REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO 398 OF 2017

ADRIAN KAMOTHO NJENGA.....PETITIONER

VERSUS

KENYA SCHOOL OF LAW.....RESPONDENT

JUDGMENT

1. **Adrian Kamotho Njenga**, is a graduate of the University of Nairobi's School of Law, having graduated with the degree of Bachelor of Laws (LLB). By virtue of that qualification he wishes to join Kenya school of law's (KSL) Advocate Training programme (ATP) with a view to be coming an Advocate of the High Court of Kenya.

2. According to his petition dated 16th August 2017 and filed in Court on the same day and the depositions in the affidavit in support thereof, Kenya School of Law, the respondent herein, issued a notice in July 2017 informing prospective applicants that Pre-Bar Examination was now mandatory for those wishing to join ATP at the KSL, which the petitioner contends, is against the Law. The petitioner takes the position that having taken his studies in a university in Kenya he, like all these who took their LLB degrees in local universities and Universities Colleges, are not required to by law to sit for Pre – Bar examinations as a pre- condition to joining ATP

3. The petitioner states that the notification purported to be anchored under regulation 6 of the Kenya School of Law (Training Programme) regulations, 2015 (the regulations) is contrary to Section 16 of the Kenya School of Law Act,2012 as read with Paragraph 1 (a) of the Seconds Schedule to the Act.

4. On the basis of the above facts and depositions, the petitioner filed this petition and sought the following relief:-

a. A declaration that the notification of Pre Bar examination, 2017 issued by the respondent is legally and constitutionally invalid be and is hereby issued.

b. An ORDER of certiorari to remove into this Honourable court and to quash the decision and Notification of Pre-Bar Examinations, 2017 by the respondent be and is hereby issued.

c. A declaration that regulations 6 of the Kenya School of law (training Programme) Regulations promulgated by the respondent vide legal notice no 175 of 2015 is illegal and constitutionally, invalid be and is hereby issued.

d. An order for costs and incidental, of this petition.

5. The petitioner sought any other orders or reliefs that the Court may deem just and expedient to grant response.

6. The respondent filed grounds of opposition dated 5th October 2017 and a replying affidavit sworn by **Fredrick Muhia** on the same day, 5th October 2017. Both the grounds and replying affidavit were filed in Court on 6th October 2017. The respondent stated in the grounds of opposition that the decision to administer pre Bar examinations is now legal since it was based on regulation 6 of the regulations which and is also authorized by paragraph 1(b) of the Second Schedule to the Act.

7. It was stated that regulation 6 of the regulations made it mandatory that those intending to join ATP must sit and pass pre Bar examination, that the issue of pre Bar examination was settled in the ***Kevin Mwiti & others v Kenya School of law and others*** [2015]eKLR, that Section 28 of the Kenya School of law Act authorized the respondent's Board to formulate regulations which was done and therefore that the Second Schedule to the Act and regulation 6 authorize administration of Pre Bar examinations.

8. The respondent further stated that it advertised expiry of the transition period in the daily newspapers on 14th January 2014 and made it clear that upon expiry of the transition period, Pre Bar examination would be compulsory. It was stated that the transition period of three years was extended to four years that is 2014/2015, 2015/2016, 2016/2017 and 2017/2018.

9. The respondent stated that in January 2014 it published information in local dailies informing the general public that the transition period would expire in the 2017/2018 academic year and thereafter Pre-Bar examination would be administered which the respondent is now doing. It therefore stated that the petition is not well grounded and should be dismissed.

Submission

10. The petitioner who appeared in person, submitted that his petition raises two main issues for determination. First, the legality of the Notification of pre Bar examination due on 10th November 2017, and two, the legality of regulation 6 of the Kenya School of law (Training Programmes) Regulations 2015.

11. Regarding the notification, for Pre Bar examination, the petitioner submitted that it made the Pre Bar examination mandatory which is not the case. According to the petitioner, not all applicants intending to join ATP at the School are required to sit and pass pre Bar examination. In the petitioner's view, Section 16 of the Act, gives criteria for qualifications for the ATP which is contained in paragraph 1 of the Second Schedule to the Act. He submitted that the Second Schedule has two categories namely; those who fall under paragraph 1(a) who do not have to sit for Pre Bar Examination and those who fall under paragraph 1(b) who are required to sit for this examination.

12. The petitioner contended that his understanding was that paragraph 1(a) refers to students who obtained LL.B degrees from local universities and therefore do not have to sit for Pre Bar examination. On the other hand he argued, paragraph 1(b), refers to those who obtained LLB degrees from foreign universities and must sit for Pre Bar examination. He concluded that the issue was dealt with in ***Kevin Mwiti & others v Kenya School of law and others*** (supra) in that the Act affects those who joined the LLB degree programme after its enactment and not before. The petitioner maintained that applicants who should sit for Pre Bar examination are those who did not obtain LLB degree from local universities.

13. Regarding regulation (6), the petitioner submitted that the regulation is illegal in so far as it makes Pre Bar examination mandatory which contravenes section 16 of the Act as read with paragraph 1(a) of the Second Schedule to the Act. According to the petitioner, although Section 28 of the Act gives power to the Board to make regulations, regulation 6 did not make a distinction between those who are required to sit for Pre Bar examination hence it is contrary to Section 16 of the Act.

14. That being the case, the petition submitted that regulation 6 offends section 24(2) of the Statutory Instruments Act. Section 24(2) provides that a statutory instrument should not contravene provisions of the present Act. For those reasons, the petitioner submitted that the regulation is illegal. He urged the Court to so find and allow the petition.

Respondent's Submissions

15. **Mr. Mwaniki,** Learned Counsel for the respondent, submitted the petition really revolves around the interpretation of paragraph 1 of the Second Schedule to the Acts, and in particular clauses 1(a) and (b) thereof. Mr. Mwaniki contended that the petitioner's perception that clause 1(a) creates a distinct eligibility criteria from 1(b) is erroneous. Counsel urged the Court to apply the well know golden rule of interpretation in interpreting this provision.

16. Counsel contended that if paragraph 1(a) was to be treated as a stand- alone provision on eligibility to join ATP, it would imply the High School requirements in 1(b)(i) and (ii)would not apply to these applicants. This, Learned Counsel submitted, would amount to strict construction which will lead to absurdity.

17. Mr. Mwaniki went on to submit that a proper reading paragraph 1(a) does not apply to LLB holders from local universities alone. Counsel contended that the legislature in its wisdom decided that every applicant for ATP should sit for Pre bar examination. He argued that if it was the intention of the legislature that applicants from local universities should not take Pre Bar examination nothing would have been easier than saying so. Learned Counsel referred to the case of ***Kevin Mwiti & others v Kenya School of law and others*** (supra) and submitted that **Odunga J,** had observed that Pre Bar examination was now mandatory.

18. Second, learned counsel submitted that Legal Notice No 175 the regulations on examinations do not contravene the Act. Mr. Mwaniki contended that the Pre Bar Examination is about standards in the legal profession which should apply across the board irrespective of the university one attended. In Counsel's view, there should not be discrimination that is not in the spirit of the law. Counsel however admitted that a literal reading of paragraph 1(a) gives the impression that Pre Bar examination is intended for those falling under paragraph 1(b) but a proper reading of the paragraph shows that Pre-Bar examination is intended for all applicants seeking to join ATP. He urged that the petition be dismissed.

Determination

19. Considering the pleadings and submissions made in this petition, only two issues arise for determination namely; whether applicants who obtained LLB degrees from local universities are exempted from sitting Pre Bar examination; and depending on the answer to the above question, whether regulation 6 of the Regulations contravenes Section 16 of the Act are read with paragraph 1(a) of the Second Schedule to the Act.

20. The petitioner has contended that those who attended local universities are not obliged to sit and pass Pre- Bar examination for them to join ATP because that is not a requirement under paragraph 1(a)

of the Second Schedule. Mr. Mwaniki on the other hand submitted that a purposive reading of paragraph 1 shows that they are required to sit and pass Pre Bar examination. The issue in contention therefore, revolves around interpretation of the section 16 of the Act as read with paragraph 1(a) and 1(b) of the Second Schedule to the Act.

21. In that regard, it is important to consider constitutional and jurisprudential principles that govern statutory interpretation. The Constitution in Article 2(4) requires courts to declare any statute or statutory provision that is inconsistent with it unconstitutional to the extent of that inconsistency. Article 259(1) of the Constitution also provides that:-

"(1) ***This Constitution shall be interpreted in a manner that—***

a. promotes its purposes, values and principles;

b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

c. permits the development of the law; and

d. contributes to good governance."

22. That would mean that the Court should as much as possible read the impugned statute or statutory provision in a way that gives its fundamental value and that the Court should also examine the object and propose of the Act and to read statutory provisions so far as is possible, to be in conformity with the Constitution (**Re *Hyundai Motor distributors (PTY) and others v Social No and others* [2000] ZACC 12 2001(1) SA 545)**.

23. In that regard, where the constitutionality of a statute or statutory provisions is in issue, the Court is obliged for determine whether through application of all legitimate interpretive aids, the impugned statute or statutory provision is capable of being read in a manner that renders it constitutionally complaint.

24. In interpreting statutes, it is also a requirement that the court looks at both the text and context in order to ascertain the true legislative intent. In ***Reserve Bank of India* v. *Peerless General Finance and Investment Co. Ltd.*, 1987 SCR (2) 1 the Supreme Court of India stated thus;**

"Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important… A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

25. On the same principle ,**Ngcobo J** of the Constitutional Court of South Africa stated in ***Bato Staff Fishing (PTY) Ltd v Minister of Environmental Affairs and Tourism and others* [2004] ZACC 15; 2004(4) SA 490(CC): 2004(7) BCLR 687(CC)** that;

"The technique of paying attention to context in statutory construction is now required by the Constitution section 39(2). As pointed above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the spirit purport and objects of the Bill of rights"

26. In the case of ***Commercial Tax Officer, Rajasthan v M/s Binan Cement Ltd*** [2014] SCR, the Supreme Court of India emphasized on the importance of context in the interpretation of statutes when it observed that ***the court should examine every word of a statute in its context and must use context in its widest sense.***

27. The Court should as much as possible also bear in mind the golden rule principle when interpreting statutes. The purpose of a statute plays a pivotal role in determining the context, scope and the intended effect of the legislation. That is what **Kasaliwal.** J stated in the Indian case of ***St. Stephen's College v University of Delhi*** (1992) 1 SCC 552 that ***the golden rule of construction requires that words be read in their ordinary, natural and grammatical meaning.***

28. And as **Schreiner J A** stated in ***Jaga v Donges No and Another*** **[1950] (4) SA 653(a).**

"*Certainty no less important than the oft repeated statement that the words and expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that the context as here used is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is matter of the statute its apparent scope and purpose and within limits of its back ground"*

29. While applying contextual or purposive reading of a statute, it is important that it remains faithful to the actual wording of the statute and only when Courts are confronted with legislation that includes words that are incapable of sustaining an interpretation that would render it constitutionally compliant, should they declare such legislation constitutionally invalid (***Bertie Vanzy L (PTY) Ltd & another V Minister for Safety and Security & others (***2009) ZACC 11).

30. There is also the need to give a statute a holistic reading in order to ascertain the true legislative intent. This was stated by the Court of Appeal in the case of ***The Engineers Board of Kenya v Jesse Waweru Wahome & others*** Civil Appeal No 240 of 2013 thus;

"One of the canons of statutory interpretation is a holistic approach… no provision of any legislation should be treated as 'stand -alone' An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act."

31. With the above principles in mind, we proceed to determine the issues at hand in this petition. The Kenya School of Law Act, 2012, provides in section 16 that those wishing to join the Kenya School of law's ATP should attain qualifications provided for in the Second Schedule.

32. For purposes of this judgment, the text of the qualifications in the Second Schedule to the Act are 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 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 grades B(plain) in English language or Kiswahili and a mean grade 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"

33. This is the text after an amendment to paragraph was introduced in 2014. Prior to this amendment, paragraph1 of the Second Schedule 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 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.

34. A contextual reading of paragraph 1 (a) of the Second Schedule prior to the 2014 amendment shows that Pre Bar examination was optional for both applicants who obtained LLB degrees from local as well as foreign universities. This was clear from paragraph (2) of the Second Schedule. A prospective applicant had to have either qualifications in paragraph 1(a), 1(b) or (2). However, the 2014 amendment removed paragraph(2) and instead, introduced clause ***1(b) (iii)*** thus making pre Bar examination compulsory for applicants whose qualifications fall under paragraph 1(b) of the Second Schedule; that is those who obtained LLB degrees from foreign universities, university colleges and institutions.

35. The question that arises here is; from both a textual and contextual reading, did the amendment introduced to the Second Schedule in 2014 make pre Bar examination compulsory to those who obtained LLB degrees from local universities, university colleges or institutions; that is to say applicants falling under paragraph 1(a) of the Second Schedule as contended by the respondent" The answer to this question calls for a proper interpretation of paragraph 1(a) contrasted with paragraph 1(b) of the

Second Schedule.

36. Starting with paragraph 1(b) for convenience purposes, there is no doubt that this paragraph refers to admission criteria for applicants who obtained LLB degrees from foreign universities and institutions. This is clear from the language in clause (i) which states that an applicant must have "***attained a minimum entry requirement for admission to a university in Kenya".*** The university entry requirements contained in clause (ii) are that the applicant must have "***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."***

37. From the above analysis, there can be no other reading of paragraph 1(b) than that it refers to those who obtained LLB degrees from foreign universities, and who must now sit and pass pre Bar examination before joining ATP. This construction is preferred by the petitioner who correctly, in my view, submitted that only persons with qualifications from foreign universities are required to sit and pass Pre Bar examination. Mr. Mwaniki on the other hand, holds a contrary view and, according to him, all applicants must sit and pass pre Bar examination. This interpretation cannot be deduced from the second schedule.

38**.** Regarding paragraph 1(a), does it in any way imply that applicants falling under this category must also sit pre Bar examination" For an appropriate answer, it becomes necessary to examine the words used in this paragraph in order to determine the true intention of the legislature. Paragraph 1(a) states that an applicant will be admitted to the school for ATP if ***"having passed relevant examination of any University in Kenya, or 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.***

39. Prior to the amendment, paragraph 1(a) read; a person shall be admitted to the school if "***having passed the relevant examination of any recognized university in Kenya holds, or has become eligible for the conferment of the bachelor of laws degree (LLB) of that university***.

40. The words introduced through the amendment immediately after the words "university or" are "***any university, University College or any other institution prescribed by the council"*** In my respectful view, this amendment did not change the import and or purport of paragraph 1(a) in so far as qualifications for joining ATP in this category are concerned. The inclusion of words "***any university, university colleges or other institution prescribed by the Council,*** cannot be interpreted to mean anything more than that these are ***local universities, university colleges or institutions recognized by council of legal education*** which is responsible for setting and maintaining standards in the legal profession.

41. This is so because paragraph 1(a) does not prescribe any university entry requirements for the simple reason that entry requirements for LLB programmes in local universities are known and no one can be admitted to undertake this degree without meeting the basic KCSE grades required for this course. Furthermore, paragraph 1(a) contains the disjunctive ward **"or"** at the end of the paragraph just before the beginning of paragraph 1(b). That means qualifications under paragraph 1(a) are distinct from those under paragraph 1(b). That can only mean one thing- that the two sub-paragraphs apply to two different and distinct categories of applicants.

42. This interpretation is supported by the **Supreme Court's** interpretation of section 83 of the Election Act, 2012, a provision with the disjunctive word "or". The **Supreme Court** stated that "***the use of the***

word "or" clearly makes the two limbs disjunctive under our law. It is, therefore, important that, while interpreting Section 83 of our Elections Act, this distinction is borne in mind."- (see ***Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another,*** petition No 1 of 2017)

43. This interpretation is further buttressed by the fact that prior to the 2014 amendment, the Second Schedule contained paragraph 2 which made pre Bar examination optional. The removal of paragraph 2 and, in place thereof, the introduction of clause (iii) in paragraph 1(b), with the conjunctive word "**and"** at the end of paragraph 1(b)(ii) and just before the beginning of clause 1(b) (iii), means pre Bar examination is now mandatory for category 1(b) applicants as opposed to those in paragraph 1(a). Any other interpretation of paragraph 1(a) that would make pre Bar examination compulsory for applicants falling under paragraph 1(a) would result into an absurdity because the word ***"or"*** cannot, by stretch any of imagination, be read to mean ***"and"***.

44. I understood Mr. Mwaniki to submit that Pre Bar examination is about standards, and that subjecting only applicants who obtained LLB degrees from foreign universities to this examination would amount to discriminatory practices. This submission means that learned counsel is convinced in the correctness of the respondent's interpretation of paragraph 1(a) to mean that all applicants, irrespective of where they obtained their LLB degrees, must sit and pass pre Bar examination. This is the position the respondent has stack to given the impugned regulation 6 and the notification that pre Bar examination is compulsory. However as stated above, a plain reading of paragraph 1(a) and 1(b) is clear that these are two distinct qualification requirements and the legislature must have intended them to be so.

45. Mr. Mwaniki's further submitted that pre Bar examination is about standards. Although this is true, it cannot be the reason for assigning un intended interpretation to this paragraph. Standards in local universities are well known given the local universities' entry requirements. By subjecting applicants from foreign universities to Pre Bar examination is intended to ensure that these standards are maintained and only applicants with foreign qualifications and who meet local standards are admitted to ATP. Administering pre Bar examination is therefore one way of maintaining standards and cannot be seen as discrimination. If discrimination it be, then it is necessary for purposes of maintaining standard. It is a reasonable and justifiable limitation under Article 24(1) of the Constitution.

46. Second, if the legislature intended that all applicants sit for pre Bar examination, all it needed to do was retain paragraph 2, remove the disjunctive word **"or**" and in place thereof insert the ward "**and**" to read "***and' has sat and passed the pre Bar examination set by the school,*** instead of introducing clause (iii) in paragraph 1(b) providing for pre Bar examination. In the absence of a clear provision in paragraph 1(a), this paragraph cannot be read otherwise than that applicants in this category do not have to sit and pass pre Bar examination for them to be admitted to ATP.

47. Mr. Mwaniki also referred to the decision in ***Kevin Mwiti & others v Kenya School of law and others (supra)*** to argue that **Odunga, J** had held that Pre Bar examination was now mandatory. With great respect to learned counsel, I am not persuaded by this submission. The learned Judge must have meant that pre Bar examination was now mandatory for those applicants in paragraph 1(b) following the 2014 amendments but not otherwise because such an interpretation is not discernible from paragraph 1(a).

48. I have gone further to look at the memorandum of objects and reasons in the Bill that was tabled in the National Assembly to ascertain the true intention of the legislature. The Bill stated that its object was ***to provide for the establishment, powers and functions of the Kenya School of law, providing the legal framework within which the school would operate and discharge its mandate.*** Regarding

part III (*sections 16-17*) it stated that they were ***to provide for admission requirements, the application and admission process.*** That is exactly what paragraph 1(a) and (b) of the Second Schedule stand for. In the absence of any other provision, I therefore find and hold that applicants under paragraph 1(a) that is; those who obtained LLB degrees from universities in Kenya, having attained required grades to pursue LLB degree locally, do not have to sit and pass pre-Bar examination as a pre-condition to their joining ATP at the respondent school.

49. The second question is whether regulation 6 of the Kenya school of law (Training Programmes) Regulations, 2015 contravenes section 16 of the Act as read with paragraph 1(a) of the Second Schedule. Having determined that applicants falling under paragraph 1(a) do not have to sit for pre Bar examination, what is the effect of regulation 6 to these applicants"

50. Regulations 6 under the sub heading ***"Pre Bar Examination and Eligibility for the Advocates Training programme"***, states that "***an applicant who wishes to be admitted to the Advocates' Training programme should apply to the school to sit for the Pre Bar examination in the prescribed form and should pay the prescribed fees".*** *Clause 2* provides for the documents to accompany applications, while *clause 3* provides for areas to be examined, *clause 5* is on the pass mark, while *clause (6)* states that results of the Pre Bar examination shall not be remarked. And *clause (7)* provides that those who pass pre bar examination become eligible to be admitted to the ATP.

51. Clearly, the language used in regulation 6 connotes that pre Bar examination is mandatory for all applicants because it begins with the word "***A person who wishes to be admitted to the Advocates' Training Prpgramme".*** It is for this reason that the respondent published the notification of July 2017 informing prospective applicants, without distinction, that pre Bar examination would be administered on 10th November 2017. That also informs Mr. Mwaniki's submission that the respondent had notified the general public that the transition period from the old Act to the Kenya School of law Act 2012 would end in the 2017/2018 academic year and that pre Bar examination is mandatory.

52. However, as I have stated, my reading of the law shows clearly that Pre Bar examination is not mandatory for all applicants. Only those in paragraph 1(b) are required to sit and pass pre Bar examination before admission. In that regard, therefore, the July 2017 notification can only be taken to have been intended for those applicants and not every applicant. In so far as regulation 6 was used as the basis for the notification for pre Bar examination, and given that the language of the regulation is to the effect that all applicants have to sit and pass this examination in order to qualify for admission to ATP, the same contravenes section 16 of the Act as read with paragraph 1(a) of the Second Schedule.

53. In the same vein, regulation 6 also offends section 24(2) of the Statutory Instruments Act which states that ***a statutory instrument shall not be inconsistent with the provisions of the enabling legislation or any Act, and the statutory instrument shall be void to the extent of the inconsistent***. Looking at regulation 6 ***visa viz*** section 16 as read with paragraph 1(a) of the second schedule, it is obvious that the regulation is void to the extent of that inconsistency and I so find and hold.

54. Public bodies like the respondent, have an obligation to observe national values and principles of governance under Article 10 of the Constitution, and in particular, values and principles in Article 10(1)(b) ***which bind all state organs, state officers, public officers and all persons whenever any of them enacts, applies or interprets any law.*** The respondent is not only bound to interpret section 16 of the Act as read with paragraph 1 of the Second Schedule purposively to achieve the legislative intent, but also to enact regulations that are compatible with section 16 of the Act as read with the Second Schedule in so far as admission to ATP is concerned.

55. The respondent cannot purport to apply a law that does not exist or interpret the existing law in a manner that results into an absurdity and or oppression to the public. In the circumstances of this case it is my considered view that the respondent is applying a non-existent legal provision. For that reason, this petition would have been completely unnecessary had the respondent performed its functions in accordance with clear provisions of the law.

56. This Court must also express its displeasure in the many but completely unnecessary petitions filed in this Division challenging what would appear to be the respondent's deliberate misinterpretation and misapplication of clear legal provisions on the pretext of enforcing standards. The respondent's mandate is to apply the law enacted by the legislature and ensure that its own standards in "Advocacy Training" are maintained. And if for any reason it feels academic standards in other institutions are suspect, raise the issue with the relevant institutions and authorities. It should never purport to enforce a non-existent law causing unnecessary panic, anxiety, fear and despondency amongst prospective applicants, and when challenged, vigorously support indefensible acts using public resources.

57. Turning to reliefs grantable in this petition, Article 2(4) of the Constitution gives this Court power to declare a law that is inconsistent with the Constitution invalid to the extent of its inconsistency. Equally, section 24(2) of the Statutory Instruments Act allows this Court to declare a statutory instrument void and invalid to the extent of that inconsistency. This Court has also power in terms of Article 165(3) (b) of the Constitution to determine a question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Article 23(1) gives the Court jurisdiction to hear applications for redress for denial, violation and infringement of, or threat to these rights or fundamental freedoms. Article 23(3) further enjoins the Court to make an order that is appropriate in the circumstances of a particular case.

58. To that extent, the Court can make orders including one suspending a declaration of invalidity to allow a competent authority to correct the defect invalidating the legislation. The Court has power to even read words into a statute or regulation to make it compatible with the Constitution or legislation.

59. Having determined that regulation 6 of the Kenya School of Law Training Programmes) Regulations, 2015 is void for contravening section 16 as read with paragraph 1(a) of the Second Schedule, the question that arises is whether this Court should read words into regulation 6 in order to make it compatible with section 16 of the Act as read with Paragraph 1(a) of the Second Schedule or declare it invalid or even suspend the declaration of invalidity awaiting action to make the regulation compatible.

60. This Court has toyed with the idea of reading words into regulation 6 to make it compatible with section 16 as read with paragraph 1(a). I am however conscious of the caution sounded by the Constitutional Court of South Africa in ***Gaertner and others v Minister of Finance and others [2013]SACC38: 2014(1)SA 442(CC): 2014(1) BCLR 38(CC)*** that ***"reading- in" should be resorted to sparingly because the "actual act of writing or editing legislation may constitute a possible encroachment by the Judiciary on the terrain of the Legislature and, therefore, a violation of the separation of powers"***

61. Taking into account the importance of the impugned regulation to the administration of pre Bar examination to those who must sit that examination, and in order to avoid causing unnecessary disruption to the examination due on 10th November 2017 , it would be appropriate to give the respondent's Board time to take necessary steps to make the impugned regulation compatible with the parent Act and the Second Schedule to the Act given that some applicants must sit and pass pre Bar examination for purposes of admission to ATP.

62. The upshot is that having considered the petition and the law, I am persuaded that the petitioner has proved his case to the required threshold and must succeed. Consequently, the petition dated 16th August 2017 is allowed and I make the following orders which I find appropriate.

1. A declaration is hereby issued that the notification of Pre Bar examination, 2017 issued by the respondent to the extent of including applicants falling under paragraph 1(a) of the Second Schedule to wit; applicants who studied LLB degrees in universities in Kenya having attained the required KCSE grades, is invalid null and void.

2. For avoidance of doubt, it is HEREBY DECLARED that applicants under paragraph 1(a) of the Second Schedule that is; those who studied LLB degrees in universities in Kenya, having attained the required KCSE grades, shall not sit for the pre Bar examination scheduled for 10th November 2017 or any such future examination. The respondent shall forth with refund any examination fees paid by these applicants.

3. A declaration is hereby issued that regulation 6 of the Kenya School of law (Training Programme) Regulations 2015 promulgated by the respondent vide legal notice no 175 of 2015 to the extent of referring to applicants falling under paragraph 1(a) of the Second Schedule to wit; applicants who studied LLB degrees in universities in Kenya having attained the required KCSE grades, contravenes section 16 as read with paragraph 1(a) of the Second Schedule, section 24(2) of the Statutory Instruments Act and is therefore void and invalid to extent of its inconsistency.

4. However the declaration of invalidity shall remain suspended for a period of twelve months from the date of this judgment within which time the respondent's Board shall take necessary steps to make regulation 6 of the Kenya School of Law (Training Programmes) Regulations, 2015 compatible with section 16 of the Kenya School of Law Act, 2012 as read with paragraph 1(a) of the Second Schedule. In default the declaration of invalidity shall take effect.

5. Given that the respondent's action was totally unnecessary, it shall pay costs of the petition to the petitioner.

Dated Signed and Delivered at Nairobi this 6th Day of November 2017

E C MWITA

JUDGE