REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 118 OF 2016

REPUBLIC.....APPLICANT

VERSUS

KENYA SCHOOL OF LAW…….…….....1ST RESPONDENT

COUNCIL OF LEGAL EDUCATION……2ND RESPONDENT

EX-PARTE

JANEROSE NANJIRA

JUDGEMENT

1. The ex-parte Applicant, Janerose Nanjira holds a Bachelor of Laws degree (LL.B) awarded to her on 16th December, 2011 by Moi University. Upon graduation, she applied for admission to the 2nd Respondent, Kenya School of Law ("the School") to undertake the Advocates Training Programme ("ATP") for the 2012/2013 academic period.

2. After she made her application, it emerged that she had not met the qualifications for direct admission to the School. She therefore embarked on registration for the pre-bar examination. By a letter dated 1st February, 2016 the Director of the School notified her that she had passed the remaining unit of the five pre-bar examination units she was required to do. The same letter also informed her that she was required to undertake corrective measures in respect of Public International Law which was a core unit missing in her law degree.

3. According to the Applicant, the School later contacted her by phone informing her that the decision not to admit her, based on the fact that her degree missed out on Public International Law, had been rescinded as this was not a requirement at the time she graduated in 2011. She was subsequently issued a letter dated 22nd February, 2016 admitting her to pursue the ATP at the School.

4. She immediately paid Kshs.100,000/= in partial settlement of the fees and was issued with a receipt. She also duly filled and signed the registration form. It was at this juncture that the School declined to clear her on the ground that she had not done Public International Law, a core unit, in her undergraduate studies.

5. It is the Applicant's case that she was advised by the Director of the School to write to the 2nd Respondent, the Council of Legal Education ("the Council") for guidance. The Director of the School

intimated to her that he would not have any problem admitting her if the Council gave the School authority to admit her. The Council replied to her through a letter dated 29th February, 2016, affirming the School's decision not to admit her. In the letter, the Council noted that **"the LL.B qualification does not meet the threshold prescribed by Part II of the Second Schedule to the Legal Education Act, 2012. Specifically, Public International law which is one of the core units is missing."**

6. On 14th March, 2016 the Applicant moved this Court and obtained leave to commence these judicial review proceedings. Through the notice of motion application filed on 18th March, 2016, the Applicant therefore prays for an order of mandamus compelling the respondents to admit her into the ATP for the 2016/2017 academic period. She also prays for costs of the proceedings.

7. The Applicant's case is premised on legitimate expectation, procedural unfairness and unreasonableness. On legitimate expectation, it is the Applicant's case that prior to the enactment of the Legal Education Act, 2012, the law governing admission to the ATP was the Council of Legal Education Act, Cap 16A; Legal Notice No. 170 of 2009-the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009; and Legal Notice No. 169 of 2009-the Council of Legal Education (Kenya School of Law) Regulations, 2009. It is the Applicant's case that the Legal Education Act, 2012 was assented to on 21st September, 2012 and came into operation on 28th September, 2012 when she had already completed her studies and graduated.

8. The Applicant contends that she had a legitimate expectation that the new entry requirements which were introduced by the Legal Education Act, 2012 would not apply to her as she had already completed her LL.B studies. Further, that she had made plans and even incurred expenses based on the reasonable and legitimate expectation that having begun her LL.B course in 2005 the criteria to qualify as an advocate would not change or if it changed, it would not apply retrospectively.

9. The Applicant asserts that the School had represented to her, by issuing the admission letter that she will not be required to undertake corrective measures in respect of Public International Law, which was not a requirement at the time she completed her LL.B studies. She contends that based on the admission letter she had paid fees and secured accommodation at considerable expense in readiness for the 2016/2017 ATP academic year.

10. The Applicant asserts that she would have taken steps to satisfy the requirement of sixteen core subjects if this was brought to her attention at the time she commenced her LL.B studies in 2005. It is her case that she placed reliance on the legitimate expectation that the Council of Legal Education Act, 2012 would not be applied retrospectively to deny her admission into the ATP.

11. On the question of procedural unfairness, the Applicant asserts that the decision of the respondents was unprocedural, unfair and a breach of her right to fair administrative action under Article 47 of the Constitution. It is the Applicant's case that she began her undergraduate studies in 2005 and the decision to deny her admission is based on the retrospective application of Part III (20) of the Third Schedule to the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009; and Section 23(1) of the Legal Education Act, 2012 as read with the Second Schedule to the Act. According to her, she had already started her undergraduate studies when these Regulations and Acts came into force.

12. It is the Applicant's case that the decision to reject her application in the first instance, issue her with an admission letter, only to reject the application again is evidence that the respondents acted unfairly. The Applicant therefore concludes that the decision to deny her admission is procedurally and substantively unfair as the respondents did not take into account the criteria that should have been used for admission into the School in light of the fact that she completed her undergraduate studies when Public International Law was not a mandatory course unit.

13. Turning to her third ground, the Applicant submits that the decision to deny her admission to the School was unreasonable. It is the Applicant's case that she was denied admission to the School on the basis of the provisions of the Kenya School of Law Act, 2012; the Legal Education Act, 2012; and the

Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009 which all came into force after she had commenced her studies.

14. It is the Applicant's position that the decision to deny her admission to the School is unreasonable as it is based on the retrospective application of laws and regulations requiring the Applicant to have studied the sixteen stipulated courses. It is the Applicant's case that the Council had previously published a public notice indicating that it would apply different admission criteria to ensure that applicants who had already begun their studies, after the new laws and regulations came into force, would not be prejudiced and discriminated against. The Applicant thus holds the respondents' decision to deny her admission to the School unreasonable.

15. The Applicant supported her arguments with the decisions in **Eunice Cecilia Mwikali Maema v Council of Legal Education & 2 others [2013] eKLR** and **Kevin K Mwiti & others v Kenya School of Law and 2 others [2015] eKLR.** The Applicant also cited page 609 of the 6th Edition of **Judicial Review of Administrative Action** by de Smith, Woolf and Jowell to assert that legitimate expectation is a principle of fairness which is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in the government's dealings with the public.

16. The School opposed the application through a replying affidavit sworn on 21st March, 2016 by its Academic Manager, Fredrick James Muhia. Mr. Muhia averred that on 3rd December, 2015 the School placed an advertisement at page 56 of the Daily Nation inviting applicants for pre-bar examination for admission to the ATP. In the advert, it was stated that for admission to the ATP, applicants must have undertaken 16 core subjects which includes Public International Law.

17. The Applicant was among those who registered for the pre-bar examination mounted between 6th and 8th January, 2016. She sat and passed her one remaining pre-bar unit.

18. The School then communicated to the Applicant on 1st February, 2016 that while she had successfully passed the pre-bar examination, she had to undertake corrective measures in respect to Public International Law which was missing in her LL.B degree.

19. On 5th February, 2016, the School received an advisory opinion indicating that premised on Transitional Admission Guidelines that were preserved by the judgement in **Nairobi High Court Constitutional Petition No. 377 of 2015 Kevin K Mwiti & others v Kenya School of Law & 2 others**, applicants with degrees obtained from local universities were to be admitted into the ATP without further reference to their 'O' Level qualifications.

20. Based on the said advice, the School issued to the Applicant a provisional letter of offer dated 15th February, 2016. It is the School's assertion that the letter clearly indicated that the offer was provisional subject to verification of relevant documents and the conditions set thereunder. It is further the School's assertion that the letter clearly indicated that the offer was provisional subject to verification of relevant documents and the conditions set thereunder.

21. It is the School's case that when the Applicant presented herself for registration on 22nd February, 2016 the issue of the Applicant's failure to sit Public International Law in her undergraduate studies cropped up again. It is then that Mr. Muhia advised the Applicant that the School could not proceed and register her as she was not admissible on account of lack of Public International Law which is a core unit as provided in Section 23(1) and the Second Schedule of the Legal Education Act, 2012.

22. Further, that Public International Law was also a core unit as provided under Article 24 of the Third Schedule to the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009, which came into force on 27th November, 2009, prior to the Applicant's completion of her LL.B degree in December 2011.

23. It is the School's position that since the Applicant had not finalised her programme prior to the commencement of the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009 the same are applicable to her. It is thus the School's case that since the Applicant has not undertaken Public International Law which is a core unit, she does not meet the requirements for admission to the ATP as stipulated in the advertisement of 3rd December, 2015.

24. The Council's opposition to the application is through grounds of objection dated 24th March, 2016 and filed in Court on the same date. In summary the Council's case is that in declining to admit the Applicant to the ATP, the respondents are enforcing the Kenya School of Law Act, 2012 and the Legal Education Act, 2012.

25. The Council asserts that certiorari does not issue against a lawful decision of a public body whereas mandamus does not issue to compel a public body to act illegally.

26. The Council contends that there is no demonstrable retroactive application of the law as the course content provision of an LL.B degree was initially borne by the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009 which at paragraph 20 Part III of the Third Schedule provided for the course units to be done for purposes of admission to the ATP. It is the Council's case that in 2009 the Applicant had three years to graduation in 2011. She therefore had knowledge of the requirement and occasion to comply with the course content of her LL.B degree. It is the Council's case that the requirement in the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009 for a law student to undertake sixteen core units was simply replicated in the Legal Education Act, 2012.

27. The Council contends that there was no violation of any legitimate expectation since the Applicant knew way back in 2009 the contents of a Bachelor of Laws degree and had sufficient time to comply with the law. Further, that the School has a duty to apply the current law which requires the undertaking of the sixteen core units. The Council concludes that it would be grossly discriminative to permit admission of a person who holds a non-compliant LL.B degree to the ATP.

28. Looking at the pleadings and submissions of the parties herein, it is clear that the only issue for the determination of this Court is whether the Applicant met the requirements for admission to the ATP. The issues of breach of legitimate expectation, procedural unfairness and unreasonableness will be addressed in the process of addressing the core issue.

29. There is agreement by all the parties herein that the Kenya School of Law Act, 2012 and the Council of Legal Education Act, 2012 had not been enacted by the time the Applicant graduated in December, 2011. To deny her admission to the ATP on the strength of the two Acts would amount to applying the law retroactively to her detriment. The Council's letter of 29th February, 2016 addressed to the Applicant, to the effect that her **"LL.B qualification does not meet the threshold prescribed by Part II of the Second Schedule to the Legal Education Act, 2012"** would therefore amount to applying the law retrospectively.

30. However, the Applicant's case should not only be viewed through the lenses of the 2012 enactments, but also from the regulations that were made in 2009. There is no argument by the Applicant that the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009 required a person undertaking the LL.B course to study sixteen core courses. This Court (Lenaola,J) in **Eunice Cecilia Mwikali Maema v Council of Legal Education & 2 others [2013] eKLR** and the Court of Appeal (Maraga, Kariuki and Kairu JJA) in **Eunice Cecilia Mwikali Maema v Council of Legal Education & 2 others [2013] eKLR,** an appeal arising from the decision of Lenaola, J, extensively addressed the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009.

31. Briefly, the facts in **Eunice Cecilia Mwikali Maema** (supra) were that the Petitioner was awarded a degree of Bachelor of Laws in July 2010 by Coventry University in England. Sometimes in 2012 the Council of Legal Education through a press advert invited applications for the ATP 2013/2014 academic

year at the Kenya School of Law. The notice stipulated that in order to be considered for admission the LL.B degree must comprise all the sixteen core subjects as per Legal Notice No. 169 of 2009.

32. The Petitioner submitted her application which was rejected on the ground that she had not covered eight of the sixteen core subjects. The Petitioner moved to Court seeking orders to quash the decision rejecting her application and mandamus to compel her admission to the Kenya School of Law.

33. Dismissing the Petition, Lenaola, J stated at paragraph 15 of his judgment that:

> **"What I gather from the above is that whereas <u>Regulation 5 of Legal Notice No. 169 of 2009</u> sets the minimum criteria for admission which includes inter-alia an LL.B degree there is also the need that apart from having an LL.B degree from a recognised university, that LL.B degree must specifically comprise of certain core units set out by Legal Notice No.170 of 2009. The latter looks to the content of the LL.B degree which is only one of the components necessary for one to meet the criteria set by the former. To read one without reference to the other would be akin to selective interpretation of the law to reach a set end. I refuse to countenance such an approach because it would mean that Legal Notice No. 170 of 2009 would have no meaning in our Law books."**

34. The Petitioner being aggrieved by the decision moved to the Court of Appeal. Agreeing with the High Court, the Court of Appeal stated at paragraphs 32 to 34 that:

> **"32. We accept, as submitted by counsel for the appellant, that while the undergraduate programme offered by any accredited institution must compromise those "core units", there is no express requirement that a student undertaking the programme at such institution must necessarily take those units. Students enrolling for legal education programmes at universities or other institutions do so for a variety of reasons. Some may or may not wish to seek postgraduate admission to the advocates training programme. However, for those wishing to gain admission to the advocates training programme at the School, it seems to us that the Council, by making reference to "*relevant qualifying examinations*" under Regulation 5(2)(a) of the Council of Legal Education (Kenya School of Law) Regulations, 2009, was not merely concerned, as the appellant would have us believe, with passing of relevant examinations of a university prescribed by the Council.**
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> **33. In our interpretation, the relevant qualifying examinations must include those set out under Paragraph 20 of Part III of the Third Schedule to the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations reproduced above. Under that paragraph the Council determined and prescribed that the subjects or units set out thereunder are core. In its plain and ordinary meaning 'core' means "*the central or most important part of something*." In other words, according to the Council, the 16 identified subjects or units were so central and important that for purposes of regulating standards, an undergraduate programme that did not include those units failed the test of accreditation. We are unable to appreciate the argument that the Council may on the one hand determine certain subjects to be core for purposes of accrediting an institution and at the same time not consider them as core for purposes of qualifying for admission to the advocates training programme at the School.**
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> **34. Obviously the subsidiary legislation by the Council could have been better framed and structured to make it abundantly clear that a degree from any institution that did not include those units would not be recognized for purposes of admission to advocates training programme. Happily any ambiguity or lack of clarity has been removed with the enactment of the Legal Education Act, that commenced operation on 28th September 2012 and whose objective is to promote legal education and the maintenance of the highest possible standards in legal education. Section 23 of that Act expressly provides for core degree courses and stipulates that a legal education provider offering a course for the award of a degree in law shall in addition to any other courses offered, provide instruction and**

examination for each of the core courses set out in Part II of the Second Schedule to that Act."

35. I will revert back to this decision shortly.

36. The Applicant heavily relied on the decision of Odunga, J in **Kevin K Mwiti & others v Kenya School of Law & 2 others [2015] eKLR.** The arguments in that case were centred on the Kenya School of Law Act, 2012. The Act provides for the establishment, powers and functions of the Kenya School of Law. In the Act there is a provision for pre-bar examination but there is no provision for a transition period although by the time it was coming into force there were students, including some of the petitioners, in various universities undertaking their law degree courses.

37. Recognizing that the omission to provide for a transition clause would create a lacuna if the provisions for pre-bar examination were immediately implemented with respect to the students who were already enrolled in universities, the Kenya School of Law and the Council for Legal Education published guidelines which provided for a three-year transition period beginning 15th January, 2013. The guidelines were to take care of the students who had been admitted to universities prior to the enactment of the said Act. Those students were to complete their programmes on the basis of the legal framework that existed before the enactment of the Act.

38. The Kenya School of Law and the Council of Legal Education complied with the guidelines for the academic years 2013/2014 and 2014/2015. Sometimes in the year 2014, Parliament enacted the Statute Law (Miscellaneous) Amendment Act, 2014 which amended, among other Acts, the Second Schedule of the Kenya School of Law Act, 2012. The amendment made it mandatory for applicants to sit and pass pre-bar examination before admission to the ATP. That is when the petitioners moved to court.

39. Concurring with the petitioners, Odunga, J stated at paragraph 194 of his judgment that:

"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. I reiterate that I am not satisfied that the reasons relied upon by the Respondents for a departure from their earlier position evince justifiable grounds since Parliament did not in the Amendment Act direct the Respondents to depart from their earlier position, a position clearly and rightly in my view appreciated by the Respondents, was geared towards the upholding of the Constitutional principles and values."

40. Legitimate expectation is a tool of fairness which the courts will invoke in order to ensure that those who govern stick to their promises. Legitimate expectation is however not an all- purpose ground which leads to automatic issuance of orders by the Court upon invocation by an applicant. Certain conditions must be satisfied, for the Court to issue judicial review orders on the ground that an applicant's legitimate expectation has been compromised.

41. Those grounds were captured by the Supreme Court in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** as follows:

"[269] The emerging principles may be succinctly set out as follows:

a. there must be an express, clear and unambiguous promise given by a public authority;

b. the expectation itself must be reasonable;

c. the representation must be one which it was competent and lawful for the decision-maker to make; and

(d) there cannot be a legitimate expectation against clear provisions of the law or the

Constitution."

42. Legitimate expectation is thus a concept based on the law. In the case at hand, the Applicant was still a student at the time the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009 introduced the sixteen core subjects. She therefore had the opportunity of ensuring that she completed the units before graduating in 2011.

43. Part III of the Third Schedule of the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009 deals with curriculum standards. At paragraph 20 it is provided that the undergraduate programme for a law degree shall comprise of sixteen core units. One of the core units is Public International Law. The respondents would be acting illegally were they to exempt the Applicant from complying with the Regulations. The doctrine of legitimate expectation would therefore not come to the aid of the Applicant in the circumstances of this case.

44. The Applicant also alleged procedural unfairness and unreasonableness. She has however failed to show what procedures the respondents did not comply with. There is nothing Wednesbury unreasonable in the decision of the respondents.

45. The facts in **Eunice Cecilia Mwikali Maema** (supra) speak to the circumstances of this case. As was stated by the Court of Appeal, **"[a]ll applications for admission to the School must be considered against the same standards set by the Council"** which **"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."**

46. The **Kevin K. Mwiti & others** case was grounded on a promise that the respondents had made by issuing guidelines assuring students who had already joined universities that they would not sit the pre-bar examination. There was nothing in law that barred the respondents therein from issuing those guidelines. There was therefore room to apply the doctrine of legitimate expectation in that case. The facts of that case are thus distinguishable from those of the case herein.

47. Once again, it must be stressed that judicial review is about ensuring fairness to those subjected to the powers of public authorities. In **Isaack Osman Sheikh v Independent Electoral & Boundaries Commission & Others & 2 others [2014] eKLR** the Court of Appeal quoted, with approval, the speech of the Lord Chancellor, Lord Hailsham of St. Marylebone when he stated in the case of **Chief Constable v Evans [1982] 3 All ER 141** that:

> **"This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for declaration, is intended to protect the individual against abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner."**

The citation embodies the essence of judicial review.

48. In the case of **Republic v The Council of Eegal Education Ex-parte James Njuguna & 14 others, Nairobi High Court Misc. Civil Case No. 137 of 2004,** Nyamu, J (as he then was) summarised the circumstances under which a Court can intervene with the exercise of discretion by a decision-maker as follows:

> **"(1) Where there is abuse of discretion…**
>
> **(2) Where the decision makers exercise their discretion for an improper purpose…**

(3) Where the decision maker is in breach of the duty to act fairly…

(4) Where the decision maker has failed to exercise statutory discretion reasonably…

(5) Where the decision maker acts in a manner which frustrates the purpose of the Act donating the power…

(6) Where the decision maker exercises his discretion arbitrarily or improperly…

(7) Where the decision maker fetters the discretion given…

(8) Where the discretion maker fails to exercise discretion… [and]

(9) Where the decision is irrational or Wednesbury unreasonable."

In my view, the above list is not exhaustive. Nevertheless, under no circumstances will the Court quash a lawful decision or command a public authority to do that which is unlawful.

49. In the case before me, the Applicant has failed to demonstrate improper exercise of power by the respondents. The respondents have correctly pointed out that judicial review is not available to the Applicant as she has failed to show that there was illegality, irrationality or procedural impropriety in their decision not to admit her to the ATP on the ground that her LL.B degree had not met the requirements for admission to the School.

50. The end result is that the Applicant's application fails and the same is dismissed. The parties will meet their respective costs.

Dated, signed and delivered at Nairobi this 14th day of April, 2016

W. KORIR,

JUDGE OF THE HIGH COURT