Council of Legal Education v Tusasirwe & 13 others (Civil Appeal 242 of 2017) [2025] KECA 459 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 459 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 242 OF 2017

K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA

MARCH 7, 2025

BETWEEN

COUNCIL OF LEGAL EDUCATION ..... APPELLANT

AND

JONAH TUSASIRWE ..... 1ST RESPONDENT

AMAZIAH MARTIN OTIM ..... 2ND RESPONDENT

SSEBADDUKA ABDULSALAAM ..... 3RD RESPONDENT

AMONGIN MARGARET OKALO ..... 4TH RESPONDENT

TWESIGYE NELSON ..... 5TH RESPONDENT

NAMBIRIGE LILLIANE ..... 6TH RESPONDENT

KOBUSINGE MARTHA ..... 7TH RESPONDENT

KAMULEGEYA MOHAMMED ..... 8TH RESPONDENT

VICTORIA MADONG TABAN ..... 9TH RESPONDENT

NATTABI FLORENCE PENINAH ..... 10TH RESPONDENT

ATUHAIRWE BENEIDEN ..... 11TH RESPONDENT

COHEN AMANYA ..... 12TH RESPONDENT

KENYA SCHOOL OF LAW ..... 13TH RESPONDENT

ATTORNEY GENERAL ..... 14TH RESPONDENT

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mativo, J.) dated 20th February 2017 in HC Pet. No.505 of 2016 Consolidated with HC Pet. No. 509 of 2016)

Conflict of the Kenya School of Law Act with the Advocates Act on qualification for admission to the Advocates Training Program

The appeal concerned the interpretation of Sections 12 and 13 of the Advocates Act regarding the admission of non-Kenyans to the Advocates Training Program (ATP) at the Kenya School of Law. The Council of Legal Education (CLE) denied admission to Ugandan and South Sudanese law graduates, arguing that non-Kenyans must first qualify as advocates in their home countries. The High Court ruled in favor of the petitioners, declaring CLE's decision unconstitutional. The Court of Appeal held that the High Court did not err in its interpretation of sections 12 and 13 of the Advocates Act. There was a disconnect between sections 12 and 13 of the Advocates Act and section 16 and the Second Schedule to the Kenya School of Law Act. It held that sections 12 and 13 of the Advocates Act was consequent upon Kenya ratifying the EAC Treaty and assuming obligations thereunder.

Reported by John Ribia

Advocates *– Roll of Advocates of the High Court of Kenya (the bar) - qualifications to be admitted to the bar - what conditions did a candidate for admission to the bar have to satisfy to be admitted to the bar – Legal Education Act (cap 16B) section 8; Kenya School of Law Act (cap 16C) sections 4(2)(a), 16, and Schedule II; Advocates Act (cap 16) sections 12 and 13.*

Statutes *– interpretation of statues – sections 4 and 16 of the Kenya School of Law Act – sections 12 and 13 of the Advocates Act – qualifications for admission to Kenya School for the Advocates Training Programme vis-à-vis qualifications to be admitted to the Roll of Advocates of the High Court of Kenya (the bar) - whether sections 4 and 16 of the Kenya School of Law Act was in conflict with section 12 and 13 of the Advocates Act as regards the qualification for admission to the Advocates Training Program and the admission into the bar - whether section 12 of the Advocates Act that listed the nationalities of persons that could be admitted to the bar and section 13 that listed other qualifications were to be read and applied disjunctively as regards the admission of advocates to the Roll of Advocates.*

International Law *– Treaties – East African Community Treaty – obligations – obligations in relation to admission to the Roll of Advocates of the High Court of Kenya (the bar) - qualifications to be admitted to the bar – nationalities that could be admitted to the bar - of Kenya, Rwanda, Burundi, Uganda and Tanzania – rationale – whether rationale upon which section 12 of the Advocates Act listed nationals of Kenya, Rwanda, Burundi, Uganda and Tanzania as eligible for admission to the bar was based on the obligations under the EAC Treaty - whether foreign nationals that sought to be admitted to the bar had to be first admitted as advocates in their nations of origin - whether it was a violation of the East African Community Treaty for Kenya to require nationals of the other Partner States wishing to be admitted to the Roll of Advocates of the High Court of Kenya to satisfy the same conditions as those applicable to Kenyans - whether Kenya was not in full compliance in the East African Community (EAC) Treaty for not including all of the EAC Partner States in section 12 of the Advocates Act was nationals whom may be admitted to the Roll of Advocates of the High Court of Kenya - Constitution of Kenya articles 1; 2(6), 10, 27, 28, 43(1), and 47; Treaty for The Establishment of The East African Community Act (cap 4C) articles 1, 8, 76, 104, and 126; Legal Education Act (cap 16B) section 8; Kenya School of Law Act (cap 16C) sections 4(2)(a), 16, and Schedule II; Advocates Act (cap 16) sections 12 and 13.*

Civil Practice and Procedure *– mootness – scope and application – appeal on admission to the Roll of Advocates of the High Court of Kenya by appellants that had already been admitted to the bar - whether an appeal on the qualifications of one to be admitted to the he Roll of Advocates of the High Court of Kenya would be deemed moot where the appellants had already been admitted to the bar.*

Brief facts

The respondents, Ugandan and South Sudanese law graduates, applied for admission to the Advocates Training Program (ATP) at the Kenya School of Law (KSL). The Council of Legal Education (CLE) denied their applications, arguing that under sections 12 and 13 of the Advocates Act, foreign-trained applicants were required to first qualify as advocates in their home countries before seeking admission to the ATP.

The respondents challenged this decision before the High Court, asserting that it was discriminatory and lacked legal justification. The High Court found that CLE's decision violated articles 27, 28, and 43 of the Constitution, which guaranteed the rights to equality, dignity and education. The court held that CLE had acted without legal authority and ordered that the respondents be admitted to KSL.

CLE appealed, arguing that the High Court erred in its interpretation of the law and that the respondents had failed to meet the statutory requirements for admission. By the time the appeal was heard, the respondents had already completed their legal training and been admitted to the Kenyan Bar. The respondents contended that the appeal was moot.

Issues

i. What requirements must a candidate fulfill to be admitted to the Roll of Advocates of the High Court of Kenya?

ii. Whether sections 4 and 16 of the Kenya School of Law Act were in conflict with section 12 and 13 of the Advocates Act regarding the qualification for admission to the Advocates Training Program and the admission into the Roll of Advocates.

iii. Whether section 12 of the Advocates Act that listed the nationalities of persons that could be admitted to the bar and section 13 that listed other qualifications were to be read and applied disjunctively as regards the admission of advocates to the Roll of Advocates.

iv. Whether foreign nationals that sought to be admitted to the Kenyan Roll of Advocates had to be first admitted as advocates in their nations of origin.

v. Whether rationale upon which section 12 of the Advocates Act listed nationals of Kenya, Rwanda, Burundi, Uganda and Tanzania as eligible for admission to the Kenyan Roll of Advocates was based on the obligations under the East African Community Treaty.

vi. Whether it was a violation of the East African Community Treaty for Kenya to require nationals of the other Partner States wishing to be admitted to the Roll of Advocates of the High Court of Kenya to satisfy the same conditions as those applicable to Kenyans.

vii. Whether Kenya was in breach of the East African Community (EAC) Treaty for not including nationals from all EAC Partner States in Section 12 of the Advocates Act, which outlines those eligible for admission to the Roll of Advocates of the High Court of Kenya.

viii. Whether an appeal on the qualifications of one to be admitted to the he Roll of Advocates of the High Court of Kenya would be deemed moot where the appellants had already been admitted to the bar.

Held

1. The doctrine of mootness ensured that a court was not called upon to determine a dispute that had ceased to exist between the parties. It was anchored on the principle that the court's time and resources should only be deployed to determine live or active disputes, not disputes that had dissipated, ceased to exist, or have been reduced to academic, hypothetical or theoretical pursuits. The doctrine was also underpinned by the principle that the court should not act or issue orders in vain. In some instances, the court had a discretion to hear and determine a matter which was technically moot, if there was an outstanding issue that was not settled, the settlement of which may guide future actions and operations of government.

2. The appeal was moot in the sense that the petitioners who were aggrieved by the appellant's decision had since been admitted to the Roll of Advocates of the High Court of Kenya and therefore, that particular controversy between the parties was no longer extant. However, the question as to the proper interpretation of sections 12 and 13 of the Advocates Act lingered and was live. The question of admission of non-Kenyans to the Advocates Training Program and to the Roll of Advocates in future was still live and ought not to be resolved by the Court of Appeal. The decision of the court would have practical effect on future non-Kenyan applicants and that it was a fit and proper matter to exercise discretion and determine notwithstanding the fact that the dispute between the parties was otherwise technically moot.

3. The court could only depart from the words used in an Act if the words used led to inconsistencies, ambiguity, absurdity or a result that was patently in violation of a provision or provisions of the Constitution.
4. A candidate for admission to the Roll of Advocate of the High Court of Kenya must satisfy both section 12 and section 13 of the Advocates Act (the Act) by being a national of Kenya, Rwanda, Burundi, Uganda and Tanzania and in addition, satisfying the qualifications set out in section 13. Section 12 and 13 must be read conjunctively.
5. To interpret the two provisions in issue disjunctively would result in an obvious absurdity. It would mean that so long as the applicant was a national of the countries named in section 12 of the Act, he or she would be automatically entitled to admission to the Roll of Advocates of the High Court of Kenya whether or not they had met the academic and professional qualifications for admission as an advocate. It was absurd because even Kenya nationals were not admitted to the Roll of Advocates by virtue of nationality alone. There wasn't any country in the world where applicants were admitted as advocates solely on the basis of nationality without any regard to academic or professional qualification as a lawyer. Nowhere in its judgment did the High Court hold or even suggest that nationals of the countries named in section 12 of the Act were entitled to admission to the Advocates Training Program or the Roll of Advocates of the High Court of Kenya by virtue of nationality alone without satisfying the academic and professional qualifications stipulated in section 13.
6. Section 13 of the Act set out the academic and professional qualifications that various categories of applicants must satisfy in addition to being nationals of any of the nations mentioned in section 12. The section was not the easiest to understand and could have been simplified. Nevertheless, it was possible to distill the clear meaning of the qualification demanded of each class or category of applicants. The qualifications were in the alternative, meaning that a candidate was eligible for admission into the Roll of Advocates if he or she satisfied any of the stipulated qualifications.
    1. The first category of applicants eligible for admission were applicants from the five named countries who hold, or were eligible for conferment of, a degree in law from a recognised Kenyan University. Recognition of Kenyan universities to award and confer degrees in law was vested in the appellant by the Legal Education Act. Under section 8 of the Legal Education Act, the appellant was responsible for among others, the licensing of legal education providers and accrediting them for purposes of licensing.
    2. The second category was comprised of applicants from the five named countries who held or were eligible for conferment of a degree in law from such university, university college or other institution outside Kenya, approved by the appellant. In addition to satisfying this condition, the applicant in that category must satisfy two other conditions. The applicant must attend as a pupil and receive instruction in the proper business, practice of an advocate from a prescribed advocate, and attend a prescribed cause or tuition for a period not exceeding 18 months. The applicant must pass such examinations as the appellant may prescribe.
    3. The third category comprised of applicants from the five named countries who possessed any other qualifications acceptable to and recognized by the appellant.
    4. The fourth category was made up of applicants from the named countries, and who were already advocates of the High Courts of Uganda, Rwanda, Burundi or Tanzania. To have qualified as advocates in their respective countries, the applicants must have satisfied the academic and professional requirements prescribed by their local law. In that category would fall a Kenyan applicant who was not an Advocate of the High Court of Kenya, but was an advocate of the High Court of any of the other four countries.
    5. Applicants from the five named countries, and who were already advocates of a superior court in any other Commonwealth country. Applicants in that category, must, in addition, satisfy two other conditions, namely that they must have practiced in the concerned Commonwealth

country for a period of not less than five years, and must also be of good standing in the relevant professional body of the concerned country. For that category of applicants, the appellant has the discretion to require that they undergo such training as it may prescribe for a period not exceeding three months for purposes of adapting to the practice of law in Kenya.

6. The Act conferred on the appellant discretion to exempt an applicant in category two, on such conditions as it may impose, from attendance as a pupil and sitting prescribed examinations.

7. The foregoing categories were distinct and separate. If, for example, the 12th respondent, a Ugandan national, held a degree in law from a university recognised in Kenya, there was no requirement under section 12 and 13 of the Act that he must also be admitted as an Advocate of the High Court of Uganda. Similarly, if the applicant was already admitted as an Advocate of the High Court of Uganda, the Act did not prescribe any additional conditions or qualifications.

8. There was nothing in the Act that required the petitioners to be first admitted as advocates in their nations of origin. Once an applicant was from any of the countries named in section 12 of the Act and, in addition, satisfied any of the academic and professional qualifications set out in section 13 of the Act and where applicable, satisfied the requirements of section 16 and the Second Schedule to the Kenya School of Law Act, such an applicant would be entitled to admission to the roll of advocates of the High Court of Kenya.

9. Other than the Advocates Act, the Kenya School of Law Act had provisions that were relevant and bore on admission to the Roll of Advocates. From section 16 as read with the Second Schedule to the Advocates Act there was an obvious disconnect between the Kenya School of Law Act and the Advocates Act as regards the qualification for admission to the Advocates Training Program and the Roll of Advocates. Yet one of the statutory functions of the Kenya School of Law was the training of persons to be admitted to the Roll of Advocates under the Advocates Act.

10. The qualifications for admission to the Advocates Training Programme were minimalist compared to those for admission to the Roll of Advocates. They were a degree in law from a recognised university in Kenya or; a degree from a university, university college or other institution prescribed by the appellant. For the latter category, the applicant must have attained two prescribed minimum grades. Lastly, an applicant may be admitted to the School if he or she sit and pass the Pre-Bar examinations set by the School.

11. The effect of strict and literal interpretation and application of the Second Schedule to the Kenya School of Law Act would be to void and nullify sections 12 and 13 of the Advocates Act or, at the very least, constrict and emasculate them beyond recognition. The court eschewed an approach of legislative interpretation that rendered otiose provisions of a statute whose purpose and intent was clear.

12. The rationale behind section 12 of the Advocates Act on nationalities could not be commonality of legal systems because, while Kenya, Uganda and Tanzania had the common law system, the Burundi and Rwanda system was the continental legal system. Conversely, there were many other common law system countries which were not included in section 12. The only rational explanation could be discerned was that all the named countries were Partner States to the East African Community (EAC) Treaty (the Treaty).

13. Article 1 of the Treaty defined treaty to mean the EAC and any annexes and protocols. Article 2 of the Vienna Convention on the Law of Treaties, 1969, defined a treaty to include an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments. The Protocols concluded under the Treaty formed part and parcel of the Treaty.

14. By article 8 of the Treaty, the Partners States had undertaken to enact and implement legislation to, among others, confer upon the legislation, regulations and directives of the Community and its institutions the force of law within their territories; to give precedence to Community organs, institutions and laws over similar national ones on matters pertaining to the implementation of the

Treaty, and to make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones. By dint of article 2(6) of the Constitution, any treaty or convention ratified by Kenya formed part of the law of Kenya. So long as they were not demonstrated to the satisfaction of the court to be contrary to the Constitution, treaties that Kenya had domesticated and those that were applicable in Kenya by dint of article 2(6) of the Constitution must be applied and given effect like the other laws of Kenya.

15. While South Sudan was not mentioned in section 12 of the Act, there was no dispute that it was a Partner State to the Treaty and, the rationale behind section 12 was to ensure Kenya's compliance with its obligations under the Treaty. So long as South Sudan, or any other Partner State was not included in section 12, Kenya was not fully compliant with its obligations under the Treaty. In interpreting statues, were necessary and for purposes of avoiding ambiguity or absurdity, or as in this case, violation of obligations under international law, the court may legitimately consider the context and the purpose of an enactment and adopt a purposive interpretation.

16. Giving effect to sections 12 and 13 of the Advocates Act undermined the sovereignty of the Kenya. Sections 12 and 13 of the Act, which the court was requested to give effect to, were enacted by the Parliament of Kenya in exercise of the country's sovereign power under article 1 of the Constitution. The enactment of those provisions was consequent upon Kenya ratifying the Treaty and assuming obligations thereunder. Entering into international treaties and engagements was a tribute of state sovereignty. As was well accepted in international law, when a sovereign state entered into a treaty under which it accepted some duties and obligations, the result was some restriction on its exercise of its sovereign rights in the sense that it agreed to exercise its sovereignty in a particular way. An act done by a state in exercise of its sovereign power could not be said to undermine the sovereignty of the same state.

17. It was not a violation of the Treaty for Kenya to require nationals of the other Partner States wishing to be admitted to the roll of advocates of the High Court of Kenya to satisfy the same conditions as those applicable to Kenyans. Far from it. In setting the qualifications to be satisfied by nationals of the other Partner States, the conditions set by national law must be non-discriminatory on the basis of nationality and consistent with the country's obligations under the Treaty and must avoid anything that could jeopardise or undermine the attainment of the objectives of the Treaty. There was nothing amiss or untoward in requiring nationals of the other Partner States wishing to be admitted to the Roll of Advocates of the High Court of Kenya to satisfy or possess the same qualifications or equivalent qualifications to those required of Kenyan nationals seek in such admission.

18. So far as the instant appeal was not caught by the doctrine of mootness, the High Court did not err in its interpretation of sections 12 and 13 of the Advocates Act. There was a disconnect between sections 12 and 13 of the Advocates Act and section 16 and the Second Schedule to the Kenya School of Law Act, both of which were enactments of the Parliament of Kenya. Urgent legislative intervention was necessary to make the two statutes consistent, and if need be, to require in precise and clear terms that East African Community nationals seeking admission to the roll of advocates of the High Court of Kenya should meet tabulated or specified qualifications required of Kenya nationals or their equivalent. In doing so, account must be taken of the Country's obligations under the Treaty and the relevant Protocols.

Appeal dismissed.

Orders

Each party was to bear its own costs.

Citations

Cases

1. Cecilia Wangechi Ndungu v County Governement Of Nyeri & Cecilia Wangechi Ndungu v County Governement Of Nyeri (Petition 1 of 2014; [2015] KEELRC 1142 (KLR)) — Mentioned

2. Dande & 3 others v Inspector General, National Police Service & 5 others (Petition 6 (E007), 4 (E005) & 8 (E010) of 2022 (Consolidated); [2023] KESC 40 (KLR)) — Explained
3. Ekuru Aukot v Independent Electoral & Boundaries Commission, Wafula Chebukati, Jubilee Party & Orange Democratic Movement (Petition 471 of 2017; [2017] KEHC 9390 (KLR)) — Mentioned
4. Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others ([2014] KECA 615 (KLR)) — Mentioned
5. Institute for Social Accountability & another v National Assembly & 5 others (Petition 1 of 2018; [2022] KESC 39 (KLR)) — Explained
6. Kenya Airports Authority v Otieno Ragot and Company Advocates (Petition E011 of 2023; [2024] KESC 44 (KLR)) — Explained
7. Law Society of Kenya v Attorney General & another (Petition 4 of 2019; [2019] KESC 16 (KLR)) — Explained
8. Law Society of Kenya v Kenya Revenue Authority & Attorney General (Petition 39 of 2017; [2017] KEHC 8539 (KLR)) — Mentioned
9. Monica Wamboi Ng'ang'a & others v Council of Legal Education, Kenya School of Law, Attorney General, Law Council of Uganda & Uganda Pentecostal University (Petition 450, 448 & 461 of 2016; [2017] KEHC 8616 (KLR)) — Mentioned
10. Munya v The Independent Electoral and Boundaries Commission & 2 others (Petition 2B of 2014; [2014] KESC 38 (KLR)) — Explained
11. Nabulime Miriam,Steve Nyaega Aencha,Angela Ogang,Olang'o Omondi,Ng'etich Kiprono Timothy & others v Council of Legal Education,Kenya School of Law,Riara University,Commission for University Education,Attorney General & Cabinet Secretary for Education (Judicial Review Application 377 of 2015; [2016] KEHC 7630 (KLR)) — Mentioned
12. Obey Segran Segrana v Kenya School of Law & Council of Legal Education (Petition 200 of 2017; [2017] KEHC 3487 (KLR)) — Explained
13. The County Government of Nyeri & another v Ndungu (Civil Appeal 2 of 2015; [2015] KECA 1011 (KLR)) — Explained
14. AAA Investments (Pty) Ltd. v. Micro-Finance Regulatory Council & Another ((CCT51/05) [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343) — Explained
15. Reserve Bank of India v. Peerless General Finance & Investment Co. Ltd & Others ([1987] AIR 1023) — Explained
16. Irene Vlassopoulou v. Ministerium für Justiz, Bundes-und Europaangelegenheiten Baden-Württemberg (C-340/89) — Explained
17. Pepper v. Hart ([1992] 3 WLR 1032) — Explained
18. Westminster Bank Ltd v. Zan ([1966] AC 182) — Mentioned

Statutes

1. Advocates Act (cap 16) — section 12; 13 — Interpreted
2. Constitution of Kenya — article 1; 2(6); 10; 27; 28; 43(1); 47 — Interpreted
3. Fair Administrative Action Act (cap 7L) — In general — Cited
4. Kenya School of Law Act (cap 16C) — section 4(2)(a); 16; Schedule ii — Interpreted
5. Legal Education Act (cap 16B) — section 8 — Interpreted
6. Statute Law (Miscellaneous Amendments) Act (No. 12 of 2012) — Interpreted
7. Statute Law (Miscellaneous Amendments) Act (No. 2 of 2002) — In general — Cited
8. Treaty for The Establishment of The East African Community Act (cap 4C) — article 1; 8; 76; 104; 126 — Interpreted

Texts

1. I. A. Shearer (1996), Starke's International Law (11th Edition, Butterworths)

International Instruments

1. Protocol on the establishment of the East African Community Common Market — article 3(2)(a); 3(2)(b)
2. Treaty establishing the European Economic Community, 1957 — article 52
3. Vienna Convention on the Law of Treaties, 1969 — article 2

Advocates

None mentioned

JUDGMENT

1. The central issue in this appeal is the interpretation of sections 12 and 13 of the *Advocates Act*, cap 16 Laws of Kenya (the Act) regarding qualification and admission of advocates. At the hearing of the appeal, all the parties agreed that the 1st to the 12th respondents, who were the petitioners before the High Court, have since been admitted to the roll of advocates of the High Court of Kenya and that the only outstanding issue is the proper interpretation of the said provisions of the *Act*.

2. Before we determine the appeal, we must satisfy ourselves that the appeal is not moot, and that the court is not being asked to engage in an academic exercise.

3. The brief background to the appeal is as follows. The 1st to 12th respondents are nationals of the Republic of Uganda and the Republic of South Sudan. At the material time, they held bachelor of laws decrees from various universities in Uganda, South Africa and Kenya, and had applied for admission to the Kenya School of Law (the 13th respondent), an institution that is run by the appellant, the Council for Legal Education, for purposes of training aspiring advocates of the High Court of Kenya. For convenience we shall refer to the 1st to 12th respondents as "the petitioners".

4. On November 17, 2016, the appellant advised the petitioners that, being non-Kenyans, they were not eligible for admission to the Advocates Training Program at the Kenya School of Law, unless they were first admitted as advocates in their respective countries of origin. By the time the petitioners received the above information, they had successfully undertaken remedial programs in units prescribed by the appellant at Riara University, Kenya.

5. On December 1, 2016, eight of the petitioners lodged Petition No. 505 of 2016 in the High Court at Nairobi challenging the appellant's refusal to admit them to the Advocates Training Program. They contended that the appellant's action was unconstitutional and in violation of their rights and fundamental freedoms, in particular, the right to equality and freedom from discrimination under article 27, the right to dignity under article 28, and the right to education under article 43(1)(f) of the *Constitution of Kenya*. The petitioners further pleaded that the decision to deny non-Kenyans admission to the Kenya School of Law had no legal basis and was in violation of article 3(2)(a) and (b) of the *East African Community Common Market Protocol*.

6. By way of reliefs, the petitioners prayed for a declaration that the denial of admission to the Advocates Training Program was in violation of their constitutional rights; an order of certiorari to quash the appellant's decision; an order of mandamus to compel the appellant to consider the petitioners' applications; and costs. Subsequently, the 9th, 10th and 11th respondents lodged Petition No 509 of 2016, which was in similar terms as Petition No 505 of 2016. The two petitions were consolidated vide an order of the trial court dated December 20, 2016.

7. The appellant opposed the petitions vide a replying affidavit sworn on November 25, 2017 by Prof W Kulundu Bitonye, its Secretary. The substance of the response was that the decision to bar the

petitioners from the Advocates Training Program was made by the Task Force on Legal Sector Reforms rather than by the appellant. Nevertheless, the appellant defended the decision as made within the law in that, to qualify as an advocate in Kenya, a candidate had to satisfy the requirements of sections 12 and 13 of the *Act*. It was the appellant's position that, in addition to the citizenship qualification set out in section 12 of the *Act*, a candidate had also to satisfy the qualifications set out in section 13 of the *Act*, and that qualification under section 12 alone did not confer an automatic right of admission to the roll of advocates in Kenya.

8. The appellant further pleaded that it was within the power of a country to control admission to the roll of advocates by setting different qualifications for citizens and non- citizens, and that under the *Act*, non-citizens had first to qualify as advocates in their countries of origin before applying for admission into the Kenyan Bar. It was also the appellant's position that direct admission of noncitizens into the roll of advocates had no precedent in East Africa or in the world and by way of example, the appellant cited the cases of the Republic of Uganda, Republic of Rwanda, India, the Federal Republic of Nigeria, and the Republic of South Africa.

9. Lastly, the appellant pleaded that enforcement of the *Act* did not amount to unconstitutional discrimination against the petitioners within the meaning of articles 10 and 27 of the *Constitution*, or a violation of their right to dignity or education. The appellant also denied that exclusion of the petitioners from the Advocates Training Program was a violation of article 126 of the *Treaty for the Establishment of the East African Community* (the Treaty), pointing out that both Uganda and Rwanda do not allow automatic admission of Kenyans as advocates.

10. Mr Frederick Muhia, the academic manager of the Kenya School of Law, swore a replying affidavit on December 14, 2016 in which he deposed that the Kenya School of Law did not agree with the appellant's interpretation of sections 12 and 13 of the *Act*, but that the School was obliged to comply with the directives of the appellant, which in law was the regulator of legal education and training in Kenya. He added that barring the petitioners from the Advocates Training Program was a violation of articles 10 and 27 of the *Constitution* as well as article 126 of the *Treaty*, to which Kenya is a Partner State.

11. The Attorney General filed grounds of objection dated December 19, 2016 in which he denied any violation of the petitioners' rights and fundamental freedoms and pleaded that admission to the Advocates Training Program was conducted as provided by the law.

12. The petitions were heard by Mativo, J (as he then was) who, by the judgment impugned in this appeal, held that the main issue raised by the petitioners was the interpretation of sections 12 and 13 of the *Act*. After considering the various cannons of interoperation of constitutions and statutes, the trial court held that, in undertaking the interpretation, the court would be guided by the plain language of the statute.

13. As regards section 12 of the *Act*, the learned judge concluded that applying the plain language rule meant that a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania qualified for admission as an advocate.

14. As regards section 13, the court found that the contestation between the parties was on the meaning of section 13(d), which relates to advocates for the time being from the countries mentioned in section 12, except Kenya. After considering the provision, the learned judge concluded thus:

> " In the absence of clear provisions to the contrary, I find that the plain meaning of section 12(a) and section 13(d) is that the two provisions create two avenues for persons from the countries in question, and had Parliament intended otherwise, it could have said so in clear

terms. In fact, I find nothing in the above provisions to suggest that Parliament intended otherwise other than the plain meaning of the words in the two provisions. While enacting section 13(d), Parliament was already aware of section 12(a) and if at all the intention was otherwise, nothing prevented it from saying so in clear terms. The assertion that for decades the admission of students from the countries in question was premised on the wrong interpretation of the law is in my view incorrect."

15. The court therefore agreed with the interpretation adopted by the Kenya School of Law and found the interpretation by the appellant to be in violation of the petitioners' rights and fundamental freedoms and also in violation of article 126 of the *Treaty*. The court also found the appellant's decision to be null and void for violating article 47 of the *Constitution* on Fair Administrative Action the *Fair Administrative Action Act*.

16. Ultimately, the court issued a decree that the appellants decision barring the petitioners from the Advocates Training Program was null and void, an order of certiorari quashing the said decision, and an order of mandamus compelling the appellant to admit the petitioners to the Advocates Training Program. However, the court made no orders on costs.

17. The appellant was aggrieved and lodged the instant appeal based on 13 grounds of appeal, which its counsel, Mr Oduol clustered into four issues of which the last two raised and addressed the same issue. Devoid of duplication and repetition, the three issues framed by the appellant are:

    i. Whether the High Court erred in its interpretation of sections 12 and 13 of the *Act*;

    ii. Whether the High Court erred in failing to appreciate the relationship between, on the one hand, section 13 of the *Act* and, on the other, sections 4(2)(a), 16 and the Second Schedule to the *Kenya School of Law Act*; and

    iii. Whether the High Court erred by applying section 12 of the *Act* to countries beyond the five countries mentioned therein.

18. On the first issue, the appellant submitted that to qualify for admission as an advocate, a candidate must satisfy both the requirements of section 12 and 13 of the *Act*, and that satisfying section 12 alone would not entitle a candidate to admission. The appellant further contended that section 13 of the *Act* provided five different categories of persons who would qualify as advocates in Kenya.

19. In the appellant's view, satisfying the requirements of section 12 alone did not entitle a candidate to admission into the roll of advocates and that, if admitted to the Advocates Training Programme, such candidates would claim legitimate expectation to admission into the roll of advocates.

20. It was further contended that regulating admission into the roll of advocates was a country's sovereign right and that there was nothing remiss in setting different qualifications for citizens and foreign nationals. It was also the appellant's view that by dint of section 13, foreign nationals have to first qualify as advocates in their countries of origin.

21. The appellant added that the consequence of the impugned judgment was influx of candidates and diluting of the quality of legal education and training in Kenya and that the judgment was without precedent in the region or the world over. It was also argued that literal interpretation of section 12 and 13 of the *Act* results in an absurdity and violation of Kenya's sovereignty, which was not the intention of Parliament. In support of the submission that courts must eschew and interpretation that results in absurdity, the appellant relied on *Law Society of Kenya v Kenya Revenue Authority & Another* [2017] eKLR; *Ekuru Aukot v IEBC & 3 Others* [2017] eKLR; and *Ferdinard Ndung'u Waititu v IEBC & 8 others* [2014] eKLR.

22. On the second issue, the appellant submitted that by dint of section 4(2)(a) of the *Kenya School of Law Act*, admission to the Kenya School of Law is only open to persons who qualify under sections 12 and 13 of the *Act* for purposes of admission to the roll of advocates, and that any person not so qualified cannot claim that their right to education has been violated. On the same vein, it was contended that any limitations on noncitizens under section 12 and 13 of the *Act* are neither unreasonable nor unjustified in a democratic state. The cases of Uganda, Rwanda, Tanzania, South Africa, Nigeria and the United Kingdom were cited to demonstrate other states with similar restrictions.

23. On the last issue, the appellant submitted that section 12(a) of the *Act* conclusively states the countries whose citizens could apply for admission as advocates in Kenya subject to meeting the set qualifications, and that it was not open to the court to extend the list of the said nations. It was therefore contended that the High Court erred by including the Republic of South Sudan among the countries named in section 12(a) of the *Act*. In support of the submission, the appellant relied on the decision of the High Court in *Obey Segran Segrana v Kenya School of Law & another* [2017] eKLR where Mativo, J (as he then was) held that only citizens of the countries named in section 12(a) were qualified to apply for admission.

24. It was also the appellant's position that article 126 of the *Treaty* did not oblige Kenya to admit nationals of other State Parties as advocates of the High Court of Kenya, and that it only provided for harmonisation of legal educations standards and syllabi.

25. The 6th, 9th, 10th and 11th respondents, represented by learned counsel, Dr Okubasu, did not file any submissions, taking the view that the matter was moot in light of the admission of the respondents as advocates of the High Court of Kenya. All the other respondents neither filed submissions, nor appeared for the hearing of the appeal, although they were duly served with the hearing notice.

26. Mr. Amanya, the 12th respondent, who is a Ugandan national and an Advocate of the High Court of Kenya, opposed the appeal vide submissions dated October 4, 2022. He submitted that sections 12 and 13 of the *Act* do not exclude non-Kenyans from enrolling for the Advocates Training Program or admission as advocates of the High Court of Kenya. He cited the decision of this court in *County Government of Nyeri & another v. Cecilia Wangechi Ndung'u* [2015] eKLR in support of his contention that interpretation of a statute entails identification of the intention of the Parliament by reference to the words used, context, aim and purpose.

27. Mr Amanya further contended that section 12(1) of the *Act* expressly allows nationals of Kenya, Rwanda, Burundi, Uganda and Tanzania to be admitted as advocates of the High Court of Kenya, while section 13 sets the requisite academic and professional qualifications. He asserted that section 13 of the *Act* does not create five different categories as urged by the appellant, and submitted that there was no ambiguity in the two provisions nor were they capable of more than one meaning so as to justify the court departing from reliance on the ordinary meaning of the words used in the statute. He cited *Westminster Bank Ltd v Zan* [1966] AC 182 and *Reserve Bank of India v Peerless General Finance & Investment Co Ltd & Others* [1987] AIR 1023 in support of the proposition that a court is only entitled to ignore the ordinary meaning of the words if there is ambiguity or inconsistency in the provisions of the statute.

28. Mr Amanya further contended that sections 12 and 13 created two distinct avenues for nationals of the concerned countries to qualify for admission as advocates in Kenya and that, had Parliament intended otherwise, it would have provided so expressly. He added that any state organ, state or public officer called upon to interpret a statute must adopt the interpretation that promotes the values and principles of governance set out in the *Constitution* such as enjoyment of fundamental rights and freedoms, non-discrimination, constitutionalism and separation of powers.

29. It was Mr Amanya's further submission that the appellant's decision to bar the petitioners from admission as advocates of the High Court of Kenya was based on the recommendations of a Task Force, which were contrary to the provisions of the *Act* and that, therefore, those recommendations did not have the force of law. He contested the appellant's argument that the Republics of Rwanda and Uganda do not allow direct admission of nonnationals as advocates, submitting, first, that this was not the case because there were many Kenyan advocates practicing in the Republic of Uganda, and, second, that the issue was never conversed before the trial court and that, therefore, the appellant was barred from raising it on appeal since parties are bound by their pleadings.

30. It was also contended that the appellant had no power to direct the 13th respondent regrading who to admit to the Advocates Training Program because the 13th respondent was an autonomous body established by an Act of Parliament.

31. Mr. Amanya also contended that, if the interpretation of the Act advanced by the appellant is upheld, it would constitute discrimination against non-Kenya nationals contrary to article 27 of the *Constitution*, and also a violation of their right to education guaranteed under article 43(1)(f). For good measure, counsel added that a law that violates or is inconsistent with the *Constitution* is null and void to the extent of the inconsistency. He cited other decisions where the High Court had rebuffed the appellant's attempt to bar non-Kenya nationals from the Advocates' Training Program, namely, *Nabulime Miriam & others v Council for Legal Education & Others* [2016] eKLR and *Monica Wamboi Ng'ang'a & others v. Council for Legal Education & 4 others* [2017] eKLR.

32. Lastly, Mr. Amanya urged that the decision to bar the petitioners from the advocates training program and admission of as advocates of the High Court of Kenya was in violation of article 126 of the *Treaty*.

33. We have carefully considered this appeal, the judgment of the High Court, the submissions by the appellant and the 12th respondent as well as the authorities relied on. In our view, the following are the real issues raised in this appeal:

    i. Whether this appeal is moot?

    ii. If the answer is in the negative, what is the proper interpretation of sections 12 and 13 of the *Act*, and sections 4 and 16 of the *Kenya School of Law Act*?

    iii. What remedies are available to the parties?

34. The 6th, 9th, 10th and 11th respondents took the view that this appeal is moot because all the petitioners have since been admitted to the Roll of Advocates of the High Court of Kenya. In their view, there is therefore no live dispute to be determined in this appeal. The appellant was of a different mind, contending that the question of the proper interpretation of sections 12 and 13 of the *Act* is still live notwithstanding the admission of the petitioners to the Roll of Advocates of the High Court of Kenya.

35. The doctrine of mootness ensures that a court is not called upon to determine a dispute that has ceased to exist between the parties. It is anchored on the principle that the court's time and resources should only be deployed to determine live or active disputes, not disputes that have dissipated, ceased to exist, or have been reduced to academic, hypothetical or theoretical pursuits.

36. The doctrine is also underpinned by the principle that the court should not act or issue orders in vain.

37. In *Institute for Social Accountability & another v. National Assembly & 3 others* [2022] KESC 39 (KLR), the Supreme Court explained as follows regarding the doctrine of mootness:

> " ...a matter is moot when it has no practical significance or when the decision will not have the effect of resolving the controversy affecting the rights of the parties before it. If a decision of a court will have no such practical effect on the rights of the parties, a court will decline to decide on the case. Accordingly, there has to be a live controversy between the parties at all stages of the case when a court is rendering its decision. If after the commencement of the proceedings, events occur changing the facts or the law which deprive the parties of the pursued outcome or relief then, the matter becomes moot."
>
> (See also *Dande & 3 others v Inspector General, National Police Service & 5 others* [2023] KESC 40 (KLR).

38. It is however accepted that, in some instances, the court has a discretion to hear and determine a matter which is technically moot, if there is still an outstanding issue that is not settled, the settlement of which may guide future actions and operations of government. Thus, for example, in *AAA Investments (Pty) Ltd v Micro-Finance Regulatory Council & another* [2007] (1) SA 343 CC, the Constitutional Court of South Africa held that even though a matter is moot, the court could deal with the issues raised therein if it was in the interest of justice to do so, such as in the face of conflicting decisions. That decision was cited with approval by the Supreme Court in *Institute for Social Accountability & another v National Assembly & 3 Others* (*supra*) where the Court stated:

> " ...even in cases that can be said to be technically moot, it is good practice for the court to seize jurisdiction in a matter where the law on a particular issue is not settled and the question is of critical import to the operation of government."

39. In the instant appeal, the appeal is moot in the sense that the petitioners who were aggrieved by the appellant's decision have since been admitted to the Roll of Advocates of the High Court of Kenya and, therefore, that particular controversy between the parties is no longer extant. However, the question as to the proper interpretation of sections 12 and 13 of the *Act* still linger and is live. We also bear in mind that the question of admission of non-Kenyans to the Advocates Training Program and to the Roll of Advocates in future is still live and ought to be resolved by this court. In the circumstances, we are satisfied that the decision of this court will have practical effect on future non-Kenyan applicants, and that it is a fit and proper matter to exercise discretion and determine notwithstanding the fact that the dispute between the parties is otherwise technically moot.

40. As earlier indicated, at the heart of this appeal is the proper interpretation of sections 12 and 13 of the *Act* and sections 4 and 16 of the *Kenya School of Law Act*. The cannons of statutory interpretation are well known. We are called upon to establish the intention of Parliament from the words used in the *Act*. We can only depart from that approach if the words used lead to inconsistencies, ambiguity, absurdity or a result that is patently in violation of a provision or provisions of the *Constitution*.

41. In *Law Society of Kenya v Attorney General & Another* [2019] KESC 16 (KLR), the Supreme Court explained the approach as follows:

> " ...intention is construed by scrutinising the language used in the provision which inevitably discloses its purpose and effect. It is the task of a court to give a literal meaning to the words used and the language of the provision must be taken as conclusive unless there is an expressed legislative intention to the contrary."

42. And in *Kenya Airports Authority v Otieno Ragot & Co Advocates*, SC Pet No E011 of 2023, the same court held as follows:

> " We are cognisant that the purpose of interpretation of statutes or document ... is to discern the intention of the framers thereof. In doing so, such intention can be derived from the words used therein, as appreciated in *Law Society of Kenya v Attorney General & Another*, SC Petition No 4 of 2019, [2019] KESC 16 (KLR). Further, regard has to be given to the context thereof as the Supreme Court of India in the often-cited case of *Reserve Bank of India v Peerless General Finance and Investment Co Ltd and others* [1987] 1 SCC 424 expressed –
>
> > " Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important... A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word..."
>
> See also *County Government of Nyeri & Another v Cecilia Wangechi Ndungu* (*supra*).

43. Sections 12 and 13 of the *Act* fall under Part IV of the *Act*, which is headed "Admission as Advocate." The relevant provisions provide as follows:

> " Part IV – Admission as Advocate
>
> 12. Qualification for admission as advocate
>
> Subject to this *Act*, no person shall be admitted as an advocate unless—
>
> a. he is a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania; and
>
> b. he is duly qualified in accordance with section 13.
>
> 13. Professional and academic qualifications
>
> 1. A person shall be duly qualified if—
>
> a. having passed the relevant examinations of any recognized university in Kenya he holds, or has become eligible for the conferment of, a degree in law of that university; or
>
> b. having passed the relevant examinations of such university, university college or other institution as the Council of Legal Education may from time to time approve, he holds, or has become eligible for conferment of, a degree in law in the grant of that university, university college or institution which the Council may in each particular case approve; and thereafter both-
>
> i. he has attended as a pupil and received from an advocate of such

class as may be prescribed, instruction in the proper business, practice and employment of an advocate, and has attended such course or tuition as may be prescribed for a period which in the aggregate including such instruction, does not exceed eighteen months; and

ii. he has passed such examinations as the Council of Legal Education may prescribe; or

a. he possesses any other qualifications which are acceptable to and recognized by the Council of Legal Education;

b. he is an Advocate for the time being of the High Court of Uganda, the High Court of Rwanda, the High Court of Burundi or the High Court of Tanzania;

c. he is for the time being admitted as an advocate of the superior court of a country within the Commonwealth and-has practised as such in that country for a period of not less than five years; and

iii. is a member in good standing of the relevant professional body in that country:

Provided that the Council may, in addition, require that a person to whom this paragraph applies undergo such training, for a period not exceeding three months, as the Council may prescribe for the purpose of adapting to the practice of law in Kenya.

2. The Council of Legal Education may exempt any person from any or all of the requirements prescribed for the purposes of paragraph (i) or paragraph (ii) of subsection (1) upon such conditions, if any, as the Council may impose."

44. Even a cursory look at section 12 and 13 makes it clear beyond dispute that, as regards qualification for admission to the Roll of Advocate of the High Court of Kenya, the two sections must be read together. Section 12 names five countries, namely, Kenya, Rwanda, Burundi, Uganda and Tanzania, whose citizens qualify for admission as advocates in Kenya, in so far as they also satisfy the qualification criteria set out in section 13. Thus, a candidate must satisfy both section 12 and section 13 by being a national of one of the named countries and, in addition, satisfying the qualifications set out in section 13. Section 12 and 13 must be read conjunctively.

45. To interpret the two provisions in issue disjunctively would result in an obvious absurdity. It would mean that so long as the applicant is a national of the countries named in section 12, he or she would be automatically entitled to admission to the Roll of Advocates of the High Court of Kenya whether or not they have met the academic and professional qualifications for admission as an advocate. We say that it is absurd because even Kenya nationals are not admitted to the Roll of Advocates by virtue of nationality alone. We are not aware of any country in the world where applicants are admitted as advocates solely on the basis of nationality without any regard to academic or professional qualification as a lawyer. We must hasten to add, however, that nowhere in its judgment did the High Court hold or even suggest that nationals of the countries named in section 12 of the *Act* were entitled to admission to the Advocates Training Program or the Roll of Advocates of the High Court of Kenya by virtue of nationality alone without satisfying the academic and professional qualifications stipulated in section 13.

46. Turning to section 13 of the *Act*, it sets out the academic and professional qualifications that various categories of applicants must satisfy in addition to being nationals of any of the nations mentioned in section 12. In all, there are five distinct categories of applicants as correctly submitted by the appellant. As drafted, the section is not the easiest to understand and could have been simplified. Nevertheless, it is possible to distill the clear meaning of the qualification demanded of each class or category of applicants. The qualifications are in the alternative, meaning that a candidate is eligible for admission into the roll of Advocates if he or she satisfies any of the stipulated qualifications. We propose to examine these qualifications seriatim.

47. The first category of applicants eligible for admission are applicants from the five named countries who hold, or are eligible for conferment of, a degree in law from a recognised Kenyan University. Recognition of Kenyan universities to award and confer degrees in law is vested in the appellant by the *Legal Education Act*. Under section 8 of that *Act*, the appellant is responsible for among others, the licensing of legal education providers and accrediting them for purposes of licensing.

48. The second category is comprised of applicants from the five named countries who hold or are eligible for conferment of a degree in law from such university, university college or other institution outside Kenya, approved by the appellant. In addition to satisfying this condition, the applicant in this category must satisfy two other conditions. The first is that the applicant must attend as a pupil and receive instruction in the proper business, practice of an advocate from a prescribed advocate, and attend a prescribed cause or tuition for a period not exceeding 18 months. The second is that the applicant must pass such examinations as the appellant may prescribe.

49. The third category comprises of applicants from the five named countries who possess any other qualifications acceptable to and recognized by the appellant.

50. The fourth category is made up of applicants from the named countries, and who are already advocates of the High Courts of Uganda, Rwanda, Burundi or Tanzania. It must be borne in mind that to have qualified as advocates in their respective countries, the applicants must have satisfied the academic and professional requirements prescribed by their local law. In this category would fall a Kenyan applicant

who is not an Advocate of the High Court of Kenya, but is an advocate of the High Court of any of the other four countries.

51. The fifth and last category consists of applicants from the five named countries, and who are already advocates of a superior court in any other Commonwealth country. Applicants in this category, they must, in addition, satisfy two other conditions, namely that they must have practiced in the concerned Commonwealth country for a period of not less than five years, and must also be of good standing in the relevant professional body of the concerned country. For this category of applicants, the appellant has the discretion to require that they undergo such training as it may prescribe for a period not exceeding three months for purposes of adapting to the practice of law in Kenya.

52. Lastly, the *Act* confers on the appellant discretion to exempt an applicant in category two, on such conditions as it may impose, from attendance as a pupil and sitting prescribed examinations.

53. The foregoing categories are distinct and separate. If, for example, the 12th respondent, a Uganda national, holds a degree in law from a university recognised in Kenya, there is no requirement under section 12 and 13 of the *Act* that he must also be admitted as an Advocate of the High Court of Uganda. Similarly, if the applicant is already admitted as an Advocate of the High Court of Uganda, the *Act* does not prescribe any additional conditions or qualifications.

54. From our analysis of sections 12 and 13 of the *Act*, we agree with the High Court that there is nothing in the *Act* that required the petitioners to be first admitted as advocates in their nations of origin. Once an applicant is from any of the countries named in section 12 of the *Act* and, in addition, satisfies any of the academic and professional qualifications set out in section 13 of the *Act* and, where applicable, satisfies the requirements of section 16 and the Second Schedule to the *Kenya School of Law Act*, such an applicant would be entitled to admission to the roll of advocates of the High Court of Kenya.

55. Other than the *Advocates Act*, the *Kenya School of Law Act* has provisions that are relevant and bear on admission to the Roll of Advocates. The school is established by the *Kenya School of Law Act* as a public legal education provider responsible for the provision of professional legal training. One of the School's functions is the training of persons to be advocates under the *Advocates Act*.

56. Section 16 of the *Kenya School of Law Act* provides for qualification for admission to the School in the following terms:

> " 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."

The Second Schedule prescribes the following qualifications for admission into the Advocate Training Programme:

> "(1). a person shall be admitted to the School if:
>
> a. having passed the relevant examination of any recognized university in Kenya holds, or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) of that university; 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; or

(2) has sat and passed the Pre-Bar examination set by the School."

57. As is patently clear from section 16 as read with the Second Schedule, there is an obvious disconnect between the *Kenya School of Law Act* and the *Advocates Act* as regards the qualification for admission to the Advocates Training Program and the Roll of Advocates. Yet one of the statutory functions of the Kenya School of Law is the training of persons to be admitted to the Roll of Advocates under the *Advocates Act*.

58. The qualifications for admission to the Advocates Training Programme are minimalist compared to those for admission to the Roll of Advocates. They are a degree in law from a recognised university in Kenya or; a degree from a university, university college or other institution prescribed by the appellant. For this latter category, the applicant must have attained two prescribed minimum grades. Lastly, an applicant may be admitted to the School if he or she sit and pass the Pre-Bar examinations set by the School.

59. It is plainly obvious that the effect of strict and literal interpretation and application of the second schedule to the *Kenya School of Law Act* would be to void and nullify sections 12 and 13 of the *Advocates Act* or, at the very least, constrict and emasculate them beyond recognition. As a court, we must eschew an approach of legislative interpretation that renders otiose provisions of a statute who purpose and intent is quite clear.

60. We have asked ourselves the rationale behind section 12 of the *Act*, which, subject to meeting the academic and professional qualifications set out in section 13, allows admission to the Roll of Advocates of nationals of the five named countries. Clearly the reason cannot be commonality of legal systems because, while Kenya, Uganda and Tanzania have the common law system, the Burundi and Rwanda system is the continental legal system. Conversely, there are many other common law system countries which are not included in section 12. The only rational explanation that we can discern is that all the named countries are Partner States to the Treaty.

61. The three initial Partner States, namely Kenya, Tanzania and Uganda signed the Treaty on November 30, 1999 and ratified the same on July 1, 2000. The Treaty came into force on July 7, 2000 and the other Partner States acceded to the Treaty as follows: Burundi and Rwanda, July 1, 2007; South Sudan, August 15, 2016; Democratic Republic of Congo, July 11, 2022; and Somalia, March 4, 2024.

62. In the preamble to the *Treaty*, the Partner States commit to strengthen their economic, social, cultural, political technological and other ties for sustainable development by establishment of the East African Community, an East African Customs Union and a Common Market as transitional steps to integration, leading to a Monetary Union and ultimately a Political Federation. In article 76 the Partner States agreed to conclude a Protocol on a Common Market to provide progressively for free movement of labour, goods, services, capital, and the right of establishment. Lastly, in article 104, the Partner States committed to adopt measures to achieve the free movement of persons, labour and services, and to ensure the enjoyment of the right of establishment and residence of their citizens within the

Community. Towards that end, they agreed to conclude a Protocol on the Free Movement of Persons, labour services and Right of Establishment and Residence.

63. It must be noted that, under article 1 of the *Treaty*, the term 'treaty' is defined to mean:

> "... this Treaty establishing the East African Community and any annexes and protocols thereto." (Emphasis added).

Similarly, Article 2 of the *Vienna Convention on the Law of Treaties*, 1969, defines a "treaty" to include its other related documents, as follows:

> "a. "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." (Emphasis added).

64. Thus, the Protocols concluded under the Treaty form part and parcel of the Treaty.

65. To implement articles 76 and 104 of the *Treaty*, the Partner States concluded the *Protocol on the Establishment of the East African Community Common Market* on 20th November 2009, which provides for, among other things, the free movement of goods; the free movement of persons; the free movement of labour; the right of establishment; the right of residence; the free movement of services; and the free movement of capital. By article 3 of the *Protocol*, the Partner States set out the principles of the Common market and undertook to:

a. observe the principle of non-discrimination of nationals of other Partner States on grounds of nationality;

b. accord treatment to nationals of other Partner States, not less favourable than the treatment accorded to third parties;

c. ensure transparency in matters concerning the other Partner States; and

d. share information for the implementation of this Protocol.

66. The Treaty was domesticated in Kenya by the *Treaty for the Establishment of the East African Community Act*, No 2 of 2000. We believe that section 12 of the *Advocates Act* was enacted in 2012 in a bid to discharge Kenya's obligations under the Treaty and the Protocol. Prior to 2002, the *Advocates Act* allowed admission to the Roll of Advocates of only Kenya nationals. In 2002, the *Advocates Act* was amended by the *Statute Law (Miscellaneous Amendments) Act* No 2 of 2002 to allow admission to the Roll of Advocates of qualified applicants from Uganda and Tanzania. In 2012, through the *Statute Law (Miscellaneous Amendments) Act* No 12 of 2012, the *Advocates Act* was further amended to allow nationals of Burundi and Rwanda.

67. We bear in mind that by article 8 of the *Treaty*, the Partners States have undertaken to enact and implement legislation to, among others, confer upon the legislation, regulations and directives of the Community and its institutions the force of law within their territories; to give precedence to Community organs, institutions and laws over similar national ones on matters pertaining to the implementation of the Treaty, and to make the necessary legal instruments to confer precedence of Community organs, institutions and laws over similar national ones.

68. Moreover, by dint of article 2(6) of the *Constitution*, any treaty or convention ratified by Kenya forms part of the law of Kenya. So long as they are not demonstrated to the satisfaction of this court to be

contrary to the *Constitution*, treaties that Kenya has domesticated and those that are applicable in Kenya by dint of article 2(6) of the *Constitution* must be applied and given effect like the other laws of Kenya.

69. Although the appellant faults the High Court for holding that an applicant from South Sudan, which is not among the countries named in section 12, may be admitted to the Roll of Advocates subject to meeting the prescribed criteria, we would not interfere with that aspect of the decision of the High Court. This is because, while it is true that South Sudan is not mentioned in section 12, there is no dispute that it is a Partner State to the Treaty and, as we have seen, the rationale behind section 12 was to ensure Kenya's compliance with its obligations under the Treaty. So long as South Sudan, or any other Partner State is not included in section 12, Kenya is not fully compliant with its obligations under the Treaty.

70. Earlier on, we indicated that in interpreting a statute the court strives to decipher the intention of Parliament as expressed in the words used in the statute. It is also accepted that were necessary and for purposes of avoiding ambiguity or absurdity, or as in this case, violation of obligations under international law, the court may legitimately consider the context and the purpose of an enactment and adopt a purposive interpretation. In this context the decision of the Supreme Court of India in *Reserve Bank of India v Peerless General Finance & Investment Co. Ltd and others* [1987] 1 SCC 424 is aptly on point when it asserts that

> " a statute (or a provision) is best interpreted when we know why it was enacted."

71. We also recall that in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] KESC 38 (KLR), the Supreme Court cited with approval *Pepper v Hart* [1992] 3 WLR 1032 where Lord Griffiths held as follows:

> " The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted."

72. In view of what we have stated as regards the purpose of section 12 of the *Act*, the decision of the High Court in *Obey Segran Segrana v Kenya School of Law & Another* (*supra*), is easy to understand. The applicant in that case was a Liberian national and the High Court declined to order her admission into the roll of advocates because Liberia is neither mentioned in section 12(a) of the *Act*, and we would add, nor is it a Partner State to the Treaty.

73. The appellant presented an interesting argument to the effect that giving effect to sections 12 and 13 of the *Act* undermines the sovereignty of the Republic of Kenya. We are not persuaded by that argument because, first, sections 12 and 13 of the *Act*, which the court was requested to give effect to, were enacted by the Parliament of Kenya in exercise of the country's sovereign power under Article 1 of the *Constitution*. Second, the enactment of those provisions was consequent upon Kenya ratifying the Treaty and assuming obligations thereunder. Entering into international treaties and engagements is an a tribute of state sovereignty. As is well accepted in international law, when a sovereign state enters into a treaty under which it accepts some duties and obligations, the result is some restriction on its exercise of its sovereign rights in the sense that it agrees to exercise its sovereignty in a particular way. In our perception, therefore, an act done by a state in exercise of its sovereign power cannot be said to

undermine the sovereignty of the same state. Regarding the practical limits of sovereignty, I. A. Shearer notes as follows in *Starke's International Law*, 11th Edition, Butterworths, 1996:

> "Sovereignty' has a much more restricted meaning today than in the eighteenth and nineteenth centuries when, with the emergence of powerful highly nationalised states, few limits on state autonomy were acknowledged. At the present time there is hardly a state which, in the interests of the international community, has not accepted restrictions on its liberty of action. Thus, most states are members of the United Nations and the International Labour Organisation (ILO), in relation to which they have undertaken obligations limiting their unfettered discretion in matters of international policy. Therefore, it is probably more accurate today to say that the sovereignty of a state means the residuum of power which it possesses within the confines laid down by international law."

74. We should not be understood to mean by this judgment that it is a violation of the Treaty for Kenya to require nationals of the other Partner States wishing to be admitted to the roll of advocates of the High Court of Kenya to satisfy the same conditions as those applicable to Kenyans. Far from it. In this regard, we would cite for inspiration the decision of the European Court of Justice in *Irene Vlassopoulou v. Ministerium für Justiz, Bundes-und Europaangelegenheiten Baden- Württemberg* , Judgment of 07.05.91 in Case C-340/89.

75. That case involved interpretation of article 52 of the *European Economic Community Treaty*. That article provides in the pertinent part as follows:

> "Freedom of establishment shall include the right to take up and pursue activities as self-employed persons . . . under the conditions laid down for its own nationals by the law of the country where such establishment is effected . . ."

76. The applicant, a Greek lawyer who also held a doctorate in law from a German University, was denied admission as a lawyer to the local and regional courts at Mannheim and Heidelberg in Germany. Admission was denied on the ground that she did not hold the requisite qualifications. She commenced proceedings in German courts and the matter reached the Federal Supreme Court, it sought a preliminary ruling from the European Court of Justice as to whether the refusal to admit her as a lawyer was a violation of freedom of establishment provided by article 52 of the *EEC Treaty*.

77. In its preliminary ruling the European Court of Justice held that:

> "[I]n the absence of harmonisation of the conditions of access to a particular occupation the Member States are entitled to lay down the knowledge and qualifications needed in order to pursue it and to require the production of a diploma certifying that the holder has the relevant knowledge and qualifications."

78. We are persuaded by the reasoning in the above preliminary ruling, save to add that in setting the qualifications to be satisfied by nationals of the other Partner States, the conditions set by national law must be non-discriminatory on the basis of nationality and consistent with the country's obligations under the Treaty and must avoid anything that could jeopardise or undermine the attainment of the objectives of the Treaty. In other words, there is nothing amiss or untoward in requiring nationals of the other Partner States wishing to be admitted to the Roll of Advocates of the High Court of Kenya to satisfy or possess the same qualifications or equivalent qualifications to those required of Kenyan nationals seek in such admission.

79. Ultimately, to the limited extent that we have engaged with this appeal in so far as it is not caught by the doctrine of mootness, we are not persuaded that the High Court erred in its interpretation of sections 12 and 13 of the *Advocates Act*, as they now stand. We have however noted that there is a disconnect between sections 12 and 13 of the *Advocates Act* and section 16 and the Second Schedule to the *Kenya School of Law Act*, both of which are enactments of the Parliament of Kenya. Urgent legislative intervention is necessary to make the two statutes consistent, and if need be, to require in precise and clear terms that East African Community nationals seeking admission to the roll of advocates of the High Court of Kenya should meet tabulated or specified qualifications required of Kenya nationals or their equivalent. In doing so, account must be taken of the country's obligations under the Treaty and the relevant Protocols thereunder.

80. As regards costs, from the nature of this appeal, the obvious public, national and regional interest involved, we direct each party to bear their own costs. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH 2025.

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA, C.Arb, FCIArb.

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

signed

DEPUTY REGISTRAR.