



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 692 OF 2017

**IN THE MATTER OF ARTICLE 2, 10, 23, 27, 43, AND 47 OF THE CONSTITUTION
OF KENYA, 2010**

AND

IN THE MATTER OF THE LEGAL EDUCATION ACT NO. 7 OF 2012

AND

IN THE MATTER OF THE KENYA SCHOOL OF LAW ACT, 2012

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT

AND

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW
PROCEEDINGS**

BETWEEN

REPUBLIC.....APPLICANT

AND

COUNCIL OF LEGAL EDUCATION.....RESPONDENT

KENYA SCHOOL OF LAW.....INTERESTED PARTY

EX PARTE: MOSES NTHURIMA

JUDGEMENT

Introduction

1. By a Motion on Notice dated 18th January, 2018, the ex parte applicant herein, **Moses Nthurima**, seeks the following orders:

1. This Honourable Court be pleased to issue an order of MANDAMUS directed against the Respondent, directing it and its agents and or employees to approve the Application made by the Applicant for recognition and approval of his foreign qualification to be admitted to undertake the Advocates Training Program at the institution of the Interested Party.

2. This Honourable Court be pleased to issue an order of CERTIORARI to remove and to bring to this Honourable Court for purposes of quashing the decision of the Respondent through its letter dated 17th October, 2017 rejecting the application by the Applicant for recognition and approval of his foreign qualifications.

3. Costs of this Application be provided for.

Applicant's Case

2. According to the ex parte applicant, he completed his Kenya Certificate Education in the year 1983 and passed with a mean grade of Division II and thereafter attained his Advanced Certificate of Education in the year 1985. He then applied for and was selected to study a degree in Bachelor of Education at the University of Nairobi and graduated with Second Class honours in the year 2001. However being determined to become an advocate of the High Court of Kenya, he applied for and was accepted to study Bachelor of Laws degree at the University of South Africa (UNISA) in the month of May, 2004.

3..According to the applicant, after more than 10 years of vigorous training and instruction by the university he completed the law degree successfully and graduated with a Bachelor of Laws degree in the year 2015. He thereafter intended to apply to the Kenya School of Law (hereinafter referred to as "the School") for the Advocates Training Programme for the year 2016. However since his Bachelor of Laws degree was obtained from a foreign university, he applied to the Council of Legal Education (hereinafter referred to as "the Council") for the recognition and approval of his foreign qualifications to enable him apply for admission at the Kenya School of Law. Towards that end he paid Kshs. 10,000/- for the application as requested by the Respondent. He however, received a letter from the Respondent dated 15th December, 2015 informing him that his application was not successful and requesting him to provide the following documents;

i. Evidence of accreditation of UNISA's L.L.B degree program.

ii. Letter of Recommendation from UNISA confirming *inter alia* that the L.L.B programme was residential. (i.e not by distance learning or online).

iii. Curriculum for the L.L.B degree programme offered by UNISA.

4. To this request the applicant responded by requesting the Respondent to review his application having provided two of the required documents being a copy of the letter of UNISA's accreditation and a copy of the curriculum for L.L.B programme. He was however unable to provide a letter of recommendation from the University confirming that the programme he undertook was residential since he obtained the same through UNISA's distance learning programme.

5. It was however averred by the applicant that the Respondent declined his request to review the application on the basis that UNISA's Distance Learning Programme has not been submitted to the Council for evaluation as per Regulation 45 of the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016***. It was the applicant's contention that he completed his degree in the year 2015 and as such the Regulations passed in the year 2016 ought not to apply in his case since according to his legal advice, laws do not apply retrogressively.

6. The applicant asserted that the said university is accredited by the South African Council for Higher

Education, the South African Qualifications Authority and the South African Department of Higher Education and has more than 350,000 students across the world practicing e-learning to great success as given in their Accreditation information by the Manager; Licensees and International Registration.

7. It was the applicant's case that the decision of the respondent to reject his application for recognition and approval of his foreign qualifications was arbitrary and against the provisions of the law and that the same was arrived at in abuse of power and is therefore *mala fide* and unfair. The applicant disclosed that the Kenya School of Law has previously admitted students of UNISA's distance learning degree programme who are now practicing as advocates of the High Court and the decision to lock him out is therefore unfair and discriminatory. He further contended that the approval process by the Respondent is oppressive, unreasonable and unfair and urged this Court ought to intervene to address the injustice urgently.

8. In his submissions the applicant relied on the second schedule of the **Kenya School of Law Act** which provide for the requirements into the Advocates Training Programme as follows;

1. A person shall be admitted to the School if:

(a) having passed the relevant examination of any recognized university in Kenya holds, or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) of that university; 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 (LL.B) in the grant of that university, university college or other institution:

9. In this case it was submitted that it is not in dispute that the *ex parte* applicant passed the relevant examinations of a university prescribed by the Council of Legal Education. However, the university is a foreign university and his qualifications are foreign qualifications. On the role of the Council of Legal Education, the applicant relied on section 8(1) of **Legal Education Act, 2012** which provides that:

(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;

(d)

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

(f)

10. It was the applicant's case that one of the Respondent's mandate is to recognize and approve qualifications obtained outside Kenya for purposes of admission to the Advocates Training Programme and eventual admission to the roll of advocates. However, the decision to either approve and recognize foreign qualifications or not has to be guided and arrived at using a certain criteria and codified parameters. However, it was submitted that the Respondent has not set out a criterion that it uses to equate foreign qualifications to Kenyan qualifications and the basis on which it is able to make a decision.

11. It was submitted that the only information available on its website on the issue is;

"The Statute Law (Miscellaneous Amendment) Act 2014, bestowed on the Council of Legal

Education the singular mandate to recognize and approve legal education qualifications obtained abroad for individuals seeking admission to the Bar Programme and/or practice law in Kenya. Recognition and approval services are offered on formal application by any seeking to have his/her qualifications equated and approved.

Once Council has evaluated the qualification, it issues a recommendations on how the particular qualification compares with similar qualification or set of qualifications in the Kenyan Legal education system, labour market or the profession.”

12. In the applicant’s view, without a solid codified criterion the decision by the Respondent could only be arbitral (sic) and in this case unreasonable. In this respect the applicant relied on the **Joyce W. Gichohi case** (supra) in which **Aburili, J**, rendered herself on the issue as follows:

“This court does acknowledge that online or distance learning has evolved into the dynamic and technology driven world of online education, allowing students to learn while in different locations to the course provider. As to the merits and demerits of online study is beyond the scope of these Judicial Review proceedings. However, for the respondent to determine that it does not recognize and approve online LLB degrees, it must have a legal basis. The idea of recognition and approval of qualifications on scales and progress measured from time to time is not any specific measurement scale capable of being understood by any person especially where even the 1st respondent recognizes the dynamism in the progression of legal training in Kenya. Those professionally measured standards must be displayed to the court to appreciate. In arriving at the decision to reject the applicant’s application, it is expected that the respondent deliberated upon and based on the standards or criteria set under the relevant statute or regulation, they found the applicant’s online degree wanting. However, as I have stated above, no such standards or criteria have been displayed before this court. There is also no evidence that the respondent ever undertook any evaluation or equation of the course undertaken by the applicant with the so called standards.”

13. It was however submitted that whereas the regulations invoked by the Respondent in basing its decision to decline the application came into force in the year 2016, the Applicant’s degree was attained in the year 2015 and the application for recognition was submitted in the year 2015 as well. The Respondent based its decision on laws that were not in force when the applicant attained his degree certificate and more so when he applied to the Respondent for recognition and approval of his foreign qualifications.

14. According to the ex parte applicant, it is trite law that laws do not apply retrospectively unless the retrospective application is expressly provided for and the applicant relied on **Shroud’s Judicial Dictionary of Words and Phrases Fourth Edition Vol. 3, London, Sweet & Maxwell Limited, 1973** as captured in the Latin maxim ‘*lex prospicit non respicit*’ meaning ‘the law looks forward not backward’. He also relied on **Municipality of Mombasa v Nyalı Limited [1963] E.A. 371**. And submitted that this case is a good candidate of a case in which the law should not be allowed to be applied retrospectively since in doing so the substantive rights of the applicant to education as enshrined under article 43(1) of the Constitution of Kenya would definitely be affected.

15. In the applicant’s view, even assuming that the law could be applied retrospectively, Regulation 45 relied upon to dismiss the applicant’s application is not applicable in this case since the said regulation was intended to apply for Kenyan Universities only. This, according to the applicant, is so because the regulation provides that for a legal education provider to award a qualification obtained through distance learning or online the online/distance learning programme should be submitted to the Council of Legal Education for accreditation. In the applicant’s view, the Respondent’s mandate to accredit legal learning institutions/programmes is only limited to local institutions/programmes and not foreign ones.

16. The applicant noted that online or distance learning programme is allowed under the laws of Kenya and there is therefore no basis for the Respondent to disallow foreign qualifications obtained through that

mode. It was therefore his case that the decision by the Respondent based on the reasons given was an arbitrary decision which resulted in unfairness to the applicant. In that respect the applicant relied on **Joyce Gichobi Case** (supra) where it was held that:

“The 2016 Regulations which the respondent attempted to invoke in these proceedings do not even bar recognition or approval of online learning qualifications. As it clearly emerges from the material before court that the respondent did not even attempt to equate the applicant’s qualifications with the existing standards, and as there are no set standards for consideration for purposes of equation and recognition of the distance learning LLB degree submitted by the Respondent. Failure to recognize and approve the LLB qualifications submitted by the applicant was in my humble view, abuse of discretion.”

17. He therefore urged the Court to make a finding in his favour that the decision by the Respondent was arbitral (sic) for the aforementioned reasons. In as much as it is acceptable that the Respondent has the discretion in carrying out its mandate donated by the law, such discretion must be guided by a certain criteria established by law.

Respondent’s Case

18. In opposing the application the Respondent filed grounds of opposition and skeleton arguments.

19. According to the Respondent, this application is premature and based on section 8(1) of the Legal Education Act which provides that one of its functions is to recognise and approve qualifications obtained outside Kenya for the purposes of admission to the Roll. Apart from that since it has the mandate to regulate legal education in Kenya, the duty of providing sufficient material to enable it consider qualifications obtained outside Kenya lies with the applicant. In this case it was contended that sufficient information was not supplied to the Council by the ex parte applicant to enable the Council make a final decision as to the qualifications of the ex parte applicant as well as to enable it evaluate the institution to ascertain whether it embodies the quality safeguards prescribed by law. In this respect the Respondent relied on **Eunice Cecilia Mwikali Maema vs The Council of Legal Education & Others [2013] eKLR**. While distinguishing the decision in ***Joyce Gichohi*** (supra). The Respondent contended that while in the said case the Court found that the thresholds had not been articulated, in this case the degree by long distance learning has to satisfy the Physical Standards, Library Standards and Curriculum Standards under Parts I, II and III of the Third Schedule to the ***Legal Education (Accreditation of Legal Institutions) Regulations, 2009***, which in the Respondent’s view are mandatory requirements of law in the ***Legal Education Act***, the Council of Legal ***Education (Accreditation of Legal Institutions) Regulations, 2009*** and the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016***. According to the Respondent, it needed sufficient information to mirror the applicant’s degree as well as evaluate the said institution of learning on these thresholds so that it could arrive at a final informed decision since in its view, without UNISA’s distance learning programme being submitted to it, the Respondent could not conclusively pronounce itself on the application hence this application was premature.

20. The Respondent contended that the petitioner has misconceived the judgement in the ***Gichohi Case*** (supra) since in that case the Court did not order an admission. It was submitted that if this Court is minded to follow the said case it ought to simply direct that the Respondent reconsiders the aptitude and credentials of the ex parte applicant under the law, but not to order that the applicant be certified to have passed the aptitude test of the law.

21. Based on **Kenya National Examinations Council vs. Republic ex parte Kemunto Regina Ouro [2010] eKLR**, it was submitted that this Court has no jurisdiction to issue a writ of *mandamus* against the Respondent to violate the law since as was held in **Kenya National Examinations Council vs. Republic ex parte Geoffrey Gathenji Njoroge & 9 Others [1997] eKLR**, the Court cannot issue such a writ against a public authority to perform its function in a particular way if statute gives discretion to it.

22. It was submitted that since the decisions demanded of here are specialised decisions of the

Respondents, the decision of the Respondent on the merits in such circumstances is protected by law and reliance was placed on **Eunice Cecilia Mwikali Maema vs The Council of Legal Education & Others [2013] eKLR** and **Nabeel Onyango Khan vs. Council of Legal Education [2015] eKLR**.

23. According to the Respondent, the requirements of law being exacted on the ex parte applicant are the requirements that were in place at the time of the ex parte applicant's qualifications but necessarily the law present today must be imported to apply. According to the Respondent, the Diploma in Law that the applicant seeks is issued today, and accordingly in so far as there is no appreciable inconsistency, the law in force presently must apply.

Determinations

24. I have considered the issues raised both in support of and in opposition to the application.

25. These proceedings were clearly provoked by the letter dated 17th October, 2017 in which the Respondent, in rejecting the application expressed itself as hereunder:

“Council finds that the UNISA’s Distance Learning Programme has not been submitted to Council for evaluation to ascertain whether it embodies the quality safeguards prescribed by law pursuant to Regulation 45 of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 which states that:

A legal education provider may award a qualification for a course conducted through online or distance learning: provided that the programme has been accredited by the Council of Legal Education.”

For these reasons, your application for review is unsuccessful with the resultant effect being that Council upholds its decision vide its letter of 15th December, 2016.”

26. In the letter of 15th December, 2015, the Respondent had sought that it be furnished with the following documents to facilitate it in reviewing the applicant's application:

- i. Evidence of accreditation of UNISA's L.L.B Degree Program.
- ii. Letter of Recommendation from UNISA confirming *inter alia* that the L.L.B programme was residential. (i.e not by distance learning or online).
- iii. Curriculum for the L.L.B degree programme offered by UNISA containing course description of the courses taken in the LLB Programme.

27. According to the applicant, he duly provided two of the required documents being a copy of the letter of UNISA's accreditation and a copy of the curriculum for L.L.B programme. He was however unable to provide a letter of recommendation from the University confirming that the programme he undertook was residential since he obtained the same through UNISA's distance learning programme.

28. It is however clear that in the letter dated 17th October, 2017, the Respondent introduced a totally new condition which was not in the letter dated 15th December, 2015, i.e. that that the distance learning programme had not been submitted to the Council.

29. It is noteworthy that the Respondent has not controverted the factual averments made by the applicant in the verifying affidavit. In its submissions the Respondent now contends that it needed sufficient information to mirror the applicant's degree as well as evaluate the said institution of learning on these thresholds so that it could arrive at a final informed decision since in its view, without UNISA's distance learning programme being submitted to it, the Respondent could not conclusively pronounce itself on the application hence this application was premature.

30. In other words the Respondent contends that since it is yet to make a conclusive decision in the matter, the ex parte applicant “jumped the gun”. However, in the letter dated 17th October, 2017, the Respondent was categorical that the applicant’s application for review was unsuccessful and the Respondent proceeded to wish the applicant well in his endeavours. In my view the tone of the letter had the hallmarks finality. According to *Public Administration, a Journal of the Royal Institute of Public Administration, By P H Levin, at Page 25*, a decision is a deliberate act that generates commitment on the part of the decision maker toward an envisaged course of action of some specificity. An act by which an application by a person is rejected without more is in my view a decision for the purposes of judicial review proceedings. In this case the letter dated 17th October, 2017 did not inform the applicant that there was further action that the Respondent intended to take in the matter hence the applicant cannot be accused of having acted in haste.

31. I therefore agree that the applicant was properly entitled to invoke this Court’s jurisdiction. Whereas I agree that the Respondent is entitled to set standards for the admission to the Advocates Training Programme, those standards must comply with the law and as this Court has stated time and again, the change in law after one has, based on the prior law, embarked on a particular course, ought not to be invoked retrospectively to his detriment.

32. In my view the Respondent’s contention that because the Diploma in Law that the applicant seeks is issued today, and accordingly in so far as there is no appreciable inconsistency, the law in force presently must apply, cannot hold in the circumstances of this case. Whereas in undertaking his examinations at the School, the applicant cannot expect that he would be examined on subjects peculiar to what he studied earlier on, since examinations cannot be set to fit his unique circumstances, the Respondent cannot deny the applicant admission simply because the course which the applicant intends to undertake has changed its complexion. That is my understanding of the decision in *Eunice Cecilia Mwikali Maema vs. The Council of Legal Education & Others [2013] eKLR* where it was 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.”

33. In this case the applicant deposed, and it was not controverted, that Kenya School of Law had previously admitted students of UNISA’s distance learning degree programme who are now practicing as advocates of the High Court hence the decision to lock him out is therefore unfair and discriminatory.

34. It is therefore clear that the Respondent’s decision transmitted vide its letter dated 17th October, 2017 was irrational and is hereby quashed. I however agree that this Court cannot, unless the Respondent has no reason for declining the applicant’s application, compel the Respondent to approve the Application made by the Applicant for recognition and approval of his foreign qualification to be admitted to undertake the Advocates Training Program at the Interested Party’s institution, the Kenya School of Law. Pursuant to section 11(1)(e) of the *Fair Administrative Action Act*, I hereby direct the Respondent to consider the applicant’s application, make a decision thereon and furnish the applicant with reasons therefor within 14 days from the date of service of this order. Failure to do so, it will be deemed that the Respondent has no reason for disallowing the applicant’s application in which event an order of mandamus will issue compelling the Respondent to approve the Application made by the Applicant for recognition and approval of his foreign qualification to be admitted to undertake the Advocates Training Program at the said Kenya School of Law.

35. The applicant will have the costs of these proceedings to be borne by the Respondent.

36. It is so ordered.

Dated at Nairobi this 7th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kiriimi for the applicant

CA Ooko