that all persons who practice law or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya; determine, maintain and enhance the standards of professional practice and ethical conduct, and learning for the legal profession in Kenya among others which cannot be achieved without some of the impugned levies.

40. The Petitioner’s argument if, I understood it correctly, is that young advocates have difficulties in raising money and, therefore, requiring them to pay as much as Kshs. 21560/= to obtain practicing certificates is a toll order because they are without employment. The requirement for taking out annual practicing certificates is statutory. The Petitioner did not show that other professions are treated differently so that the requirement in the impugned section 22 in general presents an element of discrimination against the legal profession as opposed to other professions.

41. The Petitioner’s attention seems to have escaped the importance of section 23 of the Act which provides as follows:

**1) Every advocate to whom a practising certificate is issued under this Part shall thereupon and without payment of any further fee, subscription, election, admission or appointment, and**

**2) notwithstanding anything contained in the Law Society of Kenya Act (Cap. 18) or in any regulations made thereunder, become a**

*member of the Society and the Advocates Benevolent Association and be subject to any provision of law or rule of the Society and the Advocates Benevolent Association for the time being affecting the members thereof.*

*(2) Every advocate who has become a member of the Society under this section shall remain a member until the end of one month after expiration of his practising certificate, unless his name, whether at his own request or otherwise, is removed from or struck off the Roll, whereupon he shall cease to be a member of the Society.*

*(3) An advocate who has become a member of the Society under this section and who is suspended from practice shall not be entitled during the period of the suspension to any of the rights or privileges of such membership.*

42. The import of section 23 is that it is the practising certificate that entitles the advocate to become a member of the 1<sup>st</sup> Respondent and to practice law in the country. That makes the advocate subject to the overall control of the 1<sup>st</sup> Respondent in accordance with the provisions of the Law Society of Kenya Act as read with the Advocates Act. That makes him liable to sanctions that may be imposed against him by the 1<sup>st</sup> Respondent. Furthermore, before the Chief Registrar issues a practicing certificate, she has to satisfy herself that apart from meeting the requirements on payment of subscriptions to the 1<sup>st</sup> Respondent and the Advocates Benevolent Association, there is a letter of no objection from the President of the 1<sup>st</sup> Respondent. This is meant to ensure that the regulation of the profession is tight for the benefit of not only the profession itself but also the public who are the consumers of services provided for by members of the profession.

43. The Petitioner's argument that section 22(1) (b) is unconstitutional to the extent that it applies to newly admitted advocates as a precondition to taking out practising certificates to practice law and therefore violates Articles 27, 28, 43 and 55 of the Constitution is, in my respectful view, unsustainable. Article 27 prohibits all forms of discrimination based on any grounds. However, where one pleads discrimination, he has a duty to establish that indeed there is unfair discrimination, for it is the unfair discrimination that the constitution prohibits. There may be instances that although on the face the act may appear to be discriminatory, it may not essentially be discrimination based on the prevailing circumstances of that particular case.

44. In the context of this Petition, the Petitioner has not shown why he thinks the demand for payment of fees is discriminatory and a violation of Article 27. Moreover, the demand is addressed to those advocates who were admitted in 2017 but had not taken out practising certificates. The demand notice was addressed to them by reason of a statutory requirement and for that reason I see no discrimination as contended by the Petitioner.

45. On the other hand, Article 43(1) of the Constitution provides that every person has the right to (f) education. However, the Petitioner has not shown how section 22(1) (b) violates the right to education as guaranteed under Article 43(1) (f). It must always be borne in mind that a litigant in a constitutional petition must not only clearly plead violation of rights or constitutional provisions but should always strive to establish how that is so. (See *Anarita Karimi Njeru* [1979] KLR 154 and *Meme v Republic* [2004] 1KLR 637) In the present petition, the Petitioner has not attempted at all to show how the impugned section contravenes Article 43(1) (f). He merely stated that the Article has been violated without any effort to show how.

46. With regard to section 55, I must state that the Petitioner has fallen short of showing why the Article has been violated, if at all. The Article provides that *the State shall take measures, including affirmative action programmes, to ensure that the youth—(a) access relevant education and training; (b) have opportunities to associate, be represented and participate in political, social, economic and other spheres of life; (c) access employment; and (d) are protected from harmful cultural practices and exploitation.*

47. The Article talk of the state taking into measures to enable the youth access not only education and training but also opportunities to associate representation and employment. The Petition is not about access to employment only but challenges the decision of the 1<sup>st</sup> Respondent to demand levies and subscriptions from newly admitted advocates in order to not only allow them to practice law, but also be members of the 1<sup>st</sup> Respondent as required by law so that the 1<sup>st</sup> Respondent is able to perform its statutory functions. Without a practicing certificate, one is not allowed to practice his profession and this applies to all professions in the country.

48. As I have already stated, the requirement for taking out practicing certificates is statutory and that is what makes the advocate a member of the 1<sup>st</sup> Respondent and subject to the regulations applicable to advocates under both the Advocates Act and the Law Society of Kenya Act. This is not only for the benefit of the advocate himself but also for the public.

49. A statute or its provision may be declared unconstitutional if its purpose or effect in implementation results into unconstitutionality. In *Olum and another v Attorney General* [2002] EA 508 it was stated that;

*“To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional.”*

50. In *The Queen v Big M. Drug Mart Ltd*, (1986) LRC (Const.) 332, the Supreme Court of Canada stated that;

*“Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity.”*

51. And in *Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others* [2012] e KLR the court observed that in determining whether a statute is constitutional or not, the object and purpose of the impugned Act must be determined and this can be discerned from the intention expressed in the Act itself.

52. Looking at this petition, the Petitioner has not made an attempt to show how the impugned provision violate the rights under Articles of the Constitution either in purpose or effect to the extent of nullifying it. For the foregoing reasons I am unable to hold that section 22(1) (b) of the Advocates Act is unconstitutional in any respect.

***Whether the demand notice for fees is unreasonable, illegal or inconsistent with the statutory provisions***

53. I have already held that the levies paid to the 1<sup>st</sup> Respondent pursuant to section 22 of the Advocates Act before issuance of a practicing certificate are not unconstitutional. In that regard, the 1<sup>st</sup> Respondent's demand notice dated 30<sup>th</sup> November 2017 was addressed to those Advocates who were admitted in 2017 and did not take out the 2017 practicing certificates. The notice called on them to pay **Kshs. 18,060/=** to the 1<sup>st</sup> Respondent and **Kshs. 3,500/=** annual subscription fee to the Advocates Benevolent Association, making a total of **Kshs. 21,560/=**.

54. The Petitioner does not dispute the entire amount in the demand notice but some levies including the East African Law Society levy; the Law Society of Kenya Building levy and charges for the Advocate's Identity Card. The Advocate's Identity card is for the benefit of the advocate who may need it when he is in the usual course of his business to identify himself as an advocate. There would therefore be no reason to oppose what is for the advocate's benefit. With regard to the building levy, this is an essential service levy which the 1<sup>st</sup> Respondent as a society had its own reasons for introducing and supported by its membership. This is an internal matter that this court should not readily venture to adjudicate in the guise of a constitutional issue.

55. Moreover, the Petitioner has not shown how this particular levy negatively impacts on him to seek the court's aid to nullify it. The Petitioner should have raised the issue with the 1<sup>st</sup> Respondent's governing organs and seek to have the levy abolished or varied. It is not even clear to the court whether the Petitioner is challenging the bonafides of this levy or he is simply saying that he is unable to pay it for now.

56. And with regard to the East African Law Society levy, I do not think the Petitioner's argument that the levy is illegal and unreasonable has any legal basis. The 1<sup>st</sup> Respondent is a corporate member of the East African Law Society. It joined that organization with its corporate membership, that is, all its members became members of the East African Law Society by virtue of the 1<sup>st</sup> Respondent's membership. Whatever levies may be payable, are paid by virtue of that membership with the approval of the 1<sup>st</sup> Respondent's membership.

57. It should also be appreciated that the East African countries are moving towards regional integration and the legal professions within the region cannot stand by and watch. In any event, it has been argued by the 1<sup>st</sup> Respondent that certain levies had either been suspended or reduced and that the issues had been discussed at the 1<sup>st</sup> Respondent's Annual General Meetings and some decisions taken. That being the case, it is this court's view that these are internal matters that internal organs of the 1<sup>st</sup> Respondent should address and resolve if need be.

58. Finally, there was the argument by the Respondents that the Petitioner was not a member of the 1<sup>st</sup> Respondent and therefore he could not challenge the demand notice since it was no address to him. I have perused this Petition with a lot of keenness. The Petitioner seeks to advance arguments regarding the plight of those pursuing a career in law to the point of admission and later the start of practicing law which he contends is affected by the demand for fees for a practicing certificate immediately after admission.

59. This problem experienced by law students is not limited those seeking to become advocates only. It is a problem that afflicts all the youth of this country regardless of their professions. All professions experience their own unique challenges and, therefore, the Petitioner and the legal profession for that matter is not alone in this regard.

60. That notwithstanding, looking at the impugned demand notice, it is clear that it was addressed to those advocates who were admitted in the year 2017 but did not take out practicing certificates for that year. The Respondents have argued that the Petitioner was not an advocate at the time he filed this petition which means he could not challenge a notice not addressed to him.

61. Whereas the impugned demand notice was not a general demand addressed to all advocates. It was directed to a specific class or group of advocates but that does not mean any other person could not challenge it. Our constitutional scheme did away with the restriction through **locus standi** and, therefore, the Petitioner could he legitimately challenge that demand notice since Article 258 of the Constitution allows any person to institute proceedings where there is a likelihood of violation of the constitution. I therefore do not agree that the Petitioner not being an advocate could not file the present petition.

62. In the end, having carefully considered the submissions, the Constitution and the law, I do not find merit in this petition. Consequently, the petition dated 22<sup>nd</sup> February 2018 is declined and dismissed. Each party will however bear their own costs.

Dated, Signed and Delivered at Nairobi this 13<sup>th</sup> day of September 2019.

**E C MWITA**

**JUDGE**