REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO.377 OF 2015

CONSOLIDATED WITH PETITION NOS. 472 & 480 OF 2015 AND JR NO. 392 OF 2015

BETWEEN

NABULIME MIRIAM & 16 ORS…....….....1ST PETITIONERS/APPLICANTS

STEVE NYAEGA AENCHA.....….....2ND PETITIONER/APPLICANT

ANGELA OGANG …….....….....3RD PETITIONERS/APPLICANTS

OLANG'O OMONDI & 20 ORS…….....4TH PETITIONERS/APPLICANTS

NG'ETICH KIPRONO TIMOTHY & ORS.....5TH PETITIONERS/APPLICANTS

VERSUS

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

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

RIARA UNIVERSITY.....3RD RESPONDENT

THE COMMISSION FOR UNIVERSITY EDUCATION.....4TH RESPONDENT

ATTORNEY GENERAL ……...5TH RESPONDENT

CABINET SECRETARY FOR EDUCATION…….....…6TH RESPONDENT

JUDGEMENT

Introduction

1. The 1st Petitioners herein describe themselves as adults of sound mind and disposition, and are students at the **Kenya School of Law** for **Advocates Training Programme (hereinafter referred to as "the ATP")** and prospective candidates for the November, 2015 Bar Examination.

2. The 1st Respondent; The Council of Legal Education (hereinafter referred to as "the Council"), is described as a body corporate established under the ***Council of Legal Education Act, 2012*** Laws of Kenya, whose mandate *inter alia* is to administer Bar Examination for purposes of section 13 of the ***Advocates Act*** (Cap. 16) Laws of Kenya.

3. The 2nd Respondent, **The Kenya School of Law** (hereinafter referred to as "the School"), is described as a body corporate established under the ***Kenya School of Law Act*** (No. 26 of 2012) Laws of Kenya, whose mandate *inter alia* is to admit qualified persons to the school and prepare them for the Bar Examination.

4. The 3rd Respondent, **Riara University** (hereinafter referred as "the University") is described as a private licensed legal provider under the meaning of the ***Legal Education Act, 2012***.

5. The 4th Respondent, the **Commission for Universities Education** (hereinafter referred to as "the Commission") is described as a public body created under the ***Universities Act,*** (Cap. 211) Laws of Kenya whose mandate *inter alia* is to charter universities in Kenya.

6. The 5th Respondent, the **Attorney General** (hereinafter referred to as "the AG"), is the Principal Legal Adviser to the Government of the Republic of Kenya.

7. The 6th Respondent, **the Cabinet Secretary, Ministry of Education Science and Technology** (hereinafter referred to as "the CS"), is in charge of *inter alia* of all education matters in Kenya.

Petitioners' Case

8. According to the Petitioners, they were *bona fide* students of the School having been admitted as such, issued with students' identification cards**,** Admission Numbers and studied successfully for full period of study for the Advocates Training Programme (ATP) for the academic year 2015/2016 and having satisfied all the requirements pending sitting of their Bar Examination.

9. On 23rd September, 2015 when the Council placed an advert in the local dailies requiring *inter alia* all candidates currently at the School and those who had re-sit to apply for registration for the November, 2015 Bar Examination and like all other eligible candidates, the Petitioners contended that they submitted their application vide forms in the prescribed form within the prescribed time frame.

10. It was however their contention that the Council, without granting them an opportunity to be heard rejected their application for registration to sit for the bar examinations leading to admission to the Roll of Advocates for no apparent reason despite being graduands and holders of Bachelor of Laws degree from various universities including but not limited to **University of Dar Es Salaam-Tanzania(UD), Makerere University-Uganda (MUK), The Catholic University of Eastern Africa-Kenya (CUEA), Uganda Pentecostal University-Uganda (UPU), Uganda Christian University Mukono-Uganda (UCU)** and **Islamic University of Uganda (IUIU), University of Essex**, a qualification upon which their admission to the School for **ATP,** within the meaning of sections 16 and 17 of the ***Kenya School of Law Act, 2012*** was premised and as such, they belong to the class of persons for whose benefit the Act anticipates as well as the ***Legal education Act, 2012***.

11. As the affected students the Petitioners tried to inquire from Kenya school of law about their status in regard to sitting for the forthcoming Examinations and enjoyment of all the rights in regard to all the activities on the Kenya school of law calendar for the Academic year 2015/2016. Pursuant thereto, on 26th October 2015, Kenya School of Law, with great concern, wrote to the council of Legal Education copying to the concerned students indicating their position that the school recognizes all admitted and registered students of Kenya school of Law as eligible to sit for the final Examinations and enjoy all the rights accruing as result of being admitted and registered as Kenya school of law students.

12. The Petitioners averred that they had successfully completed their project work and sat for oral

examinations of which they received their respective marks and also attended the requisite tutorials and as such nothing could deprive them of the right to sit for the said bar examinations.

13. To the Petitioners, the Council by its decisions rejecting or failing to consider the said Applications to sit for the bar examination was arrived at without observing the principles of natural justice in that:-

i. It failed to give them sufficient or any reasonable notice of the proceedings (if any) before rejecting or failing to consider their applications for registration of the bar examination.
ii. It failed to give them a fair opportunity to present their cases to enable them correct or contradict any relevant statements and/or allegations prejudicial in their view.
iii. It failed to avail to them and/or show them and/or apply any evidence, whether written or oral in support of the allegation made prior to making its decision to reject or decline to consider their applications to sit for the bar examination.
iv. It made and reached a decision unilaterally leading to the rejection and or failure to consider the said applications which decision was merely rubber stamped.

14. It was the Petitioners' case that the Council by its decision purported to seize the duties of the School hence acted *ultra-vires* as to the law governing the Petitioners' admission for **ATP** under the ***Kenya School of Law Act*** and as provided under sections 7, 10, 16 and 17 in arriving at the decision to reject and or fail to consider the Petitioners' applications for registration to sit the Bar Examination and in particular failed to take cognizance that the Petitioners had completed their tutorials, done their project work and oral examination from the School as stipulated under section 22(1) (c) of the ***Legal Education Act, 2012*** and that the Council further acted without following the prescribe procedure therein.

15. To the Petitioners, the actions of the Council were in abuse of power and with improper motive in its decision to condemn them on non-existent allegations and rejecting and or failing to consider their said applications in that the Council acted without substantive fairness and irrationally and without regard to the principles applicable in its decision making process. To them the same were outrageous and were mere unwarranted allegations arrived at without any evidence to in support thereof.

16. It was contended further that the said actions and decisions were in breach of the principle of proportionality and in particular, failed to strike a fair balance between their adverse effects and their impact upon the Petitioners vis-à-vis the decision. Apart from that it was averred that the same amounted to a breach of the duty to act in good faith in the Petitioners' interest in that the Council failed to produce any evidence pursuant to its decision prior to rejecting and or failing to consider my the said applications and also acted with *malafide*. To the Petitioners, the said actions violated the legal principle of legitimate expectation**,** that, the Petitioners like every other student who completes his or her tutorials from the School for ATP and satisfies the requirements for sitting for the Bar Examination had the legitimate expectations that the Council would exercise his powers lawfully, adhere to national values and principles of governance pursuant to Article 10 of the Constitution of Kenya in arriving at its decision and would in doing so also adhere to fairness and all other known principles of law and honour its expected obligations and duty to that effect. Further they had legitimate expectations of registering and sitting for their bar examination leading to admission to the Roll of Advocates, when they were admitted in by the School pursuant to the ***Kenya School of Law Act, 2012***.

17. The Petitioners accused the Council of being in cahoots with the Riara University in defrauding unsuspecting members of the public and in particular the prospective ATP students to the School and creating a cartel amongst themselves to advance their illegal actions, which actions they desire to actuate further by forcing the Petitioners to study for a bogus Remedial Programme to qualify to sit for the Bar Examination. The Petitioners disclosed that decision as contained in the rejection letter read partly as follows:

> ***"while the council of legal education will give you credit for the Advocates Training Programme at the Kenya School of Law, your LL.B degree does not satisfy the threshold for recognition under part II of the Second Schedule to the Legal Education Act No. 27 of 2012. As such, you will be required to take the remedial programme currently offered at Riara University***

to meet the recognition criteria under the Legal Education Act.

You will be required to study the following under the Remedial Programme to qualify to sit the Bar Examination."

18. According to the Petitioners, there is no provision in either the **Legal Education Act, 2015** or under the **Kenya School of Law Act, 2012** or **The Universities Act, 2012**, that requires any candidate prior to sitting for the Bar Examination to sit and or be admitted and or enrol and study for any remedial course or programme to any institution. It was disclosed that **Riara University** charges to a tune and in excess of Kenya Shillings Seventy Five Thousand (Kshs. 75, 000/-) per core course, specified under the Second Schedule of the **Legal Education Act, 2012**, which course can be studied in any other public and or private universities in Kenya or elsewhere, in line with the provisions of section 23 of the Act, which section of the law invites no magic to interpret and to understand that no legal provider requires any special authorization, clearance or accreditation for any remedial programme. While not speculating on the interest of the 1st and 2nd Respondents to refer them to the said University, the Petitioners contended that the said arrangement was laced with illegality and in the premises negated the spirit of the Constitution of Kenya espoused under Article 27 in nature and substance.

19. According to the Petitioners, the Council owed them concrete, valid and rational reasons for the rejection and or failure to consider their applications for registration to sit the November, 2015, Bar Examination, not withstanding having satisfactorily met all criterion as pertains and in preparation of the examination in compliance with the law. They further accused the Commission of University Education, of having failed in its duty as provided under the law and more particularly as provided under section 5 of the **Universities Act, 2012** and averred that the law that usurps the mandate of the 4th Respondent is devoid of legal effect. To the Petitioners, the authority to grant a University Charter or an Interim Letter of Authority lies with the Commission and as such it would be illegal for any other body which cannot on its own grant either of this two instruments to purport to accredit any course of study, for the obvious reason that if a charter of an interim letter of authority is withdrawn by the Commission the position of the other body and in the case of the Council is put at a precarious position.

20. According to the Petitioners, the Council has always exercised its function under section 8 of the **Legal Education Act, 2012**, and although the Act does not make any reference to the **Universities Act, 2012** and vice versa or the Commission, the mess in which they found themselves in was as a result of competing interest in the law and hence the need for intervention by this Court.

21. The Cabinet Secretary, on the other hand was blamed for having blatantly failed in its duty to bring sanity in the education system in Kenya and as pertains bodies dealing with professionals; in particular the between the Council, who has brought disgrace to the country at large and the Commission.

22. According to the Petitioners:

a. Whereas Courts of law in Kenya are very loath to interfere with decisions of domestic bodies and tribunal, and have no desire to run such institutions or indeed any other body, they will however interfere to quash decisions of public body or public official when they are moved to do so where it is manifest that the decisions have been made without fairly and justly hearing the person concerned or the other side.
b. It is the duty of the Court to curb excesses of officials and bodies which exercise administrative authority. I verily believe that my case herein merits and calls for such intervention hence my application herein.

23. The Petitioners further averred that although their admission numbers appeared in the documents exhibited herein, which annextures constitute 40% marks of the final Bar Examination, for each of the ex-parte Applicant, the same was not reflected on the list released as at 29th October, 2015 by the Council for purposes of sitting for the remainder, being 60% to make the total aggregate 100%. As such by the decision contained in various letters dated 22nd October, 2015 and constructively by omission of their names, they were discriminately barred from sitting for the said final examination.

24. The Petitioners reiterated that the decision by the respondents was unfair, discriminative and oppressive to the petitioners, bearing in mind that they were duly qualified and in possession of all the documents required from a law graduate and to be a bona fide student of Kenya School of Law. They had also been incurring substantial accommodation expenses at an average of Kshs 15,000 and travelling expenses at an average of Kshs. 350.00 per day from their respective residences to Karen as they cannot afford renting the expensive houses in Karen or Langata area, some commute as far as Thika road where they have to commute every day to Kenya School of Law for Studies.

25. The Petitioner were emphatic that in arriving at the decision to stop them from sitting for the November examinations, they were denied the right to a fair hearing and fair administrative action as they were not given an opportunity to appear before the Council to explain why they were being denied the chance to be heard and coming up with a decision stopping them from sitting for the November examinations was in breach of the Constitutional threshold required of administrative bodies and discriminatory in nature as some students were issued with letters allowing them to sit for the November examinations while the petitioners were issued with letters denying them the opportunity to sit for the exams.

26. It was the Petitioners' case that any decision made in breach of the rules of natural justice are ***ultra-vires***, irregular, null or void *ab initio* and are amenable to Judicial Review jurisdiction of this Honourable Court and ought to be removed for purposes of being quashed. In this instance the Petitioners contended that the Council's decision to reject or not to consider their applications to sit for November, 2015 Bar Examination and any other issue arising therefrom is a nullity and devoid of legal effect.

27. The Petitioners therefore prayed for the following orders:

1. **An order of certiorari to remove into this Honourable Court and quash the decision of the Council of Legal Education contained in its letter dated 22nd October, 2015 directing the Applicant to undertake the Remedial Programme at the Riara University.**
2. **An order of prohibition, prohibiting the Respondents from barring the Petitioner's from registration, attending and participating in the Advocates Training Programme Examination for the academic year 2015/2016 with the 1st Respondent forthwith.**
3. **An order of mandamus, compelling the 2nd Respondent to register the Petitioners for their Advocate Training Programme Examination for the Academic Year 2015/2016 with the 1st Respondent forthwith.**
4. **An order of mandamus, compelling the Respondents to issue Examination Cards/pass to the Petitioner's for Advocate Training Programme Examination for the Academic Year 2015/2016 admission thereto, registration and allocation of examination centres as to enable them sit for their studies for the Advocate Training Programme Examinations for the academic year 2015/2016 with the 1st Respondent forthwith.**
5. **A Declaration that the Petitioners' rights under Article 47 of the Constitution have been infringed and threatened with violation by the 1st and 2nd Respondents and that in the discharge of its statutory mandate the 2nd Respondent cannot act in a manner that that infringes, violates or denies the Petitioner its right to freedom of Education and fair Administrative Action.**
6. ***A Determination on who has the legal mandate as between the Kenya school of Law and the Council for Legal Education, to determine the qualification for Admission, registration of Applicants to the Kenya school of Law.***
7. ***A Determination on who has the legal mandate as between Kenya School of Law, and the Council for Legal Education, to set, supervise or mark Advocate Training Programme examinations.***
8. ***A Declaration order do issue staying the implementation of the letters dated 22nd October 2015 issued by the 1st and 2nd Respondents that the Petitioners be estopped from doing their final examinations and locking them out of the learning facilities and sitting any examinations.***
9. ***A Declaration that the 1st and 2nd Respondents' decision to send the petitioner's to Riara University is illegal, unconstitutional and null and void.***

10. ***An order directing the 1st, 2nd and 3rd Respondents to allow the Petitioners to continue with their academic studies for the Academic year 2015/2016 at the Kenya School of Law.***
11. ***A Declaration order do issue directing the 1st and 2nd Respondents to issue Examination clearance letters and Cards (by which ever name they call them) and allocation of Examination Centre's to the petitioners for the Advocates Training Programme for the Academic year 2015/2016.***
12. ***A Declaration that in passing a decision barring the petitioner's from sitting for the forthcoming Advocates Training Programme Examinations was illegally constituted and therefore they cannot pass and make any legal decision.***
13. ***A Declaration do issue directing the 1st and2nd Respondents to provide all information and criteria, minutes (if any) used in issuing letters of clearance to some students to sit for the ATP final examinations for the Academic year 2015/2016.***
14. ***A declaration that the petitioner's right to Fair Administrative Action were violated by the Respondents.***
15. ***An order does issue Declaring the entire process of Registration for the ATP Examination and issuance of Examination cards for the Academic year 2015/2016 or otherwise the entire process of clearance and registration be declared null and void for being discriminative and not adhering to the well-known principles of natural justice.***
16. ***Injunctive orders be granted against the Respondents from interfering, harassing the Petitioner's herein in any manner whatsoever.***
17. ***A declaration that the Respondents issuance of letters allowing some students to sit for the final examinations and denying the petitioners clearance and barring them from sitting for the same examinations as being discriminative and therefore unconstitutional.***
18. ***A declaration that the Petitioners are bona fide students of the Kenya School of law and therefore be accorded same treatment like other students by allowing them to enjoy and participate in all the activities at the Kenya School of Law calendar including sitting for the final written examinations offered by the Kenya School of Law.***
19. ***A Declaration that the Appointment of 2nd Respondent into the 1st Respondent's office did not meet the constitutional threshold as the criteria of Appointment of a public officer was not followed and therefore he cannot purport to make any decision as the Secretary/Chief Executive officer of the 1st Respondent and in the circumstance his office be declared Vacant.***
20. ***Exemplary Damages and costs of and incidental to this Suit.***
21. ***Any further reliefs that this Honourable Court deems fit in the interests of justice to grant.***

Petitioners' Submissions

28. The Petitioners submitted that whether motivated by the noble goal of achieving excellence in legal education or egos of their officials, two statutory bodies, the Council of Legal Education and the Kenya School of Law are feuding as each seeks to carve out its space within the relevant legislative landscape and stamp its authority. This battle for supremacy is coming at the expense of hapless students navigating at great expense (not just financially), the maze they have to pass through to qualify as Advocates of this Honourable Court. Contrary to its protestations playing the victim card of a hapless statutory body determined to enforce unpopular statute, the CLE is engaged in huge ego-trip that has nothing to do with ensuring excellence in legal education.

29. The Petitioners lamented that it should not have come to this had both the 1st and 2nd Respondents been willing to harmoniously and constructively work together. Unfortunately, no one who has read the ***Kenya School of Law Act, 2012*** ("the KSL Act") and the ***Legal Education Act, 2012*** ("the LEA") is struck by its lucidity especially with respect to the implementation of some of their provisions. At the heart of the dispute before this Court, according to the Petitioners, is the interplay between section 16 of the ***KSL Act*** which specifies the minimum course requirements of an undergraduate degree to qualify for admission to the Advocates Training Programme ("ATP") and section 23 of the ***LEA*** setting out the minimum requirements of an LLB programme to be provided by a licensed education provider. Initially, the Council and the School were working together on admissions to the ATPs but the promise of any further continued co-operation fizzled as a state of open warfare developed between them. While the Petitioners submitted that they were unaware of the exact cause of these indefensible hostilities, which to

them are not capable of rational explanation, they were however of the view that the same had caused collateral damage- the careers of the Petitioners and their fellow students. Students who have already been cleared for admission to the ATPs by the School upon fulfilling certain conditions and have complied, were now being required by the Council (and without notice, hearing or reasoned explanation) for a do over of qualification for admission as a pre-condition to sitting the formal written exams.

30. According to the Petitioners, the Council's decision violated Article 47 of the Constitution as read with the provisions of section 4(3)(a) of the ***Fair Administrative Action Act***, 2015. They contended that The CLE further failed to invite them to make representations with respect thereto before rejecting their applications for registration as required by section 4(3)(a) of the ***Fair Administrative Act, 2015***. The Petitioners asserted that the Council's actions were neither expeditious, lawful, reasonable nor procedurally fair but in violation of their rights under Article 47(1) of the Constitution when it failed to give the Petitioners any or any sufficient reasons for its decision. In this respect the Petitioners referred to **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR**.

31. It was submitted that the joint notice upon which the School and the Council invited applications to the ATP did not include any requirement for separate registration with the Council for a student to sit for the ATP examinations. In addition, the Council failed to take into account the fact that the Petitioners had already been admitted to the Kenya School of Law for the ATP and that they had fulfilled all the course requirements. To cap it all, the Council also failed to take into account the fact that they had already undertaken the oral examinations as well as the project work and the Council itself awarded them marks for the oral project. The Petitioners supported their submissions vide **Republic vs. Attorney General & Another Ex-parte Salome Nyambura Nyagah [2014] eKLR** in which the Court found expressed itself thus:

"In my view fair administrative action imports the rules of natural justice. To fail to adhere to the rules of natural justice may render an administrative action procedurally improper and procedural impropriety is no doubt one of the grounds for grant of judicial review remedies. In Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, the Court while citing Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2 and An Application by Bukoba Gymkhana Club [1963] EA 478 at 479 held: '…Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.'"

32. It was contended that there is no requirement in any of the relevant legislation i.e. the **Legal Education Act, 2012** or any regulations made thereunder, for registration with the Council after a student has already been admitted into the ATP, in order to sit for the written examinations nor is there any provision for the Council to conduct a post hoc review of whether a candidate met the minimum requirements stipulated in the Second Schedule of ***KSL Act*** as whether as a pre-condition to sitting exams or at all.

33. To the Petitioners, the general function of the School under section 4(1) is that "the School shall be a public legal education provider responsible for the provision of professional legal training as an agent of the Government"- and that one of its specific objects as per section 4(2)(a) "is to train persons to be advocates under the Advocates Act" i.e. the Advocates Training Programme. By section 16 of the ***KSL Act*** "a person shall not qualify for admission to a course of study at the School, unless that person has met the admission requirements, set out in the Second Schedule for that course.

34. It was contended that under section 17(1) of the KSL Act, applications for admission to the Advocates Training Programme are made to the KSL which by section 17(2) shall consider an application submitted under paragraph (1) and if satisfied that the applicant meets the admission criteria, admit the Applicant. To the Petitioners therefore provision of training for admission into the roll of advocates is provided by

the School and the criterion for such admission is set out in the Second Schedule. Application is to be made to the KSL which admits the applicant if it is satisfied that the criteria has been met. In short, the responsibility to enforce the second schedule to the ***KSL Act*** is vested exclusively to the School and no power has been donated to the Council to enforce it or review its enforcement. It was therefore contended that in light of these statutory provisions it is difficult to understand how on matters which are clearly within the exclusive jurisdiction of the School, the Council can essentially purport to constitute itself as a self-appointed appellate Tribunal and arrogate to itself the power to review the decisions of the School as to whether a student has fulfilled the core course requirement for admission to the School as per section 16 of the ***KSL Act, 2012,*** as read with the Second Schedule. To the Petitioners, the Council has no role to play.

35. This Court was therefore urged, based on **Edwards (Inspector of Taxes) vs. Bairstow and Another [1955] 3 All ER 48** at pages 53 and 57 to intervene in these circumstances as it is wholly within the jurisdiction of this Honourable Court in the exercise of its supervisory jurisdiction to authoritatively interpret the relevant statutory provisions and quash a decision of a statutory body which is contrary to and inconsistent with such interpretation. The Petitioners further relied on the decision of **Lord Diplock** in **Council of Civil Servant Unions vs. Minister for the Civil Service, [1984] 3 All ER 935, 950-951** where it was held that illegality as a ground for judicial review mean that the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it and that whether he has or not, is par excellence a justiciable question to be decided, in the event of dispute, by those persons, by whom the judicial power of the state is exercisable. The Petitioners also submitted that error of law by a public body is a good ground for judicial review and relied on **Lord Scarman's** decision in **R vs. Barnet London Borough Council ex p Nilish Shah [1983] 1 All ER 226, 240, HL** that:

"It is now settled law that an administrative or executive authority entrusted with the exercise of a discretion must properly direct itself properly in the law."

36. The Petitioners reiterated that in their joint notice setting out the admission criteria that would be used with respect to applications for admission into the Advocates Training Programme for the 2014/2015 academic year, there was no requirement and/or statutory provision whether in the ***CLE Act***, the Regulations which have been made thereunder or at all for the Council to undertake the same exercise of reviewing whether or not a student qualified for admission to the ATP under the guise of application for registration for examination. Whereas the 1st Respondent sought to justify its action by dint of the provisions of section 8(1) (f) of the ***CLE Act***, it was contended by the Petitioners that the said provision which was introduced by the ***Statute Law (Miscellaneous) Amendments, 2014***, merely extended the functions of the CLE to include "*administer such examinations as may be prescribed under section 13 of the Advocates Act,* but did not empower the Council to constitute itself as an review as to whether or not a student was properly admitted into the ATP. Based on the said notice, the Petitioners contended that they paid for all the fees including the examinations fees, attended all the classes, sat for the oral exams and undertook the project work, they would be entitled to sit for the written examinations.

37. It was however submitted that not only did the Council introduce the requirement for registration post-admission of the Petitioners to the ATP but rejected their applications for failure to comply with the Second Schedule of the ***KSL Act*** referring them to Riara University, the same institution which had written to the Council confirming that one of the Petitioners, **Ms. Ogang**, had undertaken sufficient remediation which conformation the Council never protested nor questioned. The Petitioners therefore contended that the Council violated their legitimate expectations and cited **Republic vs. Commissioner of Domestic Taxes and another, ex-parte Kenton College Trust [2013] eKLR**.

38. With respect to irrationality and abuse of power it was submitted that the impugned actions and decisions of the Council were and are arbitrary, irrational and constitute an abuse of powers. Firstly, the requirement for registration was introduced capriciously well after the 3rd Applicant had been admitted into the ATP about five to six weeks before the written examinations were scheduled to be taken without regard to requirements of the joint notice published in the newspapers or specifying the criteria which the CLE would apply in reviewing applications for registration. In addition, the decisions on whether or not an application was successful were communicated to the Petitioners, barely two weeks before the

examinations were scheduled to take place with the effect that they barely had adequate time to challenge the decision hence their preparations for the said exams were severely disrupted by both the need to mount a challenge as well as the anxiety whether or not they would sit for examinations.

39. Based on the ***Pastoli Case***, it was submitted that the impugned acts of the Council were grossly irrational as well as a gross abuse of power and should be quashed. It was submitted that the Council acted without legal authority in purporting to require students who have already been admitted to the ATP to once again undergo the process of a review of conformity of their degrees with the Second Schedule of the ***KSL Act***. The Council has gone rogue and your Lordship has the responsibility and duty to rein it in by granting relief as sought by the 3rd Applicant. It was contended that the Council was insistently nibbling away the rights of students who had been properly admitted to and completed the ATP and should be stopped in its tracks.

40. It was submitted on behalf of the Petitioners that the admission to the School is preserved under sections 16 and 17 of Part III of the ***Kenya School of Law*** (Act No. 26 of 2012) Laws of Kenya.

41. It was submitted by the Petitioners that by permitting other students who were admitted with the Petitioners to sit the Bar Exams while declining to allow the Petitioners to do so, the Council violated the Petitioner's freedom against discrimination as enshrined in Article 27 of the Constitution. In support of this submission the Petitioners relied on **Griggs vs. Duke Power Company 1971 401 US 424 91.**

42. It was submitted that the Council discriminated in its process of clearing students of Kenya School of Law to sit for the final examinations since all the students who studied from outside Kenya whose academic credentials were thoroughly scrutinized, verified and found the petitioners meeting all the requirements of joining Kenya school of Law the 2nd Respondent herein before admission, were denied clearance to sit for their final examinations by the 1st Respondent. According to the Petitioners, some students from the Locally based Universities whose transcripts do not have the required Cause unites were cleared by the Council of Legal education to sit for their Kenya School of Law final examinations and indeed all the Local based universities do not offer Hire purchase, partnership, Law of Agency as independent cause units but offer them under commercial law or business Associations whatever name it is referred to by the respective universities. To the Petitioners, the 1st Respondent would have stopped the Petitioners from joining the School before admission if they thought they did not qualify to join or deregister them early enough but not to deregister them with two weeks left to sit for the final examinations, after they had already paid all the school fees, sat for two examinations namely oral examinations and project works which examinations were supervised by the Council of Legal Education the 1st respondent herein. In the process, the 1st Respondent abused its discretion acted unreasonably and abused its powers for an improper purposes. In support of this submission, the Petitioners relied on **Jacques Charl Hoffmann vs. South African Airways, CCT 17 of 2000** cited in **Centre for Rights Education and Awareness (CREAW) & 7 Others vs. Attorney General [2011] eKLR.**

43. To the petitioners, the Council discriminatively cleared some students to sit for the final examinations and declined to clear the petitioners which acts were contrary to Article 27 and intended to deny the petitioners the right to the enjoyment of the right to education guaranteed by Article 49 and to the acquire the highest levels of education and their legitimate expectation of becoming Advocates of the High Court of Kenya by 2017, which acts were in breach of and fell short of respect of the provisions of Article 47 of the Constitution of Kenya 2010.

44. The Court was further urged to find that the actions of the Council in declining to clear the petitioners to sit for their final examinations without giving them an opportunity to be heard, without consulting the 2nd Respondent institution which admitted them to the Bar Course and without consulting the respective universities which the petitioners attended were not only unconstitutional but were also actions not required of a person or persons holding a public office of the 1st Respondent. According to them, Now it has been well established that the Principles of Natural Justice supplements the enacted statute with necessary implications and accordingly administrative authorities performing public functions are generally required to adopt "fair procedure". A person may also have legitimate expectation of fair

hearing or procedural fairness/treatment. It is only where their observance leads to injustice that they may be disregarded. The Petitioners relied on **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **Republic vs. The Honourable The Chief Justice of Kenya & Others Ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004, Msagha vs. Chief Justice & 7 Others Nairobi HCMCA No. 1062 of 2004 [2006] 2 KLR 553** and **Republic v Kenya School of Law & 2 Others Ex-parte Juliet Wanjiru Njoroge & 5 Others [2014] eKLR.**

45. It was submitted by the Petitioners that students who were legally admitted without any sort of fraud, corruption or other illegal means of admission cannot be discontinued or otherwise be deregistered. They relied on **Republic vs. Kenya School of Law & 2 Others Ex-parte Juliet Wanjiru Njoroge & 5 Others [2014] eKLR**.

46. In that case the Court relied on the decision of **Nyamu, J** (as he then was) in **Kenya Bus Services Ltd & 2 Others vs. Attorney General [2005] 1 KLR 787** where he held that:

> **"The only difference between rights and the restrictions are that the restrictions can be challenged on the grounds of reasonableness, democratic practice, proportionality and the society's values and morals including economic and social conditions etc. whereas rights are to the spiritual, God given, and inalienable and to the non-believers changeless and the eighth wonder of the World."**

47. The Court also relied on **Onyango Oloo vs. Attorney General [1986-1989] EA 456** in which it was held that:

> **"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void *ab initio*."**

48. It was submitted by the petitioners that it is at that hearing that the applicants would have been afforded an opportunity to urge their case whether or not in the circumstances of the case the Respondents were empowered to take the decision they took.

49. The Petitioners cited the relevant provisions under which a student may be precluded from undertaking exams in particular section 19 of the ***Kenya School of Law Act*** and Regulation 7(4) of the ***Council of Legal Education Act (Kenya School of Law) Regulations, 2009*** which provides for circumstances under which a student of Kenya School of Law may be precluded from sitting for the Examinations as follows:

> ***A student shall not be eligible to sit for any examination in any course of study unless that student has -***
>
> ***(a) attended at least two thirds of the lectures offered in that course;***
>
> ***(b) participated in moot courts, clinics and any other practical outputs; and***
>
> ***(c) Undertaken course work and assignments.***

50. The Petitioners therefore submitted that students and persons legally admitted to an institution on merit after meeting the qualifications of joining that institution, without any presence of any fraud, bribery and in the absence of any indiscipline, crimes and being in breach of any of the institutional rules and Regulations cannot be discontinued or otherwise be deregistered especially if such decision was made without giving the affected students an opportunity to be heard.

51. With respect to the functions of the Kenya School of Law the Petitioners relied on section 4 of the ***Kenya School of Law Act*** which provide:

> ***(1) The School shall be a public legal education provider responsible for the provision of professional legal training as an agent of the Government.***
>
> ***(2) Without prejudice to the generality of subsection (1), the object of the School shall be to-***
>
> ***(a) train persons to be advocates under the Advocates***
>
> ***(b) ensure continuing professional development for all cadres of the legal profession;***
>
> ***(c) provide train para-legal training;***
>
> ***(d) provide other specialized training in the legal sector;***
>
> ***(e) develop curricular, training manuals, conduct examinations and confer academic awards; and***
>
> ***(f) undertake projects, research and consultancies.***

52. It was therefore submitted that the mandate to deny students to sit for the exams is within the powers of Kenya School of Law not the Council of Legal Education as the Council is not an agent of the School and therefore not privy to the Admission Agreement between the Petitioners and the School.

53. It was further submitted that the mandate to admit, register, teach, examine, discontinue the students including the Petitioners herein is a sole mandate of the Kenya School of Law and not the Council.

54. According to the Petitioners, when they were admitted and joined the School for their ATP and they were as well offered the project work and the oral examination by the School constituting 40% of the total mark during the course of their studies and on complying with all other incidental requirements thereto for the purposes enabling them sit for their final Bar Examination slated for November, 2015 consisting the reminder of 60% of the final mark thereof, they had legitimate expectation that their applications for registration to sit for the said exam would not be unilaterally rejected or ignored, premised on the facts herein. The Petitioners, it was submitted had acquired some benefits by virtue of having studied for their

ATP course which would ultimately culminate to sitting for their final Bar-Examination and as such the Council could not deprive them that benefit and more so directing them to seeking for admission with Riara University in order to qualify for the said examination, which qualification they had obtained by virtue of their studying in Kenya School of Law.

55. In supporting their submission on this point the Petitioners relied on **Republic vs. Kenya Revenue Authority Ex-Parte Yaya Towers Limited [2008] eKLR**, in which **Nyamu, J** (as he then was) relying on the House of Lords in the case of **Council of Civil Service Unions And Others vs. Minister for the Civil Service [1924] 3 All ER 935** at p. 936.

56. The Petitioners further relied on the decision by **Okong'o, J** in **Republic vs. The District Land Adjudication & Settlement Suba District & Anor. [2013] eKLR** at p. 10 where the learned Judge held tha*t:*

> **"It is not enough that an expectation should exit; it must in addition be legitimate....It is inherent in many of the decisions and express in several that the expectation must be within the powers of the decision maker before any question of protection arises. There are good reasons why this should be so; an official cannot be allowed to rewrite Acts of Parliament by making promises of unlawful conduct or adopting unlawful practice."**

57. Reliance was similarly placed on **Rahab Wanjiru Njuguna vs. Inspector General of Police & Another [2013] eKLR** at p. 4, where this Court citing **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**, held that:

> ***"...the court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant consideration in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations..."***

58. To the Petitioners therefore, the Council's impugned decision cannot be allowed to stand as the same is prejudicial to interests and rights of the Petitioners and their livelihood.

1st Respondent's Case

59. In opposition to the Petitions, it was averred by the Council that each application by each Petitioner in the present consolidated suits was individually considered and dealt with as such and the reasons for each finding was then again individually communicated. To the Council, in all these enterprises, it considered only the law and fairness in procedure.

60. It was the Council's case that the process of admission of students is prescribed in law and particularly the issue of the 16 core courses is a substantive one, mandatory and not capable of any waiver. In its view, the Council is not the agency with the mandate of admitting students to the Kenya School of Law, under the ***Kenya School of Law Act***. Accordingly in the admission process the School does not act as the agent of the Council for the Council is not any such principal and thus incapable of taking over this obligation. Its position that the Council is a regulator who enforces the standards set in law.

61. The Council averred that in admitting students to the School, the School discharges its mandate under the ***Kenya School of Law Act***. This exercise of mandate is however enjoined to be in accordance with the law, failing which it is indictable, by among others, the Council as regulator. The Council asserted that it is by consistent application of the laws in the legal sector that it has been able to ensure uniformity, consistency and fairness in regulation of the legal education sector in Kenya. Its view was therefore that the admitting agency was enjoined to observe the law strictly, particularly the 16 core course content requirement.

62. It was however contended that at no point did the Council resile from the law by advising the School that they could admit any applicant who had done any component of Commercial law, which would be in

contravention of the law.

63. The Council conceded that averred with regard to the averments of oral examinations, it was not in dispute that with amendment of the ***Legal Education Act***, administration of the Bar examinations was vested to the Council but due to capacity issues the Council resolved to use the infrastructure of the School to administer this component of the examinations. It added that the administration of the oral Bar examinations presupposed that the admission requirements to the ATP was in accordance with the law for at this point the Council had not had occasion to study the Petitioners' qualifications.

64. It was therefore contended that the engagement of the School to administer oral Bar Examinations on behalf of the Council was not a concession by the Council that the admission requirements had been cleared. It was the Council's position that its keenness to ensure uniform qualifications for the present applicants is so foremost for attainment of objectives of the ***Legal Education Act***, but more significantly to ensure proper precedent in the sector.

65. According to the Council, if present Petitioners, with the noted deficiencies are allowed to pass through the qualification system, the Council would not be able to demand that the subsequent applicants with similar deficiencies to comply.

1st Respondent's Submissions

66. It was submitted on behalf of the Council that Legal training and qualification in Kenya is regulated by law, through and through, that is to say from obtaining the LLB degree, to admission for the Advocates Training Programme for the Diploma in Law to Petitioning the Chief Justice for admission to the bar. It was submitted the Council of Legal Education, established by provisions of the ***Legal Education Act, 2013*** which at sections 3 and 8 thereof sets out the objectives and functions of the Council in the following terms:

67. It was submitted that by amendment to the ***Legal Education Act, 2012*** operationalised in December 2014 by the ***Statute Miscellaneous Amendment Act, 2014***, section 8(1) (f) was added to the Legal Education Act, with the consequence that all students had to sit the bar examinations administered by the Council. In the Council's view, the Council as intended in the provisions of the ***Legal Education Act***, sections 8 is the apex body with the ultimate responsibility of ensuring compliance with the law by all stakeholders including the Universities and the Kenya School of Law. It was contended that the mandate of the Council is thus specific and very coherent. According to it, as a matter of fact Parliament was very keen in this legislation that it saw it necessary to include section 8(4) in the ***Legal Education Act***, as follows:

> ***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.***

68. According to the Council, this provision mirrors a seriousness that needs to be acknowledged as it places the mandate of the Council in matters of regulation above the Commission of Higher Education hence the Council is not subordinate to the Commission of Higher Education and neither does it require its decisions in legal education regulation to be approved or second guessed by the Commission of High Education. It was contended that it was clear that the Council had never appointed the Kenya School of Law to be its agent, for purposes of legal education regulation hence decisions taken by the Kenya School of Law cannot bind the Council since the decisions taken by the Kenya School of Law, are equally subject to review by the Council as apex regulator.

69. It was therefore asserted that it is grossly incorrect to submit that to the extent that the School had admitted the Petitioners to the Advocates Training Programme, any deficiencies in their qualifications was laundered and beyond question. It was submitted that the Council is the entity with the jurisdiction under section 8(1)(e) of the ***Legal Education Act*** to recognize foreign qualifications for purposes of the admission to the Roll of Advocates.

70. The Council contended that it was never given occasion to inspect the qualifications of the Applicants, and the only occasion that it had that occasion was when it received the Petitioners' applications to sit the bar exams under section 8(1)(f) of the ***Legal Education Act***. According to the Council, it could not close its eyes and approve deficient qualifications because the Applicants had already gained admittance at the School. As the ultimate regulator, it was submitted that while it could not rubbish the education by the Applicants at the School, it still had to demand that the Applicants like anybody else complies with the law. It was added that as the professional body therefore, executing a mandate at law, that has inbuilt mechanisms for fairness, the Council's substantive findings are insulated. While recognising the jurisdiction of the High Court as the Cathedral of Justice to mete justice under Article 23 of the Constitution of Kenya, it contended that this jurisdiction is to be exercised within certain defined and legal frameworks, for rights are defined and limited by law. This submission was based on **Republic vs. The Council of Legal Education Ex-Parte James Njuguna & 14 Others [2007] eKLR,** the Court phased the principle as follows:

> **"It would not be proper or right for the court to veto powers conferred by Parliament on a public authority or body such as the Council of Legal Education and for the court to substitute its own view from that of the Council of Legal Education to which discretion was given except where the discretion has been improperly exercised as enumerated in the ten situations above."**

71. Reliance was similarly placed on the holding in by the Court of Appeal in **Muamar Nabeel Onyango Khan vs. Council of Legal Education & 2 others [2015] eKLR,** and **Eunice Cecilia Mwikali Maema vs. The Council of Legal Education & 2 Others (2013) eKLR**.

72. It was submitted that this Court cannot concern itself with the policy behind the Act and the regulations governing the threshold criteria as long as they are within the scope of the parent Act, in this case the ***Legal Education Act***. To this extent, the Council relied on **Council of Civil Service Unions vs. Minister for The Civil Service [1985] AC 374 HL** where the court held:

> **"But the latter phrase must not in turn be misunderstood or misused. It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show. ."**

73. In its view, the decisions of the Council creative of the present litigation are not out of proportion with the objectives and functions of the Council under the ***Legal Education Act*** hence can neither be said to be unfair or unreasonable or out of proportion. It was submitted that what the Council sought to uniformly enforce is section 16 of the ***Kenya School of Law Act, 2013*** and section 23 of the ***Legal Education Act, 2013***. The said section 16 of the ***Kenya School of Law Act*** was reproduced as follows:

> ***A person shall not qualify for admission to a course of study at the School, unless that person has met the admission requirements, set out in the Second Schedule for that course.***

74. On the other need to apply the same standards, the Council relied on the Second Schedule to the Act, section 23(1) of the ***Legal Education Act***, and in **Muamar Nabeel Onyango Khan vs. Council Of Legal Education & 2 others [2015] eKLR** and **Eunice Cecilia Mwikali Maema v. The Council of Legal Education & 2 Others [2013] eKLR,** in which the Court of Appeal delivered itself as follows:

75. To the Council, armed with the law and the judicial interpretations above, it in execution of its mandate under section 8(1)(f) of the ***Legal Education Act***, invited applicants to make applications for Bar exams in a prescribed form, which form entailed presentation of the degree certificate and the transcripts and any other evidence of qualification, to enable the Council ascertain the state of compliance of all applicants with the law. In the Council's view, the publication of the requirements in the ***Kenya School of Law Act*** and the ***Legal Education Act***, are publications in rem, and are known by all stakeholders including students. It was disclosed that the applications for Bar exams were received in a single bulk for

the nearly 2000 applicants and processed, mirroring them on the mandatory, irreducible law after which the Council made its findings on each application which findings were communicated to all applicants and those determined successful, were granted the go ahead to sit the Bar exams and those whose applications were adjudged unsuccessful, were advised together with reasons of such findings. With respect to the determinations, the Council relied on section 4(6) of the ***Fair Administration Act, 2015***, as follows:

> ***Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.***

76. According to the Council, the nature of processing of Bar exams by the Council is similar to processing by the Kenya School of Law of applications for admission to the Advocates Training Programme. The legally procedure does not provide for a hearing of parties. It entails application, determination, there is however allowance for correspondence on the decision. It therefore relied on **Republic vs. Kenya National Examination Council & Others Ex-parte Kipkurui Michelle D. Jeruto & 34 others [2015] eKLR** for the holding that:

> **"Similarly, whereas it is true that there are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal and that the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth, the position taken in Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,in my view holds supreme. In that case the Court of Appeal held:**
>
> > **"In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made.."**
>
> **… For a body entrusted with the powers to determine the rights of subjects such as the rights to fair administrative action, to be said to have been satisfied, it must have considered all the relevant factors."**

77. It was therefore submitted that there was not a necessity in law for the Petitioners to have been called in and heard prior to the determination based on the assessment of material before the Council and that none of the Petitioners laid evidence before the Court to demonstrate that they were adjudged deficient on courses that they had undertaken.

78. To the Council therefore, natural justice was observed and none of the Applicants' case was decided before making of an application. None of the Petitioners' case was determined outside of the purview of the provisions of law, which were known to all the Applicants.

79. It was contended that the Petitioners, in submitting their applications for assessment, had no expectation whatsoever for an invitation for hearing, but a determination of that assessment. Besides the reasons upon which decisions were made were communicated in the letters to the Applicants the decisions were procedurally fair and made in complete deference to natural justice.

80. On reasonableness of the decision the Council relied on **Associated Provincial Picture Houses vs.**

Wednesbury Corporation [1948] 1 KB 223 where it was held that:

> "**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."**

81. The Council similarly adopted the holding in **Nairobi High Court in Kevin K. Mwiti & Others vs. Council of Legal Eduation & Others (Nairobi JR 377 of 2015-Consolidated with Petition 395 of 2015 and JR 295 of 2015)** in which the Court expressed itself as follows:

> **'…it is my view and I so hold that 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. ..'**

82. To the Council, since the decision that has been impugned as unreasonable is the one by the Council demanding that the Applicants be given credit for what they had studied at the Kenya School of Law, and they only pursue remedial courses to ensure compliance with the law, such a decision cannot be deemed unreasonable. In its view, it would be unreasonable and probably disproportionate if the CLE determined that the Applicants degrees were non-conforming and that they should go back and restudy the LLB degree this time encompassing the 16 core courses. It must be understood that the requirement of the 16 course content is mandatory, it is unforgivable and it is irreducible. It was asserted that the decision is a discharge of a very coherent mandate and the Applicants are enjoined to demonstrate satisfaction of the 16 core courses hence cannot be unreasonable.

83. In the Council's view the Court cannot interfere with the Councils decision and cited **Republic vs. The Council of Legal Education Ex-Parte James Njuguna & 14 Others [2007] eKLR, Muamar Nabeel Onyango Khan v Council of Legal Education & 2 Others [2015] eKLR,** and **Eunice Cecilia Mwikali Maema v. The Council of Legal Education & 2 Others (2013) eKLR.**

84. The council denied the allegation of abuse of discretion/authority and malice and submitted that its decisions in the matter were made commonly basing on the same threshold that had been enforced since the year 2013. To it, the Council has absolutely no interest in subjugating or prejudicing any applicant, its business is to ensure compliance with the law, in the environment of equality, fairness and consistency.

85. On allegation of discrimination, it was submitted that any and all decisions taken by the CLE have

been in deference with its discretion at law and that in the context of the Petitioners herein, it is now trite that the same threshold were applied to the varied Petitioners and that the universities from when the Applicants herein draw are various.

86. On legitimate expectation, it was submitted that there was no representation that since the Petitioners had gained admittance in the Kenya School of Law, this was a promise that their degree qualifications were perfect and that accordingly they would sit for the Bar exams offered by the Council without question. However even if there was, then the same must have been misadvised and is wholly un-actionable. To the Council, it never appointed the Kenya School of Law to be its agent, for purposes of legal education regulation hence decisions taken by the Kenya School of Law cannot bind the Council. Accordingly, it was submitted the Council was enjoined to assess the qualifications, a legal obligation which the Council could not Passover.

87. It was explained that the Council never rubbished the Applicants' training and qualifications at the Kenya School of Law and that, that therefore takes care of any legitimate expectation that the School could give. Anything beyond that would be overreaching. There was absolutely no legal authority for the School either expressly or impliedly to promise the Applicants that the Council would not demand compliance with the law for eligibility of the Bar exams. This submission was based on **South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18]** that:

> **"Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled."**

88. It was submitted that to construe otherwise would further run afoul to law, that legitimate expectation cannot be enforced contrary to law; the law in this case being the ***Legal Education Act***, section 23(1) and the second Schedule thereto.

89. On the issue of Riara University, the Council relied on section 8(1) of the ***Legal Education Act, 2013*** which it contended was the source of the jurisdiction and exclusive mandate of the Council to supervise learning and courses offered by legal education providers in Kenya. To the Council, in accordance with the ***Legal Education Act***, no institution can mount a legal education programme without prior licence of the Council and recited the provisions as follows:

> ***(1) An institution that intends to offer any course or programme of legal education in Kenya for the award of a degree, diploma or certificate as a professional qualification in law shall apply to the Council for a licence.***
>
> ***(2) An application under subsection (1) shall be in the prescribed form and shall be accompanied by the prescribed fee.***
>
> ***(3) A person who offers any course or programme of legal education in Kenya for the award of a degree, diploma or certificate as a professional qualification in law without a licence commits an offence and shall be liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding six months or to both.'***

90. According to the Council, when the issue of 16 core courses was first discovered, and estimated to be of recurrent possibility, the Council in exercise of its mandate to accredit courses, invited all the existing fully accredited institutions to fashion a programme for remedial to facilitate qualification of graduate applicants whose LL.B degrees did not meet the course threshold. At the time an appreciable number of institutions were on provisional accreditation and of all the institutions invited, only Riara Law School fashioned such programme submitted to the Council for consideration and approval which the Council did consider and approved, thereby licensing Riara Law School to offer the said special programme. Riara

Law School, thus, has been certified by the Council to offer the special remedial programme, which is designed to be offered in short period, to enable applicants to be considered compliant and admitted as necessary.

91. The Council therefore urged the Court to dismiss the suits with costs.

2nd Respondent's Case

92. On the part of the School it was disclosed that until 2012, the Council and the School were one and the same entity managed by the sane Chief Executive Officer and depending on the function at hand, the School's officers would act as agents and employees of the School and the Council respectively. It was averred that such was the case even after the passing of the ***Kenya School of Law Act*** and the ***Legal Education Act*** through which the two institutions were separated legally and functionally.

93. According to the School due to the capacity challenges experienced by the Council, the School continued discharging admission and examination for and on behalf of the Council up to and including 2014 and the vetting and equation of applicants' qualifications to the ATP for the year 2015/2016 academic year.

94. On 23rd November, 2013 a meeting was convened by the Council which meeting developed guidelines to be used in the selection of students for admission in particular foreign students. It was this criteria that the School used in admitting the Petitioners and it its capacity as the Council's agent issued them with admission letters.

95. Another meeting was held on 24th August, 2015 at which the role of the School as an agent of the Council in administering oral examinations and project work for 2015 was discussed and it was agreed that the School would continue acting as the Council's agent and that the Council would submit the 2015/2016 oral examinations and course work marks and booklets to the School and the School examined the Petitioners amongst other students and submitted the results to the Council accounting for 40% which results the Council published.

96. According to the School the conduct of the Council and the School raised the Petitioners' legitimate expectations as to the validity of the admissions and examination processes hence their purported exclusion from the examination process goes against the said expectation and is devoid of fairness and reasonableness

97. According to the School, an agency relationship is a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts. This relationship, it was contended can be created by estoppel, by operation of law, by ratification or by agreement of the parties.

98. It was contended that the agency created between the Council and the School is one created by the agreement between parties which was both express and implied. The School averred that the Council gave them the authority to act as their agents with respect to the admission of students for the Advocate Training Programme 2015/2016 academic year and for setting, supervising and marking oral and project examinations and that this led to the 2nd Respondent admitting the applicants using the criteria set by the Respondents being an LL.B from an accredited university; obtaining a minimum grade B (plain) in English or Kiswahili language and a K.C.S.E mean grade of C+ (plus) or its equivalent; and 16 core courses as per the ***Legal Education Act 2012***.

99. According to the School, having been given authority to act as the Council's agent, it admitted the Petitioners hence its decision is deemed to be the Councils decision and therefore the Council is estopped from reviewing decisions made by the School. It was contended that in carrying out their duties as agents the School lawfully admitted the Petitioners to the Advocates Training Programme for the year

2015/2016 using the criteria set by the Council where they attended the requisite classes and took part in the Oral and Project examinations which were conducted by the School.

100. With respect to legitimate expectation, it was contended that the evolution of the doctrine in the Common law jurisdiction can been traced to an obiter dictum of **Lord Denning M. R** which was restated by **B. N. Pandey** in his article "***Doctrine of Legitimate Expectation***" in which it restated the holding of the court in **Sehmidt vs. Secretary of Home Affairs [1969] 2 Ch 149; (1969) 1.AllE.R. 904** that:

> **"The speeches in Ridge v Baldwin show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say …"**

101. The School therefore submitted that the Council is estopped from rejecting the Petitioners' application for registration for the ATP examinations by dint of the fact that they had been admitted by the School who was the Council's agent. In addition, it was submitted that the Petitioners had already completed the oral and project examinations which constitute 40% of the total marks. Thirdly, it was contended that the Petitioners had attended the requisite classes in order to sit for the final written examinations. Lastly, the School submitted that the Council did not reject the oral and project results which were forwarded to them by the School, which results were published and which publication had not been revoked. In light of the foregoing, it was submitted that the Council's decision went against the Petitioners' legitimate expectations to sit the final written ATP examination.

102. In support of its submissions, the School relied on Article 47 of the Constitution and section 4(3) of the ***Fair Administrative Act, 2015*** as well as **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** in which it was held that:

> **"….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 the 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… 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."**

103. It was the School's position that by dint of the above, the Council should be estopped from rejecting the Petitioners' right to take ATP examinations without giving them sufficient grounds for arriving at the said decision. Moreover, it was contended that the Council's decision is in contravention of rules of natural justice as they did not give the Petitioners a chance to make representations with respect to not meeting the requisite requirements as required by section 4(3)(a) of the ***Fair Administration Act***. To the

Petitioner, the promulgation of the Constitution of Kenya 2010 meant that the right to be heard is no longer just a rule of natural justice but is now a constitutional principle in Kenya which applies in equal measure to all proceedings investigations and hearings whether judicial or administrative.

104. To the School, natural justice is a concept of common law and represents higher procedural principles developed by courts, which every judicial, quasi-judicial and administrative agency must follow while taking any decisions adversely affecting the rights of a private individual. Natural justice implies fairness, equity and equality. The principles of natural justice are rules governing procedure and conduct of administrative bodies and are firmly grounded in Articles 47-50 of the Constitution of Kenya, 2010.

105. To the School, the said principles encompass the right to a hearing and that if an administrative body fails to give the concerned person the right to be heard, whatever decision it makes will be invalidated upon review. It applies in common law that, the right to be heard before the court makes any decision, is mandatory to ensure adequate administration of justice, on the grounds that, a person is presumed innocent until proven guilty in a court of law. The second principle is the requirement for prior notice and it was submitted that the rule requires that adequate prior notice be given to a person of any charge or allegation. It simply means that if an administrative body makes a charge it has to give a person against whom allegations have been made adequate notice before a decision is made. Prior notice must be served on the relevant party. The notice must contain sufficient detail to enable the person concerned to know the substance of any charge, allegation or action to be taken against the accused. The third element of the same rule, it was submitted was the need for disclosure of information. To the School, the concerned party must be given all information which the decision maker will rely on to make his judgment. This rule requires that all allegations and reports bearing on a person's case must be disclosed to that person. Failure to do so is fatal to a decision. In support of this submission, the School relied on **Republic vs. the Honorable the Chief Justice of Kenya & Others ex Parte Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** in which the Court held:

> **"The term natural justice, the duty to act fairly and legitimate expectation have no such difference but are generally flexible and interchangeable depending on the circumstances and the context in which they are used. The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons, or bodies that are under a duty to act judicially. They were applied originally to courts of justice and now extend to any person or body deciding issues affecting the right of interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure. The content of natural justice is therefore flexible and variable. All that is fundamentally demanded of the decision-maker is that his decision in its own context be made with due regard for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case.**

106. The School reiterated that the School was acting as an agent of the Council during the period for admission and that the Council had not stated or indicated that there would be a separate registration for the Council in order for a student to sit for the ATP examinations.

107. With respect to the issue of who has the mandate to determine the qualifications for admission to the School, it was the School's position that the ***Statute Law (Miscellaneous Amendment) Act 2014***, bestowed on the Council the singular mandate to recognize and approve legal education qualifications obtained abroad for individuals seeking admission to the Bar Programme and/or practice law in Kenya which recognition and approval services are offered on formal application by any applicant seeking to have his/her qualifications equated and approved for entry to the ATP programme. The School's position was based on the Second schedule paragraph (1)(a), sections 16 and 17 of the ***Kenya School of Law Act***, Cap 26 of 2012.

108. It was submitted that whereas the Council is mandated to recognize, approve and equate qualifications obtained abroad for individuals seeking admission to the bar, the Council is estopped from

denying ex-parte applicants the right to sit the final ATP examinations, because the School was acting as an agent of the Council and that the School admitted the ex-parte applicants using the criteria set forth by the Council.

109. On the question of who has the legal mandate to set, supervise and or mark the Advocate Training Programme Examinations, the School relied on section 13 of the ***Advocates Act,*** Cap 16 of 1989 and section 8 (1) (f) the ***Legal Education Act***.

110. It was therefore submitted that it is the mandate of the Council to set, supervise and mark the Advocate Training Programme Examinations.

111. Based on the foregoing the School was of the view that the Petitioners were entitled to the reliefs sough that the costs of this litigation to be borne by the Council and the Petitioners for wrongful enjoinment.

The 3rd Respondent's Case

112. Riara University (the University), on its part while reiterating the averments made by the Council averred that it was engaged by the Council being an accredited legal education provider in Kenya to devise remedial programmes for its approval to enable Petitioners with deficient LLB degrees study for and attain compliance by undergoing certification of the sixteen core course components that lacked in their LLB degrees. Consequently, the University developed a remedial programme which programme was after due consideration approved by the Council on merit.

113. It was averred that a number of students with non-compliant degrees had since 2013 completed the remedial programme with the University so as to cover the deficiencies. To the University the allegations of conspiracy between the Council and the University are therefore baseless, untenable and made in bad faith.

Determinations

114. I have considered the issues raised both in support of and in opposition to the petition.

115. In my view, at the core of these consolidated petitions is the respective mandate of the Council and the School.

116. Under section 17 of the ***Kenya School of Law Act,*** it is clear that the institution that is empowered to admit students to the School is the School itself. The School is further empowered pursuant to section 4 of the same Act in its capacity as a public legal education provider responsible for the provision of professional legal training as an agent of the Government to develop curricular, training manuals, conduct examinations and confer academic awards. However, section 8 of the ***Legal Education Act***, provides 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) 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.

1. ***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 enroll 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.***

117. In this case, all the Petitioners are students from foreign universities. It is clear from the foregoing provisions that the power to recognise such foreign universities is bestowed upon the Council. It is however my view that in making a decision to recognise any foreign university, the Council is under a statutory duty to thoroughly vet such institutions in order to satisfy itself that the quality of legal education offered by the said institutions is at par with the quality being offered by the local universities in order to ensure that all those who are being admitted to the School meet the same standards. It is the Council that recognises and approves qualifications obtained outside Kenya for purposes of admission to the Roll. The Council is also mandated to *inter alia* supervise legal education providers and administer such professional examinations as may be prescribed under section 13 of the ***Advocates Act***.

118. This in my view was what informed the holding in **Muamar Nabeel Onyango Khan vs. Council of Legal Education & 2 others [2015] eKLR,** and **Eunice Cecilia Mwikali Maema vs. The Council of Legal Education & 2 Others (2013) eKLR** where it was held as follows:

> **"We are also of the view that the learned judge correctly applied the principle in the decision in Susan Mungai V The Council for Legal Education Petition No. 152/2011 to the effect that the Council has the power to set standards to ensure that the highest professional standards are maintained in the profession and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the Regulations'.**

119. The decision in **Muamar Nabeel Onyango Khan vs. Council of Legal Education & 2 others**

(supra) in my view clarified the position further when the Court of Appeal emphasised that:

> **"We reiterate this Court's statements in the cases of Eunice Mwikali Maema vs. The Council of Legal Education & 2 Others, Nairobi CA No. 121 of 2013 and Susan Mungai vs. The Council of Legal Education & Others Nairobi HC Petition No. 152 of 2011 that for purposes of admission to the ATP, there should not be "different or double standards for local and foreign degree holders". Both should be subject to the same standards. We therefore find that by requiring the applicant, like all other applicants, to meet the threshold for admission to the ATP, the respondents did not in any way violate her constitutional rights to fair administrative action and/or education and training."**

On the same issue **Eunice Cecilia Mwikali Maema vs. Council of Legal Education and 2 Others** (supra**)** further held that:

> **"While we accept the submissions by counsel for the appellant that foreign universities and institutions outside Kenya are outside the 'accreditation jurisdiction' of the Council, in our view, the requirement that a degree from a foreign university or institution, in order for it to be recognised for purposes of admission to advocates training programme, must be shown to contain the core units is not to extend the 'accreditation jurisdiction' of the Council. It is to avoid different or double standards for local and foreign law degree holders. We think that law degrees earned from foreign universities or institutions must for purposes of admission to the advocates training programme at the school, be held against the standards that the council has set out."**

120. In my view, the Council ought to properly and thoroughly undertake its homework before giving recognition under the law. Once satisfied that a particular University or instruction ought to be recognised, the criteria for admission to the School in sections 16 and 17 of the ***Kenya School of Law Act*** and the Second Schedule thereto come into play. Sections 16 and 17 aforesaid provide as follows:

> ***16. A person shall not qualify for admission to a course of study at the School, unless that person has met the admission requirements set out in the Second Schedule for that course.***
>
> ***17 (1) any person who wishes to be admitted to any course of study at the School shall apply in the prescribed form and pay the prescribed application fees.***
>
> ***(2) The School shall consider an application submitted under paragraph (1) and if is satisfied that the applicant meets the admission criteria, admit the applicant to the School.***

121. The said Second Schedule on the other hand provides as follows:

> ***A person shall be admitted to the School if—***
>
> ***(a) having passed the relevant examination of any recognized university in Kenya, or of any university, university college or any other institution prescribed by the Council, holds or becomes eligible for the conferment of the Bachelor of Laws (LLB) degree of that university, university college or institution; or***
>
> ***(b) having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) in the grant of that university, university college or other institution—***
>
> ***(i) attained a minimum entry requirement for admission to a university in Kenya; and***
>
> ***(ii) obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent; and***

(iii) has sat and passed the pre-Bar examination set by the school.

122. However, in determining whether or not to admit the students, the School must adhere to the guidelines made by the Council. In my view, the passing of prescribed examinations entails a consideration not only of the course content but must necessarily entail the substances of the courses as well and the right body to determine whether the substance of a particular course purported to have been offered and undertaken is the Council. On the issue of substance, the law reposes upon the Council the power to make a determination thereon which determination of course has to be lawful, fair and reasonable. In this respect, it is my view that no objection can be successfully be taken with respect to a decision for some remedial courses to be taken to align the qualifications with the local standards where the substance of the courses undertaken are found wanting.

123. Once this is done the Courts would be very reluctant to interfere with such exercise of power or discretion since it is trite that where a power or discretion is donated to a particular body the Courts ought to exercise restraint in and ought not to readily accede to invitation to interfere with the exercise of such powers and discretion. This was the position adopted by **Muchelule, J** in **Muamar Nabeel Onyango Khan vs. Council of Legal Education & 2 others [2014] eKLR** in which he expressed himself as follows:

> **"Back to the crucial, and only question: did the petitioner qualify to be admitted to the Kenya School of Law? Once again, it is emphasized that the decision to admit or not to admit belonged to the respondents. Once they showed that they were acting within the law, doing so fairly and that they were subjecting the petitioner to the same standards they were subjecting other candidates, the court cannot interfere. The respondents must be left with the power to insist on the highest possible professional standards for those who wish to qualify as advocates (Republic Vs The Council of Legal Education Ex-parte James Njuguna & Others, Misc. Civil Application No. 137 of 2004 at Nairobi)."**

124. It is however important to point out that this position does not mean that the Council is the sole and ultimate judge when it comes to the determination of proper exercise of such discretion since this Court is under a constitutional obligation to ensure that the safeguards provided under Article 47 of the Constitution are not destroyed by being whittled away in purported exercise of discretion. 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."**

125. The Courts have therefore identified circumstances under which they would be entitled to interfere with discretion as being (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

126. It must however be emphasised that the Council in conjunction with the School are the institutions specially tasked with providing professional training to and examining those who intend to be advocates. To unduly curtail their powers in carrying out that onerous mandate would amount to usurping their

mandates and substituting the Court's discretion for that of the School. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. As was appreciated by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

> **"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."**

127. I adopt the position adopted in **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 374 HL** that:

"It is not for the courts to determine whether a particular policy or particular decisions taken in fulfilment of that policy are fair. They are only concerned with the manner in which those decisions have been taken and the extent of the duty to act fairly will vary greatly from case to case as indeed the decided cases since 1950 consistently show. Many features will come into play including the nature of the decision and the relationship of those involved on either side before the decision was taken."

128. In other words, there is nothing inherently wrong or unreasonable in the School and the Council setting reasonable guidelines for the attainment of their statutory mandate as long as such guidelines are lawful and are geared towards ensuring that those whom they admit for ATP are duly qualified to undertake the training and the eventual task for which they intend to train as long as the said guidelines cut across board and they do not amount to a discrimination that cannot be lawfully justified.

129. The decision of what constitutes proper guidelines necessary for the proper breeding of advocates ought to be left for the wise counsel of the Council and the School with the Court only intervening to ensure that there is fairness in whatever process is put in place for evaluating the applicants to join the ATP. This Court, therefore, ought not to decide for the School and the Council which guidelines are appropriate for it to administer on its prospective students even if the Court was of the view that such guidelines are not suitable or necessary as long as they are geared towards the attainment of the intended statutory objectives. As was held in **Republic vs. The Council of Legal Education ex parte James Njuguna and 14 Others, Misc Civil Case No. 137 of 2004 [2007] eKLR:**

> **"It would not be improper or right for the court to veto powers conferred by Parliament on a public authority or body such as the Council of Legal Education and for the court to substitute its own view from that of the Council of Legal Education to which discretion was given except where the discretion has been improperly exercised as enumerated in the ten situations above."**

130. In my view it is not the Court's view on the suitability of the guidelines that should determine whether or not the Court should interfere with the guidelines. Where it is not shown that the decision was unreasonable, I associate myself with the decision in **Susan Mungai vs. The Council of Legal Education & 2 Others Constitutional Petition No. 152 of 2011 in which Mumbi Ngugi, J expressed herself as follows while citing with approval the case of Republic vs. The Council of Legal Education ex parte James Njuguna and 14 Others, Misc Civil Case No. 137 of 2004 (unreported):**

> **"The Council of Legal Education followed to the letter the purpose and objects of the Act including the applicable regulations and this Court has no reason to intervene in a way that interferes with the merit of the decisions clearly falling within the relevant regulations and which have been applied by the Council of Legal Education without any procedural**

irregularity or for an improper purpose. I decline to do so. The Council of Legal Education has the power and duty to insist on the highest professional standard for those who wish to qualify as advocates. The Regulations are aimed at achieving this. The decision was made on merit and this Court has no reason to intervene. The Regulations and the policy behind the rules were properly made pursuant to the Act and it is not for the Court to be concerned with the efficaciousness of the decision made pursuant to the regulations...The Council of Legal Education is the best judge of merit pertaining to academic standards and not the courts. Parliament clearly vests the power of formulating policy of training and examining of advocates on the Council of Legal Education and it would be wrong in the view of this court to intervene with the merits of the decision by the Council of Legal Education...a Court of law would only be entitled to inquire into the merits of a decision in circumstances where the decision maker abused its discretion, exercised its decision for an improper purpose, acted in breach of its duty to act fairly, failed to exercise its statutory duty reasonably, acts in a manner which frustrates the purposes of the Act which gives it power to act, exercises its discretion arbitrarily or unreasonably, or where its decision is irrational or unreasonable as defined in the case of *Associated Provincial Picture Houses Ltd. –v-Wednesbury Corporation [1947] 1 KB 223*. In the case before me, there is no evidence to suggest that the 1st respondent, in dealing with the application for admission by the petitioner, acted in any of the ways set out above that would justify interference by this Court with its decision."

131. The learned Judge continued:

"I find and hold that it would not be proper or right for the court to veto powers conferred by Parliament on a public authority or body such as the Council of Legal Education and for the court to substitute its own view from that of the Council of Legal Education to which discretion was given except where the discretion has been improperly exercised as enumerated in the ten situations above. In judicial review, the courts quash decision made by public bodies so that these same bodies remake the decisions in accordance with the law. It is not proper for the court to substitute its decision which is what this court is being asked to do by issuing a mandamus to compel a re-sit. I reiterate my earlier findings on this point in the case of *R v JUDICIAL SERVICE COMMISSION ex-parte PARENO Misc Civil Application No.1025 of 2003* (now reported) that it is not the function of the courts to substitute their decisions in place of those made by the targeted or challenged bodies."

132. This was a reflection of the position taken in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarstheth [1985] LRC** in which it was held:

"so long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of the efficaciousness of such rules and regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair."

133. It is therefore my view that the mere requirement that remedial programme be taken ought not to be termed as unlawful. To decide to the contrary would amount to treating the petitioners differently from their fellow students and it is that action that would amount to discrimination.

134. However, once a student is admitted to the school the student acquires all the rights which appertains to his or her status and those rights can only be taken away through the due process of the law. In other words the rights of a duly admitted student cannot be abrogated, restricted or altogether taken away arbitrarily or whimsically. Such rights can nolonger be enjoyed at the discretion of the Council hence the Council is nolonger empowered to unilaterally make a decision whose effect would be to stultify the enjoyment of the same. In my view for the Council to unilaterally decide at that stage when not only have the Petitioners been admitted to the school but have undertaken courses set by the Counsel whose results have been released, that the Petitioners ought to undertake remedial courses would fly in the face of the provisions of Article 47 of the Constitution and violate the tenets of the rules of natural justice.

135. Moreover to subject a student as happened in this case to return to the same institution that had given her a clean bill of health earlier on is *prima facie* irrational unless circumstances have changed and the said changes have been brought home to the particular student concerned and the student has been heard thereon.

136. The petitioners alleged that their legitimate expectations had been breached.

137. In **Council of Civil Service Unions And Others vs. Minister for the Civil Service [1924] 3 All ER 935** where **Lord Diplock** stated, at page 949 that:

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

138. As I have stated herein above, the Petitioners herein had acquired certain rights as students. The effect of unilaterally exposing them to remedial programme implied some measure of exposure to a possibility of being unable to get admitted to the Bar. Having enjoyed the status of being students at the School it is my view that they had enjoyed some benefits or advantages that go withy the said status. Such benefits or advantages could only be withdrawn or restricted on some rational grounds which they had been given an opportunity to comment on. This position is restated by **De Smith, Woolf & Jowell, *Judicial Review of Administrative Action*** 6th Edn. Sweet & Maxwell page 609 to the effect that:

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

139. It is similarly affirmed in the 8th Edition of **Garner's Administrative Law**, **B. L. Jones** and **K. Thompson** observed at page 259 that:

> **"The revocation of a privilege may generally be regarded as comparable to the act of taking away 'property'. It will usually defeat the privilege-holder's legitimate expectation that it will continue for its initially granted time-span, and accordingly the *audi alteram partem* rule will normally apply with some vigour."**

That was the view of this Court in **Republic vs. Kenya School of Law & 2 Others Ex-parte Juliet Wanjiru Njoroge & 5 Others [2014] eKLR,** where this Court expressed itself as follows:

"In this case, the applicants had already been admitted whether rightly or wrongly. In my view, the rules of natural justice mandated that the applicants be notified of the intention to revoke their admission to the School and the reasons therefore disclosed before the decision was taken. The applicants were nolonger students of the University but were students of the School provisionally or otherwise. In my view by the said admission they had acquired some rights and were therefore entitled to be treated fairly before a decision adverse to their interest was made. It is not a question whether the Respondents would have arrived at the same decision even if the applicants had been heard...it is not the perceived hopelessness of a person's case that determines whether or not he ought to be heard in a decision likely to adversely affect him. The right to be heard is a fundamental human right that is not given by the State since human rights are generally universal and inalienable rights of human beings. A Constitution simply recognises the natural and original human rights of mankind which any and every human being should have in order to lead a dignified life till his natural death."

140. That the principle applies not only to the past enjoyment but also to the future expectations was recognised in **Republic vs. Attorney General & Another Ex Parte Waswa& 2 Others [2005] 1 KLR 280** where it was held that:

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

141. The rationale for this principles was espoused in **R vs. Devon County Council ex parte P Baker [1955] 1 All ER** where it was held:

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

142. Having found that the Council, in carrying out its mandate is empowered in appropriate circumstances to direct applicants to ATP to undergo remedial programmes, the next issue that arises in these proceedings is whether it was proper for the Council to direct the Petitioners to a particular institution, Riara University. As I have stated hereinabove the rationale for remedial programmes is to attain some standards in the legal profession. Under section 8 of the ***Legal Education Act***, the Council has been bestowed with a lot of powers with respect to regulation of legal education in this Country. It, for example, is responsible for setting and enforcing standards relating to the accreditation of legal providers for purposes of licensing. For the Council to justify preferences for Riara University when it comes to remedial programmes to other accredited Universities, whether provisionally or fully accredited in my view amounts to unjustifiable discrimination. To justify that action amounts to a dereliction of the obligation placed on the Council to ensure standardisation in the legal education in the country. The Council cannot be permitted to rely on its own inabilities to carry out its statutory mandate to in effect operate unconstitutionally by discriminating against other institutions it is obligated to regulate in terms

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

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

143. With respect to the issue of which institution is empowered to set and mark examinations, section 4(2)(e) of the ***Kenya School of Law Act***, sets out one of the functions of the School as to develop curricular, training manuals, conduct examinations and confer academic awards. Section 8(1)(f), on the other hand sets one of the functions of the Council as to administer such professional examinations as may be prescribed under section 13 of the ***Advocates Act***. Section 13(1)(b)(ii) of the ***Advocates Act*** provides that the body to prescribe the examinations is the Council. That is the law and whereas eyebrows may be genuinely raised with respect to the propriety of a regulator also setting and marking examinations, it is not for this Court to determine the propriety of such a policy in these proceedings. That is a matter for the law makers and this position was appreciated by the School itself.

144. However the School contended that the Council had delegated some of its functions to the School. That the School did examine the Petitioners with respect to 40% of the course work is not disputed. That the Council approved the School's action in that respect is not also in doubt. The Council having acted as it did cannot therefore purport to disown the School's role with respect to the 60% and in effect take a unilateral decision whose effect would be to deprive the Petitioners of their benefits and legitimate expectations.

Findings

145. Having considered the issues raised herein I make the following findings:

1. **By unilaterally directing the Petitioners to undergo remedial programme the Council violated the Petitioners' rights to a hearing and in the circumstances contravened the rules of natural justice under Article 47 of the Constitution as read with the provisions of the *Fair Administrative Action Act, 2015* and violated the Petitioners' legitimate expectations.**
2. **Whereas the Council has powers to direct that remedial programmes be undertaken, by directing the Petitioners to undertake the same from a particular institution without regard to the other accredited institutions, the Council acted in a discriminatory manner.**
3. **In directing the 3rd Petitioner to undertake the said programme without addressing itself to the fact that the 3rd Petitioner had earlier on been referred to the same institution, Riara University and successfully undertook remedial programme, the Council's decision was irrational.**
4. **That the body with *the legal mandate to determine the qualification for Admission, registration of Applicants to the Kenya school of Law is the Council but the actual admission of students to the School is to be undertaken by the School.***
5. ***That the body with the legal mandate as between Kenya School of Law, and the Council for Legal Education, to set, supervise or mark Advocate Training Programme examinations is the Council though in this instance, that mandate was delegated to the School by the Council.***

Order

146. Accordingly I find merit in these consolidated petitions/applications and grant the following orders:

1. **An order of certiorari removing into this Court the decision of the Council of Legal Education contained in its letter dated 22nd October, 2015 directing the Petitioners to undertake the Remedial Programme at the Riara University which decision is hereby quashed.**
2. **An order of mandamus, compelling the 2nd Respondent to register the Petitioners for their Advocate Training Programme Examination for the Academic Year 2015/2016 with the 1st Respondent forthwith.**
3. **A Declaration that the Petitioners' rights under Article 47 of the Constitution were infringed and threatened with violation by the 1st Respondent.**
4. ***A Declaration that the 1st Respondents' decision to send the petitioners/applicants to Riara University in exclusion of the other accredited institutions was illegal, unconstitutional, null and void.***
5. ***An order of mandamus directing the Respondents to forthwith release the Petitioners' examination results which were withheld.***
6. ***The costs of these proceedings are awarded to the Petitioners and the 2nd Respondent to be borne by the 1st Respondent Council.***

147. Orders accordingly.

Dated at Nairobi this 9th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Amoko for the 3rd Petitioner

Miss Otieno for the interested party

Cc Mutisya