Otieno & another v Council of Legal Education (Civil Appeal 38 of 2018) [2021] KECA 349 (KLR) (17 December 2021) (Judgment)

Neutral citation: [2021] KECA 349 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 38 OF 2018

DK MUSINGA, RN NAMBUYE & AK MURGOR, JJA

DECEMBER 17, 2021

BETWEEN

JAVAN KICHE OTIENO ..... 1ST APPELLANT

FRED MOMANYI ..... 2ND APPELLANT

AND

COUNCIL OF LEGAL EDUCATION ..... RESPONDENT

(Being an appeal arising from the Judgment and Decree of the High Court of Kenya at Nakuru (Maureen A. Odero, J.) dated 30th January 2018 in High Court Petition No. 20 of 2016)

Requirements for advocates trained in the commonwealth countries to be eligible for admission to the roll of advocates in Kenya.

Reported by Kakai Toili

Legal Practice *- advocates - foreign advocates – advocates from commonwealth countries – eligibility of admission of commonwealth advocates to the Kenyan Bar – what were the requirements to be met by advocates trained in commonwealth countries to be eligible for admission to the roll of advocates in Kenya - Advocates Act (cap 16) sections 12 and 13.*

Constitutional Law *– constitutionality of legislations – effect of a declaration of unconstitutionality of a statute - where a court had declared that the amendments in sections 12 and 13 of the Advocates Act were unconstitutional - when did a piece of legislation declared unconstitutional by a court become a nullity.*

Statutes *- statutory instruments – regulations – requirement to lay regulations before Parliament - what was the effect of failure to lay regulations before Parliament and the failure of Parliament to adopt the regulations – whether the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 had come into effect and enacted in a procedural manner - Statutory Instruments Act, 2013, section 11(4).*

Brief facts

The appellants averred that the respondent legislated and gazetted the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 (impugned Regulations) which provided that a Kenyan undergoing

training in a foreign institution and who had attained professional qualifications for the practice of law had to first practice for 5 years in that country before applying to the respondent for recognition of their professional qualifications. The appellants claimed that the respondent did not have powers to enact the impugned Regulations. The appellants further argued that the respondent commenced implementation of the impugned Regulations prior to adoption by Parliament, which was in contravention of sections 6 and 7 of the Statutory Instruments Act.

Aggrieved, the appellants filed a constitutional petition against the respondent in the High Court seeking, among others, an order of *certiorari* to quash the impugned Regulations; and an order of *mandamus* compelling the respondent to recognize and approve the petitioner's professional qualifications for purposes of section 13 of the Advocates Act.

The appellants contended that they were Kenyan citizens and that they held diplomas in legal practice from the only Bar School in Rwanda. It was the appellants' case that they applied under section 13 of the Advocates Act (cap 16) (as amended by the Statute Laws Miscellaneous (Amendment) Act 2012), for the respondent to recognize and approve the qualifications they obtained in Rwanda so that they could be admitted to the roll of advocates in Kenya. The appellants claimed that the respondent refused to recognize their qualifications, and instead demanded that in order to qualify for admission, they had to first be admitted to the Bar in Rwanda, and have practiced law in Rwanda for five years, which were conditions precedent for the recognition and approval of their professional qualifications.

The High Court dismissed the petition for want of merit, for among other reasons, that the impugned Regulations having not been enacted had no force of law and in view of the appellants' failure to meet the threshold requirements for admission to the roll of advocates in Kenya. The appellants were dissatisfied with the High Court's decision and thus filed the appeal.

Issues

i. What were the requirements to be met by advocates trained in the commonwealth countries for purposes of admission to the roll of advocates in Kenya?
ii. When did a piece of legislation declared unconstitutional by a court become a nullity?
iii. What was the effect of failure to lay the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 before Parliament, and the failure of Parliament to adopt the Regulations?

Relevant provisions of the Law

Statutory Instrument Act, 2013

Section 11 - Laying of Statutory Instruments before Parliament

(4) If a copy of a statutory instrument that is required to be laid before the relevant House of Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void.

Held

1. On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate and draw its own conclusions. However, it should always bear in mind that it had never seen or heard the witnesses and should make due allowance in that respect. The responsibility of the court was to rule on the evidence on the record and not to introduce extraneous matters not dealt with by the parties in evidence.
2. The record did not disclose that following gazetting of the impugned Regulations, they were thereafter laid before Parliament and adopted. There was nothing that showed that they were at any time passed into law in accordance with the procedures set out in section 11(4) of the Statutory Instrument Act, 2013. The impugned Regulations were not adopted by Parliament and as a consequence, did not acquire the force of law. As such, they were inapplicable for want of legality, and therefore could not have been the basis upon which the appellants were denied admission to the roll of advocates.

3. The amended provisions of the Advocates Act by the Statute Laws Miscellaneous (Amendment) Act 2012) expanded to include advocates of the High Court of Rwanda and Burundi as being eligible for admission to the roll of advocates in Kenya. Whereas, prior to the amendment, the only advocates eligible for admission were from Tanzania and Uganda. Though the appellants attended the Bar School in Rwanda, there was nothing indicative of their admission as advocates to the High Court of Rwanda; without such admission, for all intents and purposes, they were ineligible for admission to the roll in Kenya under section 13(1)(d) of the Advocates Act.
4. In the event section 13(1)(d) of the Advocates Act was inapplicable, the appellants could be admitted as advocates in a commonwealth country, Rwanda being one. However they ought to have practiced for 5 years and been found to be persons of good standing from the relevant professional body in that country, as required by section 13(1)(e) of the Advocates Act. Nothing demonstrated that the appellants were admitted to the High Court of Rwanda or to a commonwealth country, with the effect that they did not qualify for admission to the roll of advocates in Kenya since the strictures of section 13(1)(e) were also not satisfied.
5. The decision of the instant court in the case of *Law Society of Kenya v Attorney General & 2 others*, (2019) eKLR nullified the amended sections 12 and 13 of the Advocates Act. In that case, the court found that Parliament in enacting the provisions overreached its limits by passing substantive amendments in an unprocedural and non-participatory manner through the Statute Law Miscellaneous (Amendment) Act 2012. That decision had not been appealed against or set aside and therefore the unconstitutionality of the amended sections 12 and 13 remained.
6. The amended sections 12 and 13 of the Advocates Act having been declared unconstitutional meant that the law reverted to the position where, only advocates from the High Court of Tanzania and the High Court of Uganda were eligible for admission to the Kenyan Bar. It no longer extended to those from Rwanda and Burundi. Given their Rwandan qualifications, were they to be admitted as advocates in Rwanda, the nullification rendered the appellants ineligible for admission to the roll of advocates in Kenya.
7. It could be argued that the unconstitutionality or not of section 12 and 13 of the Advocates Act would not apply to the circumstances of the instant case as, the decision of the court was rendered after the appellants had filed their petition, and after the High Court had rendered its decision. However, a court having declared a piece of legislation or a section of an Act to be unconstitutional, that Act or law became a nullity from the date of inception or enactment and not from the date of the judgment. But it would not be applicable to actions already crystallised whilst the expunged law was in force.
8. The judgment in *Law Society of Kenya v Attorney General & 2 others*, [2019] eKLR declared the amendments to sections 12 and 13 of the Advocates Act unconstitutional since they were enacted in contravention of the Constitution prerequisites. Once the sections were declared unconstitutional, the provisions became void from the date of inception of the amendments, which in the instant case was when section 13 was amended in 2012.
9. The decision of the court in *Law Society of Kenya v Attorney General & 2 others*, (2019) eKLR would not only apply to the instant matter, but would also bind other matters seeking to rely on the impugned provisions, particularly those pending before the courts. The judgment would not affect or nullify admissions of those advocates who were already admitted under the expunged provisions and during the pendency of the case.
10. Even if the respondent had sought to comply with the impugned provisions, the relevant provisions having been struck out and declared unconstitutional meant that the appellants' application grounded on the amended section 13 of the Advocates Act, would have had no legal basis or foundation upon which the respondent could rely to admit them. Were they to do so; they would be in clear contravention of the law.

11. If an Act was void, then it was in law a nullity. It was not only bad but incurably bad. There was no need for an order of the court to set aside. It was automatically null and void without more ado, though it was sometimes convenient to have the court declare it to be so.

Appeal dismissed.

Orders

No orders as to costs

Citations

Cases

East Africa;

1. *Kenya Country Bus Owners' Association (Through Paul G. Muthumbi – Chairman, Samuel Njuguna Secretary Joseph Kimiri – Treasurer) & 8 others v Cabinet Secretary for Transport and Infrastructure & 5 others* Judicial Review Case 124 of 2014; [2014] eKLR — (Explained)
2. *Kenya Ports Authority vs Kuston (Kenya) Limited* (2009) 2 EA 212 — (Explained)
3. Keroche Breweries Limited & 6 others vs Attorney General & 10 others Petition 295, 309, 314 of 2015 & Judicial Review 231, 242, 246 & 247 of 2015 (Consolidated); [2016] eKLR — (Explained)
4. *Law Society of Kenya v Attorney General & 2 others* Civil Appeal 96 of 2014; [2019] eKLR — (Explained)
5. *Wambui Munene Mary v Peter Gichuki King'ara & 2 others* Petition 7 of 2014; [2014] eKLR — (Explained)
6. *Republic vs Kenya School of Law & Council of Legal Education Ex Parte Daniel Mwaura Marai* Judicial Review Application 529 of 2017; [2017] eKLR — (Explained)

South Africa;

Sias Moise vs Transitional Local Council of Greater Germiston (Case CCT 54/00) — (Explained)

Northern Ireland;

A v Governor of Arbour Hill Prison [2006] IESC 45; [2006] 4 IR 88 - (Explained)

United Kingdom;

Macfoy vs United Africa Company [1961] 3 All ER 1169 — (Explained)

Statutes

East Africa;

1. Advocates Act (cap 16) sections 12, 13(1)(b)(c)(d)(e) — (Interpreted)
2. Competition Act, 2010 (Act No 12 of 2010) section 3(f) — (Interpreted)
3. Constitution of Kenya, 2010 articles 10, 27, 41, 43, 47 — (Interpreted)
4. Fair Administrative Actions Act, 2015 (Act No 4 of 2015) sections 4, 5, 6, 7(2) — (Interpreted)
5. Interpretation and General Provisions Act (cap 2) section 3(1); 69 — (Interpreted)
6. Kenya National Qualifications Framework Act, 2014 (Act No 22 of 2014) sections 4, 8, 29 — (Interpreted)
7. Legal Education Act, 2012 (Act No 27 of 2012) sections 4(5); 8(1)(3)(b); 46 (1) — (Interpreted)
8. Statutory Instruments Act, 2013 (Act No 23 of 2013) section 5(1); 6; 7; 11(1)(4); 14 — (Interpreted)
9. Universities Act, 2012 (Act No 42 of 2012) section 5 — (Interpreted)

Advocates

None mentioned

JUDGMENT

1. The appellants, Javan Kiche Otieno and Fred Momanyi filed a Constitutional Petition dated 21st April 2016 against the respondent, Council of Legal Education in the High Court at Nakuru wherein they sought the following orders:

    a) A declaration that the respondent's conduct of enacting the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 contained in the Legal Notice No 15 of 2016' is contrary to and inconsistent with the provisions of articles 73 and 232 of the Constitution;

    b) A declaration that section 46(1) of the *Legal Education Act*, 2012 with the exemption of paragraph them, stands repealed by section 5 of the *Universities Act*, No 42 of 2012 and sections 4, 8 and 29 of the *Kenya National Qualifications Framework Act*,

    c) A declaration that the respondents, jointly and severally, have violated the constitutional rights of the petitioners guaranteed and protected under articles 27, 41, 43 and 47 of the *Constitutional* of Kenya, 2010;

    d) An order of *certiorari* to remove into this court for purpose of quashing forthwith and to quash the Legal Foundation (Accreditation and Quality Assurance) Regulations 2016 contained in legal notice No 15 of 2016;

    e) An order that the respondents do pay the petitioners general damages for breach of their constitutional rights and loss of employment opportunities.

    f) An order of *mandamus* compelling the respondent to recognize and approve the petitioner's professional qualifications for purposes of section 13 of the *Advocates Act* chapter 16 of the Laws of Kenya;

    g) Costs of the petition; and

    h) Any other orders that the court shall deem fit and just to grant.

2. The petition was supported by the affidavit of 2nd appellant, where it was contended that the appellants are Kenyan citizens and hold Diplomas in Legal Practice from the Institute of Legal Practice and Development (ILPD), the only Bar School in Rwanda. The 1st appellant's certificate was issued to him on 4th April 2015, and by the time of filing the petition, the 2nd respondent had yet to receive his.

3. It is their case that they applied under section 13 of the *Advocates Act*, cap 16, Laws of Kenya (as amended by the Statute Laws Miscellaneous (Amendment) Act 2012) for the respondent to recognize and approve the qualifications they obtained in Rwanda so that they could be admitted to the Roll of Advocates in Kenya. They claimed that the respondent had refused to recognize their qualifications, and instead had demanded that in order to qualify for admission to the Roll of Advocates, they must first be admitted to the Bar in Rwanda, and must have practiced law in Rwanda for five (5) years, which were conditions precedent for the recognition and approval of their professional qualifications.

4. It was further averred that on 6th February 2016, the respondent legislated and gazetted the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 (the impugned regulations) which provided that a Kenyan who was undergoing training in a foreign institution and who has attained professional qualifications for the practice of law must first practice for 5 years in that country before applying to the respondent for recognition of their professional qualifications; that the

respondent did not have powers to enact the impugned regulations, as they were enacted pursuant to section 46(1) of the *Legal Education Act*, 2012 which, save for paragraph (f) was deemed to have been repealed by section 5 of the *Universities Act* No 42 of 2012 and sections 4, 8 and 29 of the *Kenya National Qualifications Framework Act* 2014, and as a result, the recognition and approval of foreign qualifications and credit accumulation and credit transfers became the mandate of the National Qualification Authority. Further, that the impugned regulations were not what was contemplated by the amended section 13 of the *Advocates Act*.

5. In addition, it was averred that without any legal mandate, consultation or justification, the respondent prescribed an unreasonable application fee of Kshs 10,000 under regulation 7(1) of part B of the second schedule.

6. The appellants went on to assert that the impugned regulations, and in particular regulation 7(1) in part III, part B of the Second Schedule and part X of the Third Schedule also contravened section 3 (f) of the Competition Act cap 504 in that, contrary to the provisions of the Act, it gave the Kenya School of Law the monopoly and an unfair advantage over other legal education providers in the East African Community who have not placed similar caveats on their nationals who have studied in Kenya; and that in other words, Kenya had failed to reciprocate the recognition of professional qualifications acquired in Kenya by legal providers in other jurisdictions, which in effect ran counter to East African Community Integration and in particular articles 5(1), 104 and 126(1) of the Treaty for the Establishment of the East African Community. They further contended that the respondent contravened articles 10 and 47 of the Constitution, section 5(1) of the *Statutory Instruments Act*, and sections 4, 5 and 6 of the *Fair Administrative Actions Act* for failing to allow proper public participation in the enactment of the impugned regulations; that they only came to learn of the regulations after they were gazetted on 6th February 2016.

7. The appellants further faulted the respondent for having convened a stakeholder's workshop between 29th to 30th January, 2015, to which they nor other Kenyan students from other foreign institutions were invited to attend despite the fact that the impugned regulations would directly affect them.

8. Additionally, they argued that the respondent commenced implementation of the impugned regulations prior to adoption by Parliament which was in contravention of sections 6 and /7 of the *Statutory Instruments Act*. They averred that the impugned regulations were discriminatory because they prescribe different requirements dependant on the country or jurisdiction from which the legal qualifications were obtained; that they were treated differently because they obtained their qualifications from a foreign institution, while Kenyan and-foreign citizens who attended Kenyan Institutions were not subjected to the same requirements. As a result, the appellants asserted that they have been unable to secure gainful employment which has curtailed their social and economic rights including, the right to work and to earn a living as guaranteed by article 43 of the Constitution.

9. In a replying affidavit sworn by Prof W Kulundu Bitonye, EBS, the Secretary of the respondent on 25th August, 2015, it was deponed that since the appellants were not seeking admission into the Advocates Training Programme under the *Kenya School of Law Act*, 2012 so as to take the Bar examinations provided for under section 8(1) (1) of the *Legal Education Act*, they were required to satisfy the prerequisites of the amended section 13 of the *Advocates Act* in order to be eligible for admission to the Bar.

10. The respondent deponed that it advised the appellants who had studied in the Republic of Rwanda, that they could gain admission to the Kenya Roll of Advocates by applying under the amended sections 13(d) or 13(e), after admission to the Roll of Advocates in Rwanda, or since Rwanda is now a member

of the Commonwealth, after admission to the Roll of Advocates in Rwanda and after practising in Rwanda for a minimum period of 5 years upon being ascertained as persons of good standing.

11. The respondent maintained that the advice to the appellants was not made pursuant to the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 as alleged, but under the provisions of the amended section 13 of the *Advocates Act*. It argued that the impugned regulations did not have the force of law since they are yet to be adopted by Parliament as required by section 11(4) of the Statutory Instrument Act, 2013; that failure to comply with section 11(4) of the Act, would render them void, unenforceable and inoperative until adopted and published by Parliament. It was further asserted that the declarations sought over the enactment of the impugned regulations were untenable because they were still in a draft format and have not become law; that therefore, an order of certiorari cannot issue as there is nothing to quash.

12. On the question of lack of adequate participation by the affected parties, the respondent confirmed that it held a stakeholder's workshop between the 29th and 30th January 2015 to which all stakeholders from the legal sector within the East African Community were invited to give their opinions on legal training and development within the region; that the proposals on the licencing of legal education providers and recognition of the foreign legal education awards in the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 were discussed and adopted by the members; that because of the specialized and technical nature of legal education, it prepared the draft regulations which were thereafter published in the Kenya Gazette.

13. The respondent went on to argue that the High Court cannot consider its constitutionality? by dint of the amendment to section 4(5) of the *Legal Education Act*, 2012 because the issue is *sub judice* for being the subject of Nairobi Civil Appeal 148 of 2016 Council of Legal Education vs Mt Kenya University & others and Nairobi Civil Appeal 149 of 2016 Council of Legal Education v Moi University & others; that this court had issued orders of stay against the decision of the High Court that the respondent is improperly constituted and ineligible to function.

14. The respondent also conceded that it did not have authority to make any regulations regarding the qualifications and recognition of foreign credentials, and finally concluded that an order of *mandamus* cannot issue because then the court would be compelling the respondent to act in contravention of the law, and since no violations of the constitutional rights were demonstrated, general damages did not arise.

15. Upon considering the petition, the replying affidavit and the parties' submissions, the High Court dismissed the Petition for want of merit, for the reasons in summary that the impugned regulations having not been enacted had no force of law, and in view of the appellants' failure to meet the threshold requirements for admission to the Roll of Advocates in Kenya.

16. The appellants were dissatisfied with the High Court's decision and filed an appeal on grounds, in summary that; the learned judge was wrong in finding that the Legal Education (Accreditation & Quality Assurance) Regulations, 2016 contained in legal notice No 15 of 2016 were not yet law; in failing to find that the impugned regulations were unlawful; that having found that they were void and unenforceable by dint of the provisions of section 14 of the *Statutory Instruments Act*, in failing to quash them; in finding that the appellants had not brought themselves within the requirements of the amended section 13 of the *Advocates Act*; in not finding that the respondent failed to exercise its discretion as provided for by the law; and in failing to grant all the reliefs sought.

    The appellants pray that the appeal be allowed on the following terms:

a) That the appellants' petition dated 21st April 2016 be allowed, the judgment and decree of the superior court made on 30th January 2018 be set aside.

b) That a declaration that the respondent's conduct of enacting The Legal Education (Accreditation & Quality Assurance) Regulations, 2016 contained in Legal Notice No 15 of 2016 is contrary to and inconsistent with the provisions of articles in, 73 and 232 of the Constitution, 2010.

c) That a declaration that section 46(1) of the *Legal Education Act*, 2012 with the exemption of Paragraph (f) thereof stands repealed by section 5 of the *Universities Act*, Act No 42 of 2012 and sections 4, 8 and 29 of the *Kenya National Qualifications Framework Act*, 2014.

d) That a declaration that the respondent has violated the constitutional rights of the appellants guaranteed and protected under articles 27, 41, 43, 46 and 47 of the Constitution of Kenya, 2010.

e) That an order of *certiorari* to remove into this court for purpose of quashing forthwith and to quash The Legal Education (Accreditation & Quality Assurance) Regulations, 2016 contained in legal notice No 15 of 2016.

f) That an order that the respondent do pay the appellants general damages for breach of their constitutional rights and loss of opportunities.

g) That an order of *mandamus* compelling the respondent to recognise and approve the appellants' professional qualifications for purposes of section 13 of the *advocates Act* chapter 16 of the Laws of Kenya.

h) That in the alternative, an order of *mandamus* compelling the Respondent to receive and consider the appellants' professional qualifications for purposes of section 13 of the *Advocates Act* chapter 16 of the Laws of Kenya in accordance with the law.

i) That the costs of this appeal and those of the petition in the superior court be borne by the respondent.

17. Learned counsel Mr Omae who appeared for the appellants filed written submissions and sought to rely on them in their entirety, while Mr Bwire, learned counsel for the respondent did not file any written submissions but chose to submit orally.

18. The appellants submitted that section 3(1) of the *Interpretation and General Provisions Act* defines "the Gazette" to mean "the Kenya Gazette published by authority of the Government of Kenya and includes any supplement thereto"; and that it was not disputed that the respondent published the impugned regulations, as legal notice No 15 of 2016 in the Kenya Gazette Supplement of 6th February 2016; that by dint of the provisions of section 69 of the *Interpretation and General Provisions Act*, the gazette was "*prima facie* evidence in all courts and for all purposes whatsoever of the due making and tenor of the written law or notice".

19. Counsel further submitted that, sections 22 and 23 of the *Statutory Instruments Act*, Act No 23 of 2013 provides that "every statutory instrument shall be published in the Kenya Gazette and shall be assigned a serial number as of the year in which it is made which shall be printed on the face of the statutory instrument and shall come into operation on the date specified in that instrument or, if no date is so specified, then, it shall come into operation on the date of its publication in the Gazette subject to annulment where applicable. It was counsel's submission that the impugned regulations were law and came into force when they were assigned serial number 15 and published in the Gazette on 6th

February 2016; that in *Republic v Kenya School of Law & Council of Legal Education Ex Parte Daniel Mwaura Marai [2017] eKLR* the High Court rightly found the impugned regulations to be lawful and that the judge was wrong in holding that they were not yet law.

20. Regarding the impugned regulations in particular, it was submitted that they were gazetted without carrying out any proper public participation as required by article 10 of the Constitution, and to the total exclusion of students and trainees from foreign institutions who had direct interest in the subject matter, and who would be adversely affected by their enactment; that further, the enactment of the impugned regulations was an "administrative action" subject to the requirements of article 47 of the Constitution and the *Fair Administrative Action Act*. It was however conceded that since they were not laid before Parliament as required by section 11 of the *Statutory Instruments Act*, and for this reason were rendered void and inoperative under section 11(4), but this notwithstanding, the respondent's had neglected to withdraw or have them revoked.

21. The appellants relied on the case of *Keroche Breweries Limited & 6 others v Attorney General & 10 others [2016] eKLR* and *Kenya Country Bus Owners' Association (Through Paul G Muthumbi – Chairman, Samuel Njuguna – Secretary Joseph Kimiri – Treasurer) & 8 others v Cabinet Secretary for Transport and Infrastructure & 5 others [2014] eKLR* for the proposition that the impugned regulations ought to have been quashed or nullified.

22. Further, it was submitted that, section 46(1) of the *Legal Education Act* vests power to make regulations in the following terms :"The Cabinet Secretary may, upon recommendation of the Council and with the prior approval of the National Assembly, make Regulations for the purposes of giving effect to the provisions of this Act."; that the enactment of the impugned regulations was not in compliance with section 46(1) of the Act since the respondent had purported to exercise powers not vested in it; that furthermore, section 8(3)(b) of the *Legal Education Act*, Act No 27 of 2012 which came into force on 28th September, 2012, limited the respondent's mandate to establishment of criteria for recognition and equation of academic qualifications in legal education; that professional qualifications were not included, as a result of which, section 46(1) cannot be invoked to empower the respondent with the mandate to oversee professional qualifications.

23. Furthermore, the *Universities Act*, 2012 which came into force on 13th December 2012, placed all matters relating to recognition and equation of academic degrees, diplomas and certificates under the Commission for University Education. Counsel reiterated that the effect of section 5 of the *Universities Act* and sections 4, 8 and 29 of the *Kenya National Qualifications Framework Act*, 2014 was to strip the respondent of any powers to recognize foreign academic qualifications conferred by the *Legal Education Act*, and therefore it could not lawfully enact regulations on such matters.

24. With respect to their application made under the amended section 13 of the *Advocates Act*, the appellants submitted that the use of the term "or" at the end of section 13(b) of the Act meant that the provisions of section 13(1)(c) to (e) were disjunctive. In other words, that the qualifications referred to in the sub- sections were stand-alone or distinct qualifications, and an applicant need only satisfy any one of the requirements; that by requiringthem to be admitted to the Bar in the Republic of Rwanda and to practice in that country for at least 5 years before their qualifications can be recognised in Kenya, the respondent had fettered its discretion, and introduced additional requirements to section 13(1)(c) and (d) of the *Advocates Act* which was unilateral and arbitrary.

25. Finally, the appellants sought the appropriate relief under section 7(2) of the *Fair Administrative Action Act* including, a global award of Kshs 8,500,000 for each appellant for general damages for discrimination.

26. Submitting orally on behalf of the respondent, Mr Bwire stated that the appellants' case is concerned with the admission to the Roll of an Advocate under the amended section 13 of the Advocates' Act, and not the recognition of the foreign qualification for admission to Kenya School of Law from Rwanda; that since the appellants were Kenyans and having been qualified in Rwanda, they required to be admitted under section 13(c).

27. As this is a first appeal, the guidelines as set out in *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 are pertinent. They are that:

> "On a first appeal from the High Court, the Court of Appeal shall reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has never seen or heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on the record and not to introduce extraneous matters not dealt with by the parties in evidence."

28. We have considered the pleadings, the submissions the judgment and the relevant law and are of the view that the issues for consideration are:

    i) Whether the impugned regulations were legal and enforceable in view of their having been gazetted by way of legal notice No 15 of 2016, and if so whether the learned judge was wrong to decline to quash them;

    ii) Whether the appellants qualified to be admitted to the Roll of Advocates under section 13 of the *Advocates Act*;

    iii) Whether the appellants were entitled to the reliefs sought.

29. Beginning with the legality of the impugned regulations, the appellants' claim against the impugned regulations on the one hand is that they came into effect on the date they were gazetted. Conversely, they argue that the respondent was not legally empowered to enact them because section 46(1) of the *Legal Education Act*, 2012, save for sub-section (f) thereof was deemed to have been repealed by section 5 of the *Universities Act* No 42 of 2012 and sections 4, 8 and 29 of the *Kenya National Qualifications Framework Act*, 2014; that further the respondent was not properly constituted at the time of their enactment, and they were not provided an opportunity to participate in the workshops. In effect, what the appellants are contending is that the impugned regulations were improperly enacted and so could not be used as a basis for denying them admission to the Kenyan Bar.

30. The respondent on its part responded that notwithstanding the fact that the impugned regulations were gazetted vide legal notice No 15 of 2016, they did not have the force of law since they were yet to be adopted by Parliament as required by section 11(4) of the Statutory Instrument Act, 2013; that in terms of section 11(4) of the Act, they were void, unenforceable and inoperative until such time as they are adopted and published by Parliament. They assert that the declarations sought over the enactment of the impugned regulations are untenable and an order of *certiorari* cannot issue as there is nothing to quash.

31. So, were the impugned regulations properly enacted? In this regard, the learned judge had this to say:

> "...the true position is that the Regulations have not yet become subsidiary legislation because they have not yet been adopted by Parliament as required by section 14 of the *Statutory Instruments Act*.
>
> Thus this provision renders the said regulations void and unenforceable. As such the issues being raised by the petitioners concerning the legality of the regulations are moot. At this

point there exists nothing for the court to quash, and the court will simply be engaging in an academic exercise."

32. The respondent did not dispute that the impugned regulations were gazetted. But it argued that they had not attained the force of law for the reason that they had not been adopted by Parliament as required by sections 11(1) and 11 (4)of the Statutory Instrument Act, 2013.

33. In particular section 11(4) stipulates:

> "If a copy of a statutory instrument that is required to be laid before the relevant House of Parliament is not so laid in accordance with this section, the statutory instrument shall cease to have effect immediately after the last day for it to be so laid but without prejudice to any act done under the statutory instrument before it became void".

34. The record does not disclose that following gazetting of the impugned regulations, that they were thereafter laid before Parliament and adopted. In point of fact Prof Kulundu avers;

> "16.I am aware that because Parliament was on recess at the time of the publication aforesaid, the Draft of the Regulations was never laid before Parliament in time or at all, with the consequence that the Draft became void under section 11(4) of the Act, of course until re-published, which has not been done."

35. Since there is nothing that shows that they were at any time passed into law in accordance with the procedures set out in the above cited provision, and which shortcoming the appellants have conceded, it becomes evident that the impugned regulations were not adopted by Parliament and as a consequence, did not acquire the force of law. As such, we agree with the learned judge that they were inapplicable for want of legality, and therefore could not have been the basis upon which the appellants were denied admission to the Roll of Advocates, and we so find.

36. Having said that, it is not in dispute that in 2016, the appellants applied under the amended section 13 of the *Advocates Act*, to be recognized by the respondent, and for the qualifications they obtained in Rwanda to be approved so as to enable them be admitted to the Roll of Advocates in Kenya. According to the respondent, in view of their having studied in the Republic of Rwanda, to gain admission, the appellants were required to apply under either sections 13(1)(d) or since Rwanda was a member of the Commonwealth, they would have to first gain admission to the Roll of Advocates in Rwanda, and in addition should have practiced in Rwanda for a minimum period of 5 years and be persons of good standing before applying for admission to Kenya under section 13(1)(e).

37. This brings us to the next question of whether the appellants were eligible under the amended section 13 to be admitted the Roll of Advocates in Kenya since they had attained their qualifications in Rwanda. In response to this issue, the learned judge found that: -

> "Therefore, in order to qualify for admission as an advocate of the High Court of Kenya one must be a Kenyan, Ugandan, Tanzanian or Rwandese national and in addition one must have obtained a degree from a university recognized in Kenya or an institution that has been approved by the 1st respondent. Such a person obtains professional qualifications if the person has attended pupilage for a period of not more than one year and either has passed the exams required by the 1st respondents, obtained qualifications that are recognized and approved by the 1st Respondent is an advocate of the High Court of Rwand (*sic*), Uganda, or Tanzania or is an advocate of a commonwealth (*sic*) who has practiced for more than five years in such commonwealth county (sic) and is a member of the professional body with good standing.

The petitioners did not meet the minimum qualifications prescribed by statute. They did not undertake the exams required by the 1st Respondent which are offered through the Kenya School of Law, as they attended the Rwandan Bar School and therefore could not be admitted under section 13(c). As Rwanda is a member of a Commonwealth and the East African Community, they were exempted from the requirements of 5 years' practice experience before admission. It was enough to show at the time of applying that they were Advocates of the High Court of Rwanda. However, it was common ground that they were not advocates rather had graduated from the Rwandan Bar School.

The court went on.

"...the petitioners acknowledged that they have only obtained the post graduate diplomas and are accordingly eligible to be admitted as advocates of the High Court of Rwanda. Therefore, they had not met the threshold provided for under section 13(d) above which required admission into the Roll of advocates in the county where the qualifications are obtained before being admitted into the Roll of advocates in Kenya".

38. It is not in dispute that the appellants' attained their qualifications in Rwanda, and thereafter sought to be admitted to the Roll of Advocates in Kenya. In so far as admission of persons who have studied outside of Kenya and in this case in Rwanda is concerned, such admission would be governed by section 13(1)(d) or (e). This was to remain the position until, the provisions amended by the Statute Laws Miscellaneous (Amendment) Act 2012) were declared unconstitutional, as we shall see later.

39. Prior to the amendment, section 13(1)(d) provided that a person shall be duly qualified if— "He is an Advocate for the time being of the High Court of Uganda, the or the High Court of Tanzania;"

40. Following enactment, the provision was amended as follows:

"Professional and academic qualifications

1. A person shall be duly qualified if—

(a) ...

(b) ...

(c) ...

(d) 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; or (emphasis ours)

(e) He is for the time being admitted as an advocate of the superior court of a country within the Commonwealth and-

(i) has practiced as such in that country for a period of not less than five years;

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 my prescribe for the purpose of adapting to the practice in Kenya."

41. In essence, the amended provisions expanded to included advocates of the High Court of Rwanda and Burundi as being eligible for admission to the Roll of Advocates in Kenya. Whereas, prior to the amendment, the only advocates eligible for admission were from Tanzania and Uganda.

42. As observed by the learned judge, though the appellants attended the Bar School in Rwanda, there is nothing indicative of their admission as Advocates to the High Court of Rwanda. So that, without such admission, for all intents and purposes, they were ineligible for admission to the Roll in Kenya under section 13(1)(d). The learned judge then went on to hold that, in the event section 13(1)(d) was inapplicable, the appellants could be admitted as Advocates in a Commonwealth country, Rwanda being one such, but provided they had practiced for 5 years, and been found to be persons of good standing from the relevant professional body in that country, as required by section 13(1)(e). Once again nothing demonstrated that they were admitted to the High Court of Rwanda or to a Commonwealth country, with the effect that they did not qualify for admission to the Roll of Advocates in Kenya since, the strictures of section 13(1)(e) were also not satisfied.

43. But that is not all. Notwithstanding the above, the problems the appellants faced in seeking admission to the Roll of Advocates in Kenya were to be compounded further by the nullification of the amendments to section 13 that extended admission to advocates of the High Court of Rwanda and Burundi to the list of eligible countries. This is because the decision of this court in the case of *Law Society of Kenya v Attorney General & 2 others, [2019] eKLR* nullified the amended sections 12 and 13 of the *Advocates Act*. In that case, this court found that Parliament in enacting the provisions, overreached its limits "...by passing substantive amendments in an unprocedural and non-participatory manner through the Statute Law Miscellaneous (Amendment) Act 2012". This decision has not to date been appealed against or set aside and therefore the unconstitutionality of the amended sections 12 and 13remains the situation to this day. The result is that the provisions having been declared unconstitutional meant that the law reverted to the position where, only advocates from the High Court of Tanzania and the High Court of Uganda were eligible for admission to the Kenya Bar and, it no longer extended to those from Rwanda and Burundi. Given their Rwandan qualifications, even were they to be admitted as advocates in Rwanda, the nullification rendered the appellants ineligible for admission to the Roll of Advocates in Kenya.

44. It could be argued that the unconstitutionality or not of section 12 and 13 would not apply to the circumstances of this case as, the decision of this court was rendered after the appellants had filed their petition, and after the High Court had rendered its decision.

45. However, the Supreme Court in *Mary Wambui Munene vs Peter Gichuki King'ara & 2 others [2014] eKLR* in setting out the position on the application of court decisions cited with approval the case of *A vs The Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88* where it was held that; -

> "Judicial decisions which set a precedent in law do have retrospective effect. First of all, the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position".

46. Also cited in the same case was the case of South African case of *Sias Moise v Transitional Local Council of Greater Germiston, Case CCT 54/00*, Justice Kriegler (for the majority) where, it was held:

> "If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution."
>
> "Because the Order of the High Court declaring the section invalid as well as the confirmatory order of this Court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date."

47. Consequently, it is explicit that a court having declared a piece of legislation or a section of an act to be unconstitutional, that act or law becomes a nullity from the date of inception or enactment and not from the date of the judgment. But it will not be applicable to actions already crystallised whilst the expunged law was in force.

48. In the instant case, the judgment declared the amendments to section 12 and 13 of the *Advocates Act* unconstitutional since they were enacted in contravention of the Constitution prerequisites. Once the sections were declared unconstitutional, the provisions became void from the date of inception of the amendments, which in this case was when section 13 was amended in 2012. The decision of this court would not only apply to the instant matter, but would also bind other matters seeking to rely on the impugned provisions, particularly those pending before the courts. We hasten to add that, the judgment would not affect or nullify admissions of those advocates who were already admitted under the expunged provisions and during the pendency of the case.

49. In effect, even had the respondent sought to comply with the impugned provisions, the relevant provisions having been struck out and declared unconstitutional, meant that the appellants' application grounded on the amended section 13, would have had no legal basis or foundation upon which the respondent could rely to admit them. Were they to do so, they would be in clear contravention of the law.

50. So, having found as we have above, are the appellants entitled to an order of *mandamus* to compel the respondent to recognise and approve their professional qualifications under the amended section 13 of the *Advocates Act*? Put another way, notwithstanding the findings above, can the respondent be compelled to admit the appellants and to disregard this court's decision? The answer to this would be in the negative. This would be tantamount to ordering the respondent to disregard the law and worse still, to perpetuate an illegality.

51. In the case of *Macfoy v United Africa Company [1961] 3 All ER 1169*, it was held that:

> "If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to setting aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so."

52. No good would come out of such an action as in all respects it would amount to a nullity, and inevitably the appellants would have nothing to gain from this course of action. In consort with this we would add that the appellants are therefore not entitled to the reliefs sought.

53. In sum, the appeal is unmerited and is dismissed. Since the appellants are still poised at the threshold of their careers, we make no orders as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

D. K. MUSINGA (P)

.....

JUDGE OF APPEAL

R. N. NAMBUYE

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR