REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

(Coram: A. C. Mrima, J.)

PETITION NO. 101 OF 2020

ROBERT URI DABALY JIMMA .....PETITIONER

VERSUS

KENYA SCHOOL OF LAW.....1ST RESPONDENT

KENYA NATIONAL QUALIFICATIONS AUTHORITY.....2ND RESPONDENT

JUDGMENT

Introduction:

1. This Petition once again brings to the fore the challenges facing those intending to join the Kenya School of Law upon graduating with a Bachelor's Degree in Law from a recognized University.

2. *Robert Uri Dabaly Jimma,* the Petitioner herein, is one such persons. After graduating with a Bachelor's Degree in Law from the Moi University, the Petitioner applied to join the Kenya School of Law (hereinafter referred to as '**KSL'** or **'the 1st Respondent'**) for purposes of undertaking the Advocates Training Programme (hereinafter referred to as '**ATP**'). The Petitioner had qualified from the *International General Certificate of Secondary Education* (hereinafter referred to as **'IGCSE'**) system of learning.

3. The Petitioner's application to the KSL was declined for want of a letter of equation from the *Kenya National Qualifications Authority,* the 2nd Respondent herein, (hereinafter referred to as '**the Authority'** or **'the 2nd Respondent')**.

4. The 2nd Respondent found that the Petitioner's qualifications cannot be equated within the Kenya National Qualifications Framework. The Petitioner was advised to take IGCSE Advanced Level Examinations.

5. Dissatisfied with the decisions of the Respondents, the Petitioner filed the Petition subject of this judgment.

The Petition:

6. The Petitioner claims that his application to the KSL was rejected on the basis that his qualification from the IGCSE had not been **equated** by the 2nd Respondent herein. He contends that the decision by KSL to deny him admission into the institution infringed his right to education under Article 43(1)(b) of the Constitution.

7. The Petition is dated 28th February, 2020. He pleads that the request for the equation by KSL was an extra-legal requirement which further infringed his right to fair administrative action under Article 47 of the Constitution. He further pleads that *Regulation 5(b)* of the *Council for Legal Education (Kenya School of Law) Regulations, 2009* and *paragraph 1(a) and (b) of the Second Schedule of Kenya School of Law Act, 2012* which were in force at the time he joined the University provided that the only legal requirement for admission to the Kenya School of Law was a Bachelor's Degree in Law.

8. It is further his case that he had legitimate expectation of getting admitted to the KSL's ATP based on the then legal regime.

9. The Petitioner also pleaded that the decision by the KSL to deny him admission into the institution was arbitrary, devoid of legal backing and further infringed his right to equality and freedom from discrimination as guaranteed under Article 27 of the Constitution. He contends that other people who were in the same legal regime as the Petitioner were, instead, allowed to join the KSL. He posits that the denial to join

the KSL further violated his right to dignity as provided for under Article 28 of the Constitution.

10. As against the Authority, the Petitioner claim that its failure to apply the guidelines in accordance to *Commission for Higher Education Standards and Guidelines for the Academic Degree Programmes 2011* in equating his IGCSE qualification violated his right to fair administrative action guaranteed under Article 47 of the Constitution.

11. On the foregoing basis, the Petitioner sought the following orders:

a) A declaration that the law applicable to the Petitioner's admission to the 1st Respondent's Advocates Training program is the legal regime prevailing at the time he was admitted to Moi University being Regulation 5(b) of the Council of Legal Education (Kenya School of Law) Regulation, 2009 and paragraph 1(a) and (b) of the Second Schedule of Kenya School of Law Act, 2012.

b) A declaration that the guidelines applicable to the equation of the Petitioner's International General Certificate of Secondary Education are the Commission for Higher Education Standards and Guidelines for the Academic Degree Programmes 2011.

c) A declaration that the Petitioner's right of access to education has been violated by the 1st Respondent.

d) A declaration that the petitioner's right to expeditious, efficient, lawful and reasonable administrative actions has been breached by the 1st and 2nd Respondents.

e) An order of mandamus directing the 1st Respondent to admit the Petitioner to the Advocates Training Program with immediate effect.

f) An order of Certiorari to remove into this Honourable Court and quash the decision contained in the letters dated 13th January, 2020 refusing to process the Petitioner's application.

g) An order of Certiorari quashing the 2nd Respondent's decision contained in the letter dated 8th October, 2029 refusing to equate the Petitioner's International General Certificate of Secondary Education certificate.

h) An order of Prohibition restraining the 1st Respondent from interfering with the Petitioner's participation and completion of the Advocates Training program at the Kenya School of Law.

i) An order directing the 1st Respondent to equate the Applicant's O-Level qualifications within 14 days of the judgment.

j) Punitive and general damages against the 1st and 2nd Respondent jointly and severally for deliberately violating the Petitioner's fundamental rights and freedoms.

12. The Petitioner filed written submissions, a List of Authorities and a Case Digest all dated 25th September, 2020 in support of the Petition.

The Responses:

13. The Petition is opposed. KSL contends through the Replying Affidavit of *Fredrick Muhia*, sworn on 7th April, 2020 that pursuant to Regulation 5(2) of Legal Notice 169 of 2009 (hereinafter '**The Legal Notice'**) there was an additional requirement for persons who did not have secondary school qualifications offered by the Kenya National Examination Council (hereinafter '**the KNEC'**) to submit a Certificate of equation from the Authority, which was not fulfilled by the Petitioner.

14. The 1st Respondent further contended that the foregoing information was communicated to the Petitioner on 13th January, 2020 thus according him the opportunity to submit a complete application. Therefore, his claim for breach of fundamental rights remain incorrect and baseless.

15. He deposed that it was incorrect for the Petitioner to claim eligibility to join the KSL pursuant to the Legal Notice. It is claimed that the legal notice served the important purpose of ensuring that secondary school qualifications not awarded by the KNEC were put through an equivalency test as part of eligibility criteria. He urged court to dismiss the Petition with costs.

16. The 1st Respondent filed written submissions dated 3rd November, 2020.

17. The 2nd Respondent filed a Preliminary Objection dated 11th June, 2020. It challenged the jurisdiction of this Court. It also filed a Replying Affidavit of *Dr. Juma Mukhwana*, the Chief Execution Officer. The affidavit was sworn on 7th July, 2020.

18. In the Replying Affidavit, Mr. Mukhwana averred that the equation requirement is derived from the provisions of the legal notice. That the use of the word equivalent in the clause made it necessary for the Petitioner's IGCSE education qualifications to be equated to determine if his 'O' Level were equivalent to the requirements needed at the KSL.

19. In rebutting violation of legitimate expectation, Mr. Mukhwana averred that the requirements for joining a University are different from

that of joining the 1st Respondent. As such, whereas a person may qualify to study law at the University, he/she might not be qualified to join the 1st Respondent. Legitimate expectation, he stated, cannot supersede clear provisions of the law.

20. It was further his deposition that the 2nd Respondent's inability to equate the Petitioner's 'O' level qualifications as per his request letter of 8th October, 2019 was occasioned by the fact that his qualifications were equivalent to that of *level 2* in comparison to qualifications under the KNEC as per the *Kenya National Qualifications Framework (KNQF) Act No. 22 of 2014* and the *KNQF Regulations 2018.*

21. He deposed that it is on that basis that the Petitioner was advised to undertake advanced level examination from the same examination body (IGCSE) for his qualifications to be equated to the KCSE level. He stated that the Petitioner's allegation of violation of the right to fair administrative action under Article 47 of the Constitution was unfounded.

22. In closing, he claimed that the Petitioner had neither made out a case for the grant of general damages nor demonstrated how his fundamental rights had been violated by the 2nd Respondent. He urged the Petition be dismissed.

23. The 2nd Respondent filed written submissions dated 29th October, 2020.

Issues for Determination:

24. I have carefully considered the material presented before Court by the parties including the submissions and the decisions referred to. I find the following issues arise for determination: -

a) Whether this Court has jurisdiction to entertain the Petition;

b) Whether the Petitioner's IGSCE qualifications ought to have been equated and if so, at what point in time;

c) The applicable requirements for the Petitioner to be admitted into the ATP;

d) Whether the Respondents variously violated the Petitioner's rights to fair administrative action, non-discrimination, to dignity and education under Articles 47, 27, 28 and 43 of the Constitution respectively.

e) Whether the Petitioner is entitled to any remedies.

25. I will deal with the issues as under.

(a) Whether this Court has jurisdiction to entertain the Petition:

26. The 2nd Respondent contend that the Court lacks jurisdiction over this matter. The basis of the jurisdictional point is Section 29 of the Legal Education Act. It is submitted that the law provides a clear procedure for the redress of the Petitioner's grievance and as such that procedure ought to be strictly followed. The decisions in *Speaker of the National Assembly vs. James Njenga Karume (1992) eKLR, Samuel Kamau (SK) Macharia vs. KCB Ltd & Another (2012) eKLR, Republic vs. Kenya School of Law & 2 others exparte Kgaborone Tsholofelo Wekesa (2019) eKLR, Night Rose Cosmetics (1972) Ltd vs. Nairobi County Government & 2 Others (2018) eKLR* as well as the provisions of Section 9(2) of the Fair Administrative Actions Act were referred to in support of the position.

27. The 2nd Respondent further submit that the Petitioner's grievance ought to be dealt with at the Legal Education Appeals Tribunal established under Section 29 of the Legal Education Act (hereinafter referred to as ***'the Tribunal'***) before the High Court assumes jurisdiction.

28. The 1st Respondent did not tender any submissions on the issue of jurisdiction.

29. The Petitioner vehemently oppose the submission that the Court has no jurisdiction over the matter. It is submitted that what the Petitioner has tendered before Court are pure constitutional issues and the Tribunal has no power over such issues, but the High Court under Article 165(3) of the Constitution.

30. The Petitioner relies on *Kelvin K. Mwiti & Others vs. Kenya School of Law & 2 Others (2015) eKLR* and *Kihara Mercy Wairimu & 7 Others vs. Kenya School of Law & 4 Others (2019) eKLR.*

31. This Court discussed the concept of jurisdiction in terms of the meaning, importance and source in great detail in ***Nairobi High Court Petition No. E278 of 2020 Rashid Ibrahim & 34 Others -vs- Ministry of Lands and Physical Planning and 5 Others*** (unreported).

32. The Court partly observed as follows: -

26. That, jurisdiction is so central in judicial proceedings, is a well settled principle in law. A Court acting without jurisdiction is acting in vain. All it engages in is nullity. Nyarangi, JA, in ***Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1*** *expressed himself as follows on the issue of jurisdiction: -*

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis

for a continuation of proceedings…

27. Indeed, so determinative is the issue of jurisdiction such that it can be raised at any stage of the proceedings. The Court of Appeal in ***Jamal Salim v Yusuf Abdulahi Abdi & another*** *Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -*

> Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court **in Adero & Another vs. Ulinzi Sacco Society Limited [2002] 1 KLR 577, as follows;**
>
> 1) ……..
>
> 2) The jurisdiction either exists or does not ab initio …
>
> 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
>
> 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

28. On the centrality of jurisdiction, the Court of Appeal in ***Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR*** *stated that: -*

> *So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.*

29. On the source of a Court's jurisdiction, the ***Supreme Court of Kenya*** *in* ***Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR*** *stated as follows: -*

> A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings … where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

30. And, in ***Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR****, the Court of Appeal further stated: -*

> [44] …. a party cannot through its pleadings confer jurisdiction to a court when none exists. In this context, a party cannot through draftsmanship and legal craftsmanship couch and convert an election petition into a constitutional petition and confer jurisdiction upon the High Court. Jurisdiction is conferred by law not through pleading and legal draftsmanship. It is both the substance of the claim and relief sought that determines the jurisdictional competence of a court...

31. From the foregoing, it is sufficiently settled that a Court's jurisdiction is derived from the Constitution, an Act of Parliament or both.

33. Section 29 of the *Legal Education Act*, No. 27 of 2012 (hereinafter referred to as '***the Legal Act'***) is on the establishment of the Tribunal. Although the 2nd Respondent hinged the objection on Section 29 of the Legal Act, it is Section 31 thereof which provides for the jurisdiction of the Tribunal.

34. Section 31 of the Legal Act provides as follows: -

> *(1)* ***The Tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the Council or by any committee or officer of the Council, on any matter relating to this Act, inquire into the matter and make a finding thereupon, and notify the parties concerned.***
>
> *(2) For the purposes of hearing an appeal, the Tribunal shall have all the powers of the High Court to summon witnesses, to take evidence on oath or affirmation and to call for the production of books and other documents.*
>
> *(3) Where the Tribunal considers it desirable for the purposes of avoiding expenses, delay or for any other special reasons, it may receive evidence by affidavit and administer interrogatories within the time specified by the Tribunal.*
>
> *(4) When determining any matter before it, the Tribunal may take into consideration any evidence, which it considers relevant to the subject of an appeal before it, notwithstanding that such evidence, would not otherwise be admissible under the law relating to evidence.*

35. The Legal Act is an Act of Parliament to provide for the establishment of the Council of Legal Education; the establishment of the Legal Education Appeals Tribunal; the regulation and licensing of legal education providers and for connected purposes.

36.

37. The objective of the Legal Act is provided for in Section 3 thereof as follows: -

a) promote legal education and the maintenance of the highest possible standards in legal education; and

b) provide a system to guarantee the quality of legal education and legal education providers

37. Section 8 of the Legal Act is on the functions of the Council of Legal Education (hereinafter referred to as '***the Council'***). It provides as follows: -

(1) The functions of the Council shall be to –

(a) regulate legal education and training in Kenya offered by legal education providers;

(b) licence legal education providers;

(c) supervise legal education providers; and

(d) advise the Government on matters relating to legal education and training.

(e) recognise and approve qualifications obtained outside Kenya for purposes of admission to the Roll.

(f) administer such professional examinations as may be prescribed under section 13 of the Advocates Act.

(2) Without prejudice to the generality of subsection (1), the Council shall, with respect to legal education providers, be responsible for setting and enforcing standards relating to the—

a. accreditation of legal education providers for the purposes of licensing;

b. curricula and mode of instruction;

c. mode and quality of examinations;

d. harmonization of legal education programmes; and

e. monitoring and evaluation of legal education providers and programmes

(3) In carrying out its functions under subsection (2), the Council shall—

a) make Regulations in respect of requirements for the admission of persons seeking to enroll in legal education programmes;

b) establish criteria for the recognition and equation of academic qualifications in legal education;

c) formulate a system for recognizing prior learning and experience in law to facilitate progression in legal education from lower levels of learning to higher levels;

d) establish a system of equivalencies of legal educational qualifications and credit transfers;

e) advise and make recommendations to the Government and any other relevant authority on matters relating to legal education and training that require the consideration of the Government;

f) collect, analyse and publish information relating to legal education and training;

g) advise the Government on the standardization, recognition and equation of legal education qualifications awarded by foreign institutions;

h) carry out regular visits and inspections of legal education providers; and

i) perform and exercise any other functions conferred on it by this Act.

(4) Where any conflict arises between the provisions of this section and the provisions of any other written law for the time being in

force, the provisions of this section shall prevail.

38. I have carefully perused the Petition. It seeks several declarations based on some Articles of the Constitution as well as orders in the nature of judicial review. It also seeks damages. The Petitioner contends that such remedies are not within the purview of the Tribunal.

39. It is a well settled legal principle that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed before a party reverts to a judicial process. That is commonly referred to as '*the exhaustion doctrine'*.

40. A 5-Judge Bench in ***Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 (2020) eKLR*** elaborately dealt with the doctrine of exhaustion. The Court stated as follows: -

> *52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages alternative dispute resolution mechanisms in line with Article 159 of the Constitution and was aptly elucidated by the High Court in* ***R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR,*** *where the Court opined thus:*
>
> *42. This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in* ***Speaker of National Assembly v Karume [1992] KLR 21*** *in the following oft-repeated words:*
>
> *Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.*
>
> *43. While this case was decided before the Constitution of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.*
>
> *This is* ***Geoffrey Muthiga Kabiru & 2 others – vs- Samuel Munga Henry & 1756 others [2015] eKLR,*** *where the Court of Appeal stated that:*
>
> *It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews…The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution*.

41. The Court also dealt with the exceptions to the doctrine of exhaustion. It expressed itself as follows: -

> *59. However, our case law has developed a number of exceptions to the doctrine of exhaustion. In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others ex parte The National Super Alliance Kenya (NASA) (supra), after exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:*
>
> *What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others.)*
>
> *60. As observed above, the first principle is that the High Court may, in exceptional circumstances consider, and determine that the exhaustion requirement would not serve the values enshrined in the Constitution or law and allow the suit to proceed before it. It is also essential for the Court to consider the suitability of the appeal mechanism available in the context of the particular case and determine whether it is suitable to determine the issues raised.*
>
> *61. The second principle is that the jurisdiction of the Courts to consider valid grievances from parties who lack adequate audience before a forum created by a statute, or who may not have the quality of audience before the forum which is proportionate to the interests the party wishes to advance in a suit must not be ousted. The rationale behind this precept is that statutory provisions ousting Court's jurisdiction must be construed restrictively. This was extensively elaborated by Mativo J in Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others [2018] eKLR.*
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> *62. In the instant case, the Petitioners allege violation of their fundamental rights.* ***Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or***

merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.

42. As demonstrated above, the Petition raises several constitutional issues. To me, such issues are '…. *not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court…'.* They are real constitutional issues on the enforcement of various fundamental rights and freedoms. Such issues can only be determined by the High Court under Article 165(1) of the Constitution which vests in the High Court vast powers including the power to '*determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened'* and the jurisdiction '*to hear any question respecting the interpretation of the Constitution.*'

43. Further, the jurisdiction of the Tribunal under Section 31 of the Legal Act is limited to matters arising within the Legal Act. However, the Petition raises other issues which are outside the purview of the Legal Act. Such include the legality of the Authority to equate the Petitioner's IGCSE results. Clearly, the Legal Act cannot be said to accord all desired remedies in the matter. To that end, the contention that the Tribunal has jurisdiction over the issues raised in this matter fails.

44. The upshot is that the issue is answered in the affirmative.

(b) Whether the Petitioner's IGSCE qualifications ought to have been equated and if so, at what point in time:

45. In a bid to deal with this issue, I will consider the following sub-issues: -

(i) The applicable law in respect to the admission of the Petitioner into the ATP;

(ii) The various law and entities having a bearing on the admission into ATP;

(iii) The question of equation.

46. I will deal with the sub-issues in *seriatim*.

(i) The Applicable Law:

47. It is the Petitioner's position that in view of the matters raised and the prevailing factual background, the applicable law of the Petitioner's admission to the ATP programme is the legal regime at the time the Petitioner was admitted to Moi University being *Regulation 5(b)* of the *Council of Legal Education (Kenya School of Law) Regulations, 2009* and *paragraph 1(a)* and *(b)* of the *Second Schedule of the Kenya School of Law Act, 2012*.

48. The 1st Respondent holds the position that the applicable law is only the *Regulation 5(b)* of the *Council of Legal Education (Kenya School of Law) Regulations, 2009* and that the *Kenya School of Law Act, 2012* (hereinafter referred to as '***the KSL Act'***) has no room. It posits that the KSL Act came into operation on 8th December, 2014 and since the Petitioner was admitted to the Bachelor of Laws degree at the Moi University on 26th August, 2014 then the KSL Act does not apply in this matter.

49. The 2nd Respondent holds the view shared by the Petitioner. It submits that the KSL Act was assented into law on 21st September, 2012 and became operational on 15th January, 2013. As such, since the Petitioner was admitted into the undergraduate studies in August 2014 then the applicable law can only be KSL Act.

50. I have read several decisions on various issues about students attempting to undertake the ATP at the KSL. In all those decisions, the 1st Respondent herein, the KSL, has been a common Respondent. Such is the decision in 6 consolidated ***Judicial Review Application Nos. 7, 8, 13, 20, 21 and 26 of 2020 Republic vs. Kenya School of Law & Others (2020) eKLR*** (hereinafter referred to as '**the consolidated JR'**).

51. The 1st Respondent herein, being a Respondent in the consolidated JR, raised a similar argument on the applicable law in respect to the admission of the then Petitioner into the ATP. It argued that the KSL Act was operationalized on 8th December, 2014.

52. The Court in consolidated JR answered the issue as follows: -

105. ….. One, the commencement date for the KSL Act was 15th January, 2013 and not 8th December, 2014 as erroneously stated by Mr. Simiyu.…

53. Regardless of such clear finding of the Court, KSL still holds that the commencement of the KSL Act was 8th December, 2014. That cannot be the case. It is possible that KSL may not really be aware or just ignores, what happened on and why the 8th December, 2014 is such an important date for students intending to joining the ATP at the KSL. I will, once again, shade some light on the importance of the 8th December, 2014.

54. When the KSL Act became operational on 15th January, 2013, it saved the KSL which had been established under the *Council of Legal Education Act, No. 9 of 1995 (Cap. 16A)* (hereinafter referred to as '***the CLE Act***'). The CLE Act was by then repealed by the enactment of the Legal Act. The Legal Act became operational on 12th September, 2012.

55. Upon commencement of the KSL Act, the criteria for joining the KSL for the ATP changed. **Section 16** of the KSL Act provided as follows: -

> *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 Second Schedule to the KSL Act **then** provided as follows: -

> *(1) A person shall be admitted to the School if—*
>
> *(a) having passed the relevant examination of any recognized university in Kenya, holds or becomes eligible for the conferment of the Bachelor of Laws (LLB) degree of that university; **or***
>
> *(b) having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) in the grant of that university, university college or other institution—*
>
> *(i) attained a minimum entry requirement for admission to a university in Kenya; and*
>
> *(ii) obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent; **or***
>
> *(2) has sat and passed the pre-Bar examination set by the school.*

57. The above provision, seemingly poorly drafted, meant that subsection 2 was an alternative to subsection 1. In order to cure such a glaring arnomaly there was an amendment to the Second Schedule. The amendment became operational on **8th December, 2014**. In essence, the amendment replaced the word '**or**' in paragraph 1(b)(ii) with the word '**and**'. As such, it became mandatory that any student wishing to join the ATP and falling under paragraph 1(b) must sit and pass the pre-bar examinations set by the KSL.

58. For clarity, **the amended Second Schedule** was as follows: -

> *(1) 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 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.*

59. The amendment to the Second Schedule was variously challenged in Court by those then adversely affected. One of such challenges was in ***Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others (2015) eKLR***. The Court *inter alia* held that: -

> ***3. A declaration that the Petitioners who were already in the LL. B 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 LL. B Class prior to the enactment of the Kenya School of Law Act are to comply with the provisions of the Act.***

60. I must point out that the case of ***Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others*** (supra) also clarified that the KSL Act became operational on 15th January, 2013.

61. It is factually correct that the Petitioner was enrolled into the LL. B Class at the Moi University on 26th August, 2014. By then the KSL Act had long been operationalized. Infact, by then the KSL Act had been in force for over one and a half years.

62. It is, therefore, open and beyond any peradventure that the applicable law to the Petitioner joining the ATP at the KSL can only be the provisions of the KSL Act. The date of 8th December, 2014 is only relevant to the Petitioner herein on whether he ought to sit for the pre-bar examinations or not.

63. I believe the issue is by now well settled. Going forward, it is expected that the KSL will consider applying the correct legal position more so on the date the KSL Act became operational and on the essence of the 8th December, 2014.

(ii) The various law and entities having a bearing on <u>the admission into ATP:</u>

64. There are various laws, regulations and entities governing the processes unto which one is finally admitted into the ATP at the KSL. The KSL aims at training Advocates as professionals. Needless to say, Advocates are specially-trained for specific purpose.

65. The processes begin right from the lower levels, that is primary education, to secondary education, to university level and eventually into the KSL for the ATP. Upon successfully completing the ATP and passing the examinations at the KSL, one then petitions for admission into the Roll of Advocates. In the event the petition succeeds one's name is entered into the Roll of Advocates and upon signing the Roll, becomes an Advocate.

66. As said, every such level of education is governed by a set of laws and regulations. The law recognizes various systems of secondary school education in Kenya. They include the 8-4-4 and the 7-4-2-3 systems whose examinations are undertaken by the Kenya National Examination Council. There are other systems offering secondary school education. They are the IGCSE and the IB systems.

67. In this case, the Petitioner went through the IGCSE system of secondary education. That was at Peponi School between April 2008 and June 2011. He then joined Moi University on 26th August, 2014 for undergraduate studies.

68. He successfully completed his studies at the University and was conferred with a Degree of Bachelor of Laws, Second Class Honours, Lower Division on 29th August, 2019 at the 38th Congregation for the conferment of Degrees held at the Moi University. He then applied to join the KSL for the ATP. He was advised to get an equation certificate from the 2nd Respondent. On application to the 2nd Respondent, he was informed that his results could not be equated as they were equivalent of Level 2. The Petitioner was advised to get back to secondary school and undertake further studies.

69. KSL declined to admit the Petitioner into the ATP on the basis of the said equation. The Petitioner filed the Petition subject of this judgment.

70. As said, qualifying to become an Advocate in Kenya is a journey. That journey is defined by the various laws and regulations. I will consider some of them, and as follows: -

<u>The Universities Act, No. 42 of 2012:</u>

71. The Universities Act is an Act of Parliament to provide for the development of university education; the establishment, accreditation and governance of universities; the establishment of the Commission for University Education, the Universities Funding Board and the Kenya University and Colleges Central Placement Service Board; the repeal of certain laws, and for connected purposes.

72. Section 3 thereof provides for the objectives of the Universities Act. Among them include *the facilitation of life-long learning through provision of adult and continuing education and to enhance equity and accessibility of the services offered by a University*.

73. The Universities Act establishes the *Commission for University Education* (hereinafter referred to as '***the Commission'***) under Section 4. The functions of the Commission are provided for under Section 5 to include *approval* of universities in Kenya; to promote, advance, publicise and *set standards relevant in the quality of university education*, including the promotion and support of internationally recognised standards; *to develop policy for criteria and requirements for admission to universities*; to *recognize and equate degrees, diplomas and certificates* conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set by the Commission from time to time; and to generally *regulate university education* in Kenya.

74. There is also the establishment of the *Kenya Universities and Colleges Central Placement Service* (hereinafter referred to as '***the Service***') under Section 55 of the Universities Act. The Service is governed by the Placement Board.

75. The functions of the Placement Board include to *co-ordinate the placement* of the government sponsored students to universities and colleges; to *disseminate information* on available programmes, their costs, and the areas of study prioritized by the Government; *develop career guidance programmes* for the benefit of students.

76. The Placement Board is also required to establish criteria to enable students access the courses for which they applied for taking into account the students' qualifications and listed priorities.

77. Part V of the Universities Act provides for the governance and management of any University. The law provides for the University Board of Trustees, the University Council, the University Senate and the University Management Board. All these entities ensure that the objectives of the Universities Act are attained.

78. Therefore, a glimpse of the Universities Act reveal that the law places serious responsibilities on *inter alia* the Commission, the Service and the governance and management entities towards ensuring that any student intending to join any University in Kenya is properly guided and enabled by taking all necessary parameters into account.

79. It can be said, without any doubt, that through the said entities, any admission of a student into a University in Kenya signifies **compliance** and **eligibility** on the part of the University and the student respectively, with all the necessary laws and regulations regarding

the particular course the student is admitted to. The only exception thereto can be termination of the students' studies on account of non-compliance of the law.

The Legal Education Act, No. 27 of 2012:

80. *The Legal Education Act* (‘***Legal Act’***) is an Act of Parliament to provide for the establishment of the Council of Legal Education; the establishment of the Legal Education Appeals Tribunal; the regulation and licensing of legal education providers and for connected purposes.

81. Section 4 establishes the *Council of Legal Education* (hereinafter referred to as ‘***the Council’***). Among the functions of the Council under Section 8 of the Legal Act include to ***regulate*** legal education and training in Kenya offered by legal education providers, ***licence*** legal education providers and to ***supervise*** legal education providers.

82. While carrying out its functions, Section 8(3) of the Legal Act allows the Council to –

(*a*) *make Regulations in respect of requirements for the admission of persons seeking to enroll in legal education programmes;*

(b) establish criteria for the recognition and equation of academic qualifications in legal education;

(c) formulate a system for recognizing prior learning and experience in law to facilitate progression in legal education from lower levels of learning to higher levels;

(d) establish a system of equivalencies of legal educational qualifications and credit transfers;

(e) advise and make recommendations to the Government and any other relevant authority on matters relating to legal education and training that require the consideration of the Government;

(f) collect, analyse and publish information relating to legal education and training;

(g) advise the Government on the standardization, recognition and equation of legal education qualifications awarded by foreign institutions;

(h) carry out regular visits and inspections of legal education providers; and

(i) perform and exercise any other functions conferred on it by this Act.

83. The Second Schedule provides for the core courses which a legal education provider must offer at degree, diploma and certificate levels. For clarity, a *legal education provider* means a post-secondary school institution that is licensed to offer legal education or training for the award of a certificate, diploma or degree including those granted a Charter under Section 19 of the Universities Act.

84. Further, the Council has powers under Section 21 of the Legal Act to suspend or revoke the licence of any legal education provider for not complying with the terms and conditions of the licence.

85. A synopsis of the Legal Act posits that it is the Council which is at the heart of legal training and education in Kenya. The Council has powers not only to regulate and licence the legal education providers but also to supervise what and how they offer their services to the public.

86. It can, therefore, be the only case that the Council has a duty to regulate how the universities admit students to pursue various cadres of legal education; that is at the certificate, diploma and degree levels. That duty must be discharged at the point of entry of the student at the institution offering such courses. A legal education provider, must, at the direction and supervision of the Council, be able to determine whether a student is qualified to pursue studies in law at the time the student applies to join the institution, that is a college or a university.

87. Whereas the Council has powers to make regulations in respect of requirements for the admission of persons seeking to enroll in legal education programmes, it also has the duty to ensure compliance of such regulations at the very point of admission of such persons, that is at college or university level. It is, hence, upon the Council to ensure that all those enrolled to pursue legal education programmes are duly qualified in law to undertake such studies.

The Kenya School of Law Act, No. 26 of 2012:

88. The *Kenya School of Law Act* (KSL Act) is an Act of Parliament to provide for the establishment, powers and functions of the Kenya School of Law (KSL) and for connected purposes.

89. The KSL is a public legal education provider responsible for the provision of professional legal training as an agent of the Government. Among its functions is to train persons to be advocates under the Advocates Act. KSL, therefore, has the power to admit persons for the necessary training.

90. Section 16 and the Second Schedule of the KSL Act provide for the criteria for admission of students to the School.

(iii) <u>The question of equation:</u>

91. The foregoing discussion has shed some light on this sub-issue.

92. *Section 3(2)(d)* of the Universities Act calls upon all universities to ensure sustainability and adoption of best practices in management and institutionalization of systems of checks and balances. *Section 5(1)(g)* of the Universities Act places the duty to recognize and equate degrees, diplomas and certificates upon the Commission in the following terms: -

> ***recognize*** *and* ***equate*** *degrees, diplomas and certificates conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set by the Commission from time to time.*

93. The duty to recognize and equate degrees, diplomas and certificates is, therefore, by law placed upon the Commission. It is the Commission which must discharge such duty unless the Commission delegates such a function to any suitably qualified person or body pursuant to Section 5(2) of the Universities Act.

94. From the reading of the Universities Act, it comes out that the equation of any foreign certificate must be done at the time a person applies to enroll into any course in a university. It is at that point in time where the University, under the direction and supervision of *inter alia* the Commission and the Council, must determine the eligibility of a person intending to pursue a course in the legal sector. Once a person is admitted into a university to pursue a certain course, there is a **rebuttable presumption in law** that such a person is qualified and eligible to study such a course.

95. On the basis of the provisions of the Second Schedule of the KSL Act, the 1st Respondent argues that the qualifications for joining a university are different from the qualifications required for joining the KSL to undertake the ATP. Whereas the argument may seem to be sound, nevertheless, it must not be lost that the journey to qualify as an Advocate in Kenya is a long one and involves various institutions. The KSL cannot, hence, claim to be the sole entity vested with the mandate of ensuring that a qualified person is trained as an Advocate. As said, KSL is just one of such institutions.

96. Be that as it may, Section 5A (1), (2) and (3) of the Universities Act settles that issue in the following manner: -

5A. <u>Conflicts with other Acts in approval of programmes</u>

> *(1) If there is a conflict between the provisions of this Act and the provisions of any other Act in matters relating approval or accreditation of academic programmes offered by universities, the provisions of this Act shall prevail.*
>
> *(2) Despite the provisions of any other law, the recognition, licensing, student indexing, approval or accreditation of any academic programme including postgraduate degrees, diplomas including postgraduate diplomas and other academic certificates offered at a university shall be the exclusive mandate of the Commission to be exercised in accordance with this section at the exclusion of any other person or body.*
>
> *(3) The Commission may, before approving any academic programme consult with any relevant body established by written law to regulate the profession to which the academic programme relates where such law empowers the professional body to approve or accredit courses offered at any university or colleges.*

97. Guided by the above legal provision, the provisions of the Second Schedule of the KSL Act on the need for equation of the Petitioner's IGCSE qualifications must give way to Section 5A of the Universities Act.

98. In this case, there is no doubt that the Petitioner's IGCSE certificate ought to have been subjected to equation. The question is at what point in time. Was it at the time the Petitioner applied for admission into Moi University or at the time the Petitioner applied for admission into KSL?

99. The above discussion has, rightly so, answered the question. The equation ought to have been carried out before the Petitioner was admitted to Moi University to undertake the undergraduate studies leading to the conferment of a Bachelor's degree in law. That was in August, 2014. By that time, the duty to equate was solely upon the Commission. It was until sometimes in 2015 when the Kenya National Qualification Framework Act No. 22 of 2014 was operationalized.

100. I must, however, state that the position would have been different had the Petitioner attained the Bachelor of Laws degree in a university out of the country. In that case, the Petitioner would be rightly subjected to the equation at the time he made the application to join the KSL for the ATP.

101. The Commission, Moi University and the Council failed to ensure that the equation was done before the Petitioner was admitted into the University. The Petitioner was then admitted to the University. He undertook the relevant courses and studies, sat for and passed the examinations and was eventually conferred with a Bachelor of Laws degree.

102. Summing up the issue, this Court hereby finds and hold that the Petitioner's IGCSE qualifications ought to have been subjected to equation at the time the Petitioner applied to join Moi University sometimes in August, 2014. Therefore, the demand by KSL that the Petitioner's qualifications be equated as a condition precedent to considering the Petitioner's application is unfounded and has no legal legs to stand on.

(c) The applicable requirements for the Petitioner to <u>be admitted into the ATP</u>:

103. I have already found that the applicable law to the admission of the Petitioner at the KSL for the ATP was the prevailing law at the time the Petitioner was admitted to Moi University in August 2014. That is the KSL Act.

104. Section 16 and the Second Schedule of the KSL Act are the relevant provisions. Owing to the amendment to the Second Schedule made on 8th December, 2014, the provision of the Second Schedule before the amendment is what was applicable in the case of the Petitioner herein.

105. For ease of reference, the Second Schedule provided as follows before the amendment: -

> *(1) A person shall be admitted to the School if—*
>
> *(a) having passed the relevant examination of any recognized university in Kenya, holds or becomes eligible for the conferment of the Bachelor of Laws (LLB) degree of that university;* ***or***
>
> *(b having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) in the grant of that university, university college or other institution—*
>
> *(i) attained a minimum entry requirement for admission to a university in Kenya; and*
>
> *(ii) obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent;* ***or***
>
> *(2) has sat and passed the pre-Bar examination set by the school.*

106. There are two schools of thought on the interpretation of the above provision. One school fronts the position that requirements in paragraph 1(a) and 1(b) must be similar otherwise there shall be discrimination of the students falling within category paragraph 1(a) and those in 1(b). The other school of thought is of the position that the two categories are different and ought to be treated as such.

107. Some of the decisions which posit that the qualifications must be similar include *Nairobi High Court Petition No. 20 of 2019 Victor Juma vs. Kenya School of Law, Bishar Adan Mohamed vs. Kenya School of Law (2020) eKLR, Peter Githaiga Munyeki vs. Kenya School of Law (2017) eKLR, R. vs. Kenya School of Law exparte Daniel Mwaura Marai (2017) eKLR*, among many others.

108. The Courts in *Judicial Review Application Nos. 7, 8, 13, 20, 21 and 26 of 2020 Republic vs. Kenya School of Law & Others (2020) eKLR* and in *Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others (2015) eKLR* were categorical that the qualifications for persons intending to join the ATP under 1(a) and 1(b) are different.

109. I have carefully read the said decisions among others on the interpretation of paragraph 1(a) and 1(b) above. I associate myself with the school of thought that the two categories are different and ought to be treated as such.

110. I must acknowledge the great detail in which the Court in *Judicial Review Application Nos. 7, 8, 13, 20, 21 and 26 of 2020 Republic vs. Kenya School of Law & Others (2020) eKLR* went in demonstrating the difference between the words '**or**' and '**and**'. The discussion is highly persuasive and is a reasonable and candid exposition of the law.

111. If I may add my voice to the discussion, I find the use of the word **'or'** by the drafters was very deliberate. To me, category 1(a) dealt with those persons who joined a recognized university in Kenya and obtained or became eligible for the conferment of the Bachelor of Laws (LLB) degree of that university. Mostly, such persons would be those who studied under the 7-4-3-3 or 8-4-4 systems in Kenya and qualified to join the universities and were eligible for and were admitted to pursue studies towards the conferment of the Bachelor of Laws (LLB) degrees. Another class of those falling under category 1(a) would be such persons who may have undertaken their secondary studies on a different system, for instance, the IGCSE or the IB, but applied for and were admitted to pursue their studies towards the conferment of the Bachelor of Laws (LLB) degrees in a recognized and licensed university in Kenya. As said, for such class of persons, the issue of equation would be dealt with before their admission into the university.

112. The second category under 1(b) refer to four other classes of persons. They are: -

> (i) Those who obtained their secondary and university education outside Kenya;
>
> (ii) Those who obtained their secondary education in Kenya, but studied in universities outside Kenya;
>
> (iii) Those who obtained their secondary education in Kenya, qualified to and joined universities in Kenya, but did not, through the placement by the Service, qualify to pursue studies leading to conferment of LL. B degrees in the first instance; and;
>
> (iv) Those who obtained their secondary education in Kenya and did not qualify to join the Kenyan universities, but undertook further studies until they were eventually conferred with Bachelor of Laws degrees.

113. For those in class (i), their qualifications must be subjected to equation to confirm whether the requirements in (b)(i) and (ii) are met. Those in class (ii) must subject their university qualifications to equation in the event the university is not one of those recognized by the Council in Kenya. Needless to say, they must also satisfy the requirements in (b)(i) and (ii).

114. Class (iii) persons are those who could not obtain placement into the LL. B degree programme through the Service, but qualified to and joined the university. In such a case, there must be evidence of how one advanced to attain the qualifications in (b)(i) and (ii). One may have undertaken appropriate bridging courses approved by the university or re-sat some examination subjects. In such cases, equation must be undertaken before joining the KSL.

115. The last class relates to such persons who worked through their academic lives until they joined the universities. Equation, in this case, remain a key factor.

116. The Council under *Section 8(3)(c)* of the *Legal Act* is required to: -

formulate a system for recognizing prior learning and experience in law to facilitate progression in legal education from lower levels of learning to higher levels.

117. The above duty is meant to take care of the persons in classes (iii) and (iv). The law recognizes prior learning and experience as factors to be considered in ascertaining academic progression in legal education. Therefore, a person may start from lower levels of legal education and progressively move to higher levels.

118. It, then, follows that the qualifications of all those who fall within category 1(b) of the Second Schedule must be subjected, in one way or the other, to equation before a decision to admit them or not into KSL is made.

119. Given the diverse nature of the persons targeted under categories (a) and (b) of the Second Schedule of the KSL Act, it is obvious that their qualifications cannot be similar. It is for those reasons that I echo the position that category (a) and (b) are different hence the visible use of the word 'or'.

120. In this case, the Petitioner fell into category 1(a) of the Second Schedule. I say so because although he undertook his secondary studies under the IGCSE system, he was eventually admitted into one of the local public universities when he qualified with a Bachelors of Law degree.

121. Going by the prevailing law in place in August 2014 when the Petitioner was admitted to Moi University to study a Bachelors of Law degree in law, and, having successfully been conferred with a Bachelors of Law degree by the university, then the Petitioner is eligible for consideration for admission into the KSL. As earlier held, and in the unique circumstances of this matter, the issue of equation cannot arise at such a time the Petitioner is applying to join the KSL. Further, the Petitioner does not fall under the category of the students who must mandatorily sit and pass the pre-bar examinations before admission into KSL.

(d) Whether the Respondents variously violated the Petitioner's rights to fair administrative action, non-discrimination, human dignity and education under Articles 47, 27, 28 and 43 of the Constitution respectively:

122. The Petitioner contends that the decision by the KSL to decline to consider his application for want of a letter of equation from the Authority infringes upon his right to a fair administrative action guaranteed under Article 47 of the Constitution.

123. The decisions in *Pauline Anna Benadette Onyango vs. Kenya School of Law (2017) eKLR, Judicial Service Commission vs. Mbalu Mutava Musyimi (2015) eKLR* among others were referred to in support of the Petitioner's position.

124. The Respondents are of the contrary position. To them, the Petitioner is under a duty to comply with the law and had to produce the equation certificate without which the KSL could not process the application.

125. Article 47(1), (2) and (3) of the Constitution states that: -

> *(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
>
> *(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*
>
> *(3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—*
>
> *(a) provide for the review of administrative action by a Court or, if appropriate, an independent and impartial tribunal; and*
>
> *(b) promote efficient administration*

126. The legislation that was contemplated under Article 47(3) is the Fair Administrative Actions Act. No. 4 of 2015. Section 4 thereof provides that: -

> *(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.*
>
> *(2) Every person has the right to be given written reasons for any administrative action that is taken against him.*
>
> *(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator*

shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

127. Section 2 of the Fair Administrative Act defines an '*administrative action'* and an '*administrator*' as follows: -

'administrative action' includes -

(i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

*'administrator' means 'a person who takes an administrative action or who makes an administrative decision'***.**

128. In ***Civil Appeal 52 of 2014 Judicial Service Commission vs. Mbalu Mutava & Another (2015) eKLR*** Court of Appeal addressed itself on the above. The Court held that: -

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.

129. The South African Constitutional Court in ***President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others CCT16/98) 2000 (1) SA 1*** ring-fenced the importance of fair administrative action as a constitutional right. The Court while referring to Section 33 of the South African Constitution which is similar to Article 47 of the Kenyan Constitution stated as follows: -

Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…

130. The right was further discussed in ***Republic v Fazul Mahamed & 3 Others ex-parte Okiya Omtatah Okoiti [2018] eKLR***. The Court had the following to say:

> 25. *In John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano* [39] *the Court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature.*
>
> *These are: -*
>
> *a.* ***Illegality*** *- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond it powers.*
>
> *b.* ***Fairness -*** *Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.*
>
> *c.* ***Irrationality and proportionality*** *- The Courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute 'irrationality" or 'perversity' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of Lord Green in* ***Associated Provincial Picture Houses Ltd vs Wednesbury Corporation****: -*
>
> *If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the Courts can interfere...but to prove a case of that kind would require something overwhelming...*

131. Emerging from the above, there is no doubt the 1st Respondent's decision not to consider the Petitioner's application was an administrative action. In sum, it was an administrative action because it affected the legal rights and interests of the Petitioner. As such, the decision had to pass the constitutional and statutory tests of lawfulness, reasonableness and procedural fairness.

132. The 1st Respondent (KSL) did not accord the Petitioner any hearing before making the impugned decision. The decision was unilateral.

133. At a minimum, to meet the constitutional and statutory threshold, KSL was supposed to: -

(i) Ensure that the necessary information, materials and evidence to be relied upon in making the decision or taking the administrative action are timeously forwarded to the Petitioner;

(ii) Inform the Petitioner of the procedure to be used during the proceedings;

(iii) Inform the Petitioner of his right to attend the proceedings, in person or in the company of an expert of his choice;

(iv) Inform the Petitioner of his right to be heard and to make representations in that regard;

(v) Inform the Petitioner of the right to cross-examine the witnesses;

(vi) Inform the Petitioner of his right to legal representation;

(vii) Inform the Petitioner of his right to where necessary to request for an adjournment of the proceedings;

(viii) Include in the notice the Petitioner's right to a review or internal appeal against an administrative decision;

(ix) Send to the Petitioner a statement of reasons pursuant to Section 6 of the Fair Administrative Actions Act.

134. The 1st Respondent did not undertake any of the above actions prior to making the decision. The Respondent's impugned decision, therefore, infringed Article 47 of the Constitution as well as the Fair Administrative Actions Act. The impugned decision is in contravention of the Constitution and the law.

135. It is further obvious that the Petitioner was not treated equally with the other students who were admitted into LL. B degree programmes in August, 2014, who had attained IGCSE qualifications and enrolled into a local public university. The Petitioner was not treated in accordance with the provisions of paragraph 1(a) of the Second Schedule of the KSL Act. Instead, the Petitioner was placed in a different category; that is paragraph 1(b) of the Second Schedule of the KSL Act. That is an infringement of Article 27 of the Constitution.

136. It is also on the same strength that the Petitioner's right to education was curtailed by the Respondent's actions. That contravenes the Petitioner's right to education guaranteed under Article 43 of the Constitution, and, without doubt, further contravenes the Petitioner's right to his dignity which is protected under Article 28 of the Constitution.

137. In sum, the Respondents' actions variously infringed Articles 47, 27, 28 and 43 of the Constitution.

186. Closely tied to the foregone is the issue of legitimate expectation. **De Smith, Woolf & Jowell,** in ***"Judicial Review of Administrative Action"*** 6thEdtion, Sweet & Maxwell at page 609 state as follows: -

A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public.

138. The Court in ***Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others*** (supra) held that: -

188. In my view there is a legitimate expectation that public authorities will comply with the Constitution and the law. In our context it is expected that public authorities will adhere to the constitutional values and principles including those enumerated in Article 10. The Petitioners can therefore be said to have expected the Respondents to interpret the Amendment Act in a manner that upholds their rights and fundamental freedoms as long as the interpretation did not contradict the express language of the Act. In my view an interpretation that upholds the freedom of equality and non-discrimination cannot be said to be inimical to the Amendment Act just like it was not inimical to the prior enactment.

190. On departure from a legitimate expectation which has crystallized, the Court in ***R vs. Devon County Council Ex parte P Baker [1955] 1 All ER*** held that:

...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision.

139. The Petitioner had legitimate expectation that the Respondents will uphold the law then existing as at the time he enrolled for the LL. B degree programme. That expectation could only be expressly withdrawn by a statute or in compliance with the conditions in ***R vs. Devon County Council*** (supra). (See also *Laura Makungu Lumbasio vs. Kenya School of Law (2018) eKLR*). In this case, there is no evidence that the expectation was withdrawn.

140. The upshot is that the Petitioner's right to legitimate expectation, in the circumstances of this case, was thwarted.

(e) <u>Remedies:</u>

141. The Petition has succeeded. The Petitioner has proved that his rights and fundamental freedoms under the Constitution were variously infringed by the Respondents. The Petitioner is, therefore, deserving of the appropriate remedies.

1. It is also imperative to state that in considering the appropriateness of the remedies, the Court shall remain alive to the fact that it can only compel the Respondents or any of them to discharge their/its statutory functions, but the Court cannot, by itself, take over the conduct of such functions. (See *Court of Appeal at Kisumu in* ***Civil Appeal Nos. 89 and 90 of 2011 West Kenya Sugar Company Limited vs. Kenya Sugar Board & Butali Sugar Mills Limited (2014) eKLR).***

142. On the prayer for compensatory damages for violation of the Petitioner's rights and freedoms, I will, reproduce the guidance by the Court of Appeal in ***Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR.***

143. Although the extract is rather lengthy, it nevertheless expounds a comprehensive comparative analysis on how other jurisdictions have dealt with the issue. The decision has good jurisprudential content. The Learned Judges expressed themselves as follows: -

The challenge, in our view is not whether we should interfere with a discretionary award of damages by a trial judge but what appropriate remedies are available for damages arising out of the violation of Constitutional and fundamental rights of an individual, by a State. It is important to state from the outset that damages arising out of Constitutional violations also known as Constitutional Tort Actions are within public law remedies and different from the common law damages for tort under private law.

It is convenient to consider first, the comparative jurisprudence and general principles applicable to awards and assessment of damages for the violation of the Constitutional rights of an individual by a State. We will do so very briefly and broadly because it is not in doubt under common law principles, that an injured party is entitled to damages for the loss and injury suffered under private law causes of action, such as tort, where compensation of personal loss is at issue. However, in this case and as we posited earlier, we would want to consider what appropriate remedies are available for damages arising out of the violation of Constitutional and fundamental rights of an individual by a State under public law.

The relevant principles applicable to award of damages for constitutional violations under the Constitution was explained exhaustively by the Privy Council in the famous case of ***<u>Siewchand Ramanoop v The AG of T&T,</u>*** *PC Appeal No 13 of 2004. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.*

Per Lord Nicholls at Paragraphs 18 & 19:

When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words.

If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.

An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. (emphasis ours). All these elements have a place in this additional award. "Redress" in section 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award. (emphasis ours)

*In the **Tamara Merson v Drexel Cartwright** and **Ag (Bahamas) Privy Council Appeal No. 61 of 2003** the Privy Council held that in some cases, a suitable declaration may suffice to vindicate the right which has been breached. The Court quoted the postulation by Lord Scott of Foscote in **Merson** (supra) in which, after citing a passage from **Ramanoop** (supra) including the paragraphs set out above, stated thus:*

"[[18]. These principles apply, in their Lordships' opinion, to claims for constitutional redress under the comparable provisions of the Bahamian constitution. If the case is one for an award of damages by way of constitutional redress – and their Lordships would repeat that 'constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course' (para 25 in Ramanoop) – the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge. In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary."

*Taking que from the above decisions, the Privy Council in **Alphie Subiah v The Attorney General of Trinidad and Tobago** Privy Council Appeal No. 39 of 2007 pronounced itself on the same point stating that: -*

"The Board's decisions in Ramanoop, paras 17-20, and Merson, para 18, leave no room for doubt on a number of points central to the resolution of cases such as the present. The Constitution is of (literally) fundamental importance in states such as Trinidad and Tobago and (in Merson's case), the Bahamas. Those who suffer violations of their constitutional rights may apply to the court for redress, the jurisdiction to grant which is an essential element in the protection intended to be afforded by the Constitution against the misuse of power by the state or its agents. Such redress may, in some cases, be afforded by public judicial recognition of the constitutional right and its violation. But ordinarily, and certainly in cases such as the present (and those of Ramanoop, and Merson, and other cases cited), constitutional redress will include an award of damages to compensate the victim. Such compensation will be assessed on ordinary principles as settled in the local jurisdiction, taking account of all the relevant facts and circumstances of the particular case and the particular victim. Thus the sum assessed as compensation will take account of whatever aggravating features there may be in the case, although it is not necessary and not usually desirable (contrary to the practice commended by the Court of Appeal of England and Wales for directing juries in Thompson v Commissioner of Police of the Metropolis [1998] QB 498, 516 D-E) for the allowance for aggravated damages to be separately identified. Having identified an appropriate sum (if any) to be awarded as compensation, the court must then ask itself whether an award of that sum affords the victim adequate redress or whetheran additional award should be made to vindicate the victim's constitutional right. The answer is likely to be influenced by the quantum of the compensatory award, as also by the gravity of the constitutional violation in question to the extent that this is not already reflected in the compensatory award. As emphasised in Merson, however, the purpose of such additional award is not to punish but to vindicate the right of the victim to carry on his or her life free from unjustified executive interference, mistreatment or oppression."

*The position of the Privy Council is in no way altered by the South African Case of **Dendy v University of Witwatersrand, Johannesburg & Others** [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:*

"...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

"**...**The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."

*In **Peters v. Marksman & Another** [2001] 1 LRC the Eastern Caribbean Supreme Court quoted with approval the words of Patterson JA in **Fuller v A-G of Jamaica (Civil Appeal 91/1995**, unreported**)**, where the Court held that:*

It is incumbent on the courts to develop appropriate principles and guidelines as to the quantum of awards of compensation where

applicable… Where an award of monetary compensation is appropriate the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective as an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the state itself. But that does not mean that the infringement should be blown out of all proportion to reality nor does it mean that it should be trivialized. In like manner the award should not be so large as to be a windfall nor should it be so small as to be nugatory.

> *The Supreme Court of Canada established a consideration on when a remedy in a Constitutional violation case is "just and appropriate" in* ***Doucet-Boudreau v. Nova Scotia (Minister of Education)****, 2003 SCC 62 to include, a remedy that will:*
>
> (1) meaningfully vindicate the rights and freedoms of the claimants;
>
> (2) employ means that are legitimate within the framework of our constitutional democracy;
>
> (3) be a judicial remedy which vindicates the right while invoking the function and powers of a court; and

(4) be fair to the party against whom the order is made.

> *Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "****appropriate and just*** *"according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.*

144. In this case the Petitioner's rights are certainly vindicated *vide* appropriate declarations and other orders.

145. In consideration of the circumstances of this matter I am well convinced that the grant of other remedies rather than damages will serve as adequate, just and appropriate remedies.

Disposition:

146. Flowing from the findings and conclusions, the disposition of the Petition dated 28th February, 2020 is as follows:

> **(a) This Court has jurisdiction over the Petition subject of this judgment.**
>
> **(b) A declaration hereby issue that the Petitioner's rights and fundamental freedoms guaranteed under Articles 27, 28, 43 and 47 of the Constitution and the law were jointly and variously infringed by the Respondents.**
>
> **(c) An order of *Certiorari* hereby issues to remove into this Court and quash the decisions contained in the 1st Respondent's letter dated 13th January, 2020 and the 2nd Respondent's letter dated 8th October, 2019.**
>
> **(d) An order of *Mandamus* hereby issues directing the 1st Respondent herein, the Kenya School of Law, to, without any delay whatsoever, consider the Petitioner's application to join the School and in compliance with this judgment.**
>
> **(e) The 1st Respondent shall bear the costs of the Petition.**

Orders accordingly.

DELIVERED, DATED and **SIGNED** at **NAIROBI** this **25th** day of **February, 2021**

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

Mr. Dondo, Counsel for the Petitioner.

Miss Pauline Mbusio, Counsel for the 1st Respondent.

Mr. Mukua, Counsel for the 2nd Respondent.

Elizabeth Wamboi – Court Assistant