REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 529 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW ORDERS OF PROHIBITION & CERTIORARI

AND

IN THE MATTER OF ARTICLES 10, 23 AND 47 OF THE CONSTITUTION 2010

AND

IN THE MATTER OF THE KENYA SCHOOL OF LAW ACT 2012

AND

IN THE MATTER OF THE LEGAL EDUCATION ACT 2012

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN ACCORDANCE WITH ORDER 53 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF AN APPLICATION

BETWEEN

REPUBLIC.....APPLICANT

AND

KENYA SCHOOL OF LAW.....RESPONDENT

AND

COUNCIL OF LEGAL EDUCATION.....INTERESTED PARTY

EX PARTE: DANIEL MWAURA MARAI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 5th September, 2017, the ex parte applicant herein, **Daniel Mwaura Marai**, seeks the following orders:

> **1. That an order of Prohibition be and is hereby issued directed at the Respondent prohibiting it form excluding the ex parte applicant from sitting for the pre-bar examinations.**
>
> **2. That an order of Certiorari be and is hereby issued directed to the Respondent quashing the decision made by it and published on 4th July 2017 effectively excluding the ex-parte applicant from sitting the mandatory pre-bar exams.**
>
> **3. Costs.**

Applicant's Case

2. According to the Applicant, he sat for his Kenya Certificate of Secondary Education KCSE in the 2000 and obtained a mean grade of C + (plus) with a grade B- (minus) in English and C+ (plus) in Kiswahili. He averred that at that time, the law allowed him to sit for an LLB and he would qualify if he moved to the University directly. However in May 2009 he enrolled for a diploma in law (paralegal studies) at the Kenya School of Law.

3. According to the applicant, at that time, there was no legal bar towards his eligibility for the Advocates Training Program and he undertook the Diploma at Kenya School of Law, on the basis that it would provide a platform for his registration into the LLB program and ultimately, into the Advocates Training Program. He subsequently passed his examinations at the Kenya School of Law and about July 2011, he was awarded a Diploma in Law Paralegal Studies and obtained a Credit.

4. It was averred by the applicant that in 2012, there were myriad reforms relating to legal training in Kenya and in particular the pre-bar was introduced as an alternative to joining Kenya School of Law for the Advocates Training Program. In the year 2013 he enrolled for a bachelor degree in law (LLB) at Mt Kenya University where he qualified and graduated on 7th July 2017 with a Bachelor Degree in Law (LLB) having obtained a Second Class Honours-Lower Division. However, in 2014, parliament amended the ***Kenya School of Law Act, 2012*** making the "Pre-bar" examination compulsory. By the time of the amendment, the applicant averred that he had already enrolled into the LLB program courtesy of the Diploma that he had obtained in 2013.

5. It was averred by the applicant that in 2016, the ***Legal Education Act,*** through its paragraphs 3, 4, 5 and 6 (c) of the Third Schedule was amended to take into cognizance vertical progression from Certificate, to Diploma to Degree and ultimately to the Advocates Training Program. Despite the intervention of the ***Legal Education Act*** the respondent posted a notification for pre bar examinations 2017 on its website and on local dailies on or about 4th July 2017. By this notification, the eligibility requirement to apply for pre bar examinations excluded candidates such as the applicant and others who did not meet the requirements set therein but had qualified by virtue of progression from certificate to diploma and LLB as contemplated in paragraphs 3, 4, 5 and 6 (c) of the Third Schedule to the ***Legal Education Act 2012***.

6. The applicant then visited the respondent institution for the purposes of lodging his application, but was informed by the initial assessor, that he was ineligible. He then wrote to the interested party which is the body mandated to regulate legal education seeking a clarification on 17th July 2017 which the letter was received and response made on 24th July 2017 by which the interested party confirmed that indeed candidates such as himself are eligible for admission. Pursuant to that the applicant wrote another letter to

the respondent institution seeking a clarification on 15th August 2017 which letter though received did not elicit any response.

7. According to the applicant, section 4 of that the ***Kenya School of Law Act*** 2012 provides that:

> ***(1) The School shall be a public legal education provider responsible for the provision of professional legal training as an agent of the Government.***
>
> ***(2) Without prejudice to the generality of subsection (1), the object of the School shall be to train persons to be advocates under the Advocates Act.***

8. It was also the applicant's case that sections 12 and 13 of the ***Advocates Act*** provide for the qualifications for admission and professional qualifications to be admitted as an advocate. He therefore averred that by failing to consider his application, the respondent has breached his legitimate expectation, fettered its discretion, breached its duty to give reasons and acted in violation of the law.

Interested Parties' Case

9. The application was supported by the interested parties who averred that their position was similar to that of the ex parte applicant herein.

10. In their submissions, the ex parte applicant and the interested parties contended that this is (presumably) the second case on '**pre-bar examinations'** the first case having been the case of **Kevin Mwiti & Others v Kenya School of Law & Others** (herein, Mwiti's Case). **Mwiti's** case was presented by a group of students who had been admitted to study the Bachelors of Law (LLB) degree before the enactment of the ***Kenya School of Law Act*** in 2012 (herein '*KSL Act'*). In that case, this Court found in favour of the Petitioners but explained in its judgment that, for avoidance of doubt, those who had been admitted after 2012 were to comply with the provisions of the KSL Act.

11. It was submitted that this second case also concerns pre-bar examinations but it is different from the first case. First, unlike the Petitioners in the ***Mwiti*** case who were opposed to the idea of pre-bar examinations, and thought they should not sit for it, the Applicants here are not opposed to it. They want to undertake it but have been disqualified by virtue of their circumstances. Their circumstance is that unlike their colleagues in the ***Mwiti Case,*** whose generic circumstance is that they commenced their LLB degrees before 2012, the Ex parte Applicant, and the Interested Parties, started their academic journey towards their respective LLB degrees through vertical progression before 2012 by enrolling for a Diploma, or Certificate to Diploma or Degree in other subjects to Degree in Law. The ***Mwiti case*** did not consider the circumstances of those who fell in this predicament, in any case, the judgment benefited all class of Petitioners in that case.

12. In this case it was submitted that the Ex parte Applicant sat for his KCSE examinations in the year 2000 while all the interested parties did their KCSE before the enactment and coming into force of the ***KSL Act***. The criteria then for the admission to the Advocates Training Program was set out in the ***Council of Legal Education Act*** Cap 16A. In particular it was set out under the Regulation 5.

13. It was submitted that until 2012, when the ***Kenya School of Law Act*** was enacted, the Ex parte Applicant was qualified by virtue of regulation 5(c) of the ***Council of Legal Education Act*** for direct admission to Kenya School of Law since he had scored a B- (minus) in English in 2000 and if he pursued a Diploma in Law, as he did, he would not even sit for the pre-bar examinations in the first place. The Ex-Parte Applicant's affidavit reveals that before enrolling for the LLB, for which he was eligible, he started with a Diploma in Law in 2009 at the Kenya School of Law. He graduated in 2011. At that time he was still eligible for the LLB degree, as well as the Advocates Training Program.

14. However, in 2012, two important legislations were enacted, first was the ***Kenya School of Law Act*** and second was the ***Legal Education Act***. The ***Legal Education Act*** repealed the ***Council of Legal Education Act*** though section 48 of that Act had a transitional clause, which provided that:

(1) An institution that was before the date of commencement of this Act, lawfully providing legal training, for which a licence is required under this Act shall be deemed to hold the same status under this Act.

(2) Notwithstanding the repeal of the Council of Legal Education Act, 1995—

(a) the repeal shall not affect any instrument made or any other thing done under the former Act and every such instrument or thing shall continue in force and shall, so far as it would have been made or done under this Act, have effect as if made or done under the corresponding enactment of this Act;

(b) the repeal shall not adversely affect the terms and conditions on and subject to which any person held office or served immediately before the commencement of this Act.

15. After 2012, it was submitted that a new criteria for entry to Kenya School of Law was introduced following the repeal of the ***Council of Legal Education Act,*** by the ***Legal education Act.*** The new criteria was contained in the ***Kenya School of Law Act***, and not the ***Legal Education Act***. ***The KSL Act, 2012*** introduced a new criteria by merely deleting paragraphs 5(c) and (d) of the repealed ***Council of Legal Education Act***, Cap 16A. It left out only paragraphs 5 (a) and (b) but with an alternative on pre bar. It reads:

"……..or…..has sat and passed the Pre-Bar examination set by the School."

16. According to the Applicant and the interested parties, pursuant to the ***KSL Act***, those who did not meet the criteria for direct admission (including those who had progressive education) could only be admitted to the Advocates Training Programme after sitting for the pre-bar examinations. However, in 2014, when the ex-parte Applicant and the interested parties were in the LLB program already, the ***Kenya School of Law Act*** was amended to substitute the word "or" with "and." In essence, it made pre-bar compulsory for those who would previously have had direct entry to the Advocates Training Program. The effect of this was to exclude those who did not meet the first threshold of the previous regulations 5 (a) and (b) of repealed Council of Legal Education Act, yet it was the said repealed section 5 (c) and/or (d) of the ***Council of Legal Education Act***, Cap 16 A, that the Ex Parte Applicant and Interested Parties relied on to start their journey towards legal education.

17. It was submitted that the ***Legal Education Act 2012*** that repealed the ***Council of Legal Education Act*** Cap 16 A also gave powers to the Cabinet Secretary to make regulations under the ***Legal Education Act*** and under section 46 of the ***Legal Education Act***, the regulation would only have the force of law upon recommendation of the Council of Legal Education and with the approval of the National Assembly. Acting pursuant to the powers to make Rules, ***The Legal Education (Accreditation and Quality Assurance) Regulations 2016*** were enacted which regulations were intended to mechanise the ***Legal Education Act*** which under its section 8(4) is the most authoritative law on legal education. The third schedule to the regulations provides for "Admission Requirements, Class Size and Enrolment Data". Under its paragraph 6, the criteria for admission to the Advocates Training Program is provided and it includes "proof of academic progression" from Certificate, to Diploma and to Degree. To the applicant and the interested parties, evidently such regulations mitigated the harsh and unfair effects of the amendments to the ***Kenya School of Law Act***.

18. It was submitted that presently, the Kenya School of Law, has been accredited to offer the Advocates Training Program. However, when it issued the impugned notification, it only considered the requirements under the Kenya School of Law and not the regulations under the Legal ***Education Act***. When the Ex Parte Applicant wrote to the Council for Legal Education, the Council responded, in its letter of 24 July 2017 it advised that the Ex Parte Applicant was eligible to sit for the pre-bar thus that the examinations and that Respondent did not consider vertical progression from certificate to diploma. It is this set of context that necessitates these proceedings.

19. It was the applicant and interested parties' case that the first reason why the instant application should

be allowed is that the ***Kenya School of Law Act*** is being applied retrospectively and this is unfair and unlawful since Article 10 of the Constitution requires public bodies implementing legislation to consider *inter alia* equity, non-discrimination and human rights. The application of this legislation retrospectively, according to them is unfair and discriminatory on many fronts. The Ex Parte Applicant completed his KCSE more than 10 years before the Kenya School of Law Act was enacted. It now requires him to possess a B in English, when his qualification was acquired well before the KSL Act. It was therefore submitted that this legislation takes away and impairs vested rights of the *Ex Parte Applicant* acquired under the then existing law, the ***Council of Legal Education Act***, and attaches a new disability in respect to considerations already past. For this reason only, this court should find that the Ex Parte Applicants are not meant, for fair applicability of law, to sit for pre-bar examinations. Yet this advantage is not what the Ex Parte applicants are pursuing in these proceedings. This is unfair and for that reason is unlawful.

20. It was further submitted that the general presumption is that statutes apply in a prospective manner from enactment going into the future as was held in **Kalpana H. Rawal vs. Judicial Service Commission & 4 Others [2015] e KLR** where the court observed that:

> **316. The starting position is that courts will generally presume that statutory enactment applies to the future and not to the past, unless clearly and manifestly so intended by the legislature.**
>
> **The word "retrospective' with regard to law is defined in *Black's Law Dictionary*, 6th Edition as:**
>
> ***"A law which looks backward or contemplates the past, one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the law when it occurred."***
>
> **317. In the case of *American States W S Co. v Johnson 31 Cal. App. 2d 606 (Cal Ct App. 1939)* it was held that:**
>
> ***"Retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute. The terms 'retrospective 'and 'retroactive' are interchangeable… in California a statute is not invalid merely because it is intended to operate retrospectively. It may, however, be invalid if it deprives one of vested rights which are bound to be respected or protected by the state or if it impairs the obligations of a contract… [ ] it is true that statutes will be construed to operate prospectively rather than retrospectively unless the contrary intention clearly appears"***
>
> **318. In the US case of Cooper v Watson 290 Minn. 362 (Minn 1971) there is a clear and unambiguous definition of retrospective law, as follows:**
>
> ***"A retrospective law, in the legal sense is one which takes away or impairs vested rights acquired under existing laws, or creates a new obligation and imposes a new duty, or attaches a new disability, in respect of transactions or considerations already past. It may also be defined as one which changes or injuriously affects a present right by going behind it and giving efficacy to anterior circumstances to defeat it, which they had not when the right accrued, or which relates back to and gives to a previous transaction some different legal effect from that which it had under the law when it occurred. Another definition of a retrospective law is one intended to affect transactions which occurred, or rights which accrued, before it became operative, and which ascribes to them effects not inherent in their nature, in view of the law in force at the time of their occurrence."***

21. According to the applicants and interested parties, in normal circumstances laws have to be

prospective for them to be fair. In this respect, in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** the court in quashing a retrospective tariff which imposed punitive, burdensome and unanticipated obligations on the applicant.

22. The second reason why this application should be allowed, according to the applicant and interested parties is that it violates the legitimate expectation conferred upon the Ex Parte applicant and the third set of interested parties by the regulations made under the ***Legal Education Act***, well as the pre-existing legal regime at the time they undertook their Certificates and/or Diplomas in law. The Ex parte Applicant had the assurance that he, and those in his circumstances, would *be* allowed to complete the Advocates Training Program on the basis of the legal framework existing before the enactment of the Act. The Ex parte Applicant has over the period of his legal training progressed with his studies in reliance on the principle of certainty of Law- and that should there be a change it would not adversely affect him, since he had taken considerable steps in progression in his legal studies. Yet even after the law has mitigated the harsh effects of the amendments and in so doing affirmed the expectation, the Respondent is keen to extinguish it.

23. It was submitted that the principle of legitimate expectation enables certainty and predictability of laws and reliance was placed on **Republic vs. Kenya Revenue Authority & another Ex-Parte Trade wise Agencies [2013] eKLR** in which **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** was cited with approval.

24. The third ground, according to the applicant and the interested parties is that there is fettering of discretion. In this case, legislation has given a public authority, Kenya School of Law, discretion to make decisions- that of admitting students to the Advocates Training Program. Kenya School of law has both the Act and the regulations made under the Legal Education Act, to guide it. The argument that it uses to fetter the discretion is that there is a conflict between statute and subsidiary legislation. But this argument is not correct since there is no conflict between the legislation and the regulations. The regulations are supplemental to the criteria set out in the ***Kenya School of Law Act***. They do not delete the criteria in the ***Kenya School of Law Act***, all they seek to do is to introduce a supplementary group for important reasons. First, parliament does not normally have concrete circumstances in its mind when enacting legislation. That is why law making powers are donated to institutions implementing or enforcing it. In this case, the ***Legal Education Act 2012*** gave the Cabinet Secretary powers, at the recommendation of the Council for Legal Education, to enact regulations. These regulations were in turn approved by parliament itself. It cannot be that they countermand statute.

25. In this respect they relied on the decision of the United Kingdom Supreme Court in **R (on the application of Sandiford) (Appellant) vs. The Secretary of State for Foreign and Commonwealth Affairs (Respondent)[2014] UKSC 44** in which it was observed that a public body may not unlawfully fetter discretion by whimsically failing to take into account or consider other circumstances already provided in law or policy by stating that:

> **55. The reasoning of the Court of Appeal is encapsulated in a short passage in the judgment of the Master of the Rolls:**
>
> **"53. It is clearly established that a public body may not unlawfully fetter the exercise of a discretionary statutory power: see, for example, British Oxygen Co Ltd v Board of Trade [1971] AC 610. But where a policy is made in the exercise of prerogative or common law powers (rather than a statutory discretion), there is no rule of law which requires the decision-maker to consider the facts of every case with a view to deciding whether, exceptionally, to depart from the policy in a particular case. This is because 'it is within the power of the decision-maker to decide on the extent to which the power is to be exercised in, for example, setting up a scheme. He can decide on broad and clear criteria and either that there are no exceptions to the criteria in the scheme or, if there are exceptions in the scheme, what they should be': R (Elias) v Secretary of State for Defence [2006] 1 WLR 3213, para 191."**

26. It was the case for the applicant and the interested parties that the argument that there is a conflict does not thus arise. In any case, if such a conflict existed, it would not be resolved by reference to the Cap 2, ***Interpretations and General Provisions Act*** since section 31(b) is about the conflict between an Act and subsidiary legislation under it. The lead in paragraph to section 31 reads *"Where an Act confers power on an authority to make subsidiary legislation, the following provisions"*. In this case, the regulations were made under a different Act. This argument by the Respondent is what is used to fetter its discretion by applying a rigid, excluding and one-size-fits-all criteria which excludes persons in other classes, but whom the law envisages. The effect of this act is unfair and also unreasonable. It is thus unlawful under article 47 of the Constitution.

27. It was submitted that by notice published on or about 4th July 2017 by the respondent insisting that candidates such as the Ex parte Applicant did not meet the requirements for pre bar examinations despite having fully achieved progression from Certificate to diploma and LLB as contemplated in Paragraphs 3, 4, 5 and 6 (c) of the Third Schedule to the Legal Education Act 2012, the Respondent Institution has without doubt fettered its powers under section 5 (d) of the Act and acted erratically.

28. According to the applicant and the interested parties, the Constitution of Kenya, 2010 asserts in Article 10 that non- discrimination is a core national value that should at all times in application of any laws be promoted and respected. Article 27(4) of the Constitution in particular, expressly bars the state from discriminating directly or indirectly against any person on any ground. The decision by the respondent institution as published in the Notice on 4th July 2017 and as contained in the *Pre-bar* Information booklet has grossly violated Article 27 of the Constitution of Kenya effectively denying the *ex-parte* applicant his right to education as provided for under Article 43(1) (f) of the Constitution of Kenya.

Respondent's Case

29. The application was however opposed by the Respondent.

30. According to the Respondent, the requirements for admission to the Advocates Training Programmes at the School are set out the Second Schedule to the ***Kenya School of Law Act, 2012*** as amended vide the ***Statute Law Miscellaneous Amendments) Act*** (No. 18 of 2014).

31. It was averred that at the time the ex-parte applicant joined Mt. Kenya University for his Bachelor's degree in law, the legal position set out in paragraph 4 above was already in force, the same having come into operation in January, 2013. The Respondent contended that the ex-parte applicant erroneously refers to subsidiary legislation under the ***Legal Education Act, 2012*** as "amendments" to the Act yet he is citing the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016***.

32. To the Respondent, in any event, the subsidiary legislation that the ex-parte applicant calls to his aid was made long after he had commenced his LL.B. studies and he cannot therefore cite the same as the basis for his "legitimate expectation" of joining the ATP. In this respect the Respondent relied on section 31(b) of the ***Interpretation and General Provisions Act*** Cap. 2, Laws of Kenya.

33. In its submissions, the Respondent contended that the main issue that falls to be determined in this suit is whether the ex-parte applicant and the second and third sets of Interested Parties are eligible to sit for the pre-bar examination of the Respondent which is scheduled to be taken on 10th November, 2017. The ex-parte Applicant and the third set of Interested Parties contend that, while the ***Kenya School of Law Act, 2012*** disqualifies them from taking the aforesaid Pre-Bar examination, certain other legal criteria exist which qualify them to sit for the examination. The main thrust of their argument is that the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016*** made under the ***Legal Education Act, 2012*** confer upon them eligibility for admission into the Advocates Training Programme (ATP) on the basis of vertical academic progression.

34. It was submitted on the other hand, the second set of interested parties aver that at the time they undertook their studies for a diploma in law, the law then in place permitted them to proceed to the ATP

upon completing their Bachelor of Laws studies. They contend that they have a **"legitimate expectation"** to join the Respondent's ATP.

35. It was however submitted that all the claimants do not meet the minimum Secondary School qualifications set out in the Second Schedule to the ***Kenya School of Law Act, 2012***.

36. According to the Respondent, all the claimants in this suit commenced their Bachelor of Laws studies **AFTER** the Kenya ***School of Law Act, 2012*** had come into force on 15th January, 2013. Consequently, they cannot be heard to say that they were not aware of the legal requirements for admission to the ATP. The Respondent relied on **Kevin K Mwiti and Others, vs. Kenya School of Law and Others** (Constitutional petition No. 377 of 2015) where this Court ruled that all persons who had commenced their LL. B studies before enactment of the ***Kenya School of Law Act, 2012*** could join the ATP on the basis of the admission criteria in force before the Act was passed. The court further stated that all persons who commenced their LL. B studies after enactment of the Act would have to abide by the admission requirements stipulated therein. It was therefore submitted that the said decision settled the issue of admission criteria for the ATP and the claimants in this suit are bound by that decision as the nature of the orders made by the court was such that the orders applied *in rem.*

37. According to the Respondent, by invoking the Constitution of Kenya, 2010, the claimants in this suit are essentially asking the court to declare the relevant part of the ***Kenya School of Law Act, 2012*** as being inconsistent with the Constitution. That prayer has however not been sought and the Court was urged to decline that subtle invitation.

38. Concerning the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016***, the Respondent submitted that subsidiary legislation cannot be used to amend a substantive Act of Parliament. To the extent that those regulations purport to provide different ATP admission criteria from those set out in the ***Kenya School of Law Act, 2012*** then the regulations are invalid on the basis of section 31 (b) of the ***Interpretation and General Provisions Act*** (Cap. 2, Laws of Kenya). Furthermore, it was submitted, the said regulations were made in 2016, long after the claimants had commenced their LL. B studies and they cannot therefore rely on them as the basis of their "legitimate expectation."

39. The Respondent disagreed that its notice published in the daily newspapers of 4th July, 2017 introduced new or illegal eligibility criteria for the ATP and averred that the notice merely recited the provisions of the Second Schedule to the ***Kenya School of Law Act, 2012*** which criteria have been in public knowledge since 2012 and the claimants in this suit must have been aware of them, seeing that they all have had some legal training since before 2012.

40. The Respondent insisted that it is obliged to follow the law as enacted by Parliament unless such law is found to contravene the Constitution. In enacting the eligibility criteria under the ***Kenya School of Law Act***, it was submitted that Parliament must have intended to promote high standards in the training and practice of the law.

41. Accordingly, the Court was urged to reject all the prayers made by the claimants in this suit.

Determinations

42. I have considered the application, the affidavits both in support of and in opposition to the application.

43. In **Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others (2015) eKLR,** this Court granted, *inter alia*, the following relief:

> *A declaration that the Petitioners who* ***were already in the LLB Class prior to the enactment of the Kenya School of Law Act*** *are to be treated in the manner contemplated by the guidelines issued by the School prior to the enactment of the Amendment Act. For avoidance of doubt those who had not been admitted* ***in the LLB Class prior to the enactment of the Kenya School of Law Act are to comply with the provisions of the said Act.***

44. What, however, is the position of the applicant and the interested parties herein? According to the Applicant, he sat for his Kenya Certificate of Secondary Education, KCSE, in the 2000 and obtained a mean grade of C + (plus) with a grade B- (minus) in English and C+ (plus) in Kiswahili.

45. Prior to January, 2013, the law governing admissions to the Advocates Training Programme was the ***Council of Legal Education Act*** Cap 16A, Laws of Kenya with its attendant Regulations vide ***The Council of Legal Education (Accreditation) Regulations, 2009*** and ***Council of Legal Education (Kenya School of Law) Regulations, 2009***.

46. Regulation 5 of the ***Council of Legal Education Act*** Cap 16A provided as follows:

> ***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;***
>
> ***(c) a Bachelor of Laws Degree (LL.B) from a recognized university and attained a minimum grade of C+ (C plus) in English and a minimum aggregate grade of C (plain) in the Kenya Certificate of Secondary Examination, holds a higher qualification e.g. "A" levels, "IB", relevant "Diploma", other "undergraduate degree" or has attained a higher degree in Law after the undergraduate studies in the Bachelor of Laws Programme; or***
>
> ***(d) a Bachelor of Laws Degree (LL.B) from recognized university and attained a minimum grade of C- (C minus) in English and a minimum of an aggregate grade of C- (C minus) in the Kenya Certificate of Secondary Examination sits and passes the Pre-Bar Examination set by the Council of Legal Education as a precondition for admission.***

47. The applicant therefore averred that until 2012, when the ***Kenya School of Law Act*** was enacted, he was qualified by virtue of Regulation 5(c) of the ***Council of Legal Education Act*** for direct admission to Kenya School of Law.

48. However in September 2012, Parliament enacted the ***Kenya School of Law Act, 2012*** (hereinafter referred to as "the Act") which provided for the establishment, powers and functions of the Respondent and which Act came into force on 15th January 2013. The applicant however avers that the same year, 2013, he enrolled for a bachelor degree in law (LLB) at Mt Kenya University where he qualified and graduated on 7th July 2017 with a Bachelor Degree in Law (LLB) having obtained a Second Class Honours-Lower Division. If the applicant joined the University for the said course after the date of the commencement of the amendment, he was automatically subject to the provisions of the Act as amended and the said provisions provided in the Second Schedule to the Act at section 1 and 2 as hereunder:

> ***(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 (LL.B) 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 (LL.B) in the grant of that university, university college or other institution:

(i)attained a minimum entry requirements 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.

49. In that event the applicant having not 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 would be locked out from admission to the ATP. It was the Respondent's case that at the time the ex-parte applicant joined Mt. Kenya University for his Bachelor's degree in law, the legal position set out in the Second Schedule to the ***Kenya School of Law Act, 2012*** as amended vide the ***Statute Law Miscellaneous Amendments) Act*** (No. 18 of 2014) was already in force, the same having come into operation in January, 2013.None of the parties have however attempted to show with exactitude when the applicant joined the University. Section 107(1) of the ***Evidence Act*** provides that:

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

50. On the other hand, section 109 of the same Act provides that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

51. It is therefore my view that since it was the applicant who desired the Court to believe that as at the time he joined the University, the new law had not commenced, it was upon him to prove through credible admissible evidence that that was the factual position. Commencements of statutes are usually from a particular date as opposed to a particular year. It was not just enough for the applicant to aver that he joined the University in the year 2013 without disclosing the exact date taking into account the fact that the academic transcript for the first year indicates that academic year as 2013/2014. In this case, it would have been helpful if the applicant had exhibited a copy of his admission letter to prove the exact date of his admission to the University. The law is clear that where a party to a suit fails to adduce evidence which is presumed to be in his possession and offers no explanation why the same was not adduced the Court may be entitled to draw adverse inference that such evidence would have been adverse to the party's case.

52. What then happens where a fact is neither proved nor disproved as is the case here? **Ringera, J** (as he then was) in **Gandhi Brothers vs. H K Njage T/A H K Enterprises Nairobi (Milimani) HCCC No. 1330 of 2001** relied on section 3 of the ***Evidence Act*** and held that a fact is not proved if it is neither proved nor disproved. It is therefore not proved. It follows that the applicant has failed to prove that as at the date of commencement of the ***Kenya School of Law Act, 2012*** the applicant had already commenced his LLB Degree Course hence was entitled to the provisions which were prevailing before the onset of the said legislation.

53. The applicant has however contended that in 2016, the ***Legal Education Act,*** through its paragraphs 3, 4, 5 and 6 (c) of the Third Schedule was amended to take into cognizance vertical progression from Certificate, to Diploma to Degree and ultimately to the Advocates Training Program. Despite this intervention the respondent posted a notification for pre bar examinations 2017 on its website and on

local dailies on or about 4th July 2017. By this notification, the eligibility requirement to apply for pre bar examinations excluded candidates such as the applicant and others who did not meet the requirements set therein but had qualified by virtue of progression from certificate to diploma and LLB as contemplated in paragraphs 3, 4, 5 and 6 (c) of the Third Schedule to the ***Legal Education Act 2012***.

54. On its part the Respondent contended that what the applicant erroneously referred to as subsidiary legislation under the ***Legal Education Act, 2012*** as "amendments" to the Act were in fact the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016***.

55. Section 16 of the ***Kenya School of Law Act*** provides as hereunder:

> ***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.***

56. The relevant section of the said Schedule which prescribes requirements for admission into the Advocates Training Programme provides as follows:

> ***A person shall be admitted to the School if—***
>
> ***(a) having passed the relevant examination of any recognized university in Kenya, or of any university, university college or any other institution prescribed by the Council, holds or becomes eligible for the conferment of the Bachelor of Laws (LLB) degree of that university, university college or institution; 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; and***
>
> ***(iii) has sat and passed the pre-Bar examination set by the school.***

57. It is therefore clear that the starting point must be section 16 of the ***Kenya School of Law Act*** as read with the aforesaid schedule. Section 31(b) of the ***Interpretation and General Provisions Act*** provides as hereunder:

> ***Where an Act confers power on an authority to make subsidiary legislation, the following provisions shall, unless a contrary intention appears, have effect with reference to the making of the subsidiary legislation—***
>
> ***(a)……..***
>
> ***(b) no subsidiary legislation shall be inconsistent with the provisions of an Act.***

58. According to the applicant and the interested parties, this provision only applies to subsidiary legislation made under the particular Act of Parliament. In other words other subsidiary legislation are perfectly valid even if they conflict with Acts of Parliament under which they are not made. With due respect this view cannot be correct. In **Raila Odinga & 6 Others vs. Nairobi City Council Nairobi HCCC No. 899 of 1993; [1990-1994] EA 482,** the provisions of the ***Civil Procedure Rules*** were amended to provide for extension of time within which an application for an order of certiorari could be made. Clearly the ***Civil Procedure Rules*** are made pursuant to section 81 of the ***Civil Procedure Act***. The Court however had no difficulty in finding that Rules of Court made under the ***Civil Procedure Act*** could

not override clear provisions of Section 9(1) of the ***Law Reform Act***.

59. This was the position of the Court of Appeal in **David Wakairu Murathe vs. Samuel Kamau Macharia Civil Appeal No. 171 of 1998 [2008] 2 KLR (EP) 244** where it expressed itself as hereunder:

> **"As the petition was presented on 27th January, 1998, in order to satisfy requirements as to service, the petitioner had to see to it that it was served on each and every respondent on or before 3rd February, 1998. Service on the appellant was effected on 5th February, 1998 which was two days out of time…Learned Counsel for the respondent has sought to scuttle this difficulty by invoking the provisions of Order 49 rule 3A of the Civil Procedure Rules, which provides that except where otherwise included, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time. If this provision is applicable, the date of publication of the result of the election would start to run on 8th January, 1998 and the last day for service would then have been 5th February, 1998. The result of this would be that service on the appellant on 5th February, 1998 would have been effected within twenty-eight days as stipulated by section 20(1)(a) of the Act…Unfortunately, the respondent cannot benefit from this provision for two simple reasons. First, election petitions are governed by a special and self-contained regime and Civil Procedure Rules are inapplicable except where expressly stated. Secondly, *Order 49 rule 3A is a piece of subsidiary legislation promulgated by the Rules Committee for the purposes of the Civil Procedure Act, and under the ordinary canons of statutory interpretation they cannot override express provisions of an Act of Parliament*."** [Emphasis added].

60. The position was restated by the Supreme Court in **Evans Odhiambo Kidero & 4 Others vs. Ferdinand Ndungu Waititu & 4 others [2014] eKLR** where, while answering the question whether Rule 82(1) of the ***Court of Appeal Rules, 2010***, a subsidiary legislation, conferred upon the Court jurisdiction in election petitions, to override the ***Elections Act*** by excluding the time taken in preparing appeals from the time-allowed for filing appeals to the Court of Appeal under section 85A of the ***Elections Act***, expressed itself on the contention that a subsidiary legislation can override an Act of Parliament as follows:

> **"Such a position cannot, in our view, be sustained: for it flies in the face of the time-hallowed principle of "the hierarchy of norms." It is well recognized that an instrument of subsidiary legislation cannot override the provisions of an Act of Parliament."**

61. In the above cases, it is clear that the Courts were dealing with rules made under one Act of Parliament vis-à-vis the provisions of an Act of Parliament other than the one under which they were made. To my mind therefore the provisions of a subsidiary legislation can under no circumstances override or be inconsistent with any Act of Parliament be it the one under which they are made or otherwise.

62. It is therefore my view that if the provisions of the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016*** are in conflict with the provisions of section 16 of the ***Kenya School of Law Act*** as read with the Second Schedule to the said Act, the former cannot override the latter. It is also important to note that the Third Schedule of the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016*** is expressed to have been made pursuant to rule 10(1) of the said Regulations. Rule 10(1) whose short title in "quality standards" is however couched in the following terms:

> ***The quality standards to be satisfied by a legal education provider for the purposes of accreditation and quality assurance under the Regulation are set out in the Third Schedule to these Regulations.***

63. To my understanding what the Third Schedule is supposed to provide for are quality standards to be satisfied by a legal education provider in order to meet accreditation and quality standards. However the

said Schedule has purported to provide for minimum requirements for admission to the Advocates Training Programme. The 1st interested party's position is that the said Schedule offers further threshold for admission to the Advocates Training Programme and that it was enacted pursuant to primary jurisdiction under section 46(1) of the ***Legal Education Act, 2012*** and that they are necessary in order to recognise diligence and efforts of citizens who whilst would have wished to join the Kenyan Bar, were unable for reasons sometime not of their causation, to attain the minimum KCSE Grades and that such parties then progress through measured stages, to say, Certificate in Law, Diploma in Law and eventually a Degree in Law.

64. If that position is correct, and that as submitted by the 1st interested party, the Regulations are in addition to section 16 of the ***Kenya School of Law Act*** and the Second Schedule thereto, then it would follow that apart from the provisions in the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016,*** a person wishing admission to the ATP must still meet the requirements under the Second Schedule to the ***Kenya School of Law Act.*** To that extent it follows that the reliance in the said Schedule by the Respondent cannot be faulted. In other words the provisions of the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016*** are not to be treated as offering an alternative to the provisions of section 16 of the ***Kenya School of Law Act*** and the Second Schedule thereto. To my mind this would be the proper interpretation to be adopted if the provisions of section 16 of the ***Kenya School of Law Act*** as read with Second Schedule thereto are to be found not to be in conflict with the Third Schedule of the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016.*** Any other interpretation would however render the Third Schedule of the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016*** inconsistent with an Act of Parliament and hence null and void. However since such an order is not being sought before me in these proceedings, I will say no more on that issue.

65. In this case it is clear that the applicant did not meet the provisions of the ***Kenya School of Law Act*** as read with Second Schedule thereto. He cannot ignore the same and simply rely on the Third Schedule of the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016*** as the basis for seeking admission to the School.

66. As regards the interest parties' case, it is contended that they were in the LLB Programme in 2014. There is no indication when they joined the programme. As I have held hereinabove if they joined after the commencement of the amendments to the Second Schedule of the ***Kenya School of Law Act*** then they were bound by the same in which event they could only qualify for admission to the School if they had *"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"* and not just the minimum qualifications prescribed in the Third Schedule of the ***Legal Education (Accreditation and Quality Assurance) Regulations, 2016.***

67. That being my finding the principle of legitimate expectation cannot be successfully raised since as is stated **Republic vs. Kenya Revenue Authority ex parte Shake Distributors Limited Hcmisc. Civil Application No. 359 of 2012**:

> **"…the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law."**

68. Whereas I appreciate that the intention of coming up with the said Regulation may well have been noble, that alone does not give them priority over section 16 of the ***Kenya School of Law Act*** as read with Second Schedule thereto in order to justify the disregard of the provisions of the principal legislation in preference for secondary legislation.

69. It is therefore my finding that with the current state of legislation this petition cannot succeed.

Order

70. Consequently, this petition fails and is dismissed but with no order as to costs since the issues raise herein are of public nature.

71. Orders accordingly.

Dated at Nairobi this 7th day of November, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Malenya for the ex parte applicant and 3rd interested parties

Mr Mwaniki S. M for the Respondent

Mr Oduor for the 1st interested party

CA Ooko