REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 16 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF THE UNIVERSITIES ACT NO. 42 OF 2012

AND

IN THE MATTER OF COUNCIL OF LEGAL EDUCATION ACT NO. 27 OF 2012

BETWEEN

REPUBLIC.....PETITIONER

AND

COUNCIL OF LEGAL EDUCATION.....RESPONDENT

AND

COMMISSION FOR UNIVERSITY EDUCATION.....INTERESTED PARTY

EX PARTE : MOUNT KENYA UNIVERSITY

JUDGEMENT

Introduction

1. By a Notice of Motion dated 21st January, 2016 the Applicant herein, ***Mount Kenya University*** (hereinafter referred to as "the University"), described as a Chartered University established under the ***Universities Act, 2012***, running a School of Law established in 2009, seeks the following **orders**:

> **1. An Order of Certiorari do issue to bring into this Honourable Court for the purpose of being quashed the Respondent's decision contained in the letter dated 16th December 2015 scheduling the inspection of the Applicant's School of Law on 22nd January 2016.**
>
> **2. An Order of Certiorari do issue to bring into this Honourable Court for the purpose**

of being quashed the Respondent's decision contained in the letter dated 7th January 2016 directing the Applicant to suspend admission of students to its Bachelor of Laws (LL.B) programme for the year 2016.

3. An Order of Prohibition do issue to prohibit the Respondent by itself, agents, employees or whomsoever from carrying out an inspection towards full accreditation of the Applicant's Bachelor of Laws (LL.B) programme until such time that the Respondent shall be properly constituted, and/ or until such time that the court shall determine, who, as between the Respondent and the Interested Party has power to accredit university programmes.

4. An Order of Prohibition do issue to prohibit the Respondent from interfering with the operations of the Applicant's School of Law. In particular and for the avoidance of doubt, the Respondent be stopped from interfering with the ongoing admission of students to the Applicant's School of Law for the undergraduate legal education and training programme.

5. Costs of and incidental to this suit.

2. By a letter dated 16th December, 2015, the Respondent herein, ***the Council of Legal Education*** (hereinafter referred to as "the Council"), a body established under section 4(1) of the ***Legal Education Act, 2012*** (also referred to as the LEA) tasked with *inter alia* regulation of legal education and training in Kenya and licensing legal education providers in this country scheduled the inspection of the University's Law School for 22nd January, 2016 and directed the University to suspend the admission of students to its Bachelor of Laws (LL.B) programme for the year 2016.

3. The main issue in contention in these proceedings is which body is duly authorised by statute to accredit and inspect universities offering Bachelor of Laws degree programme in Kenya. The University also raised the issue whether it is appropriate for it to be subjected to parallel accreditation procedures by two separate state organs.

4. According to the Applicant under section 6(a) and 17(3)(a) of the University's Charter, its Senate is vested with powers to approve courses of study as well as to develop and implement academic programmes and pursuant to that mandate approved the University's LLB programme.

5. According to the University under section 5 of the ***Universities Act***, 2012, the only body empowered to accredit and inspect university programmes in Kenya including LLB programme is the interested party herein, ***the Commission for University Education***, (hereinafter referred to as "the Commission"), a body corporate established (as successor of the defunct Commission for Higher Education) under section 4 of the ***Universities Act***, No. 42 of 2012.

6. However prior to the enactment of the ***Universities Act***, universities which offered LLB programme were accredited by the Respondent pursuant to the repealed Council of ***Legal Education Act,*** No 12 of 1995 which was repealed by the ***Legal Education Act***, No. 27 of 2012 which does not contain any provisions which mandate the Respondent to accredit universities offering LLB programme. According to the Applicant, this omission was not by chance and that Parliament by enacting both the ***Universities Act*** and the ***Legal Education Act*** in 2012 make clear its intention to ensure that the accreditation of all university programmes including LLB was conducted by the Commission.

7. It was disclosed that following the inspection of the University's Nairobi Campuses in February, 2015, the Commission by a letter dated 10th June, 2015 notified the Applicant that its said Campuses amongst them the School of Law met the minimum standards required and the said campuses were thus fully accredited. Prior to this the University had been granted provisional accreditation by the Respondent to offer legal education leading to an award of the LLB Degree, pursuant to the ***Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009*** (hereinafter referred to as "the Regulations") said repealed. It was pursuant to this provisional accreditation that the University continued

to offer legal education and training.

8. However when on 5th December, 2011 the applicant applied to the Respondent for full accreditation, the University was directed to provide its School of law curricula which the University did in May, 2015. Thereafter the Respondent notified the University that it would carry out an on-the-site inspection of the University's School of Law on 27th November, 2015 which inspection the Respondent cancelled and thereafter the University did not receive any feedback till 16th December, 2015 when it received a letter dated 25th November, 2015 from the Respondent enclosing copies of the peer review reports on the University's curricula, 7 months later. By a letter dated 22nd December, 2015, the University informed the Respondent that it would not be possible to address the concerns raised in the said report by 22nd January, 2016 as directed by the Respondent and requested for a further 6 months to do so.

9. By a letter dated 21st December, 2015 the Respondent complained to the University about the action by the University of inviting applications from the members of the public for LLB programme for 2016 to which the University respondent that the Respondent had not directed the University not to admit students of the year 2016 for the said programme and by a letter dated 5th January, 2016 informed the Respondent that the University had already admitted qualified students for its 2016 LLB programme and that the reporting date was 4th January, 2016. However by a letter dated 7th January, 2016, the Respondent directed the University to suspend the University's 2016 admission to the LLB programme until a decision was made on the said accreditation status.

10. To the University prior to the filing of these proceedings it has not sought legal advice with respect to the proper accreditation authority and had co-operated with the Respondent towards that process.

11. According to the University the Respondent was not the body mandated to accredit LLB programme in Kenya hence ought to be prohibited from carrying out any inspection and interfering with the University's operations on account of the accreditation process.

12. It was further contended that in light of the provisions of section 4(5) of the Legal Education Act, No. 27 of 2012, the Respondent is not properly constituted and is therefore incapable of carrying out its functions. In support of this position the University relied on **Republic vs. Chairman Land Dispue Tribunal Amukura Division &2 Others exp Jared Mwimali Mukuma & Another [2014] eKLR** and **Republic vs. Communications Appeals Tribunal & Another exp Safaricom Limited [2011] eKLR.**

13. According to the Applicant, the Respondent's decisions contained in the letters dated 16th December, 2015 and 7th January, 2016 were similarly illegal and ultra vires due to the fact that they were in excess of the Respondent's mandate since the powers of accreditation of universities and accreditation and inspection of university programmes are conferred on the Commission under section 5 of the ***Universities Act, 2012***. To the University, if the intention of Parliament was that the Respondent was to continue accrediting universities offering the LLB programme, nothing would have been easier than providing this in the ***Legal Education Act***.

14. It was therefore contended that the Respondent's decisions to conduct inspection of the University and to purport to accredit and inspect the University's LLB programme was in excess of its mandate under the Legal Education Act as it was usurping the powers of the Commission. It was averred that under section 8(2) of the ***Legal Education Act***, the only mandate that the Respondent has touching on the question of accreditation is for setting and enforcing standards relating to the accreditation of legal education providers for the purposes of licensing and that is not the same thing as accrediting and inspecting a university. To the University, it is clear that Parliament's intention was that the Commission accredits the LLB programme offered by the universities while the Respondent plays a supporting role of setting the standards with regard to the said programme and to ensure that the said standards are adhered to.

15. Based on the case of **Martin Wanderi & 19 others vs. Engineers Registration Board of Kenya &**

5 Others [2014] eKLR, it was submitted that if at all there was any inconsistency between the provisions of the ***Legal Education Act, 2012*** and the ***Universities Act***, since they came into operation on 28th September, 2012 and 13th December, 2012 respectively, the latter abrogates the former as the latter impliedly repealed the former in so far as the accreditation and inspection of the law schools is concerned.

16. It was therefore contended that the Respondent acted illegally and in excess of its jurisdiction by scheduling an inspection of the University's School of Law as part of the accreditation process and in directing the Respondent to stop admission of students to its LLB programme pending the conclusion of the accreditation process and its decisions ought to be quashed.

17. According to the University, even if the Respondent had the mandate to make the impugned decisions, the same decisions were unreasonable and irrational as the same defies logic such that no reasonable person or body could have reached the same considering the facts of the case and the applicable law. It was submitted that the other facet of unreasonableness is irrationality which is a decision that is not reasoned or if it lacks ostensible logic or comprehensible justification. In support of this submission the University relied on **Associated Provincial Picture Houses Ltd vs. Wednesbury Corporation [1948] 1 KB 223** and **De Smith, Woolf and Jowell, 7th Edition at para 11-036 on page 602.**

18. It was contended that the decisions was irrational for failing to take into account the fact that the University had already admitted qualified applicants to its programme who reported on 4th January, 2016. Further the Respondent was unreasonable in demanding that the University take remedial action on its curriculum while at the same time insisting on conducting an inspection of the University's School of Law without according the University sufficient time to address the recommendations in the peer review after delaying the same for 7 months.

19. It was therefore contended that the Respondent's action breached the University's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Considering the fact that the University had invested in excess of Kshs 663,000,000/= in the establishment of its Law School, it was contended that it was unreasonable and irrational to the Respondent to demand that the University stop its 2016 admission process as that would have led to waste of substantial investments made by the University.

20. It was contended that the Respondent in its website had indicated that where an institution has applied for full accreditation status, provisional accreditation is extended until the council has made a determination either to accredit or reject the application. To that extended the University had legitimate expectation that the Respondent, who was aware that the University had been admitting students to its undergraduate legal education and training programme would not deviate from this practice on a whim. To the University, it had legitimate expectation that having com-plied with the requirements under the Council for ***Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009*** and having been issued with a provisional accreditation certificate, the Respondent would not interfere with its admission process hence the decisions contained in the letters dated 16th December, 2015 and 7th January, 2016 were a manifest breach of the University's legitimate expectation and ought to be quashed.

21. It was contended that the decision to suspend the 2016 admission into the LLB programme by the Respondent amounted to breach of the rules of natural justice and was unconstitutional since it amounted to a rejection of the University's application for full accreditation without an on-the-site inspection being conducted. This it was contended amounted to a breach of Article 50 of the Constitution and section 4(3) of the Fair Administrative Action Act, 2015.

22. In the premises the University urged the Court to allow this application dated 21st January, 2016.

Interested Party's Case

23. According to the Interested Party, Commission, there is a conflict as to the body that is mandated to

carry out the function of accreditation of universities and particularly the universities offering the Bachelor of Laws programme. This conflict, according to the Commission arises from a reading of section 5 of the ***Universities Act, 2012*** and section 8 of the ***Legal Education Act No. 27 of 2012*** both of which give two different bodies, the Council of Legal Education and the Commission for Universities, the same functions of conducting regular inspections and accreditation of universities offering the Bachelor of Law programmes. Interestingly in both statutes the superiority of the respective legal instruments are declared in sections 8(4) and 5(3) of the ***Legal Education Act*** and the ***Universities Act*** respectively.

24. It was however submitted by the Commission that it is the Commission that has the mandate to accredit universities. According to the Commission since section 8(4) of the ***Legal Education Act*** applies to "any other written law for the time being in force" the supremacy clause thereunder applies only in so far as the Act in question was in force at the particular opportune time. To the Commission therefore as at 28th September, and 12th December, 2012, the Council for Legal Education was the only body mandated to accredit universities and i9n this case universities offering legal education in Kenya. In that event if there was any conflict with any other law, then the provisions of the Legal Education Act would prevail. In support of this submission the Commission relied on **Republic vs. Cabinet Secretary, Ministry of Information and Communication & 8 Others exp Adrian Kamotho Njenga & 2 Others [2014]** in which this Court held that:

> **"The general law of interpretation is that where the words of statute are plain there can be no more than one construction. With respect to past enactments it has always been a principle of interpretation that considerations stemming from legislative history must not override the plain words of a statute. Therefore where it is evident that a different and wider intention inspired a later Act, the intention of the Legislature as manifested in an earlier one will be of little assistance. The Respondents and interested parties argue that to interpret the section of the Order in such a way as to exclude public officers from the Board would amount to an absurdity. The law as I understand it is that for the Court to find that a literal interpretation of an enactment would lead to absurdity, the absurdity must be so plain as not to require detailed analysis in arriving thereat. For the Court to engage in an extensive analysis of the enactment in order to find whether or not the same is absurd would amount to the Court usurping the legislative powers of the authority entrusted therewith and that is not the role of the Courts. The law in my view is that a law must not be interpreted in a manner that would render it meaningless or scandalous and that it must be interpreted to give meaning to the intention of the Legislature. However where the words clearly express the intention of the Legislature there is no room for any other interpretation. In this case it is clear that section 6(2)(e) of the Order excluded public officers from being appointed to the Board of the Authority and to interpret that section otherwise would amount to usurping the powers of the legislative authority.**

25. In this case the Legal Education Act pre-dated the Universities Act in that the said statutes were enacted on 28th September, 2012 and 13th December, 2012 respectively hence it was the Legal Education Act that was the Act that was for the time being in force in relation to the functions of the Council of Legal Education in relation to accreditation of universities offering legal courses in Kenya, up until 12th December, 2012. However that mandate ceased by the enactment of the Universities Act in so far as the function of accreditation was concerned. In this submission the Commission relied on **Martin Wanderi & 19 Others vs. Engineers Registration Board of Kenya & 5 Others [2014] eKLR**.

26. It was therefore submitted that section 8(4) aforesaid applied only in so far as any other Act had not been enacted in relation to the dispute herein. Accordingly, it was contended that any attempt to accredit universities by the Respondent after 13th December, 2012 was ultra vires its powers and illegal and ought to be quashed since section 8(4) ceased to apply from that date and was overtaken by section 5(3) of the ***Universities Act***. Accordingly, the Commission is the only body entitled to accredit universities including those offering legal courses.

27. It was further contended that since the ***Universities Act*** was enacted after the ***Legal Education Act***, in accordance with the doctrine of implied repeal, the statute enacted later takes precedence and the one

predating the other is impliedly repealed to the extent of its inconsistency. In support of this position the University relied on **High Court Petition No. 320 of 2011 Elle Kenya Limited & Others vs. The Attorney General and Others** and **Street Estates Limited vs. Minister of Health [1934] 1 KB** and submitted that there no particular form or format for repealing a legislation.

28. The Commission therefore urged the Court to quash the decisions by the Respondent.

Respondent's Case

29. It was the Respondent's case that Legal education provision in Kenya has since inception been a process superintended by law. Historically, it was the province of the ***Advocates Act*** (Chapter 16 of the Laws of Kenya), the ***Council of Legal Education Act*** (Chapter 16A of the Laws of Kenya) presently, the ***Legal Education Act, 2012*** and the ***Kenya School of Law Act, 2012***.

30. It was the Respondent's position that the enactment of the ***Legal Education Act, 2012*** and in particular sections 18, 19 and 20, marked a stricter regime for legal education provision, with an elaborate framework of regulation that enjoined all legal education institutions in Kenya to be accredited and licensed and to operate only within and in accordance with such licence, issued by the Respondent. To facilitate its operations, section 48 of the Act, saved instruments made under the ***Council of Legal Education Act***, which would have been made under the ***Legal Education Act***. Accordingly, to supplement the provisions of regulation and accreditation of legal institutions, the Respondent has been guided by provisions of the ***Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009.***

31. It was the Respondent's case that armed with the mandate in the Legal ***Education Act*** and the instruments of accreditation, the Respondent has used the same yardstick to equally assess and accredit all applicants for a licence for legal education provision in Kenya and abroad and that this is the same yardstick that has been used to assess the application of the ex parte Applicant. To it, in regulation of legal education, the Respondent is not intent on punishing any party, and neither is it capricious and unreasonable but that its decisions are equal to all parties, are considerate of circumstances and are only aimed at enforcing the law as promulgated.

32. It was averred that by gazette notice No. 3167 of 15th March 2013, and in accordance with section 4 of the ***Legal Education Act, 2012*** as then, the then Minister for National Cohesion and Constitutional Affairs gazetted appointment of personalities to staff the Respondent for a period of four (4) years commencing 15th March 2013 and that the ***Legal Education Act***, was amended vide Statute Law (Miscellaneous Amendment) Act 2014, *inter alia* amending the comprisal of the Respondent. However, to date the amendments to the Respondent have not been effected, for instance there is yet to be an appointment by the State President of the Chairperson, and other offices are equally yet to be effected.

33. Therefore applying the mandate and using the Regulations, the Respondent contended that it engaged the Ex parte Applicant on the issue of accreditation as follows:

a. The Respondent applied for accreditation for its institution to offer LLB programmes, and the Respondent having been satisfied that the Ex parte Applicant satisfied Regulation 4 of the Regulations, granted Provisional accreditation under Regulation 8(3) pending proper inspection and final determination on the application. Now produced and marked **annexture WKB-1** is the Certificate of Provisional accreditation dated 29th June 2011.
b. According to Regulation 8(3) of the Regulations, Provisional accreditation is for a period of one (1) year.
c. Together with the letter forwarding the Provisional accreditation, the Respondent wrote to the Ex parte Applicant thus:

'…The accreditation is for a period of one year from 29th June 2011.

Kindly take note that the duration of the provisional accreditation will not be extended further. Upon its lapse, we shall require you to immediately cease admitting students into this programme until you renew your accreditation. We are therefore inviting you to apply for full accreditation as soon as possible in order to give the Council ample time within the provisional accreditation period, to process your application as per the laid down procedure....'

d. By the said letter the ex parte Applicant was called to furnish:
    i. A Self Evaluation Report prepared in accordance with the guidelines given;
    ii. The programme to be accredited together with the related regulations;
    iii. The payment of the accreditation fees.
e. The Respondent's letter above, was duly received and acknowledged by the Ex parte Applicant by its letter dated 22nd July 2011.
f. The application for accreditation was then made on 19th October 2012 and by letter dated 3rd June 2013 the Respondent advised the Respondent that the application was receiving attention, but that it was necessary for an inspection to undertaken on 13th September 2013.
g. The accreditation process of the Ex parte Applicant continued on with assessments being done including an audit conducted on the Ex parte Applicant's institution on 5th May 2015. This audit disclosed deficiencies that grossly militated against the Ex parte Applicant's application for accreditation and the deficiencies were communicated to the Ex parte Applicant by letter dated 18th June 2015.
h. In the said letter the Respondent advised the Ex parte Applicant to take corrective measures before next inspection. This was going to be the last inspection before the adjudging on the application for accreditation.
i. On 3rd November 2015, the Respondent had readied to conduct inspection of the Ex parte Applicant's institution for purposes of concluding on accreditation and thus gave advance notice that it will be conducting this inspection on 27th November 2015 at 9.30am.
j. In the said letter the Respondent was also advised that it would be after this inspection that the decision of whether the Ex parte Applicant's institution is a legal education provider, would be made.
k. On 27th November 2015, it was not possible to conduct the inspection because of the traffic jam within Nairobi occasioned by the Catholic Church's Pope visit.
l. By letter of 22nd December 2015, the Ex parte Applicant wrote to the Respondent expressing that it required time for full compliance to enable an inspection for full accreditation, the Ex parte Applicant accordingly applied to the Respondent for an extension of six (6) months.
m. Even as the Ex parte Applicant's aforesaid letter was receiving attention, the Respondent write to the Ex parte Applicant on 16th December 2015 advising that in view of the aborted inspection of 27th November 2015, there would be a further inspection, but in the meantime pending that ascertainment the Ex parte Applicant was to halt admission of new students.
n. After the said advice**,** the Ex parte Applicant wrote to the Respondent on 5th January 2016, advancing the position that letters of admissions had already been sent to applicants and that they were to start their programme in January and accordingly is the Respondent would allow these students to commence studies even as the accreditation proceeded.
o. After duly hearing the Ex parte Applicant on the subject, the Respondent made its decision on the matter and relayed it by letter dated 7th January 2016 that the admission of new students be suspended until the issue of accreditation is determined.
p. Subsequently the Respondent had occasion to determine the Ex parte Applicant's application for six (6) months extension before inspection and granted the six (6) months, only reiterating that new admissions be suspended until the determination on the issue of accreditation.

34. According to the Respondent the above chronology presents the context in which the Respondent made its decision creative of the present suit. However, the Respondent clarified the following:

a. The Ex parte Applicant's formal accreditation was provisional and as advised above, was for a

period of one (1) year;

b. Accordingly as at the time that the Ex parte Applicant was filing the application for leave to commence Judicial Review proceedings, it had no accreditation, provisional or otherwise, and therefore had questionable standing to even bring such proceedings;
c. The situation was ameliorated later on by the Respondent's decision conveyed by letter dated 20th January 2016 which in any event was a special extension of moratorium limited to allowing the Ex parte Applicant to continue in existence until inspection in six (6) months but not to admit new students;
d. Accordingly the Ex parte Applicant cannot claim the right to admit the students, this is an entitlement of an accredited legal education provider, which the Ex parte Applicant is not, as averred above the Ex parte Applicant is operating under a limited sui generis moratorium;

35. With regard to the plea of financial investment, the Respondent averred that the intendment of the Legal Education and the objectives of the Act, which shape and inform the functions of the Respondent are an embodiment of public interest which supersedes investment interests of a party. The law is irreducible that all legal education provider institutions must be licensed and this licensing/accreditation is in accordance to laid down procedures. The place of profits to an investor, in its view, are not any part of the requisite considerations. In any event, the Respondent has not shut down the Ex parte Applicant's institution, it has allowed continuing students to continue pending final inspection and ruling. The matter would have been dispensed with soonest but it is the Ex parte Applicant which sought an extension of six (6) months.

36. It was contended that the Ex parte Applicant has on one hand applied for an extension of six (6) months before decision on accreditation on one hand before inspection for accreditation, and on the other hand it insists on admitting new students for the very programme that it has no accreditation. To compound this, the Ex parte Applicant then makes averments of financial losses which according to the Respondent is self-occasioned. Had the Ex parte Applicant allowed the inspection for accreditation to happen, it contended, the decision would be fast tracked and the Ex parte Applicant would then know where it stands, the present cause would be unnecessary.

37. It was the Respondent's position that the averment above responds to the claim that the decision shall have consequences to students, the Ex parte Applicant's profits, litigations from students and laying off lecturers. The Ex parte Applicant is the one obstructing the process. If it communicated that it is ready for inspection, then the whole process will be urgently done. Besides, the students will still be admitted to study the course after accreditation or could be admitted in other accredited institutions, this is the contemplation even or Regulations 16 and 17 in the context of a Discontinuance.

38. The Respondent therefore contended that:

a. Its decision of 7th January 2016 is not illegal nor ultra vires, nor in violation of natural justice, nor an abuse of power, nor in excess of jurisdiction, nor unreasonable nor an infraction of a legitimate expectation, as claimed.
b. It is the special agency created contemplated by the law, the ***Legal Education Act***, to regulate the legal education sector in Kenya.
c. The only Provisional accreditation the Ex parte Applicant has had is the one issued for one (1) year on 29th June 2011. There was no other accreditation issued to the Ex parte Applicant, as the law provides.
d. The Ex parte Applicant was allowed to be in existence on the inhering and primary jurisdiction of the Respondent to regulate the sector. So in compliance with its duty under Article 10 and 20 (3) (b) of the Constitution, interpreted the law in a way that most favours protection of fundamental rights, otherwise the Ex parte Applicant would have had to close its doors on 29th June 2012.
e. Natural justice was observed at all times material. Before making its decision in letter dated 7th January 2016, the Respondent firstly heard the Ex parte Applicant vide letter dated 22nd December 2015 and 5th January 2016. Besides the matter in issue is one of law, in the sense that an entity is not legally permitted to offer legal education in Kenya unless and until it has been

licensed/accredited.

f. The letter dated 16th December 2015 is not a decision, it was advice. This is not subject to Judicial Review.
g. The claim to a legitimate expectation is denied. The Ex parte Applicant was at all times enjoined to observe the mandatory qualifications of the law. After the lapse of its provisional accreditation on 30th June 2012, the Ex parte Applicant has been operational on sui generis permission of the Respondent with its attendant limitations, including the limitation not to admit new students until accreditation.
h. The claim of unreasonableness is denied. There are twin issues, which are addressed separately; firstly, the Respondent duly granted the Ex parte Applicant the six month period it sought to take corrective action. In seeking that extension the Ex parte Applicant was making concession that it was still deficient, that is why it required time to make corrections. The other issue is related to this first issue, the primary duty of the Respondent is to standards, that any students that are then admitted are admitted in institutions that have requisites standards to mount legal education programmes. Given the circumstances herein, an unaccredited institution, which was postponing accreditation for six (6) months was nonetheless demanding that it be allowed to admit students to its institution. Requiring suspension of this admission is not unreasonable, it is critical. In any event, this standing would repose in the applicant students, not in the Ex parte Applicant.

39. It was the Respondent's case that this Court is enjoined under the Constitution of Kenya to uphold law and public policy and is hence under obligation to respect the discretion of the Respondent provided it is exercised under provisions of law.

40. The Respondent added that remedies of Judicial Review are discretionary in nature and would issue of among others the effect is to cause public chaos and grossly affect administration of justice. In its view the Court ought not to sanction continuance of operation of an entity without accreditation contrary to law in particular since all other legal education institutions have complied and operate under proper accreditation.

41. It was therefore asserted that the Notice of Motion as presently drawn and filed, does not satisfy the ingredients for grant of orders of judicial review.

42. It was submitted on behalf of the Respondent Legal Education in Kenya has existed as long as there has been university education. However, whilst the Ministry of Education, subsequently the Commission of Higher Education, and presently the Commission of University Education have been in Charge of university education, legal education was primordially differentiated; it was a professional course regulated initially under the office of the Attorney General utilising provisions of the ***Advocates Act*** (Chapter 16 of the Laws of Kenya). However following the inadequacies of that regulation Parliament enacted the ***Council of Legal Education Act*** which established the Council and conferred to it very express functions, at section 6 as follows:

> ***(1) The object and purpose for which the Council is established is to exercise general supervision and control over legal education in Kenya and to advise the Government in relation to all aspects thereof.***
>
> ***(2) Without prejudice to the generality of the foregoing, the Council shall-***
>
> ***(a) establish, manage and control such training institutions as may be necessary for-***
>
> ***(i) organizing and conducting courses of instruction for the acquisition of legal knowledge, professional skills and experience by persons seeking admission to the Roll of Advocates in Kenya, in such subjects as the Council may prescribe;***
>
> ***(ii) organizing and conducting courses in legislative drafting;***
>
> ***(iii) organizing and conducting courses for magistrates and for persons provisionally***

selected for appointment as such;

(iv) organizing and conducting courses for officers of the Government with a view to promoting a better understanding of the law;

(v) organizing and conducting such courses for para- legals as the Council may prescribe;

(vi) organizing and conducting continuing legal education courses;

(vii) holding seminars and conferences on legal matters and problems;

(viii) organizing and conducting such other courses as the Council may from time to time prescribe;

(b) conduct examinations for the grant of such academic awards membership of the Council.

(c) award certificates, fellowships, scholarships, bursaries and such other awards as may be prescribed'

43. In was contended that the ***Council of Legal Education Act***, was again discerned to be ineffective and it was determined that there was need for a comprehensive legal framework to regulate legal education which as of today has become quite enlarged, in terms of persons enrolling and therefore need to legislate structures to effectively deal with this critical profession.This, therefore led to the enactment of the ***Kenya School of Law Act, 2012*** and the ***Legal Education Act, 2012***. The ***Legal Education Act*** repealed the ***Council of Legal Education Act***, but saved and transitioned instruments and regulations made under the ***Council of Legal Education Act***, that would have been made under the ***Legal Education Act***.

44. It was averred that the ***Legal Education Act*** was:

*'**An Act of Parliament to provide for the establishment of the Council of Legal Education; the establishment of the Legal Education Appeals Tribunal; the regulation and licensing of legal education providers and for connected purposes'.***

45. The Act then proceeds to posit the objective of this law as follows:

'The objective of this Act is to—

(a) promote legal education and the maintenance of the highest possiblestandards in legal education; and

(b) provide a system to guarantee the quality of legal education and legaleducation providers.'.

46. According to the Council, the Act, then established the Council at section 4 for the functions at section 8, which are explicitly delivered as follows:

<u>Functions of the Council</u>

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

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

(b) licence legal education providers;

(c) supervise legal education providers; and

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

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

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

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

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

(b) curricula and mode of instruction;

(c) mode and quality of examinations;

(d) harmonization of legal education programmes; and

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

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

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

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

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

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

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

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

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

(h) carry out regular visits and inspections of legal education providers; and

(i) perform and exercise any other functions conferred on it by this Act.'

47. On the other hand, it was submitted that the Commission is established by provisions of the ***Universities Act, 2012***, as the successor of the **Commission of Higher Education** established then by the ***Universities Act*** (Chapter 210 B of the Laws of Kenya). The ***Universities Act, 2012*** is:

'An Act of Parliament to provide for the development of university education; the establishment, accreditation and governance of universities; the establishment of the

Commission for University Education, the Universities Funding Board and the Kenya University and Colleges Central Placement Service Board; the repeal of certain laws, and for connected purposes*'*.

48. The functions of the Commission at section 5 are outlined as follows:

(1) The functions of the Commission shall be to—

(a) promote the objectives of university education;

(b) advise the Cabinet Secretary on policy relating to university education;

(c) promote, advance, publicise and set standards relevant in the quality of university education, including the promotion and support of internationally recognised standards;

(d) monitor and evaluate the state of university education systems in relation to the national development goals;

(e) licence any student recruitment agencies operating in Kenya and any activities by foreign institutions;

(f) develop policy for criteria and requirements for admission to universities;

(g) recognize and equate degrees, diplomas and certificates conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set by the Commission from time to time;

(h) undertake or cause to be undertaken, regular inspections, monitoring and evaluation of universities to ensure compliance with the provisions of this Act or any regulations made under section 70;

(i) on regular basis, inspect universities in Kenya;

(j) accredit universities in Kenya;

(k) regulate university education in Kenya;

(l) accredit and inspect university programme in Kenya;

(m) promote quality research and innovation; '

49. It was however submitted that to fully effectuate the Council and remove any parallel jurisdiction to any other agency, for the functions for which Parliament intended the Council to perform above, section 71 of the ***Universities Act, 2012*** repealed ***The Universities Act (Cap. 210B); The University of Nairobi Act (Cap. 210); The Kenyatta University Act (Cap. 210C); The Moi University Act (Cap. 210A); The Jomo Kenyatta University of Agriculture and Technology Act(Cap. 210E); The Egerton University Act (Cap. 214); The Maseno University Act (Cap. 210D); and The Masinde Muliro University of Science and Technology Act, 2006(Cap. 210F).***However, Parliament does not repeal the ***Legal Education Act, 2012***.

50. Therefore in the Council's view, the mandate of the Commission under the ***Universities Act, 2012*** is general, while mandate of the Council under the ***Legal Education Act*** is special-to Legal education. In its view, from the objectives and functions set out in the ***Universities Act, 2012*** and the ***Legal Education Act, 2012***, it does not require rocket science or prayer for one to clearly see that Parliament intended the Commission be the agency to discharge the general duty of regulation of university education. However, Parliament did not trust the Commission to be effective in regulating legal education, thus committed

legal education to a group of experts appointed in section 4(5) of the ***Legal Education Act, 2012***for the special mandate of regulating legal education which appointments are deliberate, because legal education is a specialised professional course. This is differentiated with the personalities legislated to staff the Commission, at section 6 of the ***Universities Act***. To make the context clearer, Parliament conceiving that there was a body in existence then (Commission of Higher Education) with the mandate to generally accredit and regulate university education, did specifically and deliberately legislate as follows at section 8 (2) of the ***Legal Education Act***:

> ***'(2) Without prejudice to the generality of subsection (1), the Council shall, with respect to legal education providers, be responsible for setting and enforcing standards relating to the—***
>
> ***(a) accreditation of legal education providers for the purposes of licensing;***
>
> ***(b) curricula and mode of instruction;***
>
> ***(c) mode and quality of examinations;***
>
> ***(d) harmonization of legal education programmes; and***
>
> ***(e) monitoring and evaluation of legal education providers and programmes.'***

51. In the Council's view, this is a clear, express and unequivocal expression of Parliament, that with regard to legal education, it is not the Commission which is responsible, but the Council. According to the Council Parliament further legislated pre-emptively in section 8(4) of the ***Legal Education Act***, as follows:

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

52. Still not done with the Commission, it was submitted that Parliament did not expect any confusion between the statutes, while conferring exclusive mandate on the Council, it gives the Council discretion to cooperate with the Commission and other bodies, such that Parliament defined the relationship between the two in section 13 of the ***Legal Education Act***, in the following terms:

> ***The Council may, in the discharge of its functions, consult, collaborate and cooperate with—***
>
> ***(a) the Commission for University Education and other regulators in the field of education, generally;***
>
> ***(b) the Law Society of Kenya; and***
>
> ***(c) departments and agencies of Government, statutory bodies, and any other body or institution having functions or objects related to the functions of the Council.'***

53. On the allegation that since the ***Legal Education Act*** was operationalised on 28th September 2012 and the ***Universities Act*** on 13th December 2012, the ***Universities Act*** takes primacy over ***Legal Education Act*** on the doctrine of *'leges posteriors priores contrarias abrogant'***,** it was submitted that the doctrine above does not apply in the present case. This is due, firstly, to the fact that Parliament in enacting the ***Universities Act***, 2012 as done and ***Legal Education Act, 2012*** as done was not confusing or conflicting mandates, it was so clear in its mind, that the ***Universities Act*** should deal with general regulation of university education, while the Legal Education should strictly and specially regulate legal education in Kenya. In the Council's view, it is the ***Legal Education Act*** that should get supremacy, for being a special legislation and undertaking special regulation and relied on the legal maxim that '*lex specialis derogate legi generali'*, meaning that a law governing a specific subject matter overrides a law that only governs general matters. It was of the view that ***Legal Education Act***as a special law on regulation dealing purely with legal education, takes primacy on matters of regulation over the ***Universities Act, 2012*** in the context

of legal education regulation, which is the general law on regulation.

54. Secondly, adherence to the interpretation of the Commission, in the Council's view, would imply that the Kenyan Parliament would only but be a congregation of persons suffering from acute, certifiable amnesia since the Commission's suggestion would be that the Kenyan Parliament would introduce a Bill, have it go through the First Reading, Second Reading, Committee Stage, Third Stage and send it for Assent, then wholly forget that it had made such law in three months, by making a new law with intention of overruling the previous law but without mention of such overthrow. Such interpretation, it was contended is *prima facie* a wrong interpretation since Parliament had no intention of overthrowing the ***Legal Education Act***, that is why, when Parliament was legislating statutes that were repealed to effectuate the ***Universities Act, 2012***, it did not list the ***Legal Education Act*** as one of those statutes that stood repealed.

55. Thirdly, Parliament did not expect any confusion between the statutes, while conferring exclusive mandate on the Council, by giving the Commission the discretion to cooperate with the Commission and other bodies, such that Parliament and defined the relationship between the Commission and the Council in the terms of section 13 of the ***Legal Education Act.***

56. Fourthly**,** in 2014, Parliament made amendments to several statutes. In the same text, which is the ***Statute Law (Miscellaneous Amendment) Act 2014***, amendments were also made to the ***Legal Education Act, 2012*** and the ***Universities Act, 2012***. From page 302 through to page 305 of this Act Parliament made amendments that acknowledged side by side existence and operation of both the ***University Act 2012*** and the ***Legal Education Act, 2012***.

57. According to the Council, therefore, so far as legal education regulation is concerned, the entity with the primary, exclusive and direct jurisdiction to handle the regulation is the Council.

58. With respect to the Composition of the Council, it was contended that prior to the amendment of the ***Legal Education Act, 2012*** by the ***Statute Law (Miscellaneous Amendment) Act 2014***, composition of the Council was borne at section 4(5) differently from how it is presently composed. By gazette notice No. 3167 of 15th March 2013, and in accordance with section 4 of the *Legal Education Act, 2012*, the then Minister for National Cohesion and Constitutional Affairs gazetted appointment of personalities to staff the Council for a period of four (4) years commencing 15th March 2013.When the ***Legal Education Act***, was amended vide ***Statute Law (Miscellaneous Amendment) Act 2014***, the officers staffing the council of legal education were now expanded.

59. In the Council's view, since the amendment was by a statute whose effective date was 2014, a period when the incumbent Council has been in existence since 15th March 2013, at law the right of the incumbent Council appointed on 15th March 2013 until expiry of 4 years has legal protection. To the Council, the amendment to the constitution of the Council vide the ***Statute Law (Miscellaneous Amendment) Act 2014*** did not abolish the Council as it had been constituted hitherto then and that the tenor of the amendment is to be effected at the expiry of the appointment term of the present Council. In other words, at present there is a chairman who has been appointed by the Minister and there cannot be two chairmen with one existing and the other appointed by the President as provided for by the amending statute.

60. It was therefore submitted that the Council as comprised prior to the amendment still has the jurisdiction to act as such and the competence to discharge the functions of the Council of Legal Education.

61. It was the Respondent's position that whichever interpretation is adopted, the law does not envisage a vacuum in government business since at law, even where there is a vacancy in a Board or Commission, the Board's or Commission's functions are carried out nonetheless. Reliance was placed on section 53 of the ***Interpretation of General Provisions Act*** (Chapter 2 of the Laws of Kenya) which provides as follows:

Where by or under a written law a board, commission, committee or similar body, whether corporate or unincorporate, is established, then, unless a contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by -

(a) a vacancy in the membership thereof; or

(b) a defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof.'

62. It was the Respondent's submission that as long as statute has established a Board (for this case the Respondent), and statute has become operational, then as long as some members of that Board are in existence, notwithstanding that there are still vacancies, the Board can lawfully commence performance of function of the objectives for which it was constituted, unless a contrary intention appears. Since the Respondent is established and has been operational, the amendment to the ***Legal Education Act***, did not abolish and reconstitute the Council, it simply adjusted comprisal. To the Respondent the aspect of section 53 above, of '*unless a contrary intention appears'* is completely neutralized by presence of the following two (2) circumstances: Firstly, is First Schedule Regulation 5 of the ***Legal Education Act, 2012*** which deals with the quorum of the Council and provides that ***'****The quorum for the conduct of business at a meeting of the Council shall be six.****'*** Further, Regulation 6 provides that *'The chairperson shall preside at every meeting of the Council and in the absence of the chairperson, the members present shall elect one of their number who shall, with respect to that meeting and the business transacted at the meeting, have all the powers of the chairperson.'* Therefore in the Respondent's view there was quorum to conduct the business of the Respondent.

63. Secondly, is the pertinence of urgent and continued operationalisation of ***Legal Education Act***, the Public Interest argument or the Doctrine of necessity. In this respect it was contended that the ***Legal Education Act*** and in effect the Respondent have been in charge and continue to regulate legal education in Kenya. At present they are accrediting and supervising the marking of Bar exams to thousands of Kenyan citizens waiting to join the Bar. According to the Respondent it would not be reasonable or is it public interest that Respondent be frozen from operating until when all the political bureaucracy of composition of Respondent are done since it would lead to lack of accreditation, regulation of legal education and certainly no administration of Bar exams. In support of this submission the Respondent relied on **Kenya Coffee Producers and Traders Association & another vs. Coffee Board of Kenya & 6 others [2013] eKLR**, and **Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others [2014] eKLR**, for the holding that there can be no vacuum in government institutions because of delays in legislation.

64. On the issue of accreditation the Respondent's position based on the contents of the replying affidavit was that the Court cannot accredit the Applicant and it relied on **Republic vs. The Council of Legal Education Ex-Parte James Njuguna & 14 Others [2007] eKLR**, **Muamar Nabeel Onyango Khan vs. Council of Legal Education & 2 Others [2015] eKLR**, **Eunice Cecilia Mwikali Maema vs. The Council of Legal Education & 2 Others (2013) eKLR**, **Susan Mungai vs. The Council of Legal Education & Others, Nairobi HC Petition No. 152 of 2011** and **Council of Civil Service Unions vs. Minister for the Civil Service [1985] AC 374 HL.**

65. On the issues surrounding fair administrative action, the Council adopted a three pronged approach. Firstly, the Replying Affidavit of **Prof. W. Kulundu Bitonye** outlines the engagement of the parties and evidences that indeed due process was followed at every decision making juncture respecting the interests of the Ex parte Applicant. Secondly, the tools of accreditation, or the bench marks that the Applicant was called upon to satisfy were always in the Applicant's possession since the year 2009.

66. Thirdly, it was submitted that this being a specialised process, with own procedure under the Act and Regulations, such Act was adopted. The mechanism under the Legal Education Act and the Regulations is such that it gives deference to principles of fair administrative action in Article 47 of the Constitution. To the Respondent in this process, due process is followed.

67. Fourthly, it was submitted that with regard to claims that a public meeting was not called under section 5(a) of the ***Fair Administrative Act, 2015***, accreditation is a special process, and it is not determined by the feeling of the general public, it is about compliance with technical matters. This is the kind of process that is contemplated by section 4(6) of the ***Fair Administrative Act.***

68. In this respect, the Council relied on **Republic vs. Kenya National Examination Council & Others Ex-parte Kipkurui Michelle D. Jeruto & 34 others [2015] eKLR.**

69. Lastly, it was contended that after the decision, the reasons for the decision were communicated to the Applicant. It was therefore submitted that there was fairness and strict observance of the principles of fair administrative action, both procedurally and substantively.

70. On the allegations surrounding reasonableness, it was submitted by the Council that the said principle was stated in **Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 223** where it was held:

> "**It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short vs. Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."**

71. The Council further relied on the holding in **Nairobi High Court in Kevin K. Mwiti & Others vs. Council of Legal Education & Others (Nairobi JR 377 of 2015-Consolidated with Petition 395 of 2015 and JR 295 of 2015).**

72. With respect to the exercise of discretion, it was the Respondent's position that should the Court even find merit in the application, the Court is enjoined to consider implication of any reliefs in Judicial Review that would be issuable. The reliefs as sought herein, in its view, shall occasion administrative chaos. It relied on **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 others [2014] eKLR.**

73. The Council therefore urged the Court to dismiss the Application with costs.

Determinations

74. I have considered the issues raised by the parties in this Application.

75. It was contended by the Respondent that the letter dated 16th December 2015 is not a decision, but was simply an advice which cannot be a subject to Judicial Review. What is a decision for the purposes of judicial review? It has been held that a decision is a deliberate act that generates commitment on the part of the decision maker toward an envisaged course of action of some specificity. Going by this definition I am not prepared to find that the letter dated 16th December, 2015 did not constitute a decision. See ***Public Administration*, A Journal of the Royal Institute of Public Administration, By PH Levin,** at page 25.

76. The Applicant contended that the Respondent violated its right to fair administrative action. To the applicant the Respondent's decision of directing the University not to admit the students when the said

students had in actual fact been admitted was irrational. Secondly the said decision was similarly unreasonable since it was arrived at before a decision on the full accreditation was arrived at. To the University the decision was not proportional to what was intended to be achieved taking into account the fact that the University was an existing institution which had already admitted law students to the institution.

77. Article 47 of the Constitution provides

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***
>
> ***(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-***
>
> ***(a) Provide for the review of administrative action by court or, if appropriate, an independent and impartial tribunal; and***
>
> ***(b) Promote efficient administration.***

78. It follows that reasonableness is now a constitutional requirement in the exercise of administrative action. A similar position prevails in South Africa where in **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1,** at paragraphs135 -136 it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

> **"Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"**

79. In **Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 223** it was held:

> "**It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short vs. Poole Corporation [1926] Ch. 66, 90, 91 gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as**

being done in bad faith; and, in fact, all these things run into one another."

80. However, as this Court held in **Nairobi High Court in Kevin K. Mwiti & Others vs. Council of Legal Education & Others (Nairobi JR 377 of 2015-Consolidated with Petition 395 of 2015 and JR 295 of 2015)**:

> **'…it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. This is so because unreasonableness per se is largely a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness. ..'**

81. It is my view that in deciding on what action to take an authority ought to apply the principle of proportionality. Accordingly I associate myself with the position taken in **The Indian Borough of Newham vs. Khatun-Zeb and Iqbal [2004] EWCA Civ. 55** where it was held that:

> **"Clearly a public body may choose to deploy powers it enjoys under Statute in so draconian a fashion that the hardship suffered by the affected individuals in consequence will justify the court in condemning the exercise as irrational or perverse...At all events it is plain those oppressive decisions may be held to repugnant to compulsory public law standards."**

82. Like all legal remedies, judicial review continues to enlarge the categories of its sphere of influence. Proportionality for example is considered to be one of the grounds upon which judicial review relief may be granted. In my view the issue of proportionality ought to be seen in the context of rationality. This position is the one prevailing in England as was highlighted by **Lord Steyn** in **R (Daly) vs. Secretary of State For Home Department (2001) 2 AC 532** where it was held that: (1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions; (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

83. This position is now captured by the ***Fair Administrative Act*** under which sections 7(i) and 7(ii) recognises proportionality as a ground to challenge administrative decisions if the decision is not proportionate to the interests or rights affected. Proportionality was recognized by **Lord Diplock,** in **Council of Civil Service Unions vs. Minister for the Civil Service 1AC, 374** where he lauded the development of this ground in the Laws of the European Economic Community. Apart from that the courts have over the years developed a framework within which to conduct a proportionality analysis which is usefully summarised by **De Smith, Woolf and Jowel**, ***Judicial Review of Administrative Action***, Fifth Edition (pp.594-596) that it is "*a principle requiring the administrative authority, when exercising discretionary power to maintain a proper balance between any adverse effects which its decision may have on the rights, liberties, or interests of persons and the purpose which it pursues*". Therefore the principle, as reviewed by the Courts encompass any or all of the following tests:

a. **The balancing test, which requires a balancing of the ends which an official decision attempts to achieve against the means applied to achieve them. This requires an identification of the ends or purposes sought by the official decisions. In addition it requires an identification of the means employed to achieve those ends, a task which frequently**

involves an assessment of the decision upon affected persons.

b. **The necessity test which requires that where a particular objective can be achieved by more than one available means, the least harmful of these means should be adopted to achieve a particular objective. …this aspect of proportionality requires public bodies to adopt those regulatory measures which cause minimum injury to an individual or community.**
c. **The suitability test requires authorities to employ means which are appropriate to the accomplishment of a given law, and which are not in themselves incapable of implementation or unlawful.**

84. In this case, it is my view that a decision wherein the authority bars the admission of students from joining an ongoing institution when in actual fact the admission has taken place and when the issue of accreditation is pending in its stable, cannot be reasonable by any stretch of imagination.

85. In arriving at such a decision the authority is obliged to take into account the interests of the third parties who stand to be affected by such a decision. This position is now underpinned in sections 4(3) and 5(1) of the ***Fair Administrative Action Act***. The later provision provides:

> ***In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall-***
>
> a. ***Issue a public notice of the proposed administrative action inviting public views in that regards;***
> b. ***Consider all views submitted in relation to the matter before taking administrative action;***
> c. ***Consider all relevant and material facts;***

86. That the impugned decision was likely to materially and adversely affect the legal rights or interests of a group of persons or the general public is not in doubt since the decision would have affected the rights and interests of the students and their parents/guardians.

87. It is therefore my view that the impugned decisions did not meet the fair administrative action threshold and such action is not only unlawful but amounts to a violation of the Constitution. As was held by the Court of Appeal in **Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR**:

> **"Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."**

88. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

89. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** the learned Judge expressed himself as follows:

> **"On the issue of discretion Prof Sir William Wade in his Book *Administrative Law* has summarized the position as follows: The powers of public authorities are... essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…Certainty of law is an important pillar in the concept of the rule of law. As is no doubt clear in the findings in this case, it is an essential prerequisite of business planning and survival as well. Yes, the rule of law is a lifeline of the economy as is illustrated in the emerging and thriving economies of the world. The courts in my view have a responsibility to uphold the rule of law for this reason. The ability of businesses to plan stems from the bedrock of the rule of law. "**

90. It was in appreciation of this that judicial review was recognised in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** as the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.

91. To hold therefore that a member of the executive is the sole judge when it comes to the exercise of discretion would be to throw the rule of law out of the window. When Constitutional safeguards provided under Article 47 of the Constitution are destroyed by being whittled and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary, it has been held, is the first victim. Accordingly the Courts are empowered to and are under a duty to investigate allegations of abuse of power and improper exercise of discretion. I therefore associate myself with the holding in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240**, that:

> **"When litigants come to the courts it is the core business of the courts and the courts' role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance."**

92. Clearly the action taken by the Council failed to meet this Constitutional and statutory threshold.

93. On the issue whether the Respondent has the power to accredit universities in Kenya, the issue of accreditation seems to have been introduced by Legal Notice No. 170 of 2009 ("the Accreditation Regulations"), which were gazetted on 27th November, 2009, by which the CLE for the first time introduced the accreditation process for law schools. The Accreditation Regulations in Regulation 3(2) thereof required existing institutions offering legal education at the time, like the University herein, to

apply to the Council for accreditation within six months after the commencement of the Regulations and the Third Schedule to the Accreditation Regulations ("Physical, Library and Curriculum Standards for Legal Education Institutions) set out in detail the matters to be contained in an application for accreditation.

94. Following recommendations by the Ministerial Task Force on the Development of a Policy and Legal Framework for Legal Education in Kenya, that the regulation of legal education should be delinked from the provision of post-graduate instruction for admission to the roll of Advocates, Parliament enacted the ***Legal Education Act, 2012*** and the ***Kenya School of Law Act, 2012***.

95. According to the Council, the enactment of the Legal Education Act was informed by the realisation that the ***Council of Legal Education Act*** was ineffective and it was determined that there was need for a comprehensive legal framework to regulate legal education in terms of persons enrolling and therefore need to legislate structures to effectively deal with this critical profession. This, therefore led to the enactment of the ***Kenya School of Law Act, 2012*** and the ***Legal Education Act, 2012***. Although the ***Legal Education Act*** repealed the ***Council of Legal Education Act***, it saved and transitioned instruments and regulations made under the ***Council of Legal Education Act*** that would have been made under the ***Legal Education Act***.

96. That leads us to the purpose of the said ***LEA***. The preamble to the said Act provides that it is:

> ***'An Act of Parliament to provide for the establishment of the Council of Legal Education; the establishment of the Legal Education Appeals Tribunal; the regulation and licensing of legal education providers and for connected purposes'.***

97. Its objective is to:

> ***(a) promote legal education and the maintenance of the highest possible standards in legal education; and***
>
> ***(b) provide a system to guarantee the quality of legal education and legal education providers.***

98. The said Act in section 4 establishes the Council whose functions are set out in section 8 thereof as follows:

> ***(1) The functions of the Council shall be to—***
>
> ***(a) regulate legal education and training in Kenya offered by legal education providers;***
>
> ***(b) licence legal education providers;***
>
> ***(c) supervise legal education providers; and***
>
> ***(d) advise the Government on matters relating to legal education and training.***
>
> ***(e) recognise and approve qualifications obtained outside Kenya for purposes of admission to the Roll.***
>
> ***(f) administer such professional examinations as may be prescribed under section 13 of the Advocates Act.***
>
> ***(2) Without prejudice to the generality of subsection (1), the Council shall, with respect to legal education providers, be responsible for setting and enforcing standards relating to the—***
>
> ***(a) <u>accreditation of legal education providers for the purposes of licensing</u>;***

(b) curricula and mode of instruction;

(c) mode and quality of examinations;

(d) harmonization of legal education programmes; and

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

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

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

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

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

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

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

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

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

(h) carry out regular visits and inspections of legal education providers; and

(i) perform and exercise any other functions conferred on it by this Act.'

99. On the other hand, the Commission is established by provisions of the ***Universities Act, 2012***, as the successor of the Commission of Higher Education established then by the ***Universities Act*** (Chapter 210 B of the Laws of Kenya). The ***Universities Act, 2012*** is:

'An Act of Parliament to provide for the development of university education; the establishment, accreditation and governance of universities; the establishment of the Commission for University Education, the Universities Funding Board and the Kenya University and Colleges Central Placement Service Board; the repeal of certain laws, and for connected purposes'.

100. The functions of the Commission at section 5 are outlined as follows:

(1) The functions of the Commission shall be to—

(a) promote the objectives of university education;

(b) advise the Cabinet Secretary on policy relating to university education;

(c) promote, advance, publicise and set standards relevant in the quality of university education, including the promotion and support of internationally recognised standards;

(d) monitor and evaluate the state of university education systems in relation to the national development goals;

(e) licence any student recruitment agencies operating in Kenya and any activities by foreign institutions;

(f) develop policy for criteria and requirements for admission to universities;

(g) recognize and equate degrees, diplomas and certificates conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set by the Commission from time to time;

(h) undertake or cause to be undertaken, regular inspections, monitoring and evaluation of universities to ensure compliance with the provisions of this Act or any regulations made under section 70;

(i) on regular basis, inspect universities in Kenya;

(j) accredit universities in Kenya;

(k) regulate university education in Kenya;

(l) accredit and inspect university programme in Kenya;

(m) promote quality research and innovation; '

101. It is therefore clear that with respect to accreditation the Council's role is restricted to ***setting and enforcing standards relating to the accreditation of legal education providers for the purposes of licensing***. Nowhere in the ***LEA*** is there an express power conferred upon the Council to accredit Universities or institutions offering legal education. This ought to be juxtaposed with the role of the Commission which is *inter alia* to ***accredit universities in Kenya.*** I therefore agree with the interpretation adopted by the Council 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. My view is reinforced by the provision of section 5(3) of the ***Universities Act*** which provides that:

For the avoidance of doubt, save as may be provided for under any other written law, the Commission shall be the only body with the power to perform the functions set out in this section.

23. I gather support for this position from the celebrated Court of Appeal decision in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR,** where it was observed that, in respect of the Kenya National Examination Council, that:

" … As a creature of a statute, the council can only do that which it's creature (the Act) and the rules made thereunder permit it to do….If it were to purport to do anything outside that which the Act and the rules permit it to do, then like all public bodies created by Parliament, it would become amenable to the supervisory jurisdiction of the High Court."

102. 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.

103. Once the Council sets the said standards it is upon the Commission to ensure that the said standards are attained. In other words in the accreditation process both the Commission and the Council play complementary roles. They are expected to work hand in hand in order to ensure that the highest standards of legal education are attained. This in my view is the rationale behind the stipulation in section 13 of the ***Legal Education Act*** that:

> ***The Council may, in the discharge of its functions, consult, collaborate and cooperate with—***
>
> ***(a) the Commission for University Education and other regulators in the field of education, generally;***
>
> ***(b) the Law Society of Kenya; and***
>
> ***(c) departments and agencies of Government, statutory bodies, and any other body or institution having functions or objects related to the functions of the Council.'***

104. This collaboration and cooperation in my view is meant to ensure smooth operations of the functions of both bodies in order to avoid a situation which has arisen in these proceedings. In my view the tuff wars that have given rise to and characterised these proceedings are uncalled for and are totally unnecessary. The Commission and the Council ought to realise that they hold offices in the public service and hence the powers they exercise are to be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

105. 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. That is the only way in which the provisions of section 8(4) of the ***Legal Education Act***, can be understood where it is provided that:

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

106. I associate myself with the position adopted by **Mumbi Ngugi, J** in **Martin Wanderi & 19 Others vs. Engineers Registration Board of Kenya & 5 Others [2014] eKLR** that:

> **"It is true as submitted by the Respondents, that section 2 of the *Engineers Act* provides that "*Where any conflict arises between the provisions of this section and the provisions of any other written law for the time being in force, the provisions of this section shall prevail*." The operative words are "*for the time being in force*", meaning, in my view, any legislation that predates the Engineers Act...The universities Act, being a later legislation, impliedly repealed the provisions of the Engineers Act in so far as the accreditation of courses at universities is concerned."**

107. Therefore since the ***Universities Act*** expressly confers the power of accreditation of universities, including those offering legal courses, on the Commission, and as the ***Universities Act*** being a later legislation cannot have been in the contemplation of Parliament when it referred to "***written law for the time being in force"***, section 8(4) of the ***Legal Education Act*** is inapplicable in so far as accreditation of universities is concerned.

108. However the said section still applies with respect to ***setting and enforcing standards relating to the accreditation of legal education providers for the purposes of licensing*** since that is not a power expressly conferred upon the Commission. In other words the conflict contemplated under section 8(4) aforesaid is only referable to the ***setting and enforcing standards relating to the accreditation of legal education providers for the purposes of licensing*** and not with respect to accreditation itself. Once the standards are set by the Council and are not adhered to it falls upon the Commission to take appropriate

action including the withdrawal of the accreditation in which even the process of the closure of the relevant institution will then set in. It is only then that Regulation 16(2) of the Accreditation Regulations can set in. The said Regulation empowers the Council to issue, under its seal, an order of discontinuation to a legal education institution in Form CLE No.3 set out in the First Schedule. It is my view that the said action must necessarily follow a decision by the Commission to withdraw the accreditation where such accreditation has been given. Of course where there is no accreditation, the issue of withdrawing the same would not arise. However where there is a provisional accreditation, the Council cannot purport to withdraw the same and direct the University to submit a closure plan before the same expires as the Council purported to do in this case.

109. My view on this issue is reinforced by the holding in **Rahill vs. Brady (1971) IR 69** at page 86 also cited in **O'Neill & Anor v. Governor of Castlerea Prison &Ors [2003] IEHC 83 (27 March 2003)** in which it was held that:

> **"In the absence of some technical or acquired meaning the language of a statute should be construed according to its ordinary meaning and in according to the rules of grammar. While the literal construction generally has prima facie preference, there is also a further rule that in seeking the full construction of the section of an Act, the whole Act must be looked at in order to see what the objects and intention of the legislature were, but the ordinary meaning of words should not be departed from unless adequate grounds can be found in the context in which the words are used to indicate that a literal interpretation would not give the real intention of the legislature"**

110. The confusion however seems to have been introduced by Regulation 16(1)(d) which suggests that the Council is empowered to order an education institution to discontinue providing legal education or training where the institution is not accredited by the Council. However as rightly pointed out the ***Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009***, being subsidiary legislation cannot override the express provisions of the ***Universities Act*** by dint of section 31 of the ***Interpretation and General Provisions Act*** which provides that, *"no subsidiary legislation ought to be inconsistent with an Act of Parliament."*

111. In my view this Court ought to adopt the position of **Finlay, CJ** in **McGrath vs. McDermott (1988) IR 258 at page 275** cited in **O'Neill & Anor vs. Governor of Castlerea Prison & Ors [2003] IEHC 83 (27 March 2003)**,when the Judge dealt with the role of the court in interpreting statutes in the following terms:

> **"The function of the Courts in interpreting a statute…is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even other statutes expressed to be construed with it. "**

112. Confronted with the option of declaring a legal instrument unlawful, this Court has wide powers under Article 23 of the Constitution as discussed elsewhere in this judgement. One such power is the power to "read in" certain words in the instrument to bring it in conformity with its intended objectives in order to avoid absurdity. That this power is now available under the current Constitution was appreciated in **Nancy Makokha Baraza vs. Judicial Service Commission & 9 Others [2012] eKLR** where the Court expressed itself as follows:

> **"The defunct Constitution, as we have already observed was very limited in terms of scope of the remedies available. The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises… We are, therefore, of the view that Article 23(3) of the Constitution is wide enough and enables us to make appropriate reliefs where there has been an infringement or a threat of infringement of the Bill of Rights."**

113. The remedy of "reading in" was invoked by the South African Constitutional Court in **National Coalition for Gay and Lesbian Equality and Others vs. Minister of Home Affairs and Others (CCT10/99) [1999] ZACC** in which the said Court expressed itself *inter alia* as follows:

> **"The difficulty of providing a comprehensive legislative response to all the many people with a claim for legal protection cannot, however, be justification for denying an immediate legislative remedy to those who have successfully called for the furnishing of relief as envisaged by the Constitution. Whatever comprehensive legislation governing all domestic partnerships may be envisaged for the future, the applicants have established the existence of clearly identified infringements of their rights, and are entitled to specific appropriate relief. In keeping with this approach it is necessary that the orders of this Court, read together, make it clear that if Parliament fails to cure the defect within twelve months, the words "or spouse" will automatically be read into section 30(1) of the Marriage Act. In this event the Marriage Act will, without more, become the legal vehicle to enable same-sex couples to achieve the status and benefits coupled with responsibilities which it presently makes available to heterosexual couples."**

114. In **Roodal vs. State of Trinidad and Tobago [2004] UKPC 78,** the majority in the Privy Council cited with approval the South African case of **State vs. Manamela [2000] (3) SA 1** in which it was held:

> **"Reading down, reading in, severance and notional severance are all tools that can be used either by themselves or in conjunction with striking out words in a statute for the purpose of bringing an unconstitutional provision into conformity with the Constitution, and doing so carefully, sensitively and in a manner that interferes with the legislative scheme as little as possible and only to the extent that is essential".**

115. In **Kimutai vs. Lenyongopeta & 2 Others** (supra) the Court held that:

> "The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the "purposive approach". In all cases now in the interpretation of statutes such a construction as will "promote the general legislative purpose" underlying the provision is to be adopted. It is nolonger necessary for the judges to wring their hands and say, "There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind."

116. In the exercise of the powers conferred on this Court by the Constitution in the phrase "*the institution is not accredited by the Council*" in Regulation 16(1)(d) of the Regulations the words "*as per the standards set*" ought to be read in so as to paraphrase the same as "*the institution is not accredited as per the standards set by the Council*".

117. It is therefore my view that the enactment of the ***Universities Act, 2012*** was meant to clarify the respective roles of the Commission and the Council hence there is no conflict between their role in order to justify the invocation of the doctrine of implied repeal.

118. However for completion of the issues raised herein had I found that there was a conflict between the Universities Act and the Legal Education Act, I would have had no hesitation in finding that pursuant to the principle of *'leges posterior respriores contrarias abrogant'* if there was any power of accreditation given to the Council before the enactment of the ***Universities Act***, the same was repealed by the enactment of the later. That principle is to the effect new laws are given preference in case of an inconsistency with the older laws. In this case, it is not in dispute that the ***Legal Education Act, 2012*** came into force on 28th September, 2012 while the ***Universities Act*** came into force on 13th December, 2012; three months after the ***Legal Education Act*** came into force, hence ***Legal Education Act*** preceded the ***Universities Act*** in time. Parliament by conferring the powers of accreditation on the Commission by

the enactment of the ***Universities Act*** is presumed to have been aware of the provisions of the ***Legal Education Act***, and by deliberately conferring such power on the Commission, notwithstanding the fact that it did not expressly deal with such powers, as allegedly conferred on the Council, it must be inferred that it intended to repeal any provision conferring such powers on the Council. I gather support for this position from **Street Estates Limited vs. Minister of Health [1934] 1 KB** where it was held that:

> **"But it can also do it another way, namely, by enacting a provision clearly inconsistent with the previous Act; without going through them, four pages of MAXWELL ON THE INTERPRETATION OF STATUTES are devoted to cases in which without using the word "repeal" Parliament has repealed a previous provision by enacting a provision inconsistent with it. In those circumstances it seems to me impossible to say that these words...have no effect."**

119. I also rely on the holding in **Elle Kenya Limited & Others vs. The Attorney General and Others** (supra) that:

> **"It seems to me, in the first instance, plain that the legislature is unable, according to our Constitution, to bind itself as to the form of subsequent legislation; it is impossible for Parliament to say that in a subsequent Act of Parliament dealing with this subject matter shall there never be an implied repeal. If Parliament chooses in a subsequent Act to make it plain that the earlier statute is being to some extent repealed, effect must be given to the intention just because it is the will of the Legislature."**

120. This principle was adopted by the Uganda Court of Appeal in **David Sejjaka Nalima vs. Rebecca Musoke Civil Appeal No. 12 of 1985** where it was held that:

> **"According to principles of construction if the provisions of a later Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier Act stands impliedly repealed by the latter Act. It is immaterial whether both Acts are Penal Acts or both refer to Civil Rights. The former must be taken to be repealed by implication. Another branch of the proposition is that if the provisions are not wholly inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the Act."**

121. This principle was properly adopted in my view in **Martin Wanderi & 19 others vs. Engineers Registration Board of Kenya & 5 Others [2014] eKLR**, where the Court, while faced with the dispute pitying the engineers Board and the Commission for University Education rendered itself as follows with regard to the powers of the Commission for University Education:

> **"…Suffice to say that the effect of the enactment of the Universities Act after the Engineers Act, with the same powers vested in the Commission for Universities Education to accredit courses for universities, takes away the powers vested in the Board by section 7(1)(l). This is because of the canons of interpretation with regard to the timing of legislation, and the doctrine of implied repeal, which is to the effect that where provisions of one Act of Parliament are inconsistent or repugnant to the provisions of an earlier Act, the later Act abrogates the inconsistency in the earlier one…."**

122. The same position was restated in **United States vs. Borden Co 308 US 188, (1939)** where the court rendered itself as follows:

> **"…There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy'…"**

123. **In Steve Thoburn vs. Sunderland City Council 2002 EWHC 195** the court stated that:

"[I]f they [the two statutes] are inconsistent to that extent [viz. so that they cannot stand together], then the earlier Act is impliedly repealed by the later in accordance with the maxim Leges posterior espriores contrarias abrogant' …Authority to the effect that the doctrine of implied repeal may operate in this limited fashion is to be found in Goodwin v Phillips [1908] 7 CLR 1, in the High Court of Australia, in which Griffith CJ stated at 7:"… if the provisions are not wholly inconsistent, but may become inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the later Act."

124. A similar position was taken in **High Court Petition No. 320 of 2011 Elle Kenya Limited & Others vs. The Attorney General and Others,** where the court stated as follows at paragraphs 39-41 of its decision:

[39.] In the English case of Vauxhall Estates Ltd v Liverpool Corporation [1932] 1K.B., the court stated as follows at page 746; "If it is once admitted that Parliament, in spite of those words of the sub-section has power by a later Act expressly to repeal or expressly to amend the provisions of the sub-section and to introduce provisions inconsistent with them, I am unable to understand why Parliament should not have power impliedly to repeal or impliedly to amend these provisions by the mere enactment of provisions completely inconsistent with them."

125. To the Court in **Nzioka & 2 Others vs. Tiomin Kenya Ltd, Mombasa Civil Case No. 97 of 2001**:

"...The EMC Act being a more recent Act must be construed as repealing the old Act where there is inconsistency....where the provision of one statute are so inconsistent with the provisions of a similar but later one, which does not expressly repeal the earlier Act, the courts admit an implied repeal."

126. However in light of my finding above the issue of implied repeal does not arise. The case before me is what the Court in **Re Kenya National Union of Teachers [1969] EA 637** contemplated when it held that:

"The Teachers Service Commission Act contains no specific provisions precluding the application to teachers of the provisions of the Trade Disputes Act. Nor is there any provision which by clear implication has such an effect. If the provisions of the later Act were manifestly inconsistent with the earlier, then on general principles of construction the Court would be obliged to treat the earlier as *pro tanto* repealed by the later. But the provisions of the two enactments can stand side by side without contradiction, as long as the dual functions of the commission established by the later enactment are kept distinct. Provided that this is done, there is no conflict between the provisions of the two Acts, nor is it necessary to hold that by taking cognisance of the present dispute the Industrial Court would in any way be usurping the functions imposed by Parliament on the Teachers Service Commission."

127. In other words, the court does not construe a later Act as repealing an earlier one unless it is impossible to make the two Acts or the two sections of the Acts stand together i.e. if the section of the later Act can only be given a sensible meaning if it is treated as impliedly repealing the section of the earlier Act. See **Attorney General vs. Silver Springs Hotel Ltd and Others SCCA No. 1 of 1989** and **Re Berrey [1936] 1 Ch. 274.**

128. In light of my findings hereinabove it is my view and I hereby hold that the Council for Legal Education has no power to purport to accredit an institution of higher learning in the position of the Mount Kenya University. A fortiori, the said Council cannot purport to take an action whose effect would be to withdraw such accreditation. To that extent I agree that the Council's role is purely advisory and technical in nature and does not include the powers to suspend or stop accredited university institutions

from offering various courses. The Council's role is merely to set, regulate and oversee the standards of Legal Education in Kenya and to recommend to the Government through the Commission such recommendation as it may deem necessary in fostering regard to legal training in Kenya. It therefore, has no power to close down any University institution whatsoever without express involvement of the Commission of University Education.

129. It was contended the Council lacks the authority to interfere with University Education in Kenya. According to the Commission, the Council for Legal Education, is improperly constituted and accordingly is incapable of discharging any legal obligation, not least the purported accreditation of Universities. This position was based on section 4(5) of the ***Legal Education Act*** which provides that:

> ***The Council of Legal Education shall comprise of the following members;***
>
> ***(a) the chairperson, who shall be a person with at least fifteen years' experience in matters relating to legal education and training, appointed by President.***
>
> ***(b) the Principal Secretary of the Ministry for the time being responsible for legal education;***
>
> ***(c) the Principal Secretary of the Ministry for the time being responsible for finance;***
>
> ***(d) the Attorney-General;***
>
> ***(e) the Chief Justice;***
>
> ***(f) two advocates, nominated by the Council of the Law Society of Kenya;***
>
> ***(g) one person who teaches law in a public university, nominated by public Universities; and***
>
> ***(h) the Secretary to the Council.***
>
> ***(i) one person who teaches law in a private university nominated by private universities.***

130. However the current composition of the Council comprises of ten (10) members out of whom there are four LSK representatives in the Council, the Chairman is not an appointee of the President, there is no representative of the Ministry of Education, and there is only one representative of universities instead of two (2 one representing public and the other representing private universities. To the Commission, the Council, as constituted cannot render any legally viable decision that is capable of legal recognition. In support of this position, the Commission relied on **Noah Kibelenkenya vs. Simore Ololchurie & Another [2015] eKLR** .

131. According to the Respondent prior to the amendment of the ***Legal Education Act, 2012*** by the ***Statute Law (Miscellaneous Amendment) Act 2014***, composition of the Council was borne at section 4(5) differently from how it is presently composed. By gazette notice No. 3167 of 15th March 2013, and in accordance with section 4 of the *Legal Education Act, 2012*, the then Minister for National Cohesion and Constitutional Affairs gazetted appointment of personalities to staff the Council for a period of four (4) years commencing 15th March 2013.When the ***Legal Education Act***, was amended vide ***Statute Law (Miscellaneous Amendment) Act 2014***, the officers staffing the council of legal education were expanded as hereinabove stated. In the Council's view, since the amendment was by a statute whose effective date was 2014, a period when the incumbent Council has been in existence since 15th March 2013, at law the right of the incumbent Council appointed on 15th March 2013 until expiry of 4 years has legal protection. To the Council, the amendment to the constitution of the Council vide the ***Statute Law (Miscellaneous Amendment) Act 2014*** did not abolish the Council as it had been constituted hitherto then and that the tenor of the amendment is to be effected at the expiry of the appointment term of the present Council. In

other words, at present there is a chairman who has been appointed by the Minister and there cannot be two chairmen with one existing and the other appointed by the President as provided for by the amending statute.

132. It was therefore submitted that the Council as comprised prior to the amendment still has the jurisdiction to act as such and the competence to discharge the functions of the Council of Legal Education.

133. The argument by the Respondent with due respect does not reflect the legal position of a new statute replacing another one whether in whole in part. In **Republic vs. Kenya Anti-Corruption Commission Ex Parte Okoth [2006] 2 EA 276** a three judge bench composed of **Nyamu, Ibrahim** and **Makhandia, JJ** (as they were) expressed themselves as hereunder:

> **"The rule at common law is that the effect of a repeal was to obliterate the law as if it never existed, but subject to any savings in the repealing Act and also the general statutory provisions as to the effects of the repeal. To repeal an Act of Parliament is to cease to be part of the *corpus juris* or body of law. The general principle is that except as to the transactions past and closed, an Act or enactment which is repealed is to be treated thereafter as if it had never existed, but subject to any savings, made expressly or by implication, by the repealing enactment and in most cases is also subject to the general statutory provisions as to the effects of repeal... Under common law the consequences of a repeal of a statute are very drastic. Except as to transactions past and closed, a statute after repeal is as completely obliterated as if it had never existed. Another result of repeal…is to revive the law in force at the commencement of the repealed statute. The confusion resulting from all these consequences gave rise to the practice of inserting saving provisions in repealing statutes and later on, to obviate the necessity of inserting a saving clause in each and every repealing statute, a general provision was made in section 38(2) of the Interpretation Act 1889...In context of Kenyan situation the general provision on repeal of statutes and the subsequent enactment of others is section 23(3)(e) of the Interpretation and General Provisions Act Chapter 2 of the Laws of Kenya. The provision after correction of one word "repealed" with "repealing" *vide* the challenged Legal Notice number 162 of 2003 states that where a written law repeals in whole or in part another written law, then, unless the contrary intention appears, the repeal shall not affect any investigation, legal proceedings or remedy in respect of a right, privilege or obligation, liability, penalty, forfeiture or punishment as aforesaid, any such investigation, legal proceedings or remedy may be instituted , confirmed or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing written law had not been made...There is a general presumption against absurdity as it is presumed that Parliament intends that the court, when considering, in relation to the facts of the instant case, which of the opposing constructions of an enactment corresponds to its legal meaning should find against a construction which produces an absurd result since it is unlikely to have been intended by Parliament and here absurd means contrary to sense or reason."**

134. It is however my view that the words "**any investigation, legal proceedings or remedy in respect of a right, privilege or obligation, liability, penalty, forfeiture or punishment as aforesaid, any such investigation, legal proceedings or remedy"** cannot be read in order to include the tenure of an office which has been abolished by statute. So unless Parliament preserves the term of an existing office, that office if differently constituted, must of necessity be deemed to have been abolished on the effective date. This in my view is the reason for giving the executive the powers to set the effective date of statutes. This is meant to ensure that there is a smooth transition from one office to another.

135. In my view, Parliament by reconstituting the Council must have intended to cure a particular existing mischief. To contend that the existing Council's term must run its course would in my view amount to thwarting the legislative intent as expressed in the said amendment. As was held by the Court of Appeal in **Kimutai vs. Lenyongopeta & 2 Others [2005] 2 KLR 317**:

> "It is elementary rule that a thing which is within the letter of a statute will, generally, be construed as not within the statute unless it also be within the real intention of the legislature, and the words, if sufficiently flexible, must be construed in the sense which, if less correct grammatically, is more in harmony with that intention…. It was necessary, in order to arrive at the real meaning, to get to the exact conception of the aim, scope and aspect of the whole Act, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief"

136. In other words, it is necessary, in order to arrive at the real meaning, to get to the exact conception of the aim, scope and aspect of the whole Act, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief.

137. In the premises I agree with the position adopted by **Munyao, J** in **Noah Kibelenkenya vs. Simore Ololchurie & Another [2015] eKLR** thus:

> **"It cannot be said that the Tribunal herein was properly constituted. It clearly was not. It follows that if the Tribunal was not properly constituted, then its decision is null and void. A decision could only be said to be a decision of the Tribunal if the Tribunal was properly constituted".**

138. It was on the same vein that this Court in **Republic vs. Chairman Land Dispue Tribunal Amukura Division &2 Others exp Jared Mwimali Mukuma & Another [2014] eKLR** expressed itself as follows:

> **"Under section 4(2) of the Land Disputes Tribunal Act, a properly constituted Tribunal should consist of 3 or 5 members. This clearly shows the Tribunal that heard the dispute was not properly constituted and the orders were therefore issued by an irregularly and unlawfully constituted tribunal. That the Amukura Land Disputes Tribunal was improperly constituted, exceeded its jurisdiction and issued orders that were beyond its powers."**

139. A similar position was adopted in **Kenya Commercial Bank vs. Kenya National Commission on Human Rights [2008] eKLR**, where the Court expressed itself as follows:

> **"The Applicant contends that at the first appearance for hearing, they were informed that the hearing would be presided over by one arbiter. We have considered Regulations 27 (1) & (2) and 35 (2). The chairperson establishes the hearing panel under Regulation 27 (1 & 2) which comprises the presiding Commissioner, and others appointed by the chairperson, legal counsel and members of the Legal Services Department. That Regulation envisages a panel consisting of more than one Commissioner, legal Counsel and other staff. Regulation 35 (2) comes into play during the course of the hearing when for good reason, there is need to replace the absent Commissioners. There is no provision for the sitting of one Commissioner on the panel. Regulation 35 (2) does not apply here because right from the onset, only one Commissioner was appointed to preside over the dispute and the issue of replacement does not arise. The appointment of Godana, a single Commissioner to preside over the dispute out rightly contravenes Regulation 27 (1) & (2) and is unlawful. It is the duty of the Respondent to ensure that the requirements of the panel's composition are met i.e. Regulation 27. They cannot constitute the panel contrary to provisions of the law. In that regard, we do agree with the decision of the court in EQUATOR INN VTOMASYAN (1971) EA 405 that the properly constituted quorum started hearing a dispute where one was seeking a refund of rent. The chairman purported to visit the premises alone and on appeal, the court held that the Chairman of the Rent Restriction Board sitting alone had no power to order a refund of excess rent paid and had no power to hear and determine the application. In this case we find that Mr. Godana had no power to sit alone on the panel presiding over the dispute between the Applicant and the 1st Interested Party, as it is**

offends clear provisions of the law. The Respondent purported to rely on Regulation 36 which provides that an irregularity resulting from a failure to comply with any provision of this part or any direction of the hearing panel before it has reached its decision shall not of itself render any proceedings void. We find that Regulation 36 cannot remedy that omission because the composition of the Panel having been specifically provided for is a fundamental Provision which should ideally have been in the Act. Those proceedings presided over by Godana contrary to statute call for intervention of this court by way of judicial review."

See also **Republic vs. Communications Appeals Tribunal & Another exp Safaricom Limited [2011] eKLR**.

140. In the premises, it is my view and I hold that even if the Council had the power to take the impugned decision, as constituted, the said Council could not purport to do so.

141. It was however contended that the operations and actions of the Respondent were curable pursuant to section 53 of the ***Interpretations and General Provisions Act***, Cap 2 Laws of Kenya. Section 53 of the ***Interpretation and General Provisions Act*** was considered by this Court in Review Application No. 426 OF 2014 **– Republic vs. Agriculture Fisheries and Food Authority & Others ex parte West Kenya Sugar Company Limited** in which the Court expressed itself as follows:

"section 53 of Cap 2 is an exception to the norm and is meant to cure the exigencies occasioned by vacancies in the Board or Authority which in my view ought to be of temporary rather than permanent nature. Where the vacancy is of permanent nature, the Board or Authority cannot operate without the statutory numbers in perpetuity. To do so would amount to an illegality...In other words where the executive sets out to constitute a Board or Authority other than in the manner decreed by the law, such Board or Authority as constituted is illegal and its actions are a proper candidate for quashing by an order of certiorari. Similarly where the authority tasked with the constitution of a Board drags its feet in order to micro-manage the Board by having his cronies in position of authority for an unnecessarily long period, this Court will step in to bring to an end such abuse of power. In my consideration of this provision [section 52 of Cap 2], applies to situations where there are substantive members but they are either temporarily unable to attend or are precluded by illness, absence from Kenya or other cause from exercising their functions. With due respect none of these situations apply to the instant case. The persons who are acting as officers of AFFA in this case are not doing so because the substantive holders of these offices are unable to exercise their mandate. The position here is simply that the substantive holders thereof have not been appointed. These acting officials, however, are Acting Interim Head of Sugar Directorate and Director General and the CEO of the Authority."

142. It is therefore my view that sections 52 and 53 of Cal 2 cannot be a panacea for all ills.

143. This decision, the Court appreciates, may have serious repercussions with respect to the decisions already undertaken by the Council. However, Article 23 of the Constitution provides that a court may grant "appropriate relief", including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order for compensation; and an order of judicial review. Under the said Article, the Applicant is entitled to 'appropriate relief' which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. As was held by the Constitutional Court of South Africa in **Fose vs. Minister of Safety & Security [1977] ZACC 6**:

"Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is

necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights."

144. One of the remedies which is now recognized in jurisdictions with similar constitutional provisions as our Article 23 is what is called structural interdict. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Five elements common to structural interdicts have been isolated in this respect. In the first instance the court issues a declaration identifying how the government has infringed an individual or group's constitutional rights or otherwise failed to comply with its constitutional obligations. Secondly, the court mandates government compliance with constitutional responsibilities. The third stage is that the government is ordered to prepare and submit a comprehensive report, usually under oath, to the court on a pre-set date. This report, which should explicate the government's action plan for remedying the challenged violations, gives the responsible state agency the opportunity to choose the means of compliance with the constitutional rights in question, rather than the court itself developing or dictating a solution. The submitted plan is typically expected to be tied to a period within which it is to be implemented or a series of deadlines by which identified milestones have to be reached. Fourth, once the required report is presented, the court evaluates whether the proposed plan in fact remedies the constitutional infringement and whether it brings the government into compliance with its constitutional obligations. As a consequence, through the exercise of supervisory jurisdiction, a dynamic dialogue between the judiciary and the other branches of government in the intricacies of implementation may be initiated. This stage of structural interdict may involve multiple government presentations at several 'check in' hearings, depending on how the litigants respond to the proposed plan and, more significantly, whether the court finds the plan to be constitutionally sound. Structural interdicts thus provide an important opportunity for litigants to return to court and follow up on declaratory or mandatory orders. The chance to assess a specific plan, complete with deadlines, is especially valuable in cases involving the rights of 'poorest of the poor,' who must make the most of rare and costly opportunities to litigate. After court approval, a final order (integrating the government plan and any court ordered amendments) is issued. Following this fifth step, the government's failure to adhere to its plan (or any associated requirements) essentially amount[s] to contempt of court. In essence, structural interdicts (also known as supervised interdicts) require the violator to rectify the breach of fundamental rights under court supervision. Structural interdicts also provide significant advantages for the political branches. The very process of formulating and presenting a plan to the courts can improve government accountability, helping officials identify which organ or department of the State is responsible for providing particular services or for ensuring access to specific rights. In addition, structural interdicts have contributed to a better understanding on the part of public authorities of their constitutional legal obligations in particular areas, whilst also assisting the judiciary in gaining a valuable insight in the difficulties that these authorities encounter in their efforts to comply with their duties. The "check in" hearings that follow the initial interdict facilitate information sharing between qualified experts and government officials grappling with critical policy decisions and may clarify the content the rights at stake. In addition, structural interdicts may help authorities comply with otherwise politically unpopular constitutional obligations. An explicit court order to satisfy constitutional obligations can support government officials against pressure from small but politically powerful interest groups opposed to certain rights. Finally structural interdicts may provide a more fundamentally fair outcome than other remedies in Economic and Social Rights litigation. By requiring the responsible government officials to formulate a plan designed to operationalise the right in general, rather than just to remedy an individual violation thereof, structural interdicts can provide relief to all members of a similarly situated class, whether or not any given individual has the resources to litigate his or her own case. As such, structural interdicts do not privilege those who can afford to litigate over those who cannot, and can prevent "queue jumping" in access to Economic and Social Rights.

145. Another remedy is the suspension of invalidity of legislation. Such orders are generally granted where the matters in question are complex or where a declaration of invalidity would disrupt law enforcement processes. The Constitutional Court of South Africa in **Minister for Transport & Another vs. Anele Mvumvu & Others [2-12] ZACC 20,** expressed itself as follows:

"Section 172(1) of the Constitution empowers this Court to make a just and equitable order,

following a declaration that legislation is invalid for being inconsistent with the Constitution. In the context of this section, a just and equitable remedy includes an order suspending the declaration of invalidity for a period determined by the court. The operation of the invalidity order is suspended so as to allow Parliament to cure the defect. But sometimes it occurs, as is the position here, that Parliament is unable to correct the defect before the period of suspension lapses….When Parliament fails to cure the defect during the suspension period, it becomes necessary to request the Court to extend the period of suspension in order to prevent the coming into operation of the order of invalidity. However, the request must be made and the decision to extend must come before the suspension expires as an expired one cannot be extended, nor can it be revived"

146. Similarly, **Sachs, J** in **Doctors for Life International vs. The Speaker of the National Assembly and Others [2006] ZACC 11** dealing with the suspension of invalidity held:

"On the facts of this case I accordingly agree with the orders of invalidation made by Ngcobo J, subject to the terms of suspension he provides for. In doing so I do not find it necessary to come to a final conclusion on the question of whether any failure to comply with the constitutional duty to involve the public in the legislative process, must automatically and invariably invalidate all legislation that emerges from that process. It might well be that once it has been established that the legislative conduct was unreasonable in relation to public involvement, all the fruit of that process must be discarded as fatally tainted. Categorical reasoning might be unavoidable. Yet the present matter does not, in my view, require us to make a final determination on that score.....New jurisprudential ground is being tilled. Both the principle of separation (and intertwining) of powers in our Constitution, and the notions underlying participatory democracy, alert one to the need for a measured and appropriate judicial response. I would prefer to leave the way open for incremental evolution on a case by case in future. The touchstone, I believe, must be the extent to which constitutional values and objectives are implicated. I fear that the virtues of participatory democracy risk being undermined if the result of automatic invalidation is that relatively minor breaches of the duty to facilitate public involvement produce a manifestly disproportionate impact on the legislative process. Hence my caution at this stage. In law as in mechanics, it is never appropriate to use a steam-roller to crack a nut."

147. In this case the decision I have arrived at hereinabove may lead to serious repercussions in terms of decisions made by the Council in respect of legal education in this Country some of which may well be beneficial to the said sector.

148. Therefore where there are minor breaches which can be remedied, it would be appropriate that the principle of proportionality be adopted so as to give the relevant authorities a chance to remedy the defects rather than to invalidate the whole enactment and thereby deprive the society of some useful decisions made by the authority concerned. As was recognised by **Ojwang, J** (as he then was) in Nairobi Misc. Civil Case (Judicial Review) No. 109 of 2004 – **Republic vs. The Minister for Transport & Communications & Others ex parte Gabriel Limion Kaurai & Another** held:

"the Court, in coming to its decision, must strike a balance between the two scenarios described above – the public yearning for an effective, humane and civilised passenger transport sector, and the juridical imperatives of compliance with the law as it has been enacted. Such an attempt to find a balance will show that there are no cut and dried borderlines between the social purpose, on the one side, and the sacrosanct law, on the other. Social purposes are more dynamic, sometimes feeding into the domain of legal norms, and their earning acceptance and sanctification by the jurist; but sometimes not getting quite there, and so remaining pre-legal, even though they still represent part of normal human venture and endeavours towards improved quality of life."

149. I reiterate this Court's position in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 others [2014] eKLR** where it held that:

"...it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. What comes out from the material presented is that the physical custody of the goods in question is with the 2nd Respondent. To grant the orders against the other Respondents would be an exercise in vain. Such an order would not be efficacious. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised, even if merited. The would refuse to grant judicial review remedy when it is nolonger necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. See Republic vs. Judicial Service Commission ex partePareno [2004] 1 KLR 203-209, Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000 and Halsbury's Laws of England 4th Edition Vol. II page 805 paragraph 1508.'

150. Therefore whereas it is my view that the Council ought to have been reconstituted immediately this Court will make appropriate orders as mandated by the Constitution.

152. In this case apart from the order of certiorari seeking to quash the impugned decisions, the Applicant also seeks an order prohibiting the Respondent from purporting to carry out inspections of the University's Law School. As I have stated hereinabove there is no problem with the Respondent's power to *set and enforce standards relating to the accreditation of legal education providers for the purposes of licensing.* For that purpose the Respondent is empowered to carry out regular visits and inspections of legal education providers. It is therefore my view that there is nothing wrong with the Respondent carrying out inspection of the Law Schools with a view to performing their statutory duties which duties do not however encompass the accreditation or withdrawal of accreditation of universities. My view in respect of this matter is informed by the position adopted in ***Halsbury's Laws of England, 4th edition, Butterworths 1995, Vol 44(1),*** Para 1484 to the effect that:

"It is one of the linguistic canons applicable to the construction of legislation that an Act is to be read as a whole, so that an enactment within it is to be treated not as standing alone but as falling to be interpreted in its context as part of the Act. The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act is by implication modified by another provision elsewhere in the Act…"

152. In **Amalgamated Society of Engineers vs. Adelaide Steamship (1920) 28 CLR 129 at 161-2 Higgins J** rightly observed thus:

"The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we consider the result to be inconvenient or impolitic or improbable."

153. Whereas both the ***Legal Education Act*** and the ***Universities Act*** confer upon the Respondent and the Commission the power to ***carry out regular visits and inspections of legal education providers*** and ***inspect university programme in Kenya,*** I am not prepared to invoke the doctrine of implied repeal in order to declare one such power redundant. In my view this is a case which falls squarely within the proposition in the Uganda Supreme Court decision of **Attorney General vs. Silver Springs Hotel Ltd**

and Others SCCA No. 1 of 1989 that:

> **"...unless the earlier Act and the later one are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied. It is well settled that the court does not construe a later Act as repealing an earlier one unless it is impossible to make the two Acts or the two sections of the Acts stand together i.e. if the section of the later Act can only be given a sensible meaning if it is treated as impliedly repealing the section of the earlier Act."**

154. This position reflects the reasoning in **United States vs. Borden Co 308 US 188, (1939)** that:

> **"It is a cardinal principle of construction that repeals by implication are not favoured. When there are two acts upon the same subject, the rule is to give effect to both if possible. The intention of the legislature to repeal 'must be clear and manifest'. It is not sufficient as was said by Mr. Justice Story in *Wood v. United States*, 16 Pet. 342, 362, 363, 'to establish that subsequent laws cover some or even all the cases provided for by (the prior act); for they may be merely affirmative, or cumulative, or auxiliary'. There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, *pro tanto*, to the extent of the repugnancy'..."**

155. Therefore you cannot have two concurrent centres of power with respect to accreditation of universities, I do not seen any reason why the Respondent and the Commission cannot carry out inspection of the legal education providers and universities respectively for the purposes of their distinctive roles. In other words their respective powers of inspection can still stand together.

156. In carrying out its mandate the Respondent is empowered to do so in conjunction with the Commission or other bodies specified under the ***Legal Education Act***. Where the Respondent is however of the view that a Law School ought to be or not accredited, it can only make appropriate recommendations to the Commission which in its own right has the power to inspect the universities.

Order

157. Having considered this Application I grant the following orders:

1. **An order of certiorari removing into this Court for purpose of quashing the decision of the respondent contained in the letter dated 7th January, 2016 purporting to order the Applicant to suspend admission of students into its law campus.**
2. **An order prohibiting the Respondent from unilaterally accrediting or otherwise the Applicant or purporting to withdraw its accreditation.**
3. **The declaration of the illegality in the constitution of the Council is however suspended for a period of 60 days to facilitate the proper reconstitution of the said Council. At the expiry of the said period the said Council shall be deemed to be illegally in office.**
4. **Taking into account the public interest involved in the matters raised herein which transcended the interests of the parties to these proceedings, there will be no order as to costs.**

158. Orders accordingly.

Dated at Nairobi this 4th day of April, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kiragu Kimani for the Applicant

Mr Marabu for Mr Bwire for the Respondent

Miss Awuor for the Interested Party

Cc Mutisya