REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

PETITION NOS. 450, 448 AND 461 OF 2016 (CONSOLIDATED)

MONICA WAMBOI NG'ANG'A & OTHERS…….....……PETITIONERS

VERSUS

COUNCIL OF LEGAL EDUCATION…….……...…….1ST RESPONDENT

THE KENYA SCHOOL OF LAW.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

LAW COUNCIL OF UGANDA…….....……1ST INTERESTED PARTY

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

JUDGEMENT

Introduction

1. This judgement arises from three petitioners which were consolidated being Petition No. 450 of 2016, Petition 448 of 2016 and Petition 448 of 2016. The said petitions were on 7th December, 2016 directed to be consolidated and be heard together with the lead file being Petition No. 450 of 2016.

The Parties

2. According to the Petitioners, they are holders of Bachelor of Laws (LL.B) degrees from Uganda Pentecostal University, the 2nd interested party herein (hereinafter referred to as "the University") and are prospective students of the **Kenya School of Law,** the 2nd Respondent (herein referred to as "the School"), which is described as a public body established under section 3(1) of the ***Kenya School of Law Act*** (No. 26 of 2012) Laws of Kenya, whose mandate *inter alia* is admitting and training qualified persons to the school to study for the Advocates Training Programme (ATP).

3. The 1st Respondent herein, **Council of Legal Education** (herein referred to as "the Council"), is a body corporate established under section 4 of the ***Legal Education Act, 2012,*** Laws of Kenya.

4. The 1st Interested Party, the **Law Council-Uganda** is the regulator of legal education in the Republic

of Uganda while the 2nd Interested Party, **Uganda Pentecostal University** (hereinafter referred to as "the University") is a Private University accredited by the National Council of Higher Education in the Republic of Uganda.

Petition 450 of 2016

5. According to the Petitioners in petition 450 of 2016, they studied and where each awarded with Bachelor of Laws Degrees (LL.B) from the University, which studies were informed by the prevailing laws at the time of their admission to the said University and that they possess all qualification necessary for direct entry for admission to the said Advocates Training Programme (ATP) and for the academic year 2017/2018. Prior to joining the University they held post "O-Level" qualifications which qualified them for the said admission. The said petitioners averred that they were admitted for the study of their respective LL.B Programme on or before the legislations currently governing the affairs of the Respondents come into force. It was the Petitioners' case that studies at the 1st interested Party's Institution were informed by the prevailing laws on legal education both in the Republics of Kenya and Uganda at the time of my admission thereof.

6. The said petitioner pleaded that on or about 25th August, 2016, the School placed an advertisement in the *Daily Nation* Newspaper and on its website inviting qualified persons to apply for Admission to the Advocates Training Programme for the 2017/2018 Academic Year, but the said advert introduced conditions which are not only unreasonable but discriminative in nature thus:

> a) On paragraph (iii) of the eligibility criteria the word "and" is read with a lot of mischief in part it reads;-
>
> > *"Having passed … the Kenya Certificate of Secondary Examination and hold a higher qualification e.g. "A" levels,…".*
>
> b) Applicants from foreign universities and those in possession of Secondary School certificates not based on the 8.4.4 system must provide written evidence of clearance from the Council of Legal Education (Kenya).

7. To the petitioners, the School's administrators are well aware that the Council is not seized of the authority to recognized and approve or clear or equate either the degree certificate or the secondary school certificates held by the Petitioners' or any other person in that respect.

8. It was further averred that the 2nd Respondent charges Kshs 10,000/- for the alleged Recognition and Approval or Clearance or Equation of Degree certificate awarded by foreign universities and the secondary school certificates, which acts amounts to illegally depriving the Petitioners their property right guaranteed by the law. However, despite each of the Petitioners having paid the said sum of Kshs 10,000/-, and having submitted the necessary documents as required by the School**,** it has declined to respond to the same and no genuine reasons are advanced. To the petitioners, the School has no known laid down procedures and or regulation setting out the modalities of the alleged Recognition and Approval or Clearance or Equation of LL.B Degree certificate awarded by foreign universities and the secondary school certificates.

9. The petitioners disclosed that on 3rd October, 2016 their Advocates on record wrote to the School making enquiring on the status of the alleged Recognition and Approval or Clearance or Equation and the response thereof on 10th October, 2016 was to the effect that University is not recognised by dint of a number of correspondences to the Uganda Law Council, notwithstanding that the Petitioners had each provided the necessary documents therefrom and that the Petitioners had furnished the Council with clearance letters from the Interested parties as well as the curriculum from the 1st Interested Party**.**

10. It was the petitioners' case that the Respondents' actions of subjecting the Petitioner's both Bachelor of Laws (LL.B) Degree certificates and Secondary School certificates to the alleged Recognition and

Approval or Clearance or Equation was *ultra vires* and that the Petitioners like any other persons holding equivalent qualifications had legitimate expectation that the Respondents would follow a lawful procedure in conducting their affairs and in arriving at decisions as contained in their various correspondences. The Respondents were accused of perpetrating illegal actions as a consequence of which the petitioners suffered loss and damages.

11. The Petitioners contended that the deliberate actions or omissions by the Respondents of including extraneous eligibility criteria as a precondition for admission to the Advocates Training Programme negates the law and as such the Respondents jointly and severally are in breach of the Petitioners' Legitimate Expectation. The Respondents have failed in upholding the constitutional requirements and the Petitioners had, among others, the following legitimate expectation:

a) That the Respondents would exercise their powers lawfully pursuant to Article 10 of the Constitution of Kenya in arriving at their decision and would in doing so adhere to fairness and all other known principles of law and honour their expected obligations and duty to that effect.

b) That the Respondents would treat all persons before it equally and not act in any manner that is discriminatory or treat the Petitioners differently from others who are in their standing or class in respect of the admission for the Advocates Training Programme.

c) The Respondents would not act contrary to the provisions of the laws in addition to the principles of Public Policy and rules of natural justice.

12. The petitioners' case was that the state is obligated under the Constitution of Kenya, 2010, to observe the principles and values of good governance, to enforce and implement the Bill of Rights and they are apprehensive that the rights pleaded herein have been and are likely to be breached on account of the foregoing actions and omissions on the part of the Respondents that has the real and potential consequences of depriving the Petitioners' their individual and or personal rights and in particular right to education; and adversely interfering with the Petitioners' rights of progression within training and career path.

Petitions 448 and 461 of 2016

13. According to the petitioners in petitions 448 and 461 of 2016, who are similarly Bachelor of Laws Degree holders from Uganda Christian University, having successfully completed their undergraduate studies, on or around August 2016, pursuant to an advertisement by the School in one of the daily newspapers, like any other applicants, applied to the Council to be cleared to apply to the School for the Advocates Training Program, for the academic year 2017-2018. To their surprise the 1st and 2nd Respondents issued them with rejections letters on grounds that they did the law of Agency and Hire purchase under sale of goods and not as independent course units and therefore they had to re-do Commercial Law.

14. The said petitioners appealed to the Council on the ground that they did the law of Hire Purchase and the Law of Agency under the Law of Sale of Goods as shown in the Uganda Christian University Reading List and the curriculum but the said Respondents adamantly refused to clear them demanding that they get a revised Curriculum from their former university. To the petitioner, Uganda Christian University is accredited by the Uganda Council for Higher Education and the Uganda Law Council to teach law, its curriculum and Reading Lists for all course Units are approved by the said bodies and that the copies of the Curriculum and the Reading lists from the Law faculty of Uganda Christian University where they studied from, are within the possession of the 1st and the 2nd Respondents but the said Respondents have declined to clear them.

15. It was revealed that officials from Uganda Christian University have on several times informed the Respondents that the Law of Hire Purchase and the Law of Agency are done and covered under the Law of Sale of Goods as shown on the course lists but the Respondents have insisted in seeking for clearance to apply to the Council. It was averred that the Secretary to the Council and some officials from the

Council visited Uganda Christian University Mukono in 2012, where the Petitioners studied from, and they appreciated and indeed approved that Uganda Christian university, its curriculum and reading lists encompassed all the course unites required to join the School. It was averred that in fact the said Respondents have been clearing applicants from the Uganda Christian University for the past years including 2015 to apply and join the School basing on the same curriculum and reading list the petitioners used to apply. It was emphasised that the Secretary to the Council, the Council and the School have after their visitation to the Uganda Christian University in 2012, been admitting students from the same university using the same curriculum and the same reading list for sale of goods where the law on Hire purchase and the Law of Agency are covered. According to the petitioners, though the 3rd Respondent offers Sale of goods, Hire purchase, Law of Agency, negotiable instruments under commercial Law and Sale of goods, Hire purchase, Law of Agency, negotiable instruments are never put or reflected on the transcripts and that in fact other applicants from other Universities like Kampala international University, The University of Nairobi, the Catholic University of East and Central Africa among others offer the Law of Agency and Hire purchase under the Law of Sale of Goods just like Uganda Christian University but the students from both the University of Nairobi and CUEA have not been denied the opportunity to apply to join the ATP for the academic year 2017/2018 offered at the School.

16. It was averred that since the Uganda Council for Higher Education and the Uganda Law Council approved Uganda Christian University as a University allowed to teach Law in Uganda and indeed approved its curriculum and the contents of the Law faculty Reading Lists, the said Secretary and the Council do not have any legal mandate to force for the amendment of the said curriculum and reading list to put the Law of Agency and the Law of Hire purchase as independent course units.

17. The Petitioners expressed their surprise that the Council rejected their first Application and the Appeal without even according them an opportunity to present their case and be heard. They therefore contended that the said decision was arrived at without being accorded the right to a fair hearing and fair administrative action as they were not given an opportunity to appear before the Council board to explain any allegations in any manner whatsoever.

Petitioners' Submissions

18. It was submitted since the Petitioners in 450 of 2016 joined enrolled for their respective LL.B Degree studies with the University between the years 2008 and 2011 way before the ***Legal Education Act, 2012 Laws of Kenya*** and the ***Kenya School of Laws Act, 2012 Laws of Kenya*** were enacted, the two statutes cannot apply retrospectively. To them, the only requirements for purposes of Admissions to School to which they are subject to are as provisions ***Regulation 5*** of the ***First Schedule*** which provides that:

> ***"A person shall not be eligible for admission for the Post Graduate Diploma (Advocates Training Programme) unless that person-***
>
> ***a) …***
>
> ***b) passed the relevant examinations of a university, university college or other institutions prescribed by the Council, hold 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-***
>
> ***(i) Attained a minimum entry requirement for admission to a university in Kenya; and***
>
> ***(ii) A minimum grade B (Plain) in English language and a mean grade of C+(Plus) in the Kenya Certificate of Secondary Examination or its equivalent;***
>
> ***c) A Bachelor of Laws Degree (LL.B) from a recognized university and attained a minimum grade of C+ (C Plus) in English and a minimum aggregate grade of C (Plain) in the Kenya certificate of secondary Education, holds a higher qualification e.g. "A" levels,***

"IB", relevant "Diploma, other "Undergraduate degree" or has attained a higher degree in law after the undergraduate studies in the Bachelor of Laws Programme; or

d) …"

19. In support of this submission they relied on **Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others [2015] eKLR, p46,** where this Court granted:

> **"A declaration that the petitioners who were already in the LL.B class prior to the enactment of the Kenya School of Law Act are to be treated in the manner contemplated by the guidelines issued by the school prior to the enactment of the Amendment Act. For avoidance of doubt those who had not been admitted in the LL.B class prior to the enactment of the Kenya School of Law Act are to comply with the provisions of the said Act."**

20. The said Petitioners submitted that neither the ***Kenya School of Law, 2012,*** nor the ***Legal Education, 2012***, contain any provisions that empower the Council to recognize and approve LL.B degree certificates obtained from any foreign university or institution hence the Council by its action in purporting to recognize and approve the said Petitioners' LL.B degree certificate was not based on any lawful process and as such breached and or violated various principles of law including but not limited to;- Principles of natural Justice, acted *ultra vires*, acted with improper motive, acted unreasonable, acted against the principle of proportionality, acted with mala fide and legitimate expectation.

21. In support of their submissions the petitioners relied on Article 47 of the Constitution as read with section 7 of the ***Fair Administrative Action Act***. In the Petitioners' submissions whereas the function of the Council is limited to admission to the Roll, the law does not grant it authority to scrutinize, academic documents for the purpose of admission to the ATP and it is mandated to admit students to any of its programme pursuant to the ***Kenya School of Law Act, 2012*** or the ***Council of Legal Education (Kenya School of Law) Regulation, 2009*.**

22. The Petitioner relied on **Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others** (Supra) that;-

> **"Retrospective operation is not per se illegal or unconstitutional. Whether retrospective statutory provisions are unconstitutional was a matter considered by the Supreme Court in the case of Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others, SCK Application No. 2 of 2011 [2012] eKLR where the Court observed that, "[61] As for non-criminal legislation, 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 retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden. It is also worth noting that it is not the role of this court to dictate as to whether a law should or should not apply retrospectively. That is the province of the legislature. The role of the court is limited to product of the legislative process and determining whether its purpose or effect is such that it infringes on fundamental rights and freedoms of the individual. The duty of courts is to give effect to the will of Parliament so that if the legislation provides for retrospective operation, courts will not impugn it solely on the basis that the same appears unfair or depicts a 'lack of wisdom,' or applies retrospectively. Francis Bennion in his seminal work on Statutory Interpretation, 3rd edition, at page 235 states, "Retrospectivity is artificial, deeming a thing to be what it was not. Artificiality and make-believe are generally repugnant to law as the servant of human welfare. So it follows that the courts apply the general presumption that an enactment is not intended to have retrospective effect. As always, the power of Parliament to produce such an effect where it wishes to do so is**

nevertheless undoubted."

23. It was submitted that the School's decision to direct the Petitioners to procure clearance unknown under the law from the Council and its consideration of irrelevant issues in arriving at its decision was unreasonable and amounts to discrimination and in his respect they relied on Article 27(4) of the Constitution**.**

24. The petitioners submitted that the Respondents having breached the constitutional rights articulated in the petition against the Petitioners they are indeed entitled to damages both special damages in respect of the Kshs. 10,000.00 and general damages. In this respect while claiming Kshs 15,000,000.00 they relied on the decision of Court of Appeal in **Peter M. Kariuki vs. Attorney General [2014] eKLR** where an award of Kshs 15,000,000.00 was made being damages for violation of constitutional rights while holding at 20 and 21 held that:

> **"Turning to the ground of appeal relating to damages, it bears repeating that assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in the country and to prior relevant decisions…On the purpose of awards of damages, the Supreme Court of Uganda….noted that the object of an award of damages is to give an injured party compensation for the damage, loss or injury that he has suffered and that the general rule regarding the measure of damages is that the injured party should be awarded a sum of money as would put him in the same position as he would have been if he had not sustained the injury. Where the injury in question is non-pecuniary loss, assessment of damages does not entail arithmetical calculation because money is not being awarded as a replacement for other money; rather it is being awarded as a substitute for that which is generally more important than money, and that is the best that a court can do in the circumstances."**

25. The Petitioners in petitions 448 and 461 of 2016 on their part submitted that the **s**ecretary and the Council by their decisions given on different dates in 2016, to reject the Petitioner's applications acted unjustly, discriminatively and without observing the Principles of Natural Justice in that they: -

a) failed to give the Petitioners sufficient or any reasonable notice of the proceedings (if any) of the Council for Legal Education Board before prematurely and unjustly rejecting their application to be cleared to apply to join the 3rd Respondent for the Advocate Training Programme (ATP) for the Academic Year 2017/2018.

b) failed to give the Petitioners a fair opportunity to present their case to enable them to correct or contradict any relevant statements and/or allegations prejudicial in their view.

c) failed to avail and/or show the Petitioner's and/or apply any evidence, whether written or oral in support of allegation of that the Respondents did not do Hire Purchase and the Law of Agency.

d) made and reached a decision unilaterally leading to barring of the Petitioner's from participating in the applications to join the 3rd Respondent for the ATP academic year 2017/2018.

e) acted u*ltra-Vires* as the law governing admission to the school for the ATP and the consequential procedures in arriving at a decision not to clear the Petitioners to apply and participate in the ATP programs.

f) abused power, acted with improper motive, unreasonably, in breach of the principle of proportionality, in breach of their duty to act in good faith and violated the legal principle of Legitimate Expectation.

26. Based on local authorities and international instruments, it was submitted that the Council of legal education discriminated in its process of clearing students to apply and join Kenya school of Law for the Advocates Training program for the academic year 2017/2018 on grounds that they did not do the Law on

High purchase and the Law of Agency yet the petitioners did the said units under the Law of Sale of Goods yet the same council of legal Education cleared applicants from Kampala International University, the University of Nairobi, Catholic University who cover Hire purchase and the Law of Agency under Commercial Law where the Law of Agency and Hire Purchase are covered under commercial Law but not as independent course unit. This, it was contended, amounts to discrimination and contrary to Article 27 of the constitution of Kenya, against the ***Universal Declaration of Human Rights*** and the ***African Charter on People's Rights***.

27. According to the petitioners, Part II of the Second schedule of the ***Legal Education Act*** as Revised in 2015 does not require the Law of Agency and Hire purchase to be covered as independent units but units under commercial law as it prescribes one of the units to be taken as *C**ommercial Law (including Sale of Goods, Hire Purchase and Agency)*.** It is further of paramount importance to note that Council of legal education does not have any regulations in place to use in the process of clearance for applications to join the Kenya school of law as required by section 8(2) and (3) of the ***Legal Education Act*** No 27 of 2012 as revised in 2015 and therefore any act of clearing and refusing to clear some students from some universities without any Regulations and guidelines in place is an illegality and amounted to discrimination against the Petitioners thereby being contrary to Articles 27, 43(1)(f), 55 (a), and (c)of the constitution of Kenya 2010. In support of this submission the Petitioners relied on **Jacques Charl Hoffmann vs. South African Airways, CCT 17 of 2000** quoted in **Centre for Rights Education and Awareness (Creaw) & 7 Others vs. Attorney General [2011] eKLR**.

28. It was submitted that the 1st Respondent discriminatively cleared some students to apply and join the Kenya School of Law and declined to clear the petitioners contrary to Article 27 and intended to deny the petitioners the right to the enjoyment of the right to education guaranteed by Article 49.

29. It was submitted that the Council and the purported Taskforce in claiming to have made a decision having the force of Law usurped the Law making power of Parliament as per Articles 94 and 109 and therefore their purported decision is invalid, not tenable in law and has no force of law. Even if this Court was to find the Council and the Taskforce to have law making powers, it was contended such decision is premature, has no force of law as they did not go through the process of making it law as provided under Article 116 of the Constitution of Kenya 2010 which provides for the process of enactments to obtain the legal status and them obtaining powers to have a force of law. Similarly it was not gazetted for it to become law and therefore it cannot be enforced against the Petitioners in this Petition. In any case that decision does not apply or be enforceable against the 3rd petitioners in this Petition as the said decision was reached way after the 3rd Petitioners had applied to the Council for clearance to join the Kenya School of Law and therefore such decision cannot apply retrospectively. In this respect they relied on **Samwel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & Another, Supreme Court at Nairobi, Appeal No. 2 of 2011**.

30. It was contended that even if the resolution or decision made by the Attorney General and the Council of Legal Education was to apply as law, such law would not apply against the Petitioners since such decision was made way after the Petitioners had applied to the Council of Legal Education for clearance as the decision was made on 25th October 2016, when the 3rd Petitioners had made their applications for clearance as early as September and early October 2016 before the purported decision by the Attorney General and the Council of Legal Education. Therefore the principle applies to bar such decision being enforced against the Petitioners.

31. With respect to the position that non-Citizens cannot be admitted to Kenya School of Law, it was submitted that Article 27 of the Constitution of Kenya 2010, gives equality before the Law regardless of Nationality, religion, creed among others not only to Kenyans but also to foreigners within the Kenyan territory and reliance was placed on **Midland Finance & Securities Globetel Inc vs. The Attorney General and Kenya Anti-Corruption Commission Civil Suit No 359 of 2007**.

32. In any case, it was submitted that East Africans are not considered foreigners in the eyes of the East African Treaty which Kenya signed, ratified and by virtue of Articles 2(5) and 2(6) of the Kenyan Constitution which domesticates international treaties that Kenya is a signatory to and become part of the

Kenyan Laws. Article 1 of the East African Treaty defines a foreign State to mean a state that is outside the east African Community which is not a party to the East African Community Treaty. On the same note, the definition of who is a foreigner within the meaning of the East African Treaty can be inferred from the definition of what a foreign state is to mean that a foreigner is person whether natural or artificial who is not a citizen of any of the member states of the East African Community. In verbatim, Article 1 states that "foreign country" means any country other than a Partner State. "Partner States" means the Republic of Uganda, the Republic of Kenya and the United Republic of Tanzania and any other country granted membership to the Community under Article 3 of this Treaty.

33. To the petitioners, this definition of what a foreign state and a foreigner is negates the allegation by the Council of Legal Education of alleging that Ugandans are foreigners and that such interpretation by the Council of Legal Education contravenes the desire and spirit of the East African Treaty which demands for equality and non-discrimination of the citizens of any of the members of the East African Member states. It was therefore submitted that the suggestion that foreigners specifically Ugandans are not protected by Law while in Kenya specifically on admission to join Kenya School of Law, it is not only in breach of the East African Community Treaty but also in violation of the Constitution of Kenya specifically Articles 2(5), 2(6) and Article 27, 49 on the right to Education of the Constitution of Kenya 2010 and therefore this Court should declare such actions by the Council that foreigners cannot be admitted to study at Kenya school of Law as being discriminative in nature and therefore unconstitutional.

34. The petitioners relied on this Court's decision in **Nabulime Miriam & Others vs. Council of Legal Education & 5 Others Judicial Review Application No 377 of 2016** consolidated with Petitions No 472 and 480 of 2016, where it was held that:

> **"It is my view that in making a decision to recognize a foreign university, the Council of Legal Education is under a duty to vet such institution in order to satisfy itself that the quality of Legal Education offered by such institution is at per with the quality being offered by the local universities in order to ensure that all those who are being admitted at the Kenya School of Law meet the same standards."**

35. It was submitted that the said Petitioners were not accorded a fair hearing, since the Council acted ultra-vires in its decisions by not only handle the Applications for clearance but also handling the Appeals by the Petitioners against the 1st Respondent's decision. This is evidenced in the letters responding to the Council's application for clearance and the Appeals which both decisions of the 1st Application for clearance and the Appeals were decided and signed by the Secretary/Chief Executive officer of the 1st Respondent, which acts were not only ultra-vires but illegal. The petitioners averred that under sections 29 and 31 of the ***Council of Legal Education Act***, it is the Legal Education Appeals Tribunal that has the powers to hear Appeals against the decision of the Council of Legal Education, make its decision and communicate the said decision to the Appellants. In the circumstances of this case, there is nothing that shows that the Legal Education Tribunal ever sat and heard the Petitioners' Appeals but that the said Appeals were handled by the Secretary/Chief Executive officer of the Council. In this respect the petitioners relied on sections 39 and 31 of the ***Council of Legal Education Act*** which establishes the Legal Education Appeals Tribunal with its mandate as established in section 31 as among others to hear appeals by any party aggrieved by the decision of the Council of Legal Education.

36. It was therefore the petitioners' case that the Council and its officials' decision of not clearing the Petitioners to join the School when the petitioners had done and covered the Law of Agency and the Law on Hire Purchase under the Law of Sale of Goods which is in line with Part II of the Second Schedule to the Council of the ***Legal Education Act***, and the Council having cleared other students from other Universities who covered the same course units under commercial Law but not independently; the Council having sat to hear both the Petitioners' original Applications for clearance to join the School and the Appeals against the first decision knowing that legally it did not have the powers to hear such Appeals against their earlier decisions, such decisions were not only discriminative in nature but were also illegal, irrational, an abuse of the procedural propriety and therefore abused the petitioners principles of Natural Justice.

37. The Petitioners in the consolidated petitions therefore sought the orders in the respective petitions.

The Council for Legal Education's Case

38. The petitions were opposed by the Council for Legal Education.

39. The Council, drew to the Court's attention existence of a decision of a multi-sectoral Taskforce on Legal Sector Reforms convened by the Office of the Attorney General and Department of Justice, conveyed by letter dated 25th October 2016, interpreting and directing implementation of sections 12 and 13 of the ***Advocates Act*** (Chapter 16 of the Laws of Kenya), read with section 4 of the ***Kenya School of Law Act, 2012,*** which letter was addressed to the Director of the Kenya School of Law for implementation. It was averred that by the said decision, admission to the Advocates Training Programme at the Kenya School of Law is only for Kenyan citizens and that the decision is still in force and has not been set aside though there exist two Constitutional Petitions filed at the High Court in Nairobi, ***No. 505 of 2016*** and ***No. 509 of 2016*** seeking setting aside of the said decision which petitions are still pending disposal.

40. It was therefore averred since all Petitioners herein are not Kenyan citizens, they are not eligible to apply to the Advocates Training Programme, and that with that legal handicap, their consequent claims aimed at joining the ATP, are untenable.

41. With respect to the issue of the jurisdiction by the Council to be satisfied of qualifications before admission to the Advocates Training Programme the Council referred to section 4 of the ***Kenya School of Law Act***, 2012 which establishes the Kenya School of Law for *inter alia* the fundamental objective of training applicants for admission as advocates under the ***Advocates Act*** (Chapter 16 of the laws of Kenya). The Council also relied on the Second Schedule to the ***Kenya School of Law Act***, which provides as follows:

> ***(1) 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……'***

42. It was contended that the duty of the Council to be satisfied of the qualifications of an applicant is then completed in the ***Advocates Act*** (Cap 16) at section 13(1) as follows:

> ***(1) A person shall be duly qualified if—***
>
> ***(a) having passed the relevant examinations of any recognized university in Kenya he holds, or has become eligible for the conferment of, a degree in law of that university; or***
>
> ***(b) having passed the relevant examinations of such university, university college or other institution as the Council of Legal Education may from time to time approve, he holds, or has become eligible for conferment of, a degree in law in the grant of that university, university college or institution which the Council may in each particular case approve;'***

43. According to the Council, with an application for the Admission to the Advocates Training Programme under section 4, section 16 and second Schedule to the ***Kenya School of Law Act***, the journey

to admission under section 13(1)(a) and (b) of the ***Advocates Act*** commences. In this context, the certification of relevant examinations prescribed and passing of examinations approved by the Council, is a special function of the Council, that supersedes any other certification issued in the process since, as was held in **Nabulime Miriam & Others vs. Council of Legal Education & 5 Others [2016] eKLR**, once a person gets admitted at the Advocates Training Programme, such person gets conferred with certain rights and a legitimate expectation that he/she will be given occasion to enjoy the privileges of such *admittee* at law. It was therefore contended that when a person applies to the Advocates Training Programme, such an applicant is admitted for *inter alia* the objectives of section 4(2)(a) of the ***Kenya School of Law Act***, to train as an advocate under the ***Advocates Act*** (Chapter 16 of the laws of Kenya). In the circumstances, when the Council certifies that an applicant's qualifications satisfy the threshold of law, it does so under the Second Schedule of the ***Kenya School of Law Act***, and pre-emptively under section 13(1) of the ***Advocates Act***. Council is estopped from certifying a qualification under the Second Schedule of the ***Kenya School of Law Act*** then denying the certification upon the applicant's petition for admission to the Roll of Advocates under section 13(1) of the ***Advocates Act***.

44. According to the Council, as is amply captured under section 13(1) of the ***Advocates Act***, the duty of the Council to be satisfied of a qualification is '***from time to time'***. Such that the fact that Council has at a point been accepting qualifications from a certain institution does not mean that Council is now bound to continue accepting the qualifications. Council has the jurisdiction to require confirmation at anytime.

45. According to the Council, all that it is seeking and doing, is to be satisfied that the Petitioners' qualifications pass the threshold, in accordance with the Council's duty in the pieces of legislation cited above, a duty which in its view is a formal one, and the satisfaction is sought and done formally. It was its view that the recognition of qualifications functions by the Commission of Universities Education (CUE) under provisions of the ***Universities Act***, 2012 is the primary general approval that a qualification is from a duly established and commissioned University. The certification that an LL.B degree satisfies the threshold for admission to the Advocates Training Programme for purposes of admission to the Roll of Advocates in Kenya, is legally different from the general certification of CUE which obligation cannot be done by CUE, but only by the Council. (Are there Regulations for this?)

46. It was its view that the provisions of the ***Universities Act, 2012*** even as amended on one hand and provisions of the ***Kenya School of Law Act*** section 16 and Second Schedule, section 8 of the ***Legal Education Act, 2012*** and section 13(1) of the ***Advocates Act*** (Chapter 16 of the Laws of Kenya) are not in conflict. This position according to the Council is recognised by the CUE itself, acknowledging the distinction of the statutory roles above even on its letters of recognition bears the following disclaimer:

> ***Kindly note, that in addition to this recognition, you may be required to meet other requirements set by Kenyan professional organizations.***

47. The Council took the view that from the various enabling statutes, the jurisdiction of the Council to be satisfied of qualifications for purposes of the Advocates Training Programme and ultimately the Roll of Advocates, is further to and beyond the jurisdiction of the ***Universities Act*** which Act bestows jurisdiction for regulation of Universities and recognition of Universities' qualifications. That it is not possible at law to substitute the special mandate of certification of qualifications for the Advocates Training Programme and admission to the Roll of Advocates, to be done by CUE, under an Act of Parliament that does not even contemplate this specific professional certification. It therefore asserted that the Council has the jurisdiction to certify LL.B degree qualifications for purposes of the Advocates Training Programme which qualifies students for the Bar examinations and admission to the Roll of Advocates, a process that is not a rubberstamping one, Council's designated department becomes seized of the matter and actually assesses qualifications per threshold, before the end result is communicated to an applicant. For this professional certification the Council charges a fee of Kshs. 10,000.00 that is applied towards the said administration. It was therefore contended that the claims by Petitioners of rebate of the said sums on the premise that recognition is done by CUE, are clearly claims made without understanding the mandate of Council above and the process of certification.

48. The Council revealed that in a quest to achieve the ends above, the Council wrote letters to the

Interested Parties (Uganda Law Council and Uganda Pentecostal University), the former being the equivalent of the Council of Legal Education, in Uganda, seeking formal confirmation that the University is accredited to be a legal education provider in Uganda. To the Council, 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. In 2014, as a result of an inspection conducted by the Council at Uganda Pentecostal University, it noted significant deficiencies with the Faculty of Law of Uganda Pentecostal University that resulted in a decision not to recognize LLB degrees from the university. However, Uganda Pentecostal 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. The Council's decision was accordingly for that reason quashed. Since the Kenya School of Law 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. The Council thus 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. This decision was communicated to the University and among others the Uganda Law Council on 5th May 2015. It was therefore contended that as its stands LLB degrees from Uganda Pentecostal Universities are not recognized and that the decision of the Council of 30th April 2015, has not been set aside, and neither has it been reviewed by the Council. The Council contended that again, on 6th January 2016 it wrote to Uganda Pentecostal University inquiring of the University if any remedial action had been taken on the noted deficiencies to enable it review its decision but once again this inquiry was never responded to. When therefore the Council received the Petitioners' letters, it 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 which letter similarly did not elicit a response, which information the Council requires to enable it make a decision. 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 but no response was forthcoming. Accordingly, without the required information as sought, 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 Petitioners, stating the reasons why it was inopportune for the CLE to approve the Petitioners' qualifications.

49. The Council reiterated 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. It is in this light that the CLE has repeatedly sought the confirmation from the Law Council in Uganda, with respect to Uganda Pentecostal University. It was averred that as a public body, enjoined to judicious and fair administration of its mandate under the ***Legal Education Act, 2012***, the Council notes the plight of students from Uganda Pentecostal University and that is why, 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 clarified that its quest in the enterprises above is not to oppress any person, but ensure attainment of the objectives of the ***Legal Education Act, 2012*** at section 3, indiscriminately.

50. It was therefore its position that its letter dated 10th October 2016, is not a decision, but just an information to the Petitioners' advocates in Petition 450 of 2016, that it is necessary for the Council to receive the sought information before acting. The letter of 10th October 2016 is worded as follows at pertinent part:

> ***Kindly note that it would be inopportune for the Council to clear the applicants without***

confirmation from the Uganda Law Council on the accreditation status of the LL.B Programme at the Uganda Pentecostal University, in Uganda.

51. The Council therefore affirmed that if the information sought were to be received and the applications by the Petitioners considered, there is likelihood of certification being granted if it would be formally demonstrated that the University is indeed authorized to be a legal education provider in Uganda. The Council noted that though the University and the Law Council of Uganda are parties to the present Petition (Petition 450 of 2016), duly served with the pleadings and cognizant of the issues therein, they opted not to file any affidavit and thereby avoided to answer the critical questions that the Council has been asking. The Council's view was that it would have assisted matters, even settled an appreciable portion of these Petitions if the said Interested Parties took up their duty to cooperate seriously and furnished the primary information sought by the Council.

52. The Council therefore denied the allegations of violations of fundamental rights in Petition No. 450 of 2016 and reliefs sought therein.

53. With respect to Petition 448 of 2016, the Council reiterated the foregoing averments so far they are relevant to answer assertions in this Petition, particularly that the Council has the jurisdiction to certify qualifications for purposes of the Advocates Training Programme and ultimately admission to the Roll of Advocates. It re-affirmed that as presently non-citizens cannot be admitted to the Advocates Training Programme, the Petitioners herein who are mostly non-citizens will not qualify for certification. The particular petitioners were identified as **Natocho Doreen**; **Nakafu Grace**; **Atai Bernadette**; **Bukirwa Irene**; **Akorino Edina Cox**; **Kia Damalie**; **Masiko Annettte Martha**; **Acham Rhoda Ochom**; **Imalingat Rita**; **Dhatemwa Agnes**; **Muhwezi Ezekiel**; and **Kagoya Sophia**.

54. This role, according to the Council, is not a rubberstamping one. It has to be actually satisfied that a qualification conforms to the minimum threshold before a certification could issue.

55. It was disclosed that The Council received the applications of the Petitioners and considered them against the stated threshold and communicated its decision, that it was not satisfied that the named Petitioners had satisfied the course content on Commercial Law, save for **Muhwezi Ezekiel** whose qualifications were also indicted for deficiency in Labour Law. It was averred that by the time the applications for certification of qualifications of the Petitioners the decision of the Taskforce had not been communicated. It was reiterated that the process of certification is a formal one and that the Council considers the qualifications presented and makes a decision basing on the merits. In the instant case, the Council considered the applications and was not satisfied of the qualifications on Commercial Law for all Petitioners and additionally Labour Law for **Muhwezi Ezekiel**. To the Council, the decisions in issue were professional decisions on the merits by the professional body and did not amount to violation of natural justice, *ultra vires*, abuse of power, unreasonable, disproportionate, duty of acting in good faith and legitimate expectation.

56. Regarding the allegations of natural justice, it was averred that the process of certification of qualifications is conducted through written media, the applicants are advised of all information to furnish prior to the application. The application, with the appendices are then assessed and finding with reasons transmitted to an applicant and the applicant has the right to appeal. It was therefore the Council's case that the right to be heard is not exclusively exercised by parole hearing as hearing can be by memoranda, which is the mode that was exercised.

57. With respect to the allegations of *ultra vires,* the Council averred that, as testified hereinabove, it has jurisdiction to certify qualifications for purposes of the Advocates Training Programme and admission to the Roll of Advocates and that it performed this function as mandated and made a decision thereon as necessary. In performing this function the Council is not bound to follow thresholds in other countries, but considers its thresholds at Kenyan law and adjudicates, and that adjudication otherwise than the Petitioners expected is not of itself ultra vires.

58. To the allegations of bad faith, unreasonableness and legitimate expectation, the Council averred that

the law enjoins it to satisfy itself of LL.B degree qualifications from time to time. Further each qualification is assessed independently on the same threshold. In this manner the Council does not violate any legitimate expectation for Council makes no promise in its assessment save to assess in accordance with the law. Further any legitimate expectation is what the law promised. The law, in this case the *Kenya School of Law Act*, the ***Legal Education Act*** and the ***Advocates Act*** make not promise to guarantee the Petitioners admission to the Advocates Training Programme without compliance with the law, adjudicated by the Council. It was further averred that for the Council, assessment of compliance was not a matter of comparing the Reading list, the course content must be an approved and reviewed curriculum. The Council referred to the annexture ND-10 in the supporting affidavit of **Natocho Doreen** sworn at Nairobi on 16th October 2016, where the Dean of the faculty of Uganda Christian University confirmed that the university had embarked on a revision of the curriculum and presented to the National Council for Higher Education for approval. However this approval had not been obtained. For Council such approval is primary before then it can be certified that the curriculum covers all aspects necessary at the LLB level. The Council's decision thus even after perusal of the Readings lists was that the core unit had not been properly undertaken, and to be able to certified for the Kenyan Bar, remedial was necessary.

59. To the allegations of violation of the principle of proportionality, it was averred that once the Council adjudicated that the LL.B degrees were deficient for purposes of admission to the Advocates Training Programme and Roll of Advocates, technically the citizen Petitioners were supposed to obtain fresh LL.B degrees that were now compliant. This would be grossly onerous, and therefore the Council has to device modalities in equity to have the Petitioners only take remedial programmes specially designed to augment such deficiencies, instead of redoing the LL.B degree anew. This is proportionate.

60. Dealing with Petition 461 of 2016, the Council reiterated the averments for Petition 448 of 2016 since Petition 448 of 2016 and 461 of 2016 raise substantively similar issues.

61. It was submitted by the Council that in light of the aforesaid multi-sectoral Taskforce on Legal Sector Reforms and the pendency of the two Constitutional Petitions filed at the High Court in **Nairobi, *No. 505 of 2016*** and ***No. 509 of 2016*** seeking setting aside of the said decision, granting an order by this Honourable Court for admission of such constituency of students, (foreign national) shall present administrative difficulty. Further, wading in to discussion of merits or lack thereof of the said decision is ***Res Sub judice***, since those are issues that awaiting determination in **Nairobi Constitutional Petition 505 of 2016 and 509 of 2016.**

62. Based on section 4 of the ***Kenya School of Law Act***, 2012, section 16 and Second Schedule to the ***Kenya School of Law Act*** and section 13(1) of the ***Advocates Act*** (Cap 16) it was submitted that the certification of relevant examinations prescribed and passing of examinations approved by the Council, is a special function of the Council that supersedes any other certification issued in the process and reliance was placed on **Nabulime Miriam & Others vs. Council of Legal Education & 5 Others** (supra).

63. To the Council, all that it is seeking and doing, is to be satisfied that the Petitioners' qualifications pass the threshold, in accordance with the Council's duty in the pieces of legislation cited above which threshold in certifying qualifications is known and is borne in the ***Legal Education Act*** and Regulations made under and Regulations transitioned to operate under the ***Legal Education Act***. Primarily the Council gets satisfied that an applicant has satisfied the course content requirements of section 23 of the ***Legal Education Act***, which stipulate a minimum of the following 16 core courses. The Second Schedule to the Legal Education Act, outline the core courses at degree level as Legal Research, Law of Torts, Law of Contract, Legal Systems and Methods, Criminal Law, Family Law and Succession, Law of Evidence, Commercial Law (including Sale of Goods, Hire Purchase and Agency), Law of Business Associations (to include Insolvency), Administrative Law, Constitutional Law, Jurisprudence, Equity and the Law of Trusts, Property Law, Public International Law and Labour Law. It was submitted that the Council does not only satisfy itself that unit is reflected on an applicant's transcript, for that would be grossly hollow and defeat the very intention of bestowing Council with the mandate to certify the qualifications but resorts to two other confirmations, **firstly** is to confirm from the Regulator of Legal Education in countries from whence applicants obtain their LL.B degrees from to ascertain whether the particular university is duly authorized to be a legal education provider in that

country. Secondly, Council confirms that the Curriculum for the particular course is one that has been approved by the authorities in the particular country. It was disclosed that the duty of the Council to be satisfied of qualifications, as above is a formal one, and the satisfaction is sought and done formally. This is why Council does not consider or rely on reading lists generated by a university to undertake the certification mandate above. Reading Lists are to follow an approved curriculum.

64. While reiterating its position as regards the rule of the CUE, it was submitted that the jurisdiction of the Council to be satisfied of qualifications for purposes of the Advocates Training Programme and ultimately the Roll of Advocates, is further to and beyond the jurisdiction of the ***Universities Act*** which bestows jurisdiction for regulation of Universities and recognition of Universities' qualifications. It is not possible and it shall constitute an overreach at law to substitute the special mandate of certification of qualifications for the Advocates Training Programme and admission to the Roll of Advocates, to be done by CUE, under an Act of Parliament that does not even contemplate this specific professional certification. In this respect the Council relied on the decision of the Court of Appeal in **Nairobi Civil Appeal No. 240 of 2013 The Engineers Board of Kenya vs. Jesse Waweru & *Others***.

65. It was therefore submitted that the certification process by Council is of university degree qualifications, for purposes of a professional course and before admission to the Roll of Advocates. The ***Universities Act***, even as amended, bears no aspirations. It is noteworthy that before Council certifies a qualification, CUE must first have recognized the qualification. Thus the certification by Council is specific and in addition to and not in substitution of. In this respect the Council averred that it has the jurisdiction to certify LL.B degree qualifications for purposes of the Advocates Training Programme which qualifies students for the Bar examinations and admission to the Roll of Advocates.

66. It was reiterated that before the Council 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), the Council 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. It is in this light that the CLE has repeatedly sought the confirmation from the Law Council in Uganda, with respect to Uganda Pentecostal University.

67. respect to the mode of hearing of the aggrieved parties, it was reiterated that the right to be heard is not exclusively exercised by parole hearing, hearing can be by memoranda, which is the mode that was exercised. In this respect the Council relied on **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** followed in **Paul Kuria Kiore vs Kenyatta University Nairobi High Court Constitutional Petition No. 396 of 2014,** where the Court delivered itself as follows on the issue:

> *'***In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made'.**

68. It was submitted that in performing this function Council is not bound to follow thresholds in other countries, but considers its thresholds at Kenyan law and adjudicates, and an adjudication otherwise than the Petitioners expected is not of itself ultra vires. Indeed Parliament recognizing the seriousness of this duty granted to the Council independence, in the following terms at section 12 of the ***Legal Education Act*** which provides that:

The Council shall, in the exercise of its functions, comply with the general policy of the Government relating to legal education and training and not be subject to the control of any other person or authority.

69. The Council submitted that in this case there was a stalemate in the sense that there existed a decision of the Council at law that the assessed qualifications do not satisfy the threshold, and reasons have been given as demanded by Article 47 of the Constitution and the ***Fair Administrative Actions Act, 2015***, on one hand, and on the hand there is a view point by the Petitioners that their qualifications satisfy the Council. In such a matter, the public entity to be satisfied is the Council, who has indicated and with reasons that it is not and has offered a way forward. The decision is on the merits. While appreciating the Court's power to interfere and declare the rights of the parties whenever it finds an infringement, it was submitted that in this case, the allegations of infringement have been denied and an explanation offered. In this respect the Council relied on **Republic vs. The Council of Legal Education (2007) eKLR** and **Eunice Cecilia Mwikali Maema vs. Council of Legal Education & 2 Others [2013] eKLR**.

70. In the Council's view since sections 4(2) and 14(4) of the ***Kenya School of Law Act***, and section 8(1) of the ***Legal Education Act***, supplement each other, they are not unconstitutional. The Council therefore prayed that the petitions be dismissed with costs.

Determinations

71. I have considered the foregoing.

72. The Respondents in justifying their position relied on the decision of a multi-sectoral Taskforce on Legal Sector Reforms convened by the Office of the Attorney General and Department of Justice. This report was hinged on section 4 of the ***Kenya School of Law Act, 2012*** and sections 12 and 13 of the ***Advocates Act***, Cap 16 Laws of Kenya. Section 4(2)(a) aforesaid states that one of the objectives of the School is to train persons to be advocates under the ***Advocates Act***. Sections 12 and 13 aforesaid, on the other hand provide as follows:

12. Subject to this Act, no person shall be admitted as an advocate unless—

(a) he is a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania; and

(b) he is duly qualified in accordance with section 13. 13. (1) A person shall be duly qualified if —

(a) having passed the relevant examinations of any recognized university in Kenya he holds, or has become eligible for the conferment of, a degree in law of that university; or

(b) having passed the relevant examinations of such university, university college or other institution as the Council of Legal Education may from time to time approve, he holds, or has become eligible for conferment of, a degree in law in the grant of that university, university college or institution which the Council may in each particular case approve;

and thereafter both—

(i) he has attended as a pupil and received from an advocate of such class as may be prescribed, instruction in the proper business, practice and employment of an advocate, and has attended such course or tuition as may be prescribed for a period which in the aggregate including such instruction, does not exceed eighteen months; and

(ii) he has passed such examinations as the Council of Legal Education may prescribe; or

(c) he possesses any other qualifications which are acceptable to and recognized by the Council of Legal Education;

(d) he is an Advocate for the time being of the High Court of Uganda, the High Court of Rwanda, the High Court of Burundi or the High Court of Tanzania;

(e) he is for the time being admitted as an advocate of the superior court of a country within the Commonwealth and—

(i) has practised as such in that country for a period of not less than five years; and

(ii) is a member in good standing of the relevant professional body in that country:

Provided that the Council may, in addition, require that a person to whom this paragraph applies undergo such training, for a period not exceeding three months, as the Council may prescribe for the purpose of adapting to the practice of law in Kenya.

(2)The Council of Legal Education may exempt any person from any or all of the requirements prescribed for the purposes of paragraph (i) or paragraph (ii) of subsection (1) upon such conditions, if any, as the Council may impose.

73. To break down the foregoing, one can only be admitted as an advocate in this country, firstly, if he is a citizen of the East African Community members countries of Kenya, Rwanda, Burundi, Uganda or Tanzania (hereinafter referred to as the "member countries"). For such citizen to qualify, he or she must have passed the relevant examinations of any *recognized university in Kenya*, and holds, or has become eligible for the conferment of, a degree in law of that university. If that person is not from a *recognized university in Kenya*, then he must have passed the relevant examinations of a university, university college or other institution as the Council of Legal Education may from time to time approve, and must hold, or has become eligible for conferment of, a degree in law in the grant of such approved institution. In other words those who have passed the relevant examinations from a recognised university in Kenya and hold or have become eligible for conferment of, a degree in law from that university, as long as they are citizens of the member countries automatically qualify to join the school while with respect to other universities, university colleges or other institutions, they must obtain approval from the Council though the first condition of being citizens of member countries must similarly be met. With respect to recognition of universities in Kenya, this Court in **Moi University vs. Council of Legal Education & Another [2016] eKLR** expressed itself as follows:

> **"…that the role of the Commission under the *Universities Act, 2012* is general, while mandate of the Council under the *Legal Education Act* is special. In other words the overall power of accreditation is placed on the Commission while the setting and enforcement of standards for the said accreditation falls on the Council…Since some of the functions under the said section are to accredit universities in Kenya and to accredit and inspect university programme in Kenya, in the absence of any evidence that its powers thereunder have been delegated to the Council for Legal Education pursuant to section 5(2) of the *Universities Act* and in the absence of any other written law expressly endowing another body with such powers, it is clear the Commission is the only body legally mandated to accredit universities in Kenya…Therefore whereas the power to accredit universities belong to the Commission, it is not for the Commission to set the standards for the accreditation but the Council and where there is a conflict between the view taken by the Commission and the Council with respect to *setting and enforcing standards relating to the accreditation of legal education providers for the purposes of licensing* it is the Council's view that prevails."**

74. In addition to the foregoing the person must have undertaken pupillage and tuition in an aggregate period not exceeding eighteen months and must have passed bar exams. The other way in which one may qualify is if he or she possesses any other qualifications which are acceptable to and recognized by the Council of Legal Education. He may also qualify if he or she an Advocate for the time being of the High Court of Uganda, the High Court of Rwanda, the High Court of Burundi or the High Court of Tanzania. He may similarly qualify if he or she is for the time being admitted as an advocate of the superior court of a country within the Commonwealth and in that event he or she must have practised as such in that

country for a period of not less than five years and in addition must be a member in good standing of the relevant professional body in that country. With respect to this last criterion, the Council of Legal Education is empowered to require in addition that that person undergoes such training, for a period not exceeding three months, as the Council may prescribe for the purpose of adapting to the practice of law in Kenya. Of course the Council may exempt one from complying with the provisions of section 13(1)(i) or (ii). I must however stress that since section 12 aforesaid is a stand-alone provision, the applicant for admission to the Kenyan bar must first and foremost be a citizen of the member country.

75. It was based on the foregoing that the Secretary, Chief Executive Officer of the Council of Legal Education, purporting to be acting pursuant to the decision of the Task Force on Legal Sector Reform convened by the Office of the Attorney General and Department of Justice (hereinafter referred to as "the Taskforce") issued *inter alia* the following sweeping statement to the Director/Chief Executive & Secretary, Kenya School of Law vide its letter date 25th October, 2016:

> ***"…the Kenya School of Law should not admit any foreign candidates from the other East African Community member states to the Advocates Training Programme (ATP) for qualifying as advocates candidates for automatic admission to the Roll of Advocates in Kenya under Sections 12 and 13 of the Advocates Act, Cap 16 of the Laws of Kenya unless such persons have also been similarly admitted as advocates in their respective countries of origin."***

76. From what I have stated hereinabove, it is clear that what was expressed in this rather sweeping and broad letter was, with due respect, a misconception of sections 12 and 13 aforesaid. Where the Council has approved an institution and the applicant has passed the relevant examination and holds or has become eligible for conferment of, a degree in law from that institution, that person does not have to have been admitted as advocates in their respective countries of origin. To that extent this directive was purporting to vary or amend the express provisions of the law. *In my view a multi-sectoral Task Force has no power to in effect take a decision whose effect amounts to removal of a University from the list of recognised universities. Whereas I agree that the decision whether to allow students from a particular university to be admitted to the School may be reviewed and exercised from time to time, that decision must be by way of withdrawal of recognition in accordance with the law. As this Court held in* ***Republic vs. Ministry of Health & Others ex parte Dr.*** **Pius Wanjala [2016] eKLR:**

> **"When a member of the executive takes it upon himself to render an enactment by Parliament superfluous by issuing directives which are clearly unlawful, it can only be a manifestation of what Warsame, J (as he then was) decried in Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010. To paraphrase the learned judge, the new Constitutional dispensation has introduced a system of governance under the Constitution. These principles enjoin state officers to adhere to the national values and principles of governance under Article 10 of the Constitution which include the rule of law. Public offices, it must be remembered are held in trust for the people of Kenya and therefore Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. They must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit. To operate outside the law in my view amounts to perpetuation of a fundamental breach of the Constitution and to legalise impunity at this very young age of our Constitution. Those who accept to serve in public offices must be guided by the provisions of the Constitution and cannot be permitted to breach the Constitution with remarkable arrogance or ignorance and that is my view of an action taken with a view to undermine the legislative mandate."**

77. This was the position adopted by ***Okong'o, J*** *in* ***Republic vs. The District Land Adjudication & Settlement Suba District & Anor. [2013] eKLR*** *at p. 10 where the learned Judge held that a*n official cannot be allowed to rewrite Acts of Parliament by making promises of unlawful conduct or adopting unlawful practice.

78. My position is supported by the opinion of **Mativo, J** in **Jonnah Tusasirwe & 10 Others vs. Council of Legal Education & 3 Others [2017] eKLR**, a matter whose pendency the Respondents relied upon to oppose these petitions, where the learned Judge expressed himself as follows:

> **"Section 13(d) seems to be the bone of the different interpretation adopted by the parties. While section 12(a) is clear as explained above, to me section 13(d) creates another category of admission for persons already admitted as advocates in Uganda, Tanzania, Burundi, & Rwanda. If Parliament intended otherwise, in my view section 13(d) could have been worded in clear terms such as "notwithstanding the provisions of section 12(a) above" and then proceed to state that "must first be admitted as an advocate in the countries mentioned in section 12(a)." In absence of clear provisions to the contrary, I find that the plain meaning of section 12(a) and section 13(d) is that the two provisions create two avenues for persons from the countries in question, and had parliament intended otherwise, it could have said so in clear terms. In fact I find nothing in the above provisions to suggest that Parliament intended otherwise other than the plain meaning of the words in the two provisions. While enacting section 13(d), Parliament was already aware of section 12(a) and if at all the intention was otherwise, nothing prevented it from saying so in clear terms. The assertion that for decades the admission of students from the countries in question was premised on the wrong interpretation of the law is in my view incorrect…I also agree with the position taken by the Kenya School of Law that the action to bar foreign nationals offends the provisions of Article 126 of the Treaty Establishing the East African Community. The Kenya School of Law also confirms that in the past it has admitted and trained students from the East African countries, Cameroon, Malawi, Nigeria and Gambia. The court notes that the interested party in these proceedings is a Ugandan National who studied in Uganda and successfully went through the Kenya School of Law and was admitted as an advocate and now practices law in Kenya. The explanation by the Council of Legal Education or the alleged Task Force that *"the hither construction of the law was erroneous"* is totally unsupported by the provisions of law enumerated above whose plain meaning in clear, hence the purported decision of the Task Force contained in the letter dated 25th October 2016 is in my view premised on the wrong interpretation of the above provisions, violates the rights of the petitioners and is therefore, is null and void for all purposes."**

79. I therefore agree that the Council and the purported Taskforce in claiming to have made a decision having the force of law usurped the law making power of Parliament as per Articles 94 and 109 and therefore their purported decision is invalid, not tenable in law and has no force of law.

80. I also agree with the petitioners that in any event the said decision having been reached way after the Petitioners had applied to the Council for clearance to join the Kenya School of Law could not apply retrospectively as was held **Samwel Kamau Macharia & Another vs. Kenya Commercial Bank Ltd & Another, Supreme Court at Nairobi, Appeal No. 2 of 2011** where the court observed that:

> **"As for noncriminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relates only to matters of procedure or evidence are prima facie prospective and retrospective effect is not to be given to them unless by express word and necessary implication, it appears that this was the intention of the legislative.''**

81. With respect to the position that non-Citizens cannot be admitted to Kenya School of Law, it was submitted that Article 27 of the Constitution of Kenya 2010, gives equality before the Law regardless of Nationality, religion, creed among others not only to Kenyans but also to foreigners within the Kenyan territory and reliance was placed on **Midland Finance & Securities Globetel Inc vs. The Attorney General and Kenya Anti-Corruption Commission Civil Suit No 359 of 2007,** where **Nyamu, J** as then was in protecting a foreign company, held that:

> **"The additional reason for taking this option is, that, this judgment is premised on the realization that without invoking the Constitution and the inherent jurisdiction as stated above, the Petitioners who are foreigners, would otherwise remain unprotected by any other**

law and they would not be able to seek any effective interim relief or measures."

82. However in **Nabulime Miriam & Others vs. Council of Legal Education & 5 Others [2016] eKLR** this Court expressed itself as follows:

> **"In this case, all the Petitioners are students from foreign universities. It is clear from the foregoing provisions that the power to recognise such foreign universities is bestowed upon the Council. It is however my view that in making a decision to recognise any foreign university, the Council 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 being offered by the local universities in order to ensure that all those who are being admitted to the School meet the same standards. It is the Council that recognises and approves qualifications obtained outside Kenya for purposes of admission to the Roll. The Council is also mandated to *inter alia* supervise legal education providers and administer such professional examinations as may be prescribed under section 13 of the *Advocates Act*…In my view, the Council ought to properly and thoroughly undertake its homework before giving recognition under the law. Once satisfied that a particular University or instruction ought to be recognised, the criteria for admission to the School in sections 16 and 17 of the *Kenya School of Law Act* and the Second Schedule thereto come into play… However, in determining whether or not to admit the students, the School must adhere to the guidelines made by the Council. In my view, the passing of prescribed examinations entails a consideration not only of the course content but must necessarily entail the substances of the courses as well and the right body to determine whether the substance of a particular course purported to have been offered and undertaken is the Council. On the issue of substance, the law reposes upon the Council the power to make a determination thereon which determination of course has to be lawful, fair and reasonable. In this respect, it is my view that no objection can be successfully be taken with respect to a decision for some remedial courses to be taken to align the qualifications with the local standards where the substance of the courses undertaken are found wanting… Once this is done the Courts would be very reluctant to interfere with such exercise of power or discretion since it is trite that where a power or discretion is donated to a particular body the Courts ought to exercise restraint in and ought not to readily accede to invitation to interfere with the exercise of such powers and discretion."**

83. Therefore as long as the Council's decision is reasonable, its decision to approve or not to approve a particular institution as long as the same is not a university recognised by the Commission of University in Kenya, cannot be successfully assailed.

15. According to the Council, section 13(1) of the ***Advocates Act***, the duty of the Council to be satisfied of a qualification is '*from time to time'*. Such that the fact that Council has at a point been accepting qualifications from a certain institution does not mean that it is now bound to continue accepting the qualifications. It therefore contended that Council has the jurisdiction to require confirmation at anytime. In my view the word "anytime" is not a pastime for "arbitrariness". Public authorities must appreciate that theirs is a power held in trust for the people. They therefore have no licence to exercise their powers arbitrarily. Their exercise of powers must be for the good of the people. Accordingly where there is a change in policy, the public except them to explain the reasons behind that change before the change is effected. It is in this light that I understand the position adopted by **Laws, LJ** in **R (Bhatt Murphy) vs. Independent Assessor [2008] EWCA Civ 755** in paragraph 50 of the Judgement that:

> **"A very broad summary of the place of legitimate expectations in public law might be expressed as follows. The power of public authorities to change policy is constrained by the legal duty to be fair (and other constraints which the law imposes). A change of policy which would otherwise be legally unexceptionable may be held unfair by reason of prior action, or inaction, by the authority. If it has distinctly promised to consult those affected or potentially affected, then ordinarily it must consult (the paradigm case of procedural**

expectation). If it has distinctly promised to preserve existing policy for a specific person or group who would be substantially affected by the change, then ordinarily it must keep its promise (substantive expectation). If, without any promise, it has established a policy distinctly and substantially affecting a specific person or group who in the circumstances was in reason entitled to rely on its continuance and did so, then ordinarily it must consult before effecting any change (the secondary case of procedural expectation). To do otherwise, in any of these instances, would be to act so unfairly as to perpetrate an abuse of power."

84. In light of the treatment accorded to the past students of the two Universities, I agree that the Petitioners had legitimate expectation that they would be accorded similar treatment. In this respect I adopt the position in **Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others [2015] eKLR** 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."

85. Therefore in order to validly withdraw the expectation the Respondents ought to have adhered to the guidelines in **R vs. Devon County Council ex parte P Baker [1955] 1 All ER** where it was held:

"...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision."

86. Similarly, in **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** it was held:

"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine."

87. It is contended which contention is not disputed that the Petitioners' predecessors at the said universities had not been subjected to the same treatment that was being meted to the Petitioners. It has not been shown that the circumstances between the said Petitioners and their predecessors had changed. To subject those Petitioners to a different treatment from their immediate predecessors is not only a violation of their legitimate expectation but amounts to unjustifiable 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."

88. In **Nyarangi & 3 Others vs. Attorney General [2008] KLR 688**, it was held:

"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".

89. Where legitimate expectation is found to apply, if a public authority is to depart from it, it must be demonstrated that there exist good reason for that departure. It was accordingly stated by **Lord Diplock** in **CCSU vs. Minister for the Civil Service [1984] 3 All ER, 935** where **Lord Diplock** at page 949 that:

"To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law or (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment or (ii) he has received assurance from the decision maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn." (emphasis supplied)

90. According to the Council, all that it is seeking and doing, is to be satisfied that the Petitioners'

qualifications pass the threshold, in accordance with the Council's duty in the pieces of legislation cited above, a duty which in its view is a formal one, and the satisfaction is sought and done formally. It was its view that the recognition of qualifications functions by the Commission of Universities Education (CUE) under provisions of the ***Universities Act***, 2012 is the primary general approval that a qualification is from a duly established and commissioned University. The certification that an LL.B degree satisfies the threshold for admission to the Advocates Training Programme for purposes of admission to the Roll of Advocates in Kenya, is legally different from the general certification of CUE which obligation cannot be done by CUE, but only by the Council.

91. Whereas the law is clear in section 4 of the ***Kenya School of Law Act***, 2012 that one of the objectives of the School is the training applicants for admission as advocates under the ***Advocates Act*** the Council and the School must appreciate that being statutory bodies, they must exercise their powers within the four corners of the statutory instrument which donate the said powers to them and must resist the temptation that often bedevil executive authorities of expanding such powers through administrative craft or innovation. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others since such statutory bodies or executive authorities have no inherent powers and can only exercise expressly conferred powers as opposed to ones assumed by implication. See **Choitram vs. Mystery Model Hair Salon [1972] EA 525** and **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734.**

92. It follows that the powers conferred upon such bodies or authorities must be strictly construed, such that where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. See **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981**, **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon** (supra); **Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461**.

93. To 2nd and 3rd Petitioners, the 1st and 2nd Respondents issued them with rejections letters on grounds that they did the law of Agency and Hire purchase under sale of goods and not as independent course units and therefore they had to re-do Commercial Law. In this respect I reiterated the position in **Nabulime Miriam & Others vs. Council of Legal Education & 5 Others** (supra) that the Council is under a statutory duty to thoroughly vet foreign institutions in order to satisfy itself that the quality of legal education offered by the said institutions is at par with the quality being offered by the local universities in order to ensure that all those who are being admitted to the School meet the same standards. In my view, the passing of prescribed examinations entails a consideration not only of the course content but must necessarily entail the substances of the courses as well and the right body to determine whether the substance of a particular course purported to have been offered and undertaken is the Council. In this case however the Council seems to have concentrated on the technicalities rather than the substance of the courses undertaken by the petitioners. In my view by seeking that the petitioners, who were former students of Uganda Christian University, obtain a revised curriculum from their former university, the Council's decision was clearly irrational, particularly in light of the treatment given to Kampala International University, The University of Nairobi, the Catholic University of East and Central Africa among others which offer the Law of Agency and Hire purchase under the Law of Sale of Goods just like Uganda Christian University but whose students were not denied the opportunity to apply to join the ATP for the academic year 2017/2018 offered at the School. In this respect I associate with the decision in **Jacques Charl Hoffmann vs. South African Airways, CCT 17 of 2000** quoted in **Centre for Rights Education and Awareness (Creaw) & 7 Others vs. Attorney General [2011] eKLR,** where 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."

94. It was contended that the Petitioners were not accorded a fair hearing, since the Council acted ultra-vires in its decisions by not only handling the Applications for clearance but also handling the Appeals by the Petitioners against the 1st Respondent's decision. In this respect the Petitioners relied on sections 29 and 31 of the ***Council of Legal Education Act.*** Section 29 of the said Act establishes the Legal Education Appeals Tribunal whose composition is separate from the Council appointed by the Judicial Service Commission. The said Tribunal is mandated, upon an appeal made to it in writing by any party or a reference made to it by the Council or by any committee or officer of the Council, on any matter relating to the Act, to inquire into the matter and make a finding thereupon, and notify the parties concerned. As contended by the Petitioners there is no evidence that their appeal was considered by the said Tribunal before a decision was made rejecting the same. Therefore the purported decision relayed by the Chief Executive Officer of the Council was made without or in excess of his powers. Apart from that it was most inappropriate to permit the very person who had made the decision appealed against to not only to be part of the panel hearing the same appeal against his decision, but to be the sole decision-maker on the appeal. In **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** the Court expressed itself as follows:

"The petitioner also challenges the inclusion of the Vice Chancellor in the committee to sit on appeal of the petitioner's case having been a judge of first instance. As earlier noted s 14 provides for the composition of the Senate and the chairman of the said Senate is the Vice Chancellor. The letter of 11th September 2006 allowed an appeal to be made to the Vice Chancellor but the appeal was dismissed. A second appeal was made on 5th April 2007 but the same was rejected on 19th July 2007. The petitioner has faulted the decision of the Vice Chancellor who is supposed to chair the Students Disciplinary Committee for sitting on appeal. I do agree that the Vice Chancellor cannot be a judge at first instance and also on appeal. However, in the instant case the Vice Chancellor did not take part in the Disciplinary Committee proceedings and his sitting on appeal in the matter cannot be said to be prejudicial to the petitioners' case in any way. Had the Vice Chancellor sat on the 1st Committee then he would have lacked capacity to sit on appeal. Ordinarily I would agree that the provision that the Vice Chancellor sits both at 1st instance on the case and on appeal would be contrary to rules of natural justice and unconstitutional. The regulation authorizing the Vice Chancellor to sit as a judge in the 1st instance and on appeal should be relooked at. In this case however I find that rules of natural justice were not flouted by the Vice Chancellor sitting on appeal."

95. Implicit in the concept of fair adjudication lie two cardinal principles namely that no man shall be a Judge in his own cause and that no man shall be condemned unheard. These two principles of natural justice must be observed by the Courts and Tribunals save where their application is expressly excluded or by necessary implication. See **Prime Salt Works Ltd. vs. Kenya Industrial Plastics Ltd. Civil Appeal No. 186 of 2000 [2001] 2 EA 528.**

96. In **Kenya Commercial Bank Ltd vs. Kenya National Commission on Human Rights Nairobi HCMA No. 688 of 2006 [2008] KLR 362** a three judge bench of this Court while citing **Hannan vs. Bradford City Council [1970] 2 ALL ER 69** and **R vs. Sussex Justices ex parte Cay (HLC 1924)**, expressed itself as follows:

> **"Section 17 (b) and (d) of the Act requires the Commission to observe the principle of impartiality and rules of natural justice. One of the tenets of natural justice is that no man can be judge in his own cause. S 25 of the Act allows the respondent, after completing an enquiry, to commence proceedings in the High Court under s 84(1) of the Constitution. Having made up their mind that the applicant had contravened the 1st interested Party's rights, the respondents should have proceeded under s 25 (b) and not taken part in the adjudication. It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done. We find that in the circumstances of this case, a right thinking man would have formed the impression that there was likelihood of bias and justice would not have been done. The proceedings attract the order of *certiorari* for purposes of their being quashed...The applicant complaints that their legitimate expectation of a fair trial has been thwarted because of all the reasons raised by them that there is a real likelihood of bias by the Commissioner sitting as a judge in his own cause; because the Panel as constituted is unlawful, and because the regulations are uncertain, defective and unenforceable. As we pointed out earlier, s 17 of the Act provides that Rules of Natural Justice will be observed by the respondent in the performance of its functions which include investigation of human Rights Violations. The applicant expected to be given a fair hearing and all tenets of natural justice to be observed but from our observations above, we find that the same have been flouted by the respondent by their own conduct of prejudging the applicant, being a judge in its own cause; by regulation 14 breaching Rules of Natural Justice; by the Commissioner committing errors of precedent fact. We also find that the applicant's Legitimate Expectation that they would get a fair hearing from the respondent was breached."**

97. Having so found the issue is not whether he was in actual fact bias but whether a right thinking man [or woman] would have formed the impression that there was likelihood of bias and justice would not have been done. This was the position taken by the Court of Appeal in its majority judgement in **Beatrice Wanjiru Kimani vs. Evanson Kimani Njoroge Civil Appeal No. 79 of 1998 [1995-1998] 1 EA 134** in which **Lakha, JA** it expressed himself as hereunder:

> **"In considering whether there was a real likelihood of bias, the Court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit…There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; "The judge was biased."**

98. In **Omolo, JA**'s view, once it is accepted that a judge was in fact biased against a party then the question of any notional fairness in the eventual outcome of the dispute becomes merely academic.

99. Before I conclude this judgement, I must appreciate that concerns have been raised in this country with respect to the standards of university education in general and legal education in particular. Those concerns, in my respectful view, are not altogether misplaced or without substance. However, the concern must be addressed within the law and not by way of reports or recommendations of Taskforces especially when such recommendations are not in compliance with the law.

100. I further agree that it is upon the regulators in legal education sector to ensure that they do not unleash on the public persons with questionable qualifications especially in legal sector where clients rely on the trust bestowed upon the members of the profession for the purposes of seeking legal advice and

representation. In **Republic vs. Kenya School of Law Ex-Parte Thomas Otieno Oriwa [2015] eKLR**, this Court expressed itself as follows:

> **"It must however be appreciated that the Respondent is the institution specially tasked with providing professional training to and examining those who intend to be advocates. To unduly curtail its powers in carrying out that onerous mandate would amount to usurping the powers of the School and substituting the Court's discretion for that of the School. There is nothing inherently wrong or unreasonable in the School setting reasonable guidelines for the attainment of its statutory mandate as long as such guidelines are lawful and are geared towards ensuring that those whom its unleashes on the public are those who have the necessary professional and ethical qualifications necessary in carrying out their mandate as advocates. The role of an advocate in society is that of trust as between the advocate and the client as opposed to that of a businessman. He or she is expected to possess certain standards as expected from him or her by the society. The client entrusts him or her with execution of the client's lawful instructions in accordance with certain standards and also expects him or her to be a safe repository of the client's confidential information as well as the client's funds. The need for proper training both theoretically and practically cannot be overemphasised. The decision of what constitutes proper guidelines necessary for the proper breeding of advocates ought to be left for the wise counsel of the Respondent. This Court cannot decide for the School which guidelines are appropriate for it to administer on its students even if the Court was of the view that such guidelines are not suitable or unnecessary as long as they are geared towards the attainment of the School's objectives. In other words it is not the Court's view on the suitability of the guidelines that should determine whether or not the Court would interfere with the School's choice. Where it is not shown that the decision was unreasonable."**

101. I associate myself with the decision of the Court of Appeal in **Eunice Cecilia Mwikali Maema vs. Council of Legal Education and 2 Others Civil Appeal No. 121 of 2013** 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."**

102. I also wish to associate myself with the decision in **Susan Mungai vs. The Council of Legal Education & 2 Others Constitutional Petition No. 152 of 2011 in which Mumbi Ngugi, J expressed herself as follows while citing with approval the decision of Nyamu, J (as he then was) in Republic vs. The Council of Legal Education (2007) eKLR** at page 12 that**:**

> **"The Council of Legal Education followed to the letter the purpose and objects of the Act including the applicable regulations and this Court has no reason to intervene in a way that interferes with the merit of the decisions clearly falling within the relevant regulations and which have been applied by the Council of Legal Education without any procedural irregularity or for an improper purpose. I decline to do so. The Council of Legal Education has the power and duty to insist on the highest professional standard for those who wish to qualify as advocates. The Regulations are aimed at achieving this. The decision was made on merit and this Court has no reason to intervene. The Regulations and the policy behind the rules were properly made pursuant to the Act and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the regulations...*The Council of Legal Education is the best judge of merit pertaining to academic standards and not the courts. Parliament clearly vests the power of formulating policy of training and examining of advocates on the Council of Legal Education and it would be wrong in the view of this court to intervene with the merits of the decision by the Council of Legal Education..... a Court of law would only be entitled to inquire into the merits of a decision in circumstances where the decision maker abused its discretion, exercised its decision for an improper purpose, acted in breach of its duty to act fairly, failed to exercise its statutory duty reasonably, acts in a manner which frustrates the purposes of the Act which gives it power to act, exercises its discretion***

***arbitrarily or unreasonably, or where its decision is irrational or unreasonable as defined in the case of Associated Provincial Picture Houses Ltd. –v- Wednesbury Corporation [1947] 1 KB 223*. In the case before me, there is no evidence to suggest that the 1st respondent, in dealing with the application for admission by the petitioner, acted in any of the ways set out above that would justify interference by this Court with its decision."** [Emphasis mine].

103. In fact this was the position adopted in **Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others [2015] eKLR** where this Court expressed itself inter alia as follows:

> **"In this case the School has been faulted for intending to examine the Petitioners on the subjects which they have undertaken at the University. To the Petitioners the School, in so conducting itself seems to be casting aspersions at the standards of the said institutions by exhibiting lack of respect for the competence and discretion of the universities. With due respect, I disagree. To curtail the powers of the School in deciding what subjects to examine its prospective students would amount to usurping the powers of the School and substituting the Court's discretion for that of the School. There is nothing inherently wrong or unreasonable in the School setting what in its view are appropriate exams for the admission of students to the School as long as the exams in question are relevant to the course of study. This Court cannot decide for the School which subjects are appropriate for it to administer on their prospective students even if the Court was of the view that such subjects are not suitable as long as they are geared towards the attainment of the School's objectives. In other words it is not the Court's view on the suitability of the subjects that should determine whether or not the Court would interfere with the School's choice of examinable subjects."**

104. In other words as was held in **Moi University vs. Council of Legal Education & Another [2016] eKLR**:

> **"Therefore there must be standards to be met by those institutions which set out to impart knowledge to its students. The Interested Party herein is therefore empowered under section 5(1)(c) of the *Universities Act* to promote, advance, publicise and set standards relevant in the quality of university education, including the promotion and support of internationally recognised standards."**

105. Accordingly, the mere fact that a person has in his or her possession a law degree and even mere admission to the Law School does not give rise to an expectation that can be legitimised that that person will in fact pass the bar examinations and in fact be admitted to the bar. Where a person is admitted to the school, for him or her to be admitted to the bar, must satisfy the examiners that he or she deserves an admission to the bar by passing the prescribed bar exams. Again even after passing the bar exams, the Chief Justice, before admitting a person to the bar must under section 15(3) of the ***Advocates Act*** be satisfied as to the qualifications, service and moral fitness of the petitioner. Therefore it does not necessarily follow that a person who has passed the bar exams automatically becomes an advocate though the Chief Justice in exercising his or her discretion is expected to do so judicially.

106. It is in this light that I understand the caution and disclaimer of the Commission for University Education that:

> ***….in addition to this recognition, you may be required to meet other requirements set by Kenyan professional organizations.***

107. This, in my view, is in tandem with the view expressed by the Court of Appeal in **Nairobi Civil Appeal No. 240 of 2013 - The Engineers Board of Kenya vs. Jesse Waweru & *Others***, paragraphs 46, 47, 48 and 49 thereof that:

> **"The second level of accreditation is not governmental in the sense that it is not required for purposes of authorization or registration to offer an academic training or a given professional service. It is quality assurance accreditation for purposes of recognition, call it**

approval if you like, that a given institution or firm offers an academic course or service that meets the required standards of a given profession. This is the level in which the Council of Legal Education…, to mention a few, fall…."

108. It is to this extent that I agree with the Council that the certification of the Commission for University Education is general while that of the Council is specific and in addition to and not in substitution of. General in the sense that the person who has undergone the process of acquiring university degree is awarded the same. That person accordingly meets the minimum qualification to join the Law School as long as he or she meets the additional legally prescribed requirements for doing so. However whether or not that person will actually pass the bar exams and qualify for admission as an Advocate of the High Court of Kenya depends on whether he or she will satisfy the Council and the School that he or she merits be so certified. However the Council cannot at that stage disqualify a person from joining the School simply because in its view the applicant is unlikely to pass the bar exams.

109. I therefore disagree with the Respondent's general statement that it has the jurisdiction to certify LL.B degree qualifications for purposes of the Advocates Training Programme which qualifies students for the Bar Examinations and admission to the Roll of Advocates. In other words the Council cannot set out to question the authenticity of the degrees awarded to the applicants with a view to making a determination as to whether those degrees were in actual fact merited as long as the degrees emanate from recognised institutions. However, nothing bars the Council from subjecting the applicants to courses which in its view are necessary for the proper undertaking of the duties of an Advocate. It is in this light that I understand section 12 of the ***Legal Education Act*** which provides that:

The Council shall, in the exercise of its functions, comply with the general policy of the Government relating to legal education and training and not be subject to the control of any other person or authority.

110. In fact this was the position adopted in **Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others [2015] eKLR** where this Court expressed itself inter alia as follows:

"In this case the School has been faulted for intending to examine the Petitioners on the subjects which they have undertaken at the University. To the Petitioners the School, in so conducting itself seems to be casting aspersions at the standards of the said institutions by exhibiting lack of respect for the competence and discretion of the universities. With due respect, I disagree. To curtail the powers of the School in deciding what subjects to examine its prospective students would amount to usurping the powers of the School and substituting the Court's discretion for that of the School. There is nothing inherently wrong or unreasonable in the School setting what in its view are appropriate exams for the admission of students to the School as long as the exams in question are relevant to the course of study. This Court cannot decide for the School which subjects are appropriate for it to administer on their prospective students even if the Court was of the view that such subjects are not suitable as long as they are geared towards the attainment of the School's objectives. In other words it is not the Court's view on the suitability of the subjects that should determine whether or not the Court would interfere with the School's choice of examinable subjects."

111. It is true that the decision arrived at by the Council as to whether the qualifications of the petitioners met the threshold was a merit decision. However, it is now clear that the mere fact that a decision is a merit decision does not bar the Court from investigating whether the same was so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law before it, would have made it. In other words whether the decision can properly be termed as being irrational.

112. There was a claim for general damages. However as was rightly contended by the Council, though **Uganda Pentecostal University** and the **Law Council of Uganda** are parties to these proceedings and were duly served and in fact the University is represented in these proceedings by one of the advocates also appearing for some of the petitioners, they opted not to file any affidavit and thereby avoided to answer the critical questions that the Council has been asking. I particularly take issue with the deafening

silence in these proceedings by **Uganda Pentecostal University** in light of the serious allegations levelled against it with respect to the quality of legal education being offered by that University. The University ought to have taken this opportunity to clear its name and reputation but decided to squander the same. I am therefore unable to make a determination as to the quality of legal education being offered by that University and had the substance of these proceedings been the quality of its legal education, it would have been difficult for this Court in light of the material placed before me and the failure by it to respond to the Council's pertinent queries to have disagreed with the position adopted by the Council. However the Council's own undoing was the failure by it to justify the denial of admission of the petitioners to the school having admitted previous students based on the same qualifications. This does not mean that the Council is forever beholden to admit students qualified from **Uganda Pentecostal University** since the Council is, subject to the due process, being followed at liberty to reverse its earlier decision. In other words a benefit may be withdrawn as long as there exist rational basis for doing so which basis has been explained to those to be affected.

113. Similarly the **Uganda Christian University** ought to have taken steps to synchronise its courses and align them with the Council's requirements. In other words its courses ought not to be scrambled in a manner that makes it difficult for one to determine their contents.

114. It is therefore clear that these proceedings have been contributed to partly by the attitude adopted by the two interested parties herein and the manner in which **Uganda Christian University** has configured its course outlines and reading lists. In those circumstances, damages cannot be awarded against the Respondents.

115. Having considered the consolidated petitions it is my finding that the decision to bar the petitioners from being admitted to the school cannot be sustained. I also find that the petitioners who paid Kshs 10,000.00 to the Council for Legal Education are entitled to refund of the same.

Order

116. In the premises the orders which commend themselves to me and which I hereby grant are as follows:

> **1. A declaration that the Respondents' decision rejecting the petitioners' application to the Kenya School of Law for the academic program 2017/2018 was unlawful.**
>
> **2. An order of certiorari removing into this Court for the purposes of being quashed and quashing the Respondents' decision declining to clear the petitioners for admission to the Kenya School of Law for Advocates Training Programme (ATP).**
>
> **3. An order compelling the Council for Legal Education to clear the Petitioners to apply to the Kenya School of Law for admission into the Advocates Training Programme (ATP), under the same conditions as their predecessors who also qualified from the same Universities. In default of such clearance the Kenya School of Law is hereby compelled to consider the petitioners' application for admission into the Advocates Training Programme (ATP), under the same conditions as their predecessors who also qualified from the same Universities.**
>
> **4. An order directed to the Council for Legal Education to refund to those petitioners who paid Kshs 10,000.00 towards the Recognition and Approval or Clearance or Equation of their Degree certificates.**
>
> **5. In light of my findings regarding the conduct of Uganda Pentecostal University, Uganda Christian University and the Law Council of Uganda, there will be no order as to costs.**

117. Orders accordingly.

Dated at Nairobi this 4th day of April, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Asimwe Johnson for the 1st Petitioners and holds brief for MrNzaku for the 3rd Petitioners

Mr Malinzi for the 4th Petitioners and hold brief for Mr Cohen for the 2nd Petitioners and the 2nd interested party

CA Mwangi