



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION
PETITION NO. 395 OF 2018

ROSE ADHIAMBO OLUOCH.....PETITIONER

-VERSUS-

THE COUNCIL OF LEGAL EDUCATION.....RESPONDENT

JUDGEMENT

1. The Petitioner, Rose Adhiambo Oluoch, holds a second class honours, upper division bachelor of laws degree from Uganda Pentecostal University. She was also issued with a clearance letter dated 4th July, 2016 certifying Uganda Pentecostal University as duly accredited by the Committee on Legal Education and Training of the Uganda Law Council. Based on these documents she applied to the Kenya School of Law to join the advocates training programme for the academic year 2018/2019. She was indeed issued with an admission letter and a student identification card with an admission number. Upon admission, she successfully completed her project work which constitutes 20% of the final exam and was also examined on the oral exam which also constitutes 20% of the final examination.

2. Satisfied that she had qualified for registration for the bar examination, the Petitioner tendered her examination registration form together with a registration fee of Kshs. 45,000/- on 28th September, 2018 to the Respondent, the Council of Legal Education. On 19th October, 2018 she received an email confirming that she had been registered to sit the forthcoming bar examination scheduled for 15th to 27th November, 2018. She was also issued with an examination card authorizing her to sit the bar examination.

3. However, in an unexpected turn of events, the Petitioner received a letter dated 7th November, 2018 from the Respondent indicating that she had been deregistered from the bar examination because she did not apply to have her degree recognized and approved by the Respondent in accordance with the Legal Education Act, 2012. Through the same letter, the Respondent asked her not to present herself for the bar examination until the relevant committee of the Respondent deliberated on the issue and made a determination.

4. Aggrieved by the decision of the Respondent, the Petitioner filed the instant petition on 12th November, 2018. The petition which was supported by her own affidavit sworn on even date seeks the following orders:-

a) “That there be a declaration that the petitioner’s fundamental rights and freedoms as enshrined under Article 27 of the Constitution of Kenya have been contravened and also threatened to be infringed upon by the respondents.

b) That there be a declaration that the petitioner’s fundamental rights and freedoms as enshrined under Article 28 of the Constitution of Kenya have been contravened and also threatened to be infringed upon by the respondents.

c) That there be a declaration that the petitioner’s fundamental rights and freedoms as enshrined under Article 29 of the Constitution of Kenya have been contravened and also infringed by the respondents.

d) That there be a declaration that the petitioner’s fundamental rights and freedoms as enshrined under Article 43(1)(f) of the Constitution of Kenya have been contravened and also threatened to be infringed upon by the respondents.

e) That there be a declaration that the petitioner’s fundamental rights and freedoms as enshrined under Article 47(1) of the Constitution of Kenya have been contravened and also threatened to be infringed upon by the respondents.

f) That there be a declaration that the petitioner’s fundamental rights and freedoms as enshrined under Article 35 of the Constitution of Kenya have been contravened and also threatened to be infringed upon by the respondents.

g) An order compelling the respondent to register the petitioner for the Bar examination for academic year 2018/2019.

h) General damages for the breach of the petitioner's constitutional rights

i) Any other relief that the court may deem fit and just.

j) Cost of this petition.”

5. At the time of filing her case, the Petitioner also filed an application for conservatory orders. When the application came up for hearing on 13th November, 2018, the parties recorded a consent suspending the Respondent's letter dated 7th November, 2018 deregistering the Petitioner from sitting the November 2018 bar examination pending hearing and determination of the petition thereby allowing the Petitioner to sit for the bar examination.

6. In yet another application dated 16th April, 2018, the Petitioner sought to have the Respondent release her bar examination results which had been withheld when the results of the other candidates were released in February, 2019. An attempt to reach an agreement on that application failed. The application was shelved and the parties were directed by the court to proceed with the hearing of the petition.

7. In response to the petition, the Respondent filed a statement of grounds of opposition and skeletal arguments dated 15th July, 2019. It is the Respondent's case that it discharged its statutory function under the express provisions of Section 8(1)(e) of the Legal Education Act, 2012 and Regulation 7(3) as read together with the Third Schedule of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 which provides that one of its functions is to recognize and approve qualifications obtained outside Kenya for purposes of admission to the roll of advocates. The case of **Eunice Cecilia Mwikali Maema v Council of Legal Education & 2 others [2013] eKLR**, was cited in support of the statement that all law degrees earned from foreign universities or institutions must, for purposes of admission to the advocates training programme, be held against the standards set by the Respondent.

8. It is the Respondent's case that the Petitioner has not established that her treatment was discriminatory. According to the Respondent, Article 27 of the Constitution does not prohibit discrimination but only prohibits unfair discrimination. The decision of Chacha Mwita, J in **Council of Governors v Salaries & Remuneration Commission [2018] eKLR** is cited in support of this statement.

9. Finally, the Respondent asserts that the Petitioner cannot rely on the doctrine of legitimate expectation since the doctrine cannot override clear and express provisions of statute as held by the Supreme Court in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR**. This court is therefore urged to dismiss the petition with costs.

10. Mr. Wetaba appearing for the Petitioner highlighted his written submissions dated 13th December, 2018. Counsel submitted that the Petitioner having enrolled for her LL.B. degree between the years 2009 and 2013 way before the Legal Education Act, 2012 and the Kenya School of Law Act, 2012 were enacted, the two statutes cannot apply retrospectively to her. According to counsel, the only requirement she was to be subjected to for admission to the Advocates Training Programme was Regulation 5(b) of the Council of Legal Education Act. Counsel cited Article 47 as read with Section 7 of the Fair Administrative Action Act, 2015 and argued that the function of the Council is limited to admission to the roll of advocates and the law does not grant it authority to scrutinize academic documents for purposes of admission to the advocates training programme. Further, that its mandate is limited to admission of students to any of its programmes pursuant to the Kenya School of Law Act, 2012 or the Council of Legal Education (Kenya School of Law) Regulations, 2009.

11. To buttress that argument, counsel cited the case of **Kevin K. Mwiti & others v Kenya School of Law & 2 others [2015] eKLR** where the court while relying on the Supreme Court case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & 2 others (2012) eKLR** observed that the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are *prima facie* prospective, and retrospectivity is not to be given to them unless, by express words or necessary implication it appears that this was the intention of the legislature. Counsel further argued that the Respondent discriminated the Petitioner in its process of clearing students to sit for the bar examination for academic year 2018/2019.

12. Counsel for the Petitioner further submitted that the Respondent does not have any regulations in place to use in the process of clearance for applications to join Kenya School of Law as required by Section 8(2) and (3) of the Legal Education Act and therefore any act of clearing and refusing to clear some students from some universities without any regulations and guidelines in place is not only illegal but also discriminatory contrary to Articles 27, 43(1)(f), and 55(a) and (c) of the Constitution. Counsel cited the case of **Lucy Nyaguthii Wachira v Council of Legal Education & 3 others [2017] eKLR** where the court relied on various authorities from different jurisdictions defining what discrimination is and holding that discrimination is unfair or prejudicial treatment of a person or group of persons based on certain characteristics.

13. Counsel further submitted that the Petitioner having successfully completed 40% of the advocates training programme, registered for the bar examination and was even issued with an examination card, had a legitimate expectation to sit for the examination. Counsel relied on the case of **Monica Wamboi Ng'ang'a & others v Council of Legal Education & 4 others [2017] eKLR** where the court cited with approval **Kevin Mwiti** (supra) which stated that legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage. He further relied on the case of **R v Devon County Ex Parte P Baker (1955) 1 All ER** where it was held that expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest is protected by the requirements of procedural fairness hence the respondent could only validly withdraw the expectation by adhering to the guidelines.

14. Similarly, cited is the case of **Republic v Attorney General & another ex-parte Waswa & 2 others [2005] 1KLR 280** where it was held that the principle of legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or a benefit yet to be enjoyed. In conclusion, he urged the court to be guided by Article 23(3) of the Constitution and the cases of **Dr. Samson Gwer & 5 others v KEMRI Petition No. 21 of 2013** and **Nancy Baraza v Judicial Service Commission & 9 others**

[2012] eKLR and award the Petitioner Kshs. 5,000,000/- for each identified violation. He therefore urged the court to allow the petition.

15. Mr. Oduor for the Respondent reiterated the skeletal submissions which were fused with the grounds of opposition and which have already been reproduced in this judgement.

16. Upon perusal and pleadings filed in this petition, I find that the only issue for the determination of the court is whether the Petitioner has met the conditions for the grant of the orders sought.

17. As per Section 17 of the Kenya School of Law Act, the Kenya School of Law is mandated to admit students. It is also empowered pursuant to Section 4 of the same Act to develop curriculum, prepare training manuals, conduct examinations and confer academic awards. However, Section 8 of the Legal Education Act provides as follows:-

“(1) The functions of the Council shall be to—

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

(b) licence legal education providers;

(c) supervise legal education providers; and

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

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

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

(2) Without prejudice to the generality of subsection (1), the Council shall, with respect to legal education providers, be responsible for setting and enforcing standards relating to the—

(a) accreditation of legal education providers for the purposes of licensing;

(b) curricula and mode of instruction;

(c) mode and quality of examinations;

(d) harmonization of legal education programmes; and

(e) monitoring and evaluation of legal education providers and programmes.

(3) In carrying out its functions under subsection (2), the Council shall—

(a) make Regulations in respect of requirements for the admission of persons seeking to enroll in legal education programmes;

(b) establish criteria for the recognition and equation of academic qualifications in legal education;

(c) formulate a system for recognizing prior learning and experience in law to facilitate progression in legal education from lower levels of learning to higher levels;

(d) establish a system of equivalencies of legal educational qualifications and credit transfers; Emphasis added

(e) advise and make recommendations to the Government and any other relevant authority on matters relating to legal education and training that require the consideration of the Government;

(f) collect, analyse and publish information relating to legal education and training;

(g) advise the Government on the standardization, recognition and equation of legal education qualifications awarded by foreign institutions;

(h) carry out regular visits and inspections of legal education providers; and (i) perform and exercise any other functions conferred on it by this Act.

4) Where any conflict arises between the provisions of this section and the provisions of any other written law for the time being in force, the provisions of this section shall prevail.”

18. Regulation 7 of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 provides as follows:-

“7.(1) A Kenyan who has undergone training at a foreign legal education provider and who has attained professional qualifications that would enable him or her to practice law in that place where he or she underwent training and has practiced law in that place for at least five years may apply to the Council for recognition of his or her professional qualifications.

(2) An application under paragraph (1) shall be made in Form CLE/L/006 set out in the First Schedule to these Regulations.

(3) The Council shall recognise or approve foreign qualifications in law for the purposes of this regulation in accordance with the quality standards set out in the Third Schedule to these Regulations.

(4) The Council may decline to recognise or approve foreign qualifications in law where the Council determines that the quality standards of that foreign legal provider do not satisfy the quality standards set out in the Third Schedule to these Regulations.

(5) The Council shall recommend to a person who has applied for the recognition and approval of his or her qualifications from a foreign legal education provider that has not been recognised or approved by the Council to undertake a remedial programme at a legal education provider in Kenya.”

19. The Petitioner is aggrieved by the Respondent’s letter dated 7th November, 2018 deregistering her for the November 2018 bar examination for failure to have her bachelor of laws degree recognized and approved by the Respondent in accordance with the Legal Education Act. It is her case that having complied with all the requirements, she was exempted from the pre-bar examination, was issued with an admission letter, student identification card and an admission number and upon admission, she successfully completed her project work which constitutes 20% of the final exam and was also examined on the oral exam which also constitutes 20% of the final examination. She had therefore done 40% of the final examination.

20. Thereafter, the Petitioner tendered her examination registration form together with a registration fee of Kshs. 45,000/- to the Respondent and received an email dated 19th October, 2018 confirming that she had been registered to sit for the forthcoming bar examination scheduled for 15th to 27th November, 2018 and was even issued with an examination card but in an unconscionable turn of events, she received yet another letter from the Respondent deregistering her from sitting the scheduled bar examination. By a consent order recorded on 13th November, 2018, she sat for her bar examination but is yet to receive her results from the Respondent.

21. The Respondent on the other hand contends that its letter dated 7th November, 2018 is well within the provisions of Section 8(1)(f) of the Legal Education Act as read with Regulation 7(3) of the Legal Education (Accreditation & Quality Assurance) Regulations, 2016, because the Petitioner ought to have sought approval of her bachelor of laws degree which is from a foreign university being the Pentecostal University of Uganda.

22. It is clear from the already cited provisions that the power to recognize and approve foreign qualifications is bestowed upon the Respondent and it is my view that in making a decision to recognize any qualification from a foreign university, the Respondent is under a statutory duty to thoroughly vet such institutions in order to satisfy itself that the quality of legal education offered by the said institutions is at par with the quality of education offered by the local universities. This will ensure that all those who are being admitted to the Kenya School of Law meet the same standards for the ultimate admission to the roll of advocates. The Respondent is also mandated to among other things, supervise legal education providers and administer such professional examinations as may be prescribed under Section 13 of the *Advocates Act*.

23. My position is informed by the decisions of the Court of Appeal in the cases of **Muamar Nabeel Onyango Khan v Council of Legal Education & 2 others [2015] eKLR**, and **Eunice Cecilia Mwikali Maema (supra)** where in the latter case it was held as follows:-

“We are also of the view that the learned judge correctly applied the principle in the decision in Susan Mungai V The Council for Legal Education Petition No. 152/2011 to the effect that the Council has the power to set standards to ensure that the highest professional standards are maintained in the profession and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the Regulations.”

24. The Court of Appeal further emphasized the same position when it stated in its decision in the case of **Muamar Nabeel Onyango Khan (supra)** that:-

“We reiterate this Court’s statements in the cases of Eunice Mwikali Maema vs. The Council of Legal Education & 2 Others, Nairobi CA No. 121 of 2013 and Susan Mungai vs. The Council of Legal Education & Others Nairobi HC Petition No. 152 of 2011 that for purposes of admission to the ATP, there should not be “different or double standards for local and foreign degree holders”. Both should be subject to the same standards. We therefore find that by requiring the applicant, like all other applicants, to meet the threshold for admission to the ATP, the respondents did not in any way violate her constitutional rights to fair administrative action and/or education and training.”

25. In **Eunice Cecilia Mwikali Maema (supra)** it was also held that:

“While we accept the submissions by counsel for the appellant that foreign universities and institutions outside Kenya are outside the ‘accreditation jurisdiction’ of the Council, in our view, the requirement that a degree from a foreign university or

institution, in order for it to be recognised for purposes of admission to advocates training programme, must be shown to contain the core units is not to extend the ‘accreditation jurisdiction’ of the Council. It is to avoid different or double standards for local and foreign law degree holders. We think that law degrees earned from foreign universities or institutions must for purposes of admission to the advocates training programme at the school, be held against the standards that the council has set out.”

26. Once the Respondent is satisfied that a particular university or institution ought to be recognized, the criteria for admission to the Kenya School of Law found in sections 16 and 17 of the *Kenya School of Law Act* and the Second Schedule thereto come into play. Sections 16 and 17 aforesaid provide as follows:-

“16. 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 the Second Schedule for that course.

17 (1) any person who wishes to be admitted to any course of study at the School shall apply in the prescribed form and pay the prescribed application fees.

(2) The School shall consider an application submitted under paragraph (1) and if is satisfied that the applicant meets the admission criteria, admit the applicant to the School.”

27. The Second Schedule on the other hand provides as follows:-

“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. However, in determining whether or not to admit the students, the Kenya School of Law must adhere to the guidelines made by the Respondent. Once this is done, the courts should be very reluctant to interfere with such exercise of power or discretion since it is trite law that where a power or discretion is donated to a particular body, the courts ought to exercise restraint and ought not interfere with the exercise of such powers and discretion. This was the position adopted by **Muchelule, J** in **Muamar Nabeel Onyango Khan v Council of Legal Education & 2 others [2014] eKLR** where he expressed himself as follows:-

“Back to the crucial, and only question: did the petitioner qualify to be admitted to the Kenya School of Law? Once again, it is emphasized that the decision to admit or not to admit belonged to the respondents. Once they showed that they were acting within the law, doing so fairly and that they were subjecting the petitioner to the same standards they were subjecting other candidates, the court cannot interfere. The respondents must be left with the power to insist on the highest possible professional standards for those who wish to qualify as advocates (Republic Vs The Council of Legal Education Ex-parte James Njuguna & Others, Misc. Civil Application No. 137 of 2004 at Nairobi).”

29. Indeed, the Respondent correctly submitted that the Petitioner did not provide any evidence of unfair discrimination and neither has she proved that she was unfairly discriminated against. In the **Muamar Nabeel Onyango Khan** case the Court of Appeal agreed with the trial court that allowing the appellant to join the advocates training programme when she did not meet the qualifications would amount to discrimination. In **Eunice Cecilia Mwikali Maema** the Court of Appeal also held that:-

“Although the appellant pleaded that other applicants similarly circumstanced as her were admitted into the advocates training programme no material in support was placed before the court. To exclude the appellant from complying with the fulfilment of the requirement of core subjects would in our view be to propagate the very discrimination the appellant complained about.”

30. The Petitioner has not found it necessary to explain why she does not want to pass her papers through the Respondent for approval as required by the law. She holds onto the doctrine of legitimate expectation to press for the release of her results. Legitimate expectation will not come to her aid for two reasons; firstly, the Respondent did not make any promise to the Petitioner and secondly, as correctly submitted by counsel for the Respondent, legitimate expectation cannot operate contrary to the statutory powers given to the Respondent to recognize and approve law degrees obtained in foreign jurisdictions.

31. I have considered the judgement of Odunga, J in the **Kevin Mwiti** case, and I do not find any relevance of that decision to the

circumstances of this case.

32. For the reasons stated in this judgement, I find no merit in the petition. The Petitioner's petition dated 12th November, 2018 is therefore dismissed with no order as to costs.

Dated, signed and delivered at Nairobi this 5th day of December, 2019

W. Korir,

Judge of the High Court