IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, G. B. M. KARIUKI & GATEMBU JJ.A)

CIVIL APPEAL NO. 121 OF 2013

BETWEEN

EUNICE CECILIA MWIKALI MAEMA …….APPELLANT

AND

THE COUNCIL OF LEGAL EDUCATION ……1ST RESPONDENT

THE KENYA SCHOOL OF LAW …… 2ND RESPONDENT

THE ATTORNEY GENERAL …….. 3RD RESPONDENT

(Being an appeal against the judgment and order of the High Court at Nairobi, Constitutional and Human Rights Division (Lenaola J.) dated 15th March, 2013

in

HIGH COURT PETITION NO. 64 OF 2013

****

JUDGMENT OF THE COURT

1. Eunice Cecilia Mwikali Maema ("The appellant") was awarded the degree of Bachelor of Laws with Honours Upper Second Class in Law and Business by Coventry University in England in July 2010. On 14th November 2011, the University of Warwick in England awarded her the degree of Master of Laws in International Economic Law.

2. Sometimes in 2012, the 1st respondent, the Council of Legal Education ("The Council"), published a notice in the press titled "*Admission for 2013/2014 Academic Year Advocates Training Programme*". By that notice, the Council announced that the 2013/2014 academic year at the Kenya School of Law, the 2nd respondent, ("the School") would commence on 14th January 2013. Candidates seeking admission to the School were required to submit their applications to the Director/CEO of the School together with supporting documents to reach the School on or before 31st October 2012. That notice stipulated that in order to be considered for admission, "*the LLB degree must comprise all the … 16 core subjects as per Legal Notice 169 of 2009*." Those 16 core subjects were spelt out in the notice.

3. In her bid to be admitted to the advocates training programme at the School for the 2013/2014 academic year, on 20th September 2012the appellant submitted her application for admission to the School and paid the required application fee.

4. By 14th January 2013 when the academic year at the School was supposed to commence, the appellant had not received any communication from the School on the fate of her application. She became restless. She visited the School to make enquiries. A staff member at the School informally informed her that her application might have been rejected on the basis that her law degree did not cover all the 16 core subjects required.

5. Distraught by that information, the appellant wrote a letter dated 18th January 2013 to the Director/CEO of the School. In that letter, the appellant stated that she had not received a letter of admission or any formal communication that her application for admission was unsuccessful; and that she had informally been informed that her application had been rejected on account of failure to study the core subjects in her university course. She urged the School to reconsider its decision and to admit her to the School on the grounds that she was qualified for admission; that the requirement for core subjects was not applicable to her having been introduced under legislation which took effect subsequent to her application for admission; that the rejection of her application for admission was unconstitutional for being discriminatory and that she and her family had invested heavily in her education.

6. On 30th January 2013, the appellant received a letter dated 10th January 2013 from Professor W. Kulundu-Bitonye in his dual capacity as the Director/Chief Executive of the School and as Secretary of the Council informing her that "*it is regretted that your application was not successful due to the reason that your LLB degree does not meet the threshold of 16 core subjects prescribed by law for purposes of admission to the ATP*." The letter went on to list 8 of the core subjects that the appellant had not covered.

7. The appellant then petitioned the High Court of Kenya at Nairobi in Petition No. 64 of 2013 and sought declarations that she had complied with all requirements for admission to the advocates training programme under Legal Notice 169 of 2009 which was the law in force at the material time; an order of Certiorari to quash the decision contained in the letter dated 10th January 2013 rejecting her application for admission to the advocates training programme; an order of mandamus to compel the School and the Council to admit her to the advocates training programme; an order for payment of damages for infringement of her constitutional rights and an order for costs of the proceedings.

8. After hearing the parties, the High Court (Isaac Lenaola J) in a judgment delivered on 15th March 2013 dismissed the appellant's petition holding that;

> "…***Once the Petitioner admitted that Legal Notice No. 169 of 2009 was the applicable law then by dint of Legal Notice No. 170 of 2009, no substantive right due to her was affected. Had the converse been true, this Court would have happily enforced those rights without much ado but the law as I understand it is that the Council of Legal Education acted within the law and there is no prayer made that the law should be declared unconstitutional***."

Aggrieved by that decision, the appellant has appealed to this Court to set aside the judgment of the High Court and in its place to allow the Petition.

9. Although the appellant set out 15 grounds of appeal in her memorandum of appeal, the critical question for consideration, in our view, is whether the learned Judge of the High Court erred in holding that the School and the Council acted within the law, by reason of Legal Notice 169 and 170 of 2009, in rejecting the appellant's application for admission on the basis that her degree did not meet the threshold of core subjects prescribed by law. In other words is Legal Notice 170 of 2009 part of the legal regime that governed admission into the advocates training programme at the

material time? To put it differently, when the applicant applied for admission to the School, was it a legal requirement for admission to the advocates training programme that her LLB degree must comprise the 16 core subjects?

10.Learned counsel for the appellant Mr. Kamau Karori, who appeared with Ms Milly Odari, submitted that the legal regime that existed at the material time comprised of the Advocates Act, Chapter 16 of the Laws of Kenya, and Legal Notice 169 of 2012 and that the appellant satisfied regulations 4 and 5 of part II of that Legal Notice having graduated with a law degree from the University of Coventry which is a recognised university and having applied for admission into the advocates training programme.

11. Mr. Karori argued that the requirement that for a law degree to be eligible for consideration for recognition for purposes of admission to the advocates training programme must have the 16 core subjects was not a legal requirement until the enactment of the Legal Education Act No. 27 of 2012 which came into operation on 28th September 2012. That requirement, counsel submitted, cannot apply retrospectively as the appellant submitted her application before that statute became operational.

12. Regarding Legal Notice 170 of 2009 on the basis of which the High Court considered that the appellant's law degree did not meet the threshold for consideration, counsel submitted that Legal Notice 170 of 2009 had no application to the appellant. He contended that that Legal Notice had nothing to do with admission into the advocates training programme but rather dealt with accreditation of legal education institutions in Kenya; that in any event, the requirement under Legal Notice 170 of 2009 is for Universities to offer the 16 core subjects and there is no requirement that the students must take those subjects.

13. Counsel for the appellant went on to say that if some of the core subjects were not covered in the course of the appellant's law degree course at Coventry University, those subjects could be undertaken during the advocates training programme at the School. Counsel submitted that the appellant will suffer prejudice if she is locked out of the advocates training programme when in fact she can undertake any missing core subjects at the School.

14. Counsel for the appellant likened the situation in this case to the situation that obtained in the Ugandan Court of Appeal Case of **Butime Tom vs. Muhuza David and The Electoral Commission Election Petition Appeal No. 11 of 2011** where it was contended that the 1st respondent in that case did not possess the requisite minimum academic qualification set by law to contest the position of Member of Parliament. The Court of Appeal of Uganda took the view that while there may have been policy proposals requiring candidates to have undertaken a course of study in a structured manner until the enactment of a statute subsequently, the court could not ascribe to a statute retrospective application when there was no expressed or implied intention that the statute should have had retrospective application.

15. Counsel for the appellant also referred us to the judgment of the Supreme Court of Appeals of the Republic of South Africa in the case of **National Director of Public Prosecutions vs. Jacob Zuma** and the High Court of South Africa case of **Mamela Taxi Association and 2 others vs. Mamela Taxi Rank (Pty) Ltd** for the proposition that the function of the court is to adjudicate the issues between the parties to litigation and not extraneous issues; that the judgment of the court must be confined to issues that have been canvassed; that judicial officers should not rely for their decisions on matters not put before them by the parties. In that regard, and to the extent that the learned judge of the High Court relied on Legal Notice 170 of 2009 and cited authorities on which counsel did not have an opportunity to submit on, the learned judge erred.

16. Learned counsel Mr. Miller Bwire who appeared for the Council and for the School (together referred to as "the 1st and 2nd Respondents") submitted that prior to the enactment of the Kenya School of Law Act, Act No. 26 of 2012 which commenced operation on 15th January 2013 and Legal Education Act, Act No. 27 of 2012, which commenced operation on 28th September 2012, the

procedure for admission into the advocates training programme was governed by the now repealed Council of Legal Education Act, Chapter 16A, and the Advocates Act, Chapter 16 and subsidiary legislation; that Legal Notice 169 of 2009 did not contain the Council's prescribed examinations; that the prescribed examinations for purposes of admission to the advocates training programme were set out as the core subjects in the third schedule of Part III of Legal Notice 170 of 2009 which every applicant for the advocates training programme was required to have undertaken in order to be admitted into that programme.

17. Mr. Bwire went on to say that the provisions in the Legal Notice 170 of 2009 were reproduced in the Legal Education Act and nothing new was introduced by the said Act. He submitted that the new legal regime consisting of the Kenya School of Law Act, 2012 and the Council of Legal Education Act, 2012 consolidated the legal position existing before that and did not introduce any new requirements for admission into the advocates training programme; that there was no retrospective application of the law when the 1st and 2nd respondents considered and rejected appellant's application for admission to the advocates training programme; that under the legal framework existing at the material time the core subjects were a prerequisite for admission to the advocates training programme.

18. Counsel for the 1st and 2nd respondents submitted further that the appellant was not being denied admission and can still be admitted to the advocates training programme provided she produces a transcript demonstrating that she has taken, been examined on and passed the missing core subjects; that the appellant can do so, as other applicants in her position have done, by taking the missing core subjects at a locally accredited university, as the School no longer offers the core subjects; and that the requirements for admission to the advocates training programme are the same irrespective of whether the law degree is earned within or outside Kenya.

19. Citing **KNEC V Kemunto Regina Ouro (2010) eKLR** counsel submitted that the appeal should be dismissed as an order for mandamus that was sought in the High Court should not be issued. To do so, he argued, would be acting outside the powers of the Court and to require the respondents to do something contrary to law. To allow the appeal, counsel contended, would create practical difficulties as Legal Notice 169 of 2009 under which the appellant's application for admission to the advocates training programme was considered is no longer law and her application would have to be considered under the current statute.

20. Mr. Echessa Werimo learned counsel for the 3rd respondent in opposing the appeal submitted that no question of constitutionality arises in this matter; that in her Petition before the High Court the appellant sought to enforce the Bill of Rights and cited particular Articles of the Constitution that were allegedly violated by the respondents. He argued that the complaint on discrimination is a matter of fact and the appellant was obliged to show by evidence that preferential treatment was accorded to other applicants, who did not meet the requirements of core subjects had been admitted into the advocates training programme which was discriminatory to her. Counsel submitted that the allegation that fair administrative action was not met was not proved and that the nature of violation was also not demonstrated.

21. Mr. Werimo further argued that to grant the order of mandamus as sought by the appellant would have the impractical result of requiring the 1st and 2nd respondents to admit the appellant into the advocates training programme under repealed provisions of the law namely Legal Notice 169 of 2009. He urged the Court to dismiss the appeal with costs.

22.In his brief reply, Mr. Karori for the appellant submitted that the appellant was left by the 1st and 2nd respondents without a remedy; that the issue of the appellant taking courses at local universities is a matter of fact that ought to be supported by affidavit or other evidence; that in the absence of a cross appeal or notice affirming decision of the High Court under Rules 93 and 94 respectively of the Rules of this Court, the respondents cannot now seek to support the decision of the High Court on grounds other than those advanced by the court itself; that paragraph 5(b) of Regulation 4 requires an

applicant from a foreign university to have passed relevant examinations of the prescribed university (as opposed to passing examinations in prescribed courses) and the appellant's degree qualified in all respects; that the appellant's petition properly invoked the Bill of Rights and violation of constitutional rights and that the appellant pleaded that the 1st and 2nd respondents acted in a discriminatory manner against her.

23. Mr. Karori urged that the relief of mandamus is appropriate and can be issued, as was the case **in the matter of Rita Biwott and Council of Legal Education Civil Application 23B of 1994;** he reiterated that at the time the appellant applied for admission to the advocates training programme, there was no legal requirement for core subjects and the appellant's appeal should therefore be allowed.

24. We have reviewed the record and considered the appeal and the submissions by learned counsel, we take the following view of the matter. The Council derived its mandate from the Council of Legal Education Act, Chapter 16B of the Laws of Kenya until the repeal of that statute by section 47 of the Legal Education Act No. 27 of 2012 that commenced operation on 28th September 2012.

25. Under section 6 of the repealed Council of Legal Education Act, the Council was mandated to exercise general supervision and control of legal education in Kenya. In particular, under section 6(2)(i) of that repealed Act the Council was mandated to establish, manage and control such training institutions as may be necessary for organizing and conducting courses of instruction for the acquisition of legal knowledge, professional skills and experience by persons seeking admission to the Roll of Advocates in Kenya.

26. Under section 14 of the repealed Council of Legal Education Act, the Council was empowered to make regulations for purposes of giving effect to the provisions of that statute. Exercising those powers, on 27th September 2009, the Council published the Council of Legal Education (Kenya School of Law) Regulations, 2009 under Legal Notice No. 169 of 2009. It is common ground that Legal Notice 169 of 2009 applied to the appellant's application for admission to the advocates training programme. Regulation 4 of those Regulations provided that "***a person shall not qualify for admission to a course of study at the School, unless that person has met the admission requirements, set out in the First Schedule to [those] Regulations for that course***."

27. Paragraph 5(a) and (b) of Part II of the First Schedule of those Regulations dealt with admission requirements into the advocates training programme. The relevant part of that paragraph provided:

> "**5.** ***A person shall not be eligible for admission for the Post Graduate Diploma (Advocate Training Programme) unless that person has -***

a. ***passed the relevant examination of any recognized university in Kenya, he holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) of that university;***

b. ***passed the relevant examinations of a university, university college or other institutions prescribed by the Council, he holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) in the grant of that university, university college or other institution, had prior to enrolling at that university, university college or other institution***

> ***(i) attained a minimum entry requirements for admission to a University in Kenya;***
>
> ***and***
>
> ***(ii) a minimum grade B (plain) in English Language and a mean grade of C (plus) in***
>
> ***the Kenya Certificate of Secondary Examination or its equivalent.***

28. Regulation 5 of the Council of Legal Education (Kenya School of Law) Regulations, 2009 required a person wishing to be admitted for any course of study at the School to make an application to the School in Form KSL NO. 1 set out in the Third Schedule to those Regulations. The application was to be accompanied by attachments that were to include "***academic transcripts for the relevant qualifying examinations***" and "***academic certificate or other academic award***."

29. On a plain reading of paragraph 5 of the First Schedule reproduced above, it would seem that provided an applicant was a holder or eligible to hold an LLB degree from any recognized university in Kenya or other institution prescribed by the Council having passed the relevant examinations of such university or institution and met the other criteria set out thereunder, such applicant would be eligible for admission to the advocates training programme, irrespective of the content of such degree.

30. However, exercising it powers under section 14 of the repealed Council of Legal Education Act, the Council published the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009 under Legal Notice 170 of 2009 applicable to any institution offering or intending to offer legal education in Kenya. Those Regulations required, under a threat of sanction, any institution offering or intending to offer legal education in Kenya to apply, within 6 months of commencement of those Regulations, for accreditation or confirmation by the Council that the institution met the training standards prescribed by the Council.

31. Under Regulation 11 of Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, the standards governing the operation of legal education institutions accredited by the Council were set out in the Third Schedule to those Regulations under the title "Physical, Library and curriculum standards for legal education institutions". Paragraph 20 of Part III of the Third Schedule that dealt with curriculum standards provided that:

> **"20. The Under-Graduate Programme shall comprise of the following core units –**
> **(i) legal research and writing;**
> **(ii) law of torts;**
> **(iii) law of contracts;**
> **(iv) legal systems and methods;**
> **(v) constitutional law;**
> **(vi) criminal law;**
> **(vii) family law & succession;**
> **(viii) law of evidence;**
> **(ix) commercial law (including sale of goods, hire-purchase and agency);**
> **(x) law of business associations (to include insolvency);**
> **(xi) administrative law;**
> **(xii) jurisprudence;**
> **(xiii) equity and the law of trusts;**
> **(xiiv) public international law;**
> **(xv) property law; and**
> **(xvi) labour law.**

32. We accept, as submitted by counsel for the appellant, that while the under graduate programme offered by any accredited institution must compromise those "core units", there is no express requirement that a student undertaking the programme at such institution must necessarily take those units. Students enrolling for legal education programmes at universities or other institutions do so for a variety of reasons. Some may or may not wish to seek postgraduate admission to the advocates training programme. However, for those wishing to gain admission to the advocates training programme at the School, it seems to us that the Council, by making reference to "***relevant***

qualifying examinations" under Regulation 5(2)(a) of the Council of Legal Education (Kenya School of Law) Regulations, 2009, was not merely concerned, as the appellant would have us believe, with passing of relevant examinations of a university prescribed by the Council.

33. In our interpretation, the relevant qualifying examinations must include those set out under Paragraph 20 of Part III of the Third Schedule to the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations reproduced above. Under that paragraph the Council determined and prescribed that the subjects or units set out thereunder are core. In its plain and ordinary meaning 'core' means "***the central or most important part of something***." In other words, according to the Council, the 16 identified subjects or units were so central and important that for purposes of regulating standards, an under graduate programme that did not include those units failed the test of accreditation. We are unable to appreciate the argument that the Council may on the one hand determine certain subjects to be core for purposes of accrediting an institution and at the same time not consider them as core for purposes of qualifying for admission to the advocates training programme at the School.

34. Obviously the subsidiary legislation by the Council could have been better framed and structured to make it abundantly clear that a degree from any institution that did not include those units would not be recognized for purposes of admission to advocates training programme. Happily any ambiguity or lack of clarity has been removed with the enactment of the Legal Education Act, that commenced operation on 28th September 2012 and whose objective is to promote legal education and the maintenance of the highest possible standards in legal education. Section 23 of that Act expressly provides for core degree courses and stipulates that a legal education provider offering a course for the award of a degree in law shall in addition to any other courses offered, provide instruction and examination for each of the core courses set out in Part II of the Second Schedule to that Act.

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

36. All applications for admission to the School must be considered against the same standards set by the Council. In **Butime Tom V Muhumuza David and Another Election Petition Appeal No. 11 of 2011** to which we were referred by counsel for the appellant, it was held that when regulating a profession the **same standards should apply to all persons** seeking to enter into the profession.

37. Although the appellant pleaded that other applicants similarly circumstanced as her were admitted into the advocates training programme no material in support was placed before the court. To exclude the appellant from complying with the fulfilment of the requirement of core subjects would in our view be to propagate the very discrimination the appellant complained about. We also cannot accede to her entreaty that she should be admitted to the school and be required to study the remaining core subjects there as the school no longer offers them.

38. Legal Notices 169 and 170 of 2009 were in place since the year 2009. In our view the learned judge of the High Court was right and we agree with him when he stated:

> ***"What I gather from the above is that whereas Regulation 5 of Legal Notice No. 169 of 2009 sets the minimum criteria for admission which includes inter-alia an LL.B degree, there is no need that apart from having an LL.B degree from a recognised university, that LL.B degree must specifically comprise of certain core units set out by Legal Notice No. 170 of 2009. The latter looks to the content of the LL.B degree which***

is only one of the components necessary for one to meet the criteria set by the former. To read one without reference to the other would be akin to selective interpretation of law to reach a set end. I refuse to countenance such an approach because it would mean that Legal Notice No. 170 of 2009 would have no meaning in our law books."

39. To disregard Legal Notice 170 of 2009, which was operational at the material time, would be to act in disregard of existing Regulations. Yes, the respondents may not have pleaded Legal Notice 170 of 2009 but being a matter of law it could in our view be raised.

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

41. For the above reasons, we dismiss the appeal. Each party shall however bear their own costs of the appeal.

Dated and delivered at Nairobi this 22nd day of November, 2013.

D. K. MARAGA

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR