IN THE MATTER OF: AN APPLICATION BY KENIZ OTIENO AGIRA, GITEYA NYACHOTI STANLEY, MEBOH ATIENO ABUOR, JACKSON MURIUNGI MUKARIA, SHEILA KWAMBOKA MANONO DENNIS MURACHE MURIMI, FRED MAINA NJATHI, EMMA ODERO, DAVID OMONDI OOKO, STEVE MUIA, JULIA MUTHONI NJIRU, DANIEL MUTEMI, AMULI CHARLES, LEONARD SANG; GRACE KARIMI NJIRU, ELIZABETH DUYA, MARY THUMBI, DENNIS MURIMI, SAUMU YAA JUMWA, OLIVIA WAMBANI MURUNGA, DANIEL MURAKARU, KIMATHI GITHONGA, ERIC ONYANGO OTIENO AND NAOMI ACHIENG' OKELLO FOR ORDERS OF MANDAMUS AND CERTIORARI;

AND

IN THE MATTER OF: SECTIONS 13(1) (B) OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA, 4, 8, 9, AND 43 OF THE COUNCIL FOR LEGAL EDUCATION ACT NO. 27 OF 2012, REGULATIONS 4, 5 AND 14 OF THE COUNCIL FOR LEGAL EDUCATION (KENYA SCHOOL OF LAW) REGULATIONS 2009, RULES 5, 7(20 AND 11 OF THE FIRST SCHEDULE TO CAP 16A(REPEALED): CURRICULUM AND EXAMINATIONS, AND REGULATIONS 2, 3, 4, 5, 6, 7, 10, 15, 16, 17, 18 AND 19 OF THE COUNCIL FOR LEGAL EDUCATION (ACCREDITATION OF LEGAL EDUCATION INSTITUTIONS) REGULATIONS, 2009 AND THE SCHOOL OF LAW ACT, 2012

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNCIL OF LEGAL EDUCATION.....RESPONDENT

EX PARTE

KENIZ OTIENO AGIRA.....1ST EX PARTE APPLICANT

GITEYA NYACHOTI STANLEY.....2ND EX PARTE APPLICANT

MEBOH ATIENO ABUOR.....3RD EX PARTE APPLICANT

JACKSON MURIUNGI MUKARIA.....4TH EX PARTE APPLICANT

SHEILA KWAMBOKA MANONO.....5TH EX PARTE APPLICANT

DENNIS MURACHE MURIMI.....6TH EX PARTE APPLICANT

FRED MAINA NJATHI.....7TH EX PARTE APPLICANT

EMMA ODERO.....8TH EX PARTE APPLICANT

DAVID OMONDI OOKO.....9TH EX PARTE APPLICANT

STEVE MUIA.....10TH EX PARTE APPLICANT

JULIA MUTHONI NJIRU.....11TH EX PARTE APPLICANT

DANIEL MUTEMI.....12TH EX PARTE APPLICANT

AMULI CHARLES.....13TH EX PARTE APPLICANT

LEONARD SANG.....14TH EX PARTE APPLICANT

GRACE KARIMI NJIRU.....15TH EX PARTE APPLICANT

ELIZABETH DAYA.....16TH EX PARTE APPLICANT

MARY THUMBI.....17TH EX PARTE APPLICANT

DENNIS MURIMI.....18TH EX PARTE APPLICANT

SAUMU YAA JUMWA.....19TH EX PARTE APPLICANT

OLIVIA WAMBANI MURUNGA.....20TH EX PARTE APPLICANT

DANIEL MURAKARU.....21ST EX PARTE APPLICANT

KIMATHI GITONGA.....22ND EX PARTE APPLICANT

ERIC ONYANGO OTIENO.....23RD EX PARTE APPLICANT

NAOMI ACHIENG OKELLO.....24TH EX PARTE APPLICANT

RULING

INTRODUCTION

1. By a Notice of Motion dated 31st October 2012, the *ex parte* applicants herein seek the following orders:

i. The Honourable Court be pleased to grant an order of Certiorari to remove into this High Court and quash the decision of the Respondent contained in the letter dated 11th October 2012 addressed to the vice chancellor, Busoga University stopping the admission of the Applicants into the Kenya School of Law.

ii. The Honourable Court be pleased to grant an Order of Mandamus directed at the respondent to oblige the respondent to admit the Applicants into the Kenya School of Law unless for reasons other than the impugned decision of 11th October 2012, the Applicants or any of them does not qualify for the admission.

iii. The Honourable Court be pleased to grant a declaration that the accreditation issues between the respondent and Busoga University arising after the Applicant have completed their studies at the said university cannot and should not retrospectively affect the qualification of the Applicants for admission into Kenya School of Law.

iv. The Honourable Court be pleased to grant an order of mandamus directed at the Respondent to oblige the Respondent to administer pre-bar examination on the applicants who do not qualify for direct admission to the Kenya School of Law as required by Law.

***EX PARTE* APPLICANTS' CASE**

2. The application is based on the following grounds:

1) It is the contention of the Applicants that the decision made by the Respondent not to admit the Applicants to Kenya School of Law was made without jurisdiction and therefore ex facie illegal.

2) The Applicants contend that the issues regarding accreditation of Busoga University raised by the Council for Legal Education after the Applicants completed their training at Busoga University should not be applied retrospectively to stop the admission of the Applicant to Kenya School of Law.

3) The decision by the Council of Legal Education to suspend the accreditation of Busoga University can only affect students joining the institution after the suspension of the accreditation and not before.

4) The Council for Legal Education has at all material times during the training of the Applicants admitted graduates from Busoga University to the Kenya school of Law.

5) The Applicants contend further and in the alternatively that the requirement of procedural fairness demand that if such a decision is to be made by those in the position of the Respondent, then persons such as the Applicants should be given a hearing at which to make representations as to why the said decision should be waived in their cases. The Respondent did not afford the Applicants any opportunity to address them on the obvious but grave personal consequences which would arise from the decision. As such it is contended the decision is flawed by procedural unfairness and vitiated by failure to take into account relevant considerations namely the attendant grave personal consequences on the Applicants.

3. The said application is supported by the Statutory Statement filed on 26th October 2012 and the verifying affidavit sworn by **Naomi Achieng' Okello**, the 24th ex parte applicant herein on 26th October 2012. According to the applicants, they are Law graduates from Busoga University (hereinafter referred to as the University) having successfully undertaken undergraduate training in law offered at the said University. It is their case that for anyone to be admitted to the Roll of Advocates in Kenya, it is mandatory that he/she must undertake the Diploma (Advocates Training) course offered by the Council for Legal Education, the respondent herein through the Kenya School of Law (hereinafter referred to as the School) which school the applicants contend only admits students directly to the Diploma programme who have Bachelor of Laws Degree and a minimum of B plain in English and C+ mean grade in the Kenya Certificate of Secondary Education. On completion of their undergraduate decree course at the said University the applicants applied to the Kenya School of Law for consideration but the said school declined to accept their applications on the ground that the Council for Legal Education had made a decision to stop admitting students from the said University to the School, vide a decision contained in

the letter dated 11th October 2012. This decision, according to the applicants, was made despite several students from the same University having been admitted into the Roll of Advocates and are now legal practitioners in Kenya and throughout the world.

RESPONDENTS' CASE

4. In opposition to the application, **Professor W. Kulundu Bitonye**, the Director of Kenya School of Law and the Secretary of the Respondent swore an affidavit on 5th December 2012 in which he deposed that the general purpose of the respondent as contained in its objectives is the supervision and regulatory control over professional legal education and training in Kenya. The admission requirements, according to him, stipulate that applicants to the course of study under the Advocates Training Programme must have obtained a Bachelor of Laws Degree Programme from a recognised university, amongst other requirements in the event that the applicant Degree from a University outside Kenya. To ensure quality control Council of Legal Education (Accreditation of Legal Education Institutions) Regulations of 2009 (hereinafter referred to as the Regulations) and Manual (hereinafter referred to as the Manual) for Accreditation was passed under the Council for Legal Education Act (hereinafter referred to as the Act) which prescribed the irreducible standards each university is supposed to be and continue being recognised for purposes of admission of its students to the Kenya School of Law. These Regulations and the Manual prescribe the requirements for accreditation of legal education institutions by the Council to ensure that the said institutions satisfy the training standards prescribed by the Respondent in the discharge of its quality and supervisory mandate under the Act and satisfaction of recognition requirements thereunder.

5. According to him, Regulation 12 legislates that institutions are to maintain the standards which standards are exhaustively prescribed in the Third Schedule to the Regulations, which is to say that if an institution previously accredited were to violate the standards/rules then accreditation to the institution can be revoked. Regulation 19(1) of the said Regulations mandates the Respondent to consider and recognise or reject recognition to any foreign university, notwithstanding the general recognition jurisdiction of the Commission of Higher Education (hereinafter referred to as the Commission). Regulation 19(2) on the other hand mandates the respondent to equate every qualification from a foreign university against its standards and make recommendations as appropriate. Recognition of the legal education institutions within Kenya, Uganda and Tanzania is also subject of bilateral understanding between respective legal education councils in the member states in recognition of the ongoing integration of East Africa and the need to ensure uniform admission standards and criteria. By Regulation 22(a) of the Regulations, the respondent is mandated to visit and inspect institutions offering legal studies subject or the recognition or accreditation to ensure they comply with the basic requirements to enable equality and that the standards for qualification between the Legal Councils in Kenya, Uganda and Tanzania have further been crafted to as much as possible conform to ensure similarity.

6. During a meeting held between 13th and 26th March 2011 between staff from the Kenya School of Law with the Chairman, Committee of Legal Education in Uganda and the Secretary of the Law Council in Uganda on the legal education institutions accredited to offer Bachelor of Laws degree programmes in Uganda it was discovered that Busoga University was not a legal education institution accredited by the Law Council Committee of Legal Education in Uganda. Pursuant thereto the deponent on 23rd May 2011 wrote a letter to the Vice Chancellor, Busoga University advising him that the Respondent would from the 23rd of May 2011 cease to admit graduates from Busoga University unless and until the said University received accreditation status from the Uganda Law Council to which the said Chancellor assured him that the University was in the process of securing accreditation from Uganda Law Council. On further inquiry from the Law Council of Uganda, the deponent was informed by Busoga University and the Law Council Committee on Legal Education and Training was scheduled to assess Busoga University for accreditation purposes on 30th April 2010 and that under the principles of Equity, the accreditation of the law programme was done. The said Busoga University was however advised by the respondent that the Respondent would only admit law graduates of the said University upon accreditation of the University by the Uganda Law Council and corresponding communication of the same by the Uganda Law Council. Further inquires were made to the Chairman of the Law Council of Uganda

followed by visits on the Chairman of the Law Council of Uganda as well as assessment of the facilities at Busoga University which assessment on 28th September 2012 revealed that the institution could not meet quality standards and a report of the assessment of Busoga University was submitted to the Quality Assurance, Accreditation and Compliance Committee of the Respondent Council which Committee on consideration of the report at its meeting of 1st October 2012 declined to recognise Busoga University which decision was transmitted to Busoga University vide a letter dated 11th October 2012.

7. According to the respondent the decision to discontinue admission of students from Busoga at the Kenya School of Law was communicated on 23rd May 2011 while the decision not to recognise Busoga University was made on 1st October 2012. Since the assessment of actual physical facilities at Busoga University undertaken on 23rd September 2012 confirmed that the said University is at present incapable of meeting quality control standards with which the Respondent Council is charged to ensure, the decision not to recognise the University was in accordance with the mandate of the Respondent and was made after consideration of full circumstances. In the deponent's view, no preferential/discriminate treatment has been accorded to any student and that all students at the School have been attended to in complete deference to the law and the Regulations and the standards prescribed therein. In his view the Respondent's decision not to admit graduates from Busoga University of 23rd May 2011 and reiterated on 1st October 2012 has not been challenged, and accordingly stands. Since the said decision was with respect to admission of students from Busoga University continuing until when recognition of its awards shall be done, it is the deponent's view that that position cannot be legally challenged on the grounds adduced on the Motion before the Court. Since the decision not to admit graduates from Busoga University was made in May, 2011, more than 6 months allowed by the Law Reform Act (Chapter 26 of the Laws of Kenya) to commence proceedings for certiorari have lapsed. According to the respondent legitimate expectation cannot be upheld to override the law hence the Respondent cannot be compelled to compromise on the quality control standards with which it is charged hence the orders sought do not lie since the Respondent has discharged its obligation at law. Further it is deposed that the Motion as drawn and filed is wholly misconceived, as firstly the order of mandamus as sought in the Relief does not issue to a discretionary duty and secondly, an Order of mandamus does not issue to compel an authority to breach the law.

SUBMISSIONS IN SUPPORT OF THE *EX PARTE* APPLICANTS' APPLICATION

8. While reiterating the contents of the Motion, the Statement and the affidavits, the *ex parte* applicants submitted that the Respondent is a creature of statute established under section 4 of the Act with the mandate of advising the government on the standardisation, recognition and equation of legal education qualifications awarded by foreign institutions. Under section 12 of the Advocates Act Cap 16 Laws of Kenya a person is only qualified for admission as an Advocate of the High Court of Kenya if he/she, *inter alia*, meets the academic qualifications set out in section 13 of the Act by passing the relevant examinations of such university, university college or other institutions as the Respondent may from time to time approve. It is submitted that prior to the enactment of Legal Education Act 2012 and Kenya School of Law Act 2012 the Council for Legal Education Act Cap 16A (now repealed) provided that the Council of the Legal Education had the mandate to establish and administer institutions concerned with the provisions of legal education pursuant to which the Kenya School of Law was ran by the Respondent. By dint of Regulation 14 of the Council of Legal Education (Kenya School of Law) Regulations, 2009, a person shall not be duly qualified for an award under section 13(1)(b) of the Advocates Act, Cap 16 Laws of Kenya unless that person has completed the Post Graduate Diploma (Advocate Training Programme) course at the Kenya School of Law. Therefore the decision not to consider the applicants for admission to the Kenya School of Law permanently blocks the applicants from ever signing the Roll of Advocates in Kenya on account of the qualifications they already possess from Busoga University and despite the fact that Busoga University has at all material times been a recognised university for the purposes of regulation 5 in the first schedule which sets out the requirements for admission to Post Graduate Diploma (Advocate Training Programme) course which entails, *inter alia*, a Bachelor of Laws Degree from a recognised university.

9. It is the applicants' submission that under Regulation 3(1) of the Council of Legal Education

(Accreditation of Legal Education Institutions) Regulations, 2009, the regulations only apply to institutions authorised under the Act or any other written law to operate an educational institution in Kenya and intends to offer or is offering legal education. Whereas the regulations do not per se apply to qualifications from foreign institutions, the Respondent is bestowed with discretionary authority under regulation 19 of the said Regulations to recognise academic award in legal education from foreign institutions that are recognised by the Commission for Higher Education or any other authority with the mandate to recognise foreign qualifications.

10. In the applicants' view to the extent that Busoga University remains a recognised institution by the Commission for Higher Education in Kenya, the Respondent is statute-bound to recognise academic awards from Busoga University and that the discretion donated to the Respondent by statute is to subject such awards to its standards and make 'such recommendations' as it may consider necessary. Since the Respondent has not recommended to the Commission for Higher Education the need to recognise Busoga University, it is statute bound to recognise the awards from Busoga University since the power to recognise qualifications from foreign institutions vests with the Commission under section 6 of the Universities Act, Cap 210B Laws of Kenya and not the Respondent. The Respondent's attempts to reject qualifications by the Applicants thus flies in the face of the express provisions of the law and is thus illegal and/or ultra vires, based on the decision in **R vs. Communications Appeals Tribunal & Another, ex parte Safaricom Limited [2011] eKLR**.

11. It is the applicants' position that based the requirement for procedural fairness, and pursuant to the decision in **Council for Civil Service Unions and Others vs. Minister for Civil Service [1985] 1 AC 374**, they ought to have been given a hearing before the decision was made taking into account grave personal consequences on the Applicants. In their view it was a legitimate expectation on their part at the time of joining Busoga University, throughout their training period and upon their graduation that their degrees would be recognised by the Council for Legal Education and that they would be admitted to the Kenya School of Law Programme which expectation was created from the practice established by the Respondent where the Respondent previously admitted students from Busoga University to Kenya School of Law. Citing **Republic vs. The Head Teacher Kenya High School & Another ex parte SMY (a minor through her mother and next friend, AB) [2012] eKLR** it is submitted that a legitimate expectation is said to arise from an expectation arising from a promise or representation given on behalf of a public body or from the existence of a regular practice which the claimant can reasonably expect to continue and that for legitimate expectation to arise, the impugned decision must affect the other person by depriving him of some benefit or advantage which either **(i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue doing until there has been communicated to him some rational grounds for withdrawing it in which he has been given an opportunity to comment, or (ii) He has received assurance from the decision maker that it will not be withdrawn without giving him first an opportunity to advance reasons for contending that they should not be withdrawn ."**

12. It is therefore their submission that the decision by the Council for Legal Education not to admit them into the Kenya School of Law programme is in breach of their legitimate expectation under the circumstances of this case since there are many graduates from the same University who have been admitted by the Council into the School and are practising law in the country and throughout the World.

13. Relying on the said case of **Republic vs. The Head Teacher Kenya High School & Another ex parte SMY (a minor through her mother and next friend, AB)** (supra) as well as **Republic vs. Kenya National Examinations Council ex parte Geoffrey Githinji and 9 Others Civil Appeal No. 266 of 1996** the applicants contend that the orders sought are the most efficacious remedies under the circumstances. In their view:

"the remedies of certiorari and prohibition are tools that this court uses to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are ultra vires their statutory mandate or which are irrational or otherwise illegal. They are meant to keep public authorities in check to prevent them from abusing their statutory powers or subjecting citizens to unfair treatment. The nature and scope of certiorari was discussed in the case of Captain

Geoffrey Kujoga Murungi Vs Attorney General Misc Civil Application No. 293 of 1993 where it was stated; "Certiorari deals with decisions already made ….Such an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice..."

14. In conclusion, it is submitted that the Respondent has failed to perform its statutory duty of considering the applicants' applications for admission to Kenya School of Law to their detriment and therefore an order of mandamus should issue as prayed to compel performance of the said duty.

RESPONDENT'S SUBMISSIONS

15. On the part of the 1st respondent, it is submitted that with respect to admission to Advocates for graduates from foreign universities, there exists a two tier recognition for their qualifications the first being the recognition of the University and the second, the recognition of the awards in Law from the University, the latter being the exclusive province of the respondent. The respondent, accordingly, did not purport to de recognise Busoga University, but only denied recognition to LLB Degrees from the University for which it had jurisdiction, as the sole authority. Since the respondent duly complied with procedure before making any and all determinations in this case, the invocation of the right to be heard by the ex parte application is misconceived. In the respondent's view, the applicants being students at Busoga University in Uganda while the respondent is an authority in Kenya, the respondent has no standing whatsoever in communicating with students in the foreign country and having communicated through the relevant authorities, it was the obligation of the administration of Busoga University to advise its students of the development.

16. According to the respondent and based on **Republic vs. Kenya Revenue Authority ex parte Aberdare Freight Services Limited [2004] eKLR** the concept of legitimate expectation cannot operate against the law and that there are no guarantees at law that any degree of a recognised University under section 6 of the University Act passes for admittance by the Council of Legal Education. There is still the recognition of the award/degree under Regulation 19 of the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations of 2009i. Since a person gets admitted, not because they joined a university but because their qualification complies with the la w, the legitimate expectation cannot be pleaded in the present matter, since it cannot override the law.

17. From the evidence on record, it is submitted that the warning to Busoga University was given on 23rd May 2011, at the time when the ex parte applicants were still students at Busoga University. Since the respondent's decision was made pursuant to investigations and findings made pursuant to Regulation 22 of the aforesaid Regulations hence the decision was not irrational at all. It decision was further based on the fact that Busoga University's Law Degree was not even accredited/recognised by the Law Development Council of Uganda in accordance with the bilateral understanding between the law councils among the East Africa States.

18. On the allegation of discrimination, the respondent relies on **John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others [2011] eKLR** and **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarstheth [1985] LRC**.

19. The respondent therefore opine that the rationale behind non-admittance of Busoga University graduates at Kenya School of Law therefore has legal underpinnings and is not a creation of the respondent but a discretion given by law a discretion which, on the authority of **Carltona Ltd vs. Commissioner of Works [1943] 2 All ER 560**, where Parliament has given the executive the discretion to decide when a requisition should be made under he regulation, no court can interfere with that discretion if exercised properly since it is, on authority of **R vs. Judicial Service Commission ex parte Pareno Misc. Civil Application No. 1025 of 2003**, not the function of the courts to substitute their decision in place of those made by the targeted or challenged body.

20. It is further submitted that on the authority of **Kenya National Examinations Council vs. Republic & Kemunto Regina Ouru (Suing through her next friend James Ouru) & Others [2010] KLR**

mandamus does not issue to compel public servants to act contrary to law and on ***Halsbury's Laws of England, 4th Edn. Volume 1 at page 130, para 129*** that the order must command no more than what the party against whom the application is made is legally bound to perform and where a general duty is imposed, a Mandamus cannot be done at once and further where a statute which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a Mandamus cannot command the duty in question to be carried out in a specific way.

21. It is further submitted that since the decision to not admit the students from Busoga University into Kenya School of Law until conditions are met was made on 23rd May 2011, and the present application was made on 5th November 2012 which is more than 6 months allowed, the application is by virtue of section 9(3) of the Law Reform Act Cap 26 Laws of Kenya time barred. The decision of 23rd May 2012 and reiterated on 1st November 2012 was not made against the ex parte applicants but in furtherance of the objectives of the Respondent under section 8 of the Legal Education Act 2012.

22. Accordingly, it was prayed on behalf of the respondent that the application be dismissed with costs.

DETERMINATIONS

23. In the Court's view the first issue for determination is whether or not the application is time barred by limitation since if it is barred the Court may not have the jurisdiction to entertain the application with the effect that the application would be thereby rendered incompetent and would be struck out. See **Abdalla Ladha Jivraj vs. Ali Kassam Virani Limited Civil Appeal No. 58 of 1960 [1960] EA 842.**

24. The applicants' contention is that the decision that the graduates from Busoga University would not be admitted into Kenya School of Law was communicated by the respondent to the University by a letter dated 11th October 2012. The respondent's position, however, is that the decision was made on 23rd May 2011 and hence by the time these proceedings were instituted the 6 months allowed for making the application had run its course. Section 9(2) and (3) of the Law Reform Act provides:

(2) Subject to the provisions of subsection (3), rules made under subsection (1) may prescribe that applications for an order of mandamus, prohibition or certiorari shall, in specified proceedings, be made within six months, or such shorter period as may be prescribed, after the act or omission to which the application for leave relates.

(3) In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

26.In his submissions, **Mr Achach** contended that since the mandamus sought is meant to compel the admission of the applicants, the six months limitation is inapplicable. However, as was held in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others Civil Appeal No. 266 of 1996**:

"an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the appeal before us, the respondents did not apply for an order of

certiorari and that is all we want to say on that aspect of the matter."

25. If therefore the application is time barred, the grant of mandamus is unlikely to be an efficacious remedy without quashing the decision itself since the mandamus would not be issued unless the decision not to admit the applicants is rescinded.

26. Order 53 rule 7(1) of the Civil Procedure Rules, on the other hand provides:

"In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the registrar, or accounts for his failure to do so to the satisfaction of the High Court."

27. Therefore where the applicant is, due to a satisfactory reason unable to secure the order, warrant, commitment, conviction, inquisition or record the Court may excuse the need to exhibit the same. It is therefore upon the applicant to demonstrate to the Court that the orders which he seeks to quash was made within 6 months of the commencement of the judicial review proceedings. In the letter dated 23rd May 2011 the Director/Chief Executive & Secretary, Council of Legal Education/School of Law informed the Vice-Chancellor, Busoga University, *inter alia*, that "We are therefore writing to inform you that the Kenya School of Law shall forthwith cease to admit law graduates from Busoga University until the university receive accreditation from the Uganda Law Council". In my view that letter was transmitting the decision of the respondent to the University that it would not admit the said students. However, it seems that certain actions were undertaken including visits to the University's Faculty of Law and it is these actions that seem to have led to the decision of 1st October 2012 by the Quality Assurance, Accreditation and Compliance Sub-committee to decline to accredit the said Faculty.

28. The question that the Court has to determine is what was the purpose of the meeting which led to the decision of 1st October 2012. If the meeting was to make a decision whether or not to admit the students to the School, then the decision would be deemed to have been made on 1st October 2012 in which case the application would be within the limitation period. On the other hand if the said meeting was meant to follow up on the progress that the University had made with a view to varying the earlier decision, then the application would still be time barred. In the letter dated 11th October 2012, the respondent stated further that "this decision is in line with the decision of National Law Council of Uganda, previously communicated to you". In a letter dated 1st September 2011 the respondent, reiterated its decision that it would not admit law graduates from the University until the University was accredited by the Law Council of the Uganda Law Council.

29. From the foregoing it follows that the decision not to admit the students from Busoga University was made before 1st October 2012. That being the position, it follows that these proceedings were commenced outside the limitation provided under section 9 of the Law Reform Act and that would render the application incompetent. In **Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482**, **Pall, J** (as he then was) held:

"Order 53 contains the procedural rules made in pursuance of s. 9(1) of the Law Reform Act. S. 9(2) of that Act states that the rules made under subsection (1) may prescribe that an application for mandamus, prohibition and certiorari shall be made within six months or such shorter period as may be prescribed. Thus it will be seen that on one hand s. 9(2) of the Act enjoins that the court may make rules prescribing that application for mandamus prohibition and certiorari shall be made within six months or such shorter period as may be prescribed by the rules. On the other hand O. 53 rule 2(1) which is a procedural rule made under that very section says that the court may for good reason extend the period of six months. The rules of court made under the Act cannot defeat or override the clear provisions of s.9(2) of the Act. An Act of Parliament cannot be amended by subsidiary legislation. The parliament in its wisdom has imposed this absolute period of six months and it is the Parliament alone which can amend it. The Court's duty is to give effect to the

law as it exists. Thus that part of Order 53 rule 7 as amended by Legal Notice No. 164 of 1997 which reads "unless the High Court considers that there is good reason for extending the period within which the application shall be made" is ultra vires section 9(2) of the Act. Thus an application for judicial review, may it be for an order of mandamus, prohibition or certiorari should be made promptly and in any event within a maximum period of six months from the date when the ground for the application arose…As far as the notice of motion seeks to remove into the High Court and quash the minutes in question of the meeting of 4.8.1992 of the Respondent or seeks an order of prohibition against the Respondent prohibiting it from doing any act or deed in pursuance of the said meeting of 4.8.1992 it is time barred."

30. In my view it is high time the provisions of Section 9 of the Law Reform Act were amended to provide for extension of time in cases where a strict adherence to the limitations manifests a miscarriage of justice for example where a decision is made and for some reasons the same is not made public with the result that the persons affected thereby are not aware of the decision until after the expiry of the said limitation period. Whether the Court would be entitled to "read in" a provision for extension of time in line with the new Constitutional dispensation, is outside the scope of this decision since the matter before me is not an application for extension of time.

31. The Court is however, of the opinion that in order to uphold the values of the Constitution, the Court would be perfectly entitled where an Act of Parliament exhibits certain deficiencies which make it insufficient to properly realise the Constitutional aspirations to "read in" the omitted words so as to bring the Legislation in line with the Constitutional aspirations without the necessity of declaring the Legislation unconstitutional. This remedy was invoked by the South African Constitutional Court in **National Coalition for Gay and Lesbian Equality and Others vs. Minister of Home Affairs and Others (CCT10/99) [1999] ZACC 17** in which the said Court the expressed itself *inter alia* as follows:

"Attention needs to be given to the situation that would arise if Parliament fails timeously to cure the under-inclusiveness of the common law and the Marriage Act. Two equally untenable consequences need to be avoided. The one is that the common law and section 30(1) of the Marriage Act cease to have legal effect. The other unacceptable outcome is that the applicants end up with a declaration that makes it clear that they are being denied their constitutional rights, but with no legal means of giving meaningful effect to the declaration; after three years of litigation Ms Fourie and Ms Bonthuys will have won their case, but be no better off in practice. What justice and equity would require, then, is both that the law of marriage be kept alive and that same-sex couples be enabled to enjoy the status and benefits coupled with responsibilities that it gives to heterosexual couples. These requirements are not irreconcilable. They could be met by reading into section 30(1) of the Marriage Act the words "or spouse" after the words "or husband", as the Equality Project proposes. Reading-in of the words "or spouse" has the advantage of being simple and direct. It involves minimal textual alteration. The values of the Constitution would be upheld. The existing institutional mechanisms for the celebration of marriage would remain the same. Budgetary implications would be minimal. The long-standing policy of the law to protect and enhance family life would be sustained and extended. Negative stereotypes would be undermined. Religious institutions would remain undisturbed in their ability to perform marriage ceremonies according to their own tenets, and thus if they wished, to celebrate heterosexual marriages only. The principle of reasonable accommodation could be applied by the state to ensure that civil marriage officers who had sincere religious objections to officiating at same-sex marriages would not themselves be obliged to do so if this resulted in a violation of their conscience. If Parliament wished to refine or replace the remedy with another legal arrangement that met constitutional standards, it could still have the last word. Before I conclude this judgment I must stress that it has dealt solely with the issues directly before the Court. I leave open for appropriate future legislative consideration or judicial determination the effect, if any, of this judgment on decisions this Court has made in the past concerning same-sex life partners who did not have the option to marry. Similarly, this judgment does not pre-empt in any way appropriate legislative intervention to regulate the relationships (and in particular, to safeguard the interests of vulnerable parties of those living in conjugal or non-conjugal family units, whether heterosexual or gay or lesbian, not at present receiving legal protection. As the SALRC has indicated, there are a great range of issues that call

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

32. As was recognised by this Court in **Nancy Makokha Baraza vs. Judicial Service Commission & 9 Others [2012] eKLR:**

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

33. That, however, is a matter for another day.

34. Suffice to say that the application is incompetent for being barred by the limitation provided under section 9 aforesaid and hence ought to be struck out.

35. That finding would have been sufficient to dispose of this application. However, in deference to counsel, I will proceed to deal with the other issues.

36. The first issue for determination is the role, if any, of the Respondent in the admission of students to Kenya School of Law. Regulation 3 of *The Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009* provides:

3. (1) These Regulations shall apply to any institution that is authorized under the Act or any other written law to operate an educational institution in Kenya and intends to offer or at the commencement of these Regulations is offering legal education.

(2) Any institution that is offering legal education or training shall, within six months after the commencement of these Regulations, apply to the Council for accreditation.

(3) The Council may by a notice in the Gazette stop the legal education or training programme of a training institution that has not complied with this regulation.

(4) Any person who contravenes the provisions of paragraph (2) commits an offence and shall be liable to a fine of six thousand shillings or imprisonment for a term of six months or both.

37. The applicant's position is that under the foregoing Regulation, these Regulations only apply to institutions operating in Kenya and since Busoga University does not operate in Kenya these Regulations do not apply to the University. To understand the scope of these Regulations one needs to read the foregoing Regulation together with Regulation 19 which provides as follows:

19. The Council may recognize academic awards, in legal education, of foreign institutions that are recognized by the Commission for Higher Education or any other authority with the mandate under any written law to recognize foreign qualifications.

(2) Notwithstanding the generality of paragraph (1), the Council shall equate every qualification from a foreign institution against its standards and make such recommendations as it may consider necessary.

38. It is noteworthy that the foregoing Regulation does not expressly donate the powers to the Council to deny recognition to foreign institutions. What the provision states is that the Council may equate the qualification of the foreign university against its standards and make such recommendations as it may consider necessary. The question that arises is to whom is the Council meant to make the said recommendations. The powers of the Council are stipulated in section 7 of the Council for Legal Education Act, 2009 which provides:

7. The Council shall have all the powers necessary or expedient for the performance of its functions under this Act and in particular, the Council shall have power to-

(a) control, supervise and administer the assets of the Council in such manner and for such purposes as best promote the purpose for which the Council is established;

(b) control and administer the Fund;

(c) receive any grants, gifts, donations or endowments and make legitimate disbursements therefrom;

(d) enter into association with other bodies or organizations within or outside Kenya as the Council may consider desirable or appropriate and in furtherance of the purpose for which the Council is established;

(e) open a banking account or banking accounts for the funds of the Council;

(f) invest the funds of the Council not currently required for its purposes in the manner provided in section 17.

39. Although the foregoing section states that the Council has all the powers necessary or expedient for the performance of its functions under this Act it proceeds to provide for the specific powers and in none of the said specific powers does it provide for the power of the Council to accredit a foreign University. The Court of Appeal of Uganda in **David Sejjaka Nalima vs. Rebecca Musoke Civil Appeal No. 12 of 1985** while citing with approval **Henry De Souza Figueredo vs. George Blacquire, Talbot and Another [1959] EA 167** held *inter alia* that a general provision must be read subject to the specific provision. I am therefore unable to read anywhere in the said section that the Council has the power to recognise or not to do so academic awards, in legal education, of foreign institutions that are recognized by the Commission for Higher Education or any other authority with the mandate under any written law to recognize foreign qualifications.Where the Council is of the view that an award by a certain foreign University ought not to be recognized the Council is empowered to make appropriate recommendations to the authority concerned. The objects and functions of the Council are contained in section 6 of the Council for Legal Education Act which provides as follows:

6. (1) The object and purpose for which the Council is established is to exercise general supervision and control over legal education in Kenya and to advise the Government in relation to all aspects thereof.

(2) Without prejudice to the generality of the foregoing, the Council shall-

(a) establish, manage and control such training institutions as may be necessary for-

(i) organizing and conducting courses of instruction for the acquisition of legal knowledge, professional skills and experience by persons seeking admission to the Roll of Advocates in Kenya, in such subjects as the Council may prescribe;

(ii) organizing and conducting courses in legislative drafting;

(iii) organizing and conducting courses for magistrates and for persons provisionally selected for appointment as such;

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

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

(vi) organizing and conducting continuing legal education courses;

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

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

(b) conduct examinations for the grant of such academic awards as may be prescribed;

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

40. Generally the objects of the Council are to exercise general supervision and control over legal education in Kenya and to advise the Government in relation to all aspects thereof and in particular establish, manage and control such training institutions as may be necessary; conduct examinations for the grant of such academic awards as may be prescribed; and award certificates, fellowships, scholarships, bursaries and such other awards as may be prescribed. There is again no express power conferred upon the Council to deal with recognition of awards by foreign universities.

41. In the absence of an express power donated to the Council to deal with the issue of recognition of awards by foreign Universities and in light of the express power conferred by the Regulations on the Council to makesuch recommendations as it may consider necessary, it is my view and I so hold that the Council's power is limited to making the said recommendations to the authorities empowered to recognize the said awards.

42. That however is not the end of the matter since the Council apart from making recommendations towards the recognition of the award is under the obligation to ensure that the provisions of the Council for Legal Education (Kenya School of Law) Regulations, 2009 are complied with. Regulation 4 thereof provides:

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 First Schedule to these Regulations for that course.

43. The said First Schedule in paragraph 5(b) thereof provides as follows:

A person shall not be eligible for admission for the Post Graduate Diploma (Advocate Training Programme) unless that person has passed the relevant examinations of a university, university college or other institutions prescribed by the Council, he holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) in the grant of that university, university college or other institution, had prior to enrolling a that university, university college or other institution–

(i) attained a minimum entry requirements for admission to a university in Kenya; and

(ii) a minimum grade B (plain) in English Language and a mean grade of C (plus) in the Kenya Certificate of Secondary Examination or its equivalent;

44. From the foregoing, it is clear that for a person to be admitted to the Kenya School of Law for the

purposes of Post Graduate Diploma (Advocate Training Programme) he has to pass the relevant examinations of a University, University College or other institutions prescribed by the Council. It follows that where a University is not recognised by the Counsel, the Council would still at liberty to deny students from that University admission to the School.

45. That the Council has jurisdiction to enact the said Regulations was the subject of **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."

46. The respondent has outlined the steps it took before it arrived at the decision not to admit the applicants. Even after that it still gave the University an opportunity to remedy the deficiency which included the fact that the students at Busoga University were being taught by first degree holders (LL.B) which is against the requirement that they must be taught with persons with Master's Degree and above. As was held by **Mumbi Ngugi, J** in the above cited case:

"...it is clear that, rather than the respondents having acted in a manner that was discriminatory against the petitioner, it was the petitioner who was seeking what can only be viewed as preferential treatment from the respondents. The Admission Regulations applicable to all those seeking admission to the Kenya School of Law in 2006 when the petitioner made her application were the *Council of Legal Education (Kenya School of Law) Regulations, 1997*. There is nothing before this Court to show that all other applicants were not required to meet these qualifications. What the petitioner was asking was for the 1st respondent to waive these requirements with regard to her; and what she is asking this Court to do is to find that even if she was not qualified under those regulations, they were against the requirements of the Advocates Act anyway, and she should not have been required to meet them."

47. I further associate myself with the decision in **John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others** (supra) where it was held that:

"we need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our

goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case will therefore require will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one contest may not necessarily be unfair in different context. At the heart of this case, therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyse a claim of discrimination has both a subjective and an objective component...In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context...It is only by examining the larger context that a court can determine whether differential treatment results in equality."

48. I also agree with the decision in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarstheth** (supra) in which 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."

49. Whereas the applicants contended that the Respondent had in the past admitted students from the same University, there was no evidence that that had been the case in the past. Even if the respondent had done so in the past it was not shown that the conditions prevailing at the time of the admission of the former students was the same as the time when the respondent decided not to admit the applicants. Regulation 10 of the Council of Legal Education (Accreditation and Legal Institutions) Regulations provide:

10. (1) Where the Council determines that a legal education institution issued with a certificate of accreditation has failed to maintain or comply with the standards set out in these Regulations, it shall issue a notice of revocation of accreditation to that institution requiring it to show cause why the certificate of accreditation should not be revoked.

(2) An institution issued with a notice under paragraph (1), shall within three months provide the Council with necessary information regarding the issues raised in the notice of revocation.

(3) Where the information provided under paragraph (2) is reviewed and found to be inadequate in responding to the issues raised in the notice of revocation, the Council shall revoke the certificate of accreditation issued to the institution.

(4) Where the Council revokes a certificate of accreditation of an institution, it shall publish that revocation in the Gazette.

(5) The Council may rescind the notice of revocation if it is satisfied that the institution has put in place necessary measures to comply with these Regulations.

50. Although I have found that the said Regulations do not apply to foreign universities, there is nothing

in the Council of Legal Education (Kenya School of Law) which bars the Council from reviewing its earlier decision to admit or deny admission to students from a particular university. In other words there is nothing that bars the Council from reviewing, varying or rescinding its earlier decision. Therefore the mere fact that students from Busoga University may in the past have been admitted to the School would not estop the Respondent from rescinding its decision if it was satisfied that subsequent events made the admission of students from the said University untenable as long as its decision was not irrational, illegal or procedurally improper. I have already stated that the Respondent took the necessary steps to inform the University of the steps it intended to take. The University has not alleged that the Respondent breached the due process in arriving at its decision. At the time the said decision was taken in May 2012, the applicants had not graduated from the said University. In the circumstances of this case, I agree with the Respondent that it was the duty of the University to take the necessary steps to inform the applicants of the developments.

ORDER

51. In the result, even if these proceedings had been instituted within the time limited under section 9 of the Law Reform Act, I would still have found no merits in the Notice of Motion dated 31st October 2012 and would have dismissed the same. It follows that the application is incompetent and is struck out with no order as to costs taking into account my finding with respect to the powers of the Respondent to deny recognition to foreign universities.

Dated at Nairobi this day 6th of March 2013

G V ODUNGA
JUDGE

Delivered in the presence of Mr Achach for ex parte applicants