REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA TA NAIROBI

MISC. APPLICATION NO. 1122 OF 1994

IN THE MATTER OF APPLICATION BY RITA BIWOTT FOR AN ORDER OF MANDAMUS

AND IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

JUDGMENT

The applicant holds a Bachelor of Arts Degree from McGill University at Monteal, Quebec in Canada. She obtained this degree in Spring of 1991.

On 17th July, 1993 she was admitted to the degree of Bachelor of Laws at the University of Edinburgh, as per exhibit A annexed to her statement of facts.

It is not in dispute that she was exempted from one year of study and recognition of four whole course in respect of courses taken and examinations passed by her for the degree of B.A. at McGill University aforesaid.

It is also not in dispute that the applicant was a full time student in the Faculty of Law, University of Edinburgh for two year course which commenced in October, 1991.

The associate dean at the Faculty of Law at Edinburgh University has confirmed that the LLB degree can be completed in two years of study instead of the normal three years, by a candidate with a prior degree, as in such circumstances the university regulations permit it to give exemption from one year of study and that the two year LLB is regarded in Scotland as identical in academic terms to the three year LLB and is given exactly the same status.

The said associate dean confirmed the said position to the Attorney General's chambers by Fax dated 22nd September. 1993. She confirms that the applicant has studied exactly the same number of law subjects in her two years as a candidate on the three year degree.

The said associate dean also confirmed to the principal of Kenya School of Law in her Fax dated 14th October 1993 that for the award of an LLB degree a candidate without an exemption is required to complete 12 courses over a three year period of which eight must be law courses and upto four courses for any discipline within those taught at the university. She gives a full explanation of what happens and I need not set out at length what she says. It is on record as Exhibit E VIII to applicant's statement of facts.

By letter dated 18th March,1994 the secretary to the CLE informed the applicant that CLE did not approve her two year degree of the University of Edinburgh under section 13 (1) (b) of the Advocates Act. (Cap 16). So what happens. The applicant is so to speak left high and dry. She cannot take any further steps towards eventually enrolling as an advocate of the high court of Kenya.

During the course of the hearing of this app1ication I asked Mr. Okwach if CLE gave an audience of the applicant to allow her to state her case. Mr. Okwach said that council does not do so. The well-known rule of "*Audi Alteram Pastem*" was not observed. However so be it. See Vol1. Halsbury's,law of England para 74;last 2 lines of page 90; 4th Edition.

Council of Legal Education is the only body in Kenya charged with the responsibility of admitting candidates to Kenya School of Law so that such candidates can finally become advocates of the High Court of Kenya. CLE has an important task to perform and it is in the circumstances duty bound to examine carefully all applications and accept or reject applications in its discretion.

In exercise of such discretion CLE has to keep in mind that a citizen of this country who has obtained primary qualifications as an advocate of this court, has to earn a living as such, which is the inherent right of such a candidate.

The present Advocates Act (Cap 16) came into force on 15th December, 1989. At that time an LLB degree from the University of Edinburgh was a recognized qualification per The Advocates (Degree Qualifications) Regulations made pursuant to section 2l, of the Repealed Advocates Act. These Regulations were repealed or rather revoked by Legal Notice Number 476 of 1991, that is a time when the applicant was studying in Canada for her B.A. degree.

Under the present Advocates Act. (After the revocation of the aforesaid Regulations) CIE has general discretion to admit such of the overseas qualified candidates as it deems proper per section 13(1) (b) of the Advocates Act which I need not set out at length here.

Mr. Oyatsi urged that prior to June 1991 (date of revocation of the aforesaid Regulations) CLE had no powers under the Act to reject an LLB degree from University of Edinburgh if other conditions for admission were satisfied.

To a certain extent what is relevant is the period between June 1991 and October, 1991. Mr. Okwach argued that all Kenyans studying overseas after June 1991 in any of universities referred to in the revoked Regulations ought to have known that list stood cancelled and that all Kenyan Missions were asked to so notify such students. I note that no such evidence of such notification has been shown. It may however be besides the point.

What is stated in paragraph 4 of Ms. Nzioka's affidavit of 5th October; 1994 is important. She states that in a meeting of 7th July, 1987 an exemptions Panel being a sub-committee of CLE recommended that certain 2 year law degree of certain Indian Universities could not be recognized by the council. A three year course was necessary. But it has all to do with Indian Universities. At that time the University of Edinburgh was specifically recognized for the purposes of primary qualifications acceptable here.

Thereafter in paragraph 5 of his said affidavit Ms. Nzioka states that that recommendation came to be presented as "Recognition of Foreign Degree" and that the Principal of Law School duly so informed all Kenyan Embassies abroad, particularly England and India.

Ms. Nzioka states further that after some consideration CLE was not satisfied as to the applicant's qualifications and so notified her.

At this stage I have to bear in mind the unchallenged statement from the assistant dean of the faculty of law of the University of Edinburgh that in view of her previous degree (McGill University) the applicant was allowed to complete her LLB degree in two years and that <u>what she completed was exactly the same as what she could have done in three years of study.</u> (Emphasis mine)

I must also bear in mind and I should think CLE ought to have borne in mind that at the time the list of recognized universities was revoked the applicant was out of Kenya with little or nil chance of knowing what Kenyan Missions in England and India had been notified of, if at all.

As I have said CLE has cast upon it a task which (amongst other matters) could affect the livelihood of a Kenyan. If such task or responsibility is not properly carried out or discharged CLE cannot lay down a rule of thumb and say “we are not going to admit candidates who have completed their LLB degree in a lesser period.” That would be capriccios exercise of discretion and not judicious exercise of discretion.

Rules of Natural Justice must apply and must be followed by CLE in admitting candidates.

In David Oloo Onyango vs A.G. Civil Appeal No. 152 of 1986 Platt J.A said:

> It is clear that the English Court have taken the view that the courts are not bound to abdicate jurisdiction merely because the proceedings are of an administrative character. It is a lead which I think in courts in Kenya would do well to follow in carrying out their task of balancing between the interests of the executive and the citizen. It is also 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.

Substitute the word "executive" above for CLE and I think the message is clear.

In the same case Late Nyarangi J.A. said:

> “There is a presumption in the interpretation of statutes that the rules of natural justice will apply.”

In Fairmount Investments Ltd vs Secretary of State for the Environment (1976), W.L.R. 1255 at page 1263 Lord Russell of Killowen said:

> “It is to be implied unless contrary intention appears that Parliament does not within the powers in breach of the principles of natural justice and that parliament does by the Act require in the particular procedures compliance with those principles.”

In A.G vs Ryan (1980) A.C. F. 730 Lord Diplock said;

> "It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority."

In the said appeal the above-mentioned cases were followed with approval. It would be not out place to quote:

> “It is however quite clear that it is not within the powers of the Act to depart from the principles of natural justice when the discretion is being exercised under this sub-section.”
>
> "The mere fact that the exercise discretion making authority affects the legal rights or the interests of some person makes it judicial and therefore subject to the procedure required by natural justice. Thus the discretion must be exercised judicially. That is to say fairly.The fact that the exercise of discretion is administrative does not make it less judicial."

I have quoted all this for the reason that I am asked to interfere with the exercise of discretion of CLE. I appreciate that I cannot substitute my own discretion in place of council's.

A court can interfere in exercise of such discretion if the court is satisfied that the discretion was not exercised judicially or fairly.

My power is not that like that of an appellate authority to overside the decision of CLE. Mine is that of directing my mind to the issue as to whether or not CLE has acted on the principles of natural justice and fairness in this particular matter, on the facts before it and in the circumstances prevailing at the material times. See Associated Provincial Picture House Ltd vs Wednebury Cornoration (1947) 2 ALL ER 680 .

Mr. Oyatsi's argument proceeded on the line that the test to be applied was whether one has done a degree course in a University which is equivalent to such a course in the University of Nairobi and if so CLE cannot now say sorry you do not qualify; that CLE must have been satisfied of and by the Universities mentioned in the now repealed schedule; that it would be unjust to now say the two year degree was of any lesser value or weight that CLE had been or must have been aware of the courses offered at the University of Edinburgh; that a general exercise of discretion cannot be used now to proscribe a two year cause which is equivalent to a three year course; that CLE had no regard to Advocates Act; that what CLE did in this instance was arbitrary and contrary to public policy; that what was stated to be policy decision in 1987 cannot be used in a blanket form; that no policy to stifle academic excellence by reference to period is good; that in considering the applicant's achievements at the two Universities as not good enough CLE was unreasonable; that CLE has disclosed an element of bias by delaying decision from July. 1993 to March, 1994.

Mr. Okwach started by saying that the application was not made promptly but he let that argument go when arithmetica1 working showed that the applicant was within time. Mr. Okwach then proceeded to argue that she ought to have known of the policy decision in 1987. I would point out that it would be almost impossible for a student to know of what the council may have decided.

Mr. Okwach further argued that reference to foreign universities since 1991 is purely historical; that CLE was merely following its 1987 decision in not accepting the applicant's qualifications; that council has the power and the discretion to examine each specific applicant's degree; he accepted that there is more onus on CLE to be more just now; that only merits are considered (underlining mine); that CLE had done nothing wrong ton warrant court's interference; that CLE itself inquired into suitability of the applicant' qualification; that the test of qualification is to be made here in Kenya not overseas; that courses taken by the candidate were unacceptable and fell short of standards set in Kenya; that no fundamental error was shown; that a plea in sympathy is not acceptable.

I have fully considered all arguments.

What stands out and what was not considered by CLE was that the course completed by the applicant was exactly the same as she would have completed in 3 years.

I am unable to accept the argument that the applicant seeks what she wants by a plea of sympathy. She seeks her right as I see it of being admitted an advocate in Kenya; she is a Kenyan citizen; to deprive a qualified Kenyan citizen of the right to follow his/her chosen career is not fair; it is not just. That is where CLE went totally wrong.

Despite full qualifications of the applicant CLE rejects her and that too in the face of full evidence provided or in possession of CLE that she has all necessary basic qualifications to be admitted to the Kenya School of Law.

Coming back to the case law that I went into earlier, I am able to say that the decision of CLE was unfair and unjust and it does not have powers to so act.

CLE cannot in all fairness ask the applicant to go back to Edinburgh as to complete a course which she had already completed (emphasis mine). That is unjust and unfair and that is where the court can interfere with the discretion of CLE.

With respect CLE has no jurisdiction to act in a manner which would deprive a qualified candidate of two years or more of her professional life. Such discretion carries heavy responsibility and such responsibility cannot be abdicated.

It was suggested by Mr. Okwach that she could go back to the United Kingdom and do either bar examinations or become a solicitor. I think in all circumstances of this particular case that statement is not a careful statement. I will not say more.

There is no doubt in my mind that CLE ought to have accepted the applicant for studies at Kenya School of law. The term began on 16th September, 1994.

An order of mandamus goes forth now from this court to the secretary of the Council of Legal Education to issue to Rita Biwott a certificate of enrollment with reprospective effect from 16th September, 1994.Similar order also goes out to the principal of Kenya School of law to admit Miss Rita Biwott to the school forthwith to continue the course of Legal education in preparation for the examinations that she has to sit in order to qualify to be admitted as an advocate of this court.

In view of the adamant stand taken by CLE i am constrained to order that the applicant's costs be paid by the council of Legal Education.

Dated and Delivered at Nairobi this 26th Day of October, 1994

In the presence of:

……for the applicant

…….for the respondent

A.B. SHAH

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JUDGE