



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISIONS

PETITION NO. 444 OF 2016

**IN THE MATTER OF; ARTICLES 2, 3, 19, 20, 21, 22, 23, 48, 50, 73, 232 AND 259 OF THE
CONSTITUTION OF KENYA, 2010**

IN THE MATTER OF; THE COUNCIL FOR LEGAL EDUCATION ACT (ACT NO. 27 OF 2012)

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

BETWEEN

LUCY NYAGUTHII WACHIRA.....PETITIONER

VERSUS

COUNCIL FOR LEGAL EDUCATION.....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

AND

KENYA SCHOOL OF LAW..... 1ST INTERESTED PARTY

UGANDA PENTECOSTAL UNIVERSITY.....2ND INTERESTED PARTY

JUDGEMENT

Introduction

1. The Petitioner herein, **Lucy Nyaguthii Wachira**, is an adult female of sound mind and a holder of a Bachelors Degree in Law..
2. The 1st Respondent, **Council of Legal Education**, is a body Corporate established under the **Legal Education Act No. 27 of 2012**, Laws of Kenya and one of its functions is to equate Legal Education standards of Foreign Universities to local standards.
3. The 2nd Respondent, the **Attorney General** is the Principal Legal Advisor to the Government of Kenya and Government Agencies.

4. The 1st Interested Party, **Kenya School of Law**, is a body corporate established under the **Kenya School of Law Act**, Act No. 26 of 2012.

5. The 2nd Interested Party, **Uganda Pentecostal University**, is a Private University established under the Laws of Uganda.

Petitioner's Case

6. According to the Petitioner, following her admission to Uganda Pentecostal University (hereinafter referred to as "the University"), having passed her secondary school education, on or about 4th December, 2009 she was awarded a second class, with honours, Upper Division Bachelor of Laws Degree by the University after the completion of her 4 year education.

7. The Petitioner averred that she also attained a Level 3 professional diploma in law from the Institute of Legal Executives and having attained this accolades considered herself to be in the right steps of becoming an advocate of the High Court of Kenya. She averred that she was fully aware of the eligibility criteria before one is enrolled at the Kenya School of Law (hereinafter referred to as "the School") and she had acquired all necessary educational qualifications and the requirement that all applicants from foreign universities must provide written evidence of clearance from the Council of Legal Education (Kenya) (hereinafter referred to as the Council").

8. It was averred by the Petitioner that being satisfied that she qualified to enrol in to the Kenya School of Law for the 2017/2018 Academic Year, she sought the required clearance from the Council of Legal Education and pursuant thereto, on 6th June, 2016 she went to the Council and paid Kshs. 10,000/= for foreign qualification equation of her academic certificates. According to her, having done so she expected a clearance from the Council of Legal Education to allow her apply to the Kenya School of Law but the Council never responded. She on 15th September and on 18th October 2016, made further follow up inquiries on the matter.

9. And also also acquired a clearance letter from the Law Council of Uganda indicating that her alma mater is a duly accredited University by the Committee on Legal Education and Training.

10. It was the applicant's case that the delayed clearance by the Council will extinguish her chances of enrolling into the Kenya School of Law. According to the Petition the inaction on the part of the Council amounted to a violation of the Constitution and her fundamental rights and freedoms since the respondents specifically zeroing on her and failed to give her clearance while other students are being issued with the said clearance hence the action was absolutely discriminatory. To her the fact that she studied in a foreign country does not warrant the outright discrimination as this is in violation of Article 27 of the Constitution. Further the act of the Council to admit some students from the petitioner's *Alma Mater* and ignoring the petitioner is also in violation of Article 27 of the Constitution. It was her case that the Council understands the urgency in getting the said clearance and by them failing and/or neglecting to issue the same to her is disrespectful and violates Article 28 of the Constitution.

11. The Petitioner contended that ever since she noticed that a response was not forthcoming from the respondent, she had been under mental stress and anguish, contemplating how her education chain/program would be suddenly cut short. The psychological torture caused on her by the respondent, she averred is in violation of Article 29 of the Constitution of Kenya and that the failure by the Council to issue the necessary response and/or information on the said request for clearance is in violation of the petitioner's right to information as per Article 35 of the Constitution. It was the Petitioner's contention that if she fails to enrol into the School of due to the said clearance the respondent would have violated her right to education as per Article 43(1)(f) of the Constitution. The Petitioner also averred that the failure and/or delay by the respondent to issue a response on the clearance or the said clearance is an unfair administrative action as Article 47(1) of the constitution.

12. In her affidavit, the Petitioner averred that her advocates were served with a letter dated 26th October,

2016 by the Council, after it was served with the pleadings informing them that the University is not accredited by the Uganda Law Council. To the Petitioner, the said letter contained some unsubstantiated untruths, and asserted that the University is an accredited institution.

13. The Petitioner averred that from the replying affidavit of **Prof. W. Kulundu Bitonye**, filed in court on the 31st October, 2016, she learnt that the Council made a decision on 30th April, 2015 not to recognize LLB Degrees from the University, which decision according to the Petitioner was unfair, irregular and marred by procedural improprieties since it was arrived at without informing the affected parties and instead preferred to treat this new information in a clandestine manner.

14. The Petitioner further averred that there was no proof that the University was ever served with the said letters nor was the Uganda Law Council.

15. It was however the Petitioner's case that there were students from her *alma mater* who had been admitted to the Kenya School of Law and some had even been admitted as advocates. It was therefore her contention that the decision was out rightly discriminatory hence the Council was acting unreasonably.

16. The Petitioner averred that in the letter dated 26th October, 2016 the Council annexed a notice by the Law Council of Uganda informing members of the public on the accredited institutions and Uganda Pentecostal University was one of the recognized and accredited Institutions. To her, the Council acted *ultra vires* by purporting that it has the powers to regulate, inspect and/or asses institutions that are not within its jurisdiction.

17. It was therefore the Petitioner's case that from the response of the respondent, it is evident that she is qualified to be cleared to apply to the Kenya School of Law, save for the unreasonable issue of accreditation raised. It was her case that under section 5A(2) and (5) of the **Universities (Amendment) Act, 2016**, it is the Commission for University Education that has the exclusive mandate to recognize, approve or accredit any academic programme including post graduate degrees, diplomas and academic certificates offered at a university and that vide a letter dated 23rd January, 2017, the said Commission confirmed that Uganda Pentecostal is a recognized institution in Uganda whose qualification of Bachelor of Laws awarded by the said institution is also recognized in Uganda and by convention in Kenya.

18. The Petitioner also filed an affidavit sworn by one **Nanjendo Willis Wetaba** who confirmed that he was admitted to the roll of advocates in conformity with the advocates Act on 19th June, 2012 and that prior to his admission to the roll of advocates he had attained an L.L.B. at Uganda Pentecostal University on 4th December, 2009. He averred that the petitioner was his classmate at the Uganda Pentecostal University and stated that most of the students in their year have been admitted to several law schools around the world including Kenya and gave the examples of students from the said class of 2009, who were admitted to the Kenya School of Law as **Faith Usengny'o Mutei, Olive Nyakio Njuguna, Celestine Anyango Opiyo, Josephine Njeri Mburu and Eric Amboga Omae**.

19. According to the said deponent, on 13th March, 2012 the Council and the School confirmed that he had complied with all the laws and regulations as pertains admission to the roll of advocates.

20. The Petitioner submitted that the act of the 1st respondent zeroing in on the petitioner and failing to give her clearance while other persons who she graduated with were given the clearance and allowed to be admitted to the roll, is utterly discriminatory and is a violation of **Article 27** of the constitution. In support of this submission the Petitioner relied on **Nyarangi & 3 Others vs. AIG [2008] eKLR 688**, as cited in **Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others [2015] eKLR**.

21. The Petitioner further questioned the rationale behind the requirement that the students who were trained in foreign universities must provide clearance from the CLE in order to be admitted to the Kenya School of Law which requirement in his view was unfair and discriminatory since its set a different criteria between students trained in a foreign jurisdiction from those who schooled locally, and in Kenya. In the Petitioner's view, the qualification criteria should be standardized and uniform. Subjecting foreign

students to different conditions is utterly discriminatory. The petitioner further had a legitimate expectation that she would be issued with a clearance letter. These expectations arose after many of her colleagues who graduated in year **2009** were admitted to the Kenya School of Law and also the roll of advocates.

22. It was therefore contended that the Council and the School failed in predictability since the petitioner expected automatic admission having satisfied all the requirements as per the *Advocates Act*, *Council of Legal Education Act* and the *Kenya School of Law Act* as regard to her educational qualifications.

23. The petitioner therefore sought the orders prayed in the amended petition as well as general damages.

1st Respondent's Case

24. The Petition was however opposed by the Council. According to the Council, the Petitioner herein applied to the Council by letter dated 6th June 2016 for recognition and approval of her LLB degree from the Uganda Pentecostal University, for purposes of the Advocates Training Programme at the Kenya School of Law. It was the Council's position that the issue of recognition of LLB degree from Uganda Pentecostal University is one that the Council has had to deal with since the year 2014 when as a result of an inspection conducted by the Council at the University, the Council noted significant deficiencies with the Faculty of Law of the University that resulted in a decision not to recognize LLB degrees from the university. However, the University took issue with the decision of the Council and filed *Nairobi High Court Judicial Review Case No. 105 of 2014* in which the Court rendered a judgment finding that in arriving at its decision the Council had not given the University an opportunity to be heard hence the Council's decision was for that reason quashed.

25. It was averred by the Council that since the School was receiving a significant number of applications from the University, it was necessary that the issue of recognition of the University's LLB degree be dealt with urgently and decisively thus the Council wrote to the University severally inquiring of a formal update of the University's compliance with the indictment of its deficiencies, to enable the Council make a decision moving forward but the University failed to respond to all the invitations and ultimatum above. Having failed to do so, the Council sat and made a decision on 30th April 2015, not to recognize LLB degrees from the University until such a time that the compliance demanded was evidenced and this decision was communicated to the University and among others the Uganda Law Council on 5th May 2015.

26. It was therefore the Council's case that LLB degrees from Uganda Pentecostal Universities are not recognized which decision of 30th April 2015, has neither been reviewed nor set aside by the Council.

27. The Council further averred that on 6th January 2016 it wrote to the University inquiring of the University if any remedial action had been taken on the noted deficiencies to enable the Council review its decision but this inquiry was never responded to. According to the Council, when it received the Petitioner's letter dated 6th June 2016, the Council on 21st July 2016 wrote to the Law Council of Uganda, inquiring whether Uganda Pentecostal University had been accredited to offer Law as a professional course in Uganda but this letter has not elicited a response and as at 22nd August 2016, there being no response to the Council's inquiry of 21st July 2016, the Council again wrote a letter dated 22nd August 2016 to the Law Council in Uganda, requiring a formal confirmation of the position of Uganda Pentecostal University. This similarly has not elicited any response. As a result the Council was unable to review its decision of 30th April 2015 on non-recognition of LLB degrees from Uganda Pentecostal University and responded to the inquiry of the student by letter dated 26th October 2016, stating the reasons why it was inopportune for the CLE to approve the Petitioner's qualifications.

28. The Council asserted that before it can approve qualifications from foreign universities for purposes of the Advocates Training Programme in Kenya, and even consent to application to admission to the Roll of Advocates under section 13 of the *Advocates Act* (Chapter 16 of the Laws of Kenya) it foremost

receives formal confirmation from the Regulatory bodies of Universities offering Law in the respective countries. Speaking for Uganda, the same has been received for all the other universities whose LLB degrees the CLE has approved for admission to the Advocates Training Programme in Kenya and it is in this light that the Council has repeatedly sought the confirmation from the Law Council in Uganda, with respect to Uganda Pentecostal University.

29. The Council averred that as a public body, it is enjoined to judicious and fair administration of its mandate under the ***Legal Education Act, 2012***, and due to the appreciation of the plight of students from Uganda Pentecostal University, it has reached out to the University and the Law Council in Uganda for confirmation on the information sought to enable it review its decision of 30th April 2015. The Council's position was that its quest in the above enterprises is not to oppress any person, but ensure attainment of the objectives of the ***Legal Education Act, 2012*** at section 3, indiscriminately.

30. The Council therefore took the view that the main prayer in the Notice of Motion dated 24th October 2016, which is to respond to the Petitioner's application for approval, has by the Council's letter dated 26th October 2016 been dealt with.

2nd Respondent's Case

31. On behalf of the 2nd Respondent the following grounds of opposition were filed:

- 1. That the Petition suffers from a clear misjoinder of parties especially with regard to the 2nd respondent**
- 2. That the petition does not disclose any conceivable cause of action, neither does it seek any orders against the 2nd respondent.**
- 3. That the role of the 2nd respondent in the petition shall be limited if at all.**

Determinations

32. I have considered the foregoing.

33. The Petitioner contends that she has been treated in a discriminatory manner by being locked out from admission to school when her co-students from the same university were admitted to the school and have even been admitted to the bar. This contention calls for a determination of what constitutes unacceptable discrimination. To subject a person on whom a benefit had been conferred to a particular form of treatment different from the others who fall in the same class clearly amounts to discrimination. In **John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others [2011] eKLR**, it was held that:

“It should be noted that discrimination which is forbidden by the Constitution is unfair or prejudicial treatment of a person or group of persons based on certain characteristics. (James Nyasora Nyarangi and Others –Vs- Attorney General, HC. Petition No. 298 of 2008 at Nairobi). The element of what is unfair or prejudicial treatment has to be determined objectively in the light of the facts of each case. The High Court above cited with approval the observation in President of the Republic of South Africa & Another –Vs- John Phillip Hugo 1997 (4) SAICC Para 41 as follows:- “We need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case, therefore will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in different context.” At the heart of this case,

therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyse a claim of discrimination has both a subjective and an objective component.”

34. In Nyarangi & 3 Others vs. Attorney General [2008] KLR 688, the Court pronounced itself as hereunder:

“The Blacks Law Dictionary defines discrimination as follows: “The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured.” Wikipedia, the free encyclopedia defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. The Bill of Rights Handbook, Fourth Edition 2001, defines discrimination as follows:- “A particular form of differentiation on illegitimate ground.”... The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of *Griggs vs. Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications was found “to disqualify Negroes at a substantially higher rate than white applicants”.

35. In this respect I adopt the criteria in Jacques Charl Hoffmann vs. South African Airways, CCT 17 of 2000 cited in Centre for Rights Education and Awareness (CREAW) & 7 Others vs. Attorney General [2011] eKLR, in which the court stated:

“This court has previously dealt with challenges to statutory provisions and government conduct alleged to infringe the right to equality. Its approach to such matters involves three basic enquiries: first, whether the provision under attack makes a differentiation that bears a rational connection to a legitimate government purpose. If the differentiation bears no such rational connection, there is a violation of Section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of Section 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision. Whether the third stage, however, arises will further be dependent on whether the measure complained of is contained in a law of general application.”

36. In this case the petitioner has relied on an affidavit of her co-student one, **Nanjendo Willis Wetaba**, who deposed that he has since been admitted as an advocate of the High Court of Kenya. The Council justifies its decision to decline the admission of the Petitioner on the school as the failure by the University to satisfy the academic criteria set by the Council. It has however maintained a deafening silence with respect to the damning averments by the said **Nanjendo Willis Wetaba**. In the absence of any controverting averments, it is clear that the decision by the Council not to approve the admission of the petitioner the school is *prima facie* discriminatory.

37. Article 24 of the Constitution which provides *inter alia* that:

(1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic

society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right or fundamental freedom;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(e) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

38. The law is, once it is shown that there is a limitation on a fundamental right or freedom, the burden of proving that the limitation is justifiable in an open and democratic society based on human dignity, equality and freedom rests of the State or the authority limiting the fundamental right or freedom. As was held in **Lyomoki and Others vs. Attorney General [2005] 2 EA 127**, the principles of constitutional interpretation are that firstly, the onus is on the petitioners to show a *prima facie* case of violation of their constitutional rights. Thereafter the burden shifts to the Council to justify that the limitations to the freedom from discrimination in the impugned decision is justified. In this case no attempt whatsoever was made to justify why the petitioner was subjected to differential treatment from her former co-students. In my view the Council has not shown, in light of its previous treatment of students who undertook similar courses as the Petitioner, the existence in the decision being challenged herein, of a differentiation that bears a rational connection to a legitimate purpose.

39. In light of the treatment accorded to the Petitioner's former co-students, I agree that the Petitioner had legitimate expectation that she would be accorded similar treatment. In this respect I adopt the position in **Kevin K. Mwiti Case** (supra) that:

“A 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 of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public.”

40. Hence in **R (Bibi) vs. Newham London Borough Council 2001 EWCA CIV 607**, it was held:

“Unless there are reasons recognised by law for not giving effect to those legitimate

expectations then effect should be given to them. In circumstances as the present where the conduct of the Authority has given rise to a legitimate expectation then fairness requires that, if the Authority decides not to give effect to that expectation, the Authority articulates its reasons so that their propriety may be tested by the court if that is what the disappointed person requires.”

41. It is therefore my view that the decision to zero-in on the Petitioner and failure to give her clearance while other students within her class were cleared amounted to unjustifiable discrimination and arbitrariness. In the premises I find that the Council violated Articles 27 and 47 of the Constitution that protects equality and freedom from non-discrimination and decrees the right to fair administrative action and its decision cannot be allowed to stand.

42. In the premises the decision transmitted vide the Counsel’s letter dated 26th October, 2016 is hereby quashed. The Council is hereby directed to clear the Petitioner for admission to the Kenya School of Law.

43. With respect to general damages, there is no material on the basis of which such an award can be made. It is upon the applicant to place before the Court the material upon which the Court can not only find that an award of damages is deserved but also the quantum thereof.

44. I however do not see any justification for the joinder of the 2nd Respondent to these proceedings.

45. Consequently, in order to be fair to all the parties each party will bear own costs of these proceedings.

46. It is so ordered.

Dated at Nairobi this 6th day March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wetaba for Mr Abubakar for the Petitioner.

CA Mwangi