Case Number:	Petition 505 & 509 of 2016 (Consolidated)
Date Delivered:	28 Feb 2017
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	John Muting'a Mativo
Citation:	Jonnah Tusasirwe & 10 others v Council of Legal Education & 3 others [2017] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petitions allowed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 505 OF 2016

IN THE MATTER OF CONSTITUTIONAL INTERPRETATION, PROTECTION AND ENFORCEMENT OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 2, 19, 20, 22, 23, 27, 28, 43 AND 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE KENYA SCHOOL OF LAW ACT NO. 26 OF 2012

AND

IN THE MATTER OF THE ADVOCATES ACT, CAP 16

AND

IN THE MATTER OF THE LEGAL EDUCATION ACT NO. 27 OF 2012

AND

IN THE MATTER O THE EAST AFRICAN COMMUNITY COMMON MARKET PROTOCOL

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

JONNAH TUSASIRWE.....1ST PETITIONER

AMAZIAH MARTIN OTIM.....2ND PETITIONER

SSEBADDUKA ABDULSALAAM.....3RD PETITIONER

AMONGIN MARGARET OKALO.....4TH PETITIONER

TWESIGYE NELSON.....5TH PETITIONER

NAMBIRIGE LILLIANE.....6TH PETITIONER

KOBUSINGE MARTHA.....7TH PETITIONER

KAMULEGEYA MOHAMMED.....8TH PETITIONER

AND

COUNCIL OF LEGAL EDUCATION.....1ST RESPONDENT

KENYA SCHOOL OF LAW.....2ND RESPONDENT

CONSOLIDATED WITH

PETITION NO. 509 OF 2016

VICTORIA MODONG TABAN.....1ST PETITIONER

NATTABI FLORENCE PENINAH.....2ND PETITIONER

ATUHAIRWE BENAIDINE.....3RD PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....1STRESPONDENT

KENYA SCHOOL OF LAW.....2ND RESPONDENT

COUNCIL OF LEGAL EDUCATION.....3RD RESPONDENT

AND

AMANYA COHEN.....INTERESTED PARTY

JUDGEMENT

This judgement relates to two consolidated petitions, namely petition number **505** of **2016** (hereinafter referred to as the first petition) and petition number **509** of **2016** (hereinafter referred to as the second petition). On 20th December 2016, the Hon. Justice Muriithi, by the consent of the parties herein ordered that the two petitions be consolidated and be heard and determined together.

The petitioners in both petitions challenge the legality and or constitutionality of a decision by the Counsel of Legal Education barring the Kenya School of Law from admitting non-Kenyans to the Advocates Training Programme (ATP).

All the petitioners in the first petition aver that they hold Bachelors of Law degrees from various Universities in Uganda and South Africa, that they applied for clearance from the Council of Legal Education for purposes of applying for admission to the Advocates Training Programme at the Kenya School of Law and that upon reviewing the petitioners aforesaid applications, Council of Legal Education referred the petitioners to Riara University to undertake a remedial programme in order to meet the

threshold prescribed under Part 11 of the second schedule to the Legal Education Act.[1] Pursuant thereto, the petitioners enrolled for the remedial programme at Riara University where they undertook certain units prescribed by the Council of Legal Education. They successfully completed the remedial program and applied for clearance from the Council of Legal Education for purposes of their applications for admission to the Advocates Training Programme at Kenya School of Law and Council of Legal Education recognized and approved their LLB degree qualifications. Also, the petitioners paid the requisite fees and submitted their applications for admission for the Advocates Training Programme at the Kenya School of Law.

However, on 17th November 2016, the Kenya School of Law published an internal memo stating that it received communication dated 25th October 2016 from the Council of Legal Education to the effect that non-Kenyans are not eligible for admission to the Advocates Training Programme at the school, hence their applications were not considered. Further, in the said letter, the Council of Legal Education directed the Kenya School of Law not to admit any foreign candidates from East African Community member States to the Advocates Training Programme for qualifying as candidates for automatic admission to the Roll of Advocates in Kenya under sections 12 and 13 of the Advocates Act[2] unless such persons have been admitted as advocates in their respective countries of origin.

It is also averred that Council for Legal Education intimated that it shall not Gazette any person who does not meet the criteria for admission to the roll of advocates as set out under section 4 (2) of the Kenya School of Law Act[3]as read with sections 12 and 13 of the Advocates Act.[4]

The petitioners case is that their fundamental rights and freedoms under Articles 19 (1), (2), (3) (a), (b) & (c), 20 (1) & (2), 20 (3), (b), (4) (a) & (b), 22 (1), (3), 27 (1), 28, 43, (1) (f), 159 and 258 of the constitution were violated or threatened and seek orders declaring the said directive as unconstitutional, an order quashing the decision complained of, and an order of mandamus compelling the admissions committee of the Kenya School of Law to consider their applications for admission.

They all annexed documents in support of their averments among them their respective degree certificates and a letter entitled "recognition and approval of foreign qualifications issued by Council of Legal Education." Clearly, the Council of Legal Education approved their qualifications.

The first petitioner in the second petition is a citizen of south Sudan who has lived in Kenya since 1994 and has undertaken all her education in the Republic of Kenya as follows, Highway Educational Complex, South B, Nairobi, Our Lady of Mercy Primary School, Nairobi, Secondary School at Parklands Girls High School, Nairobi and Moi University where she graduated in 2016 with a Bachelors in Law (LLB) degree. She holds a student visa and also Sudan is a member of the East African Community.

She secured admission at the Kenya School of Law as evidenced by a letter dated 10th November 2016, but, but her hope was quashed by the directive complained of herein and that previously the Kenya School of Law has all along been admitting foreign students.

The other two petitioners in the second petition are Ugandans who studied law in Kenya at the Catholic University of Eastern Africa and Moi University respectively and are also adversely by the decision complained of.

On record in both petitions is a relying affidavit sworn by Fredrick Muhia the Academic manager of the Kenya School of (hereinafter referred to as the school) in which he avers *inter alia* that section 12 of the Advocates Act[5] provides that no person shall be qualified to be admitted as an advocate in Kenya unless **(a)** he is a citizen of Kenyan, Rwanda, Burundi, Uganda or Tanzania and **(b)** he is duly qualified

in accordance with section 13 of the Act which provides the professional and academic qualifications for an advocate. He avers that before he could process the petitioners admissions, he received communication from the Council of Legal Education directing the school not to admit foreign students.

The position adopted by the school and its interpretation of the relevant provisions of the Advocates Act[6] sharply disagrees with the interpretation by the law by Council of Legal Education contained in the letter now being challenged. The school offers the following reasons:-

*a. That section 12 of the Advocates Act**[7]** clearly provides for admission as advocates of persons from Rwanda, Burundi, Uganda and Tanzania subject to them qualifying under section 13 of the Advocates Act.**[8]***

*b. Section 13 of the Advocates Act**[9]** provides for various avenues of qualification for admission to the bar which include undertaking the Advocates Training Programme, the reading of sections 13 (1) (a) &)b) does not expressly exclude applicant from Rwanda, Burundi, Uganda and Tanzania.*

*c. Admission to the first Respondents Advocates Training Programme is open to everyone who qualifies for admission to the first Respondent's aforesaid programme irrespective of nationality while admission to the Kenyan bar is limited to persons contemplated under section 12 of the Advocates Act.**[10]***

*d. It is also averred that the action to bar foreign applicants contemplated under the Advocates Act**[11]** contravenes Article 126 of the Treaty establishing the East African Community and that the first Respondent has in the past admitted to its Advocates Training Programme students from the East African Community, Cameroon, Malawi, Nigeria and the Gambia who have successfully completed the Advocates Training Programme and that the directive in question is a direct violation of Articles 10 & 27 of the constitution an Article 126 of the Treaty establishing the East African Community.*

The Hon. Attorney General filed grounds of opposition stating *inter alia* that the petitioners have not demonstrated how their constitutional rights have been violated, that the Council of Legal Education is mandated to supervise and control legal education, that there has been an error in procedure of admitting foreign nationals to the Advocates training programme, and that the Kenya School of Law should not admit students from the East African States to train to qualify as advocates for automatic admission to the Roll of advocates and that such students can only be admitted as advocates in Kenya upon being admitted as advocates in their countries.

In a Replying affidavit filed on 26th January 2017 Prof. W. Kulundu Bitonye avers *inter alia* that the decision complained of was made by a task force that evaluated the law and concluded that the situation hither obtaining whereby foreign students were admitted to the law school was an error, hence maintaining that even though in the past foreign students have been admitted, trained and qualified at the school, that was in his view an error. In his view the interpretation of the law does not confer foreign persons from Uganda, Rwanda, Burundi and Tanzania the right for direct admission to the Roll of advocates in Kenya.

Mr. Njuguna, counsel for the petitioners in Pet. No. 505 of 2016 identified three issues, namely; **(a)** whether sections 12 and 13 of the Advocates Act[12] bars foreign nationals from Advocates Training Programme, **(b)** whether the second Respondent is justified in law to direct the Kenya School of Law not to admit foreign students, **(c)** whether the petitioners are entitled to the reliefs sought in the petition.

Counsel correctly submitted that the bone of contention is the interpretation of sections 12 of the Advocates Act[13] (which deals with qualifications) and section 13 of the Advocates Act[14] (which deals

with categories). Counsel submitted that the word used in section 13 (1) is "person" and reiterated the contents of the petition and supporting affidavit and submitted that the decision complained of is illegal and that it offends the provisions of the constitution, particularly Article 43 (1) (a) .

Ok'basu for the petitioners in Pet No. 509 of 2016 submitted that the first petitioner in the said petition is a national of South Sudan who has lived and studied in Kenya throughout her education from nursery, primary, secondary and University and argued that the interpretation adopted by the Council of Legal Education on the contested provisions is wrong and that a reading of section 13 of the Advocates Act[15] does not preclude a non-Kenyan from being admitted as an advocate and urged the court in the event it agrees with the interpretation preferred by the Council of Legal Education then it ought to declare the sections in question to be unconstitutional on account of discrimination and violating fundamental rights enshrined in the Bill of Rights.

Mr. Simiyu, counsel for the Kenya School of Law supported the petition and adopted the affidavit referred to earlier dated 14th December 2016 and in particular the interpretation of sections 12 and 13 of the Advocates Act as expounded in the said affidavit.

The interested party Mr. Cohen is an advocate of the High Court of Kenya practising as such in Kenya. He is a Uganda national, he studied in Uganda and he studied at the Kenya School of Law and was subsequently admitted to the roll of advocates in Kenya and to his knowledge the law has never changed and that the decision not to admit non Kenyans is discriminatory. He also referred to the treaty establishing the East African Community which allows free movement of persons and labour and added that Kenya is a signatory to the treaty. Counsel cited several decisions in support of his position[16] and submitted that the challenged decision lacked procedural fairness, hence it is unconstitutional.

In his submissions, Mr. Bwire, counsel for the Council of Legal Education essentially highlighted the contents of the Replying affidavit sworn by Prof. Bitonye and stated that the decision in question was made by a task force and that the council conveyed the decision merely for the purposes of implementation. He added that the law as hither understood and interpreted and applied was wrong, and that the decision in question merely communication the correct interpretation of the law.

Determining the issues raised by the parties in this case involves interpreting the various sections of the law and also the relevant provisions of the constitution that are alleged to have been offended by the acts or omissions complained of. To effectively address the said issues, it is important to bear in mind the relevant guiding principles. These are:-[17]

*i. Under Article **259** of the constitution, the court is enjoined to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. In exercising its judicial authority, this court is obliged under Article **159 (2) (e)** of the constitution to protect and promote the purposes and principles of the constitution.*

*ii. There is the general presumption that every Act of Parliament is constitutional and the burden of proof lies on every person who alleges otherwise.**[18]** (The court should start by assuming that the Act in question is constitutional).*

iii. In determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned statute for it is important to discern the intention expressed in the Act itself. Further, in examining whether a particular statutory provision is unconstitutional, the court must have regard not only to its purpose but also its effect.

iv. The constitution should be given a purposive, liberal interpretation.

*v. That the provisions of the constitution must be read as an integrated, whole, without any one particular provision destroying the other but each sustaining the other.***[19]**

Also relevant are the words expressed in the Namibian case of *State vs Acheson*[20] that *'The spirit of the constitution must, therefore preside and permeate the process of judicial interpretation and judicial discretion.'*

The disposition of issues relating to interpretation of statutes and determining constitutional questions must be formidable in terms of some statutory and constitutional principles that transcend the case at hand and is applicable to all comparable cases. Court decisions cannot be *had hoc*. They must be justified and perceived as justifiable on more general grounds reflected in previous case law and other authorities that apply to the case at hand.[21]The privy council in the case of *Minister for Home Affairs and Another vs Fischer*[22] while interpreting the Constitution of Bermuda stated that:-

"a constitutional order is a document sui generis to be interpreted according to principles suitable to its particular character and not necessarily according to the ordinary rules and presumptions of statutory interpretation… It is important to give full recognition and effect to those fundamental rights and freedoms……."

Lord Wilberforce, while delivering the considered opinion of the court in the above case observed:-

"A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to the language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms……"

The recognition of the sanctity of the Constitution and its special character calling for special rules of interpretation was captured in the decision of the High Court of Kenya in the case of *Anthony Ritho Mwangi and another vs The Attorney General*[23] where the court stated:-

"Our Constitution is the citadel where good governance under the rule of law by all three organs of the state machinery is secured. The very structure of separation of powers and independence of the three organs calls for judicial review by checking and supervising the functions, obligations and powers of the two organs, namely the executive, and the legislature. The judiciary though seems to be omnipotent, is not so, as it is obligated to observe and uphold the spirit and the majesty of the Constitution and the rule of law."

Ringera J (as he then was) put it more succinctly in *Njoya and Others vs Attorney General*[24]when he observed that the Constitution is a living document and not like an Act of Parliament when he observed that:-

"the Constitution is the supreme law of the land; it's is a living instrument with a soul and a consciousness; it embodies certain fundamental values and principles and must be construed broadly, liberally and purposely or teleologically to give effect to those values and principles"

In the celebrated case of *Ndyanabo vs Attorney General*[25]**Samatta CJ** had this to say:-

"We propose to allude to general provisions governing constitutional interpretation. These principles may, in the interest of brevity, be stated as follows; ***first,*** *the Constitution of the Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in (tune) with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. As* ***Mr. Justice E.O Ayoola,*** *former Chief Justice of Gambia stated…… "A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the Constitution a stale and sterile document."* ***Secondly,*** *the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our democracy not only functions but grows, and the will and dominant aspirations of the people prevail. Restrictions of fundamental rights must strictly be construed."*

Courts must be innovative and take into account the contemporary situation of each age but innovations must be supported by the roots. In this regard, I endorse fully the presumption of constitutionality which was powerfully expressed by the Supreme Court of India in the case of *Hamdarddawa Khana vs Union of India Air***[26]** where the respected Court stated:-

"In examining the Constitutionality of a statute it must be assumed that the legislature understands and appreciates the need of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the Constitutionality of an enactment."

My discernment from the foregoing jurisprudence is that in interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

Statutory interpretation is the process by which courts interpret and apply legislation. The court interprets how legislation should apply in a particular case as no legislation unambiguously and specifically addresses all matters. Legislation may contain uncertainties for a variety of reasons such as:-

a. Words are imperfect symbols to communicate intent. They can be ambiguous and change in meaning over time.

b. Unforeseen situations are inevitable, and new technologies and cultures make application of existing laws difficult.

c. Uncertainties may be added to the statute in the course of enactment, such as the need to compromise or catering for certain groups.

Therefore, a court must try to determine how a statute should be enforced, but I am alive to the fact that in constructing a statute, the court can make sweeping changes in the operation of the law so this judicial power should be exercised carefully. There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. *Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete*. The implication is that when the language is clear, then it is not necessary to belabour

examining other rules of statutory interpretation.

In my view, it is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.

The Supreme court of India in *Reserve Bank of India vs. Peerless General Finance and*

*Investment Co. Ltd. and others***[27]** observed that:-

"Interpretation must depend on the text and the context. They are the bases 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. That interpretation is best which makes the textual interpretation match the contextual."

In any event, one possible suggestion of the indeterminacy of canons is that statutory construction should be a narrow pursuit, not a broader one:-

*"[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others..... [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."***[28]**

A word in a statutory provision is to be read in collocation with its companion words. The pristine principle based on the maxim *noscitur a sociis* (meaning of a word should be known from its accompanying or associating words) has much relevance in understanding the import of words in a statutory provision.[29]

In addition to being guided by rules of statutory interpretation, one key function of the court in interpreting a statute is the creation of certainty in law. Certainty in law enables planning of human affairs in reliance on the law, and the realization of expectations based on such planning. It makes for uniformity in the administration of justice, and prevents the unbridled discretion of the judiciary. It makes available the tested legal experience of the past.[30] The other key point for the court to consider while interpreting the law is to change and adapt the law to new and unforeseen conditions. Law must change because social institutions change.[31] And in applying generalized legal doctrine, such as statutes, to the facts of specific cases uncertainties and unforeseen problems arise. As conditions change with the passage of time, some established legal solutions become outmoded. The courts should resolve these uncertainties and assist in adapting the law to new conditions.

Finally while interpreting the law, the court should bear in mind that they should make laws when necessary to make the ends of justice. Legal systems world over could not grow as has been the case without a great amount of judicial law making in all fields, Constitutional law, Common Law and statutory interpretation. However, to the extent that judges make laws, they should do so with wisdom and understanding. Judges should be informed on the factual data necessary to good policy making. This includes not only the facts peculiar to the controversy between the litigants before them, but also enough

of an understanding of how our society works so that they can gauge the effect of the various alternative legal solutions available in deciding a case.

In my view, there are two key assumptions relied by courts to explain and justify statutory interpretation. One is the assumption that meaning in legislative texts is "plain" -- that is, clear and certain, not susceptible of doubt. This assumption is the necessary basis for the plain meaning rule. The other assumption is that legislatures have intentions when they enact legislation and these intentions are knowable by courts when called on to interpret legislation. This assumption is the necessary basis for the doctrine of fidelity to legislative intent.

Although these assumptions are repeatedly challenged by academics, the courts are not inclined to give them up, for actually they are quite useful. The assumptions tell us that interpretation is rooted in something definite -- the text -- which has been fixed once and for all by the legislature. The plain meaning says that if the meaning of a legislative text is plain, the court may not interpret it but must simply apply it as written. The court may resort to the rules and techniques of interpretation only if the text is ambiguous.

This rule presupposes that there is an important difference between the first-impression meaning of a text and post-interpretation meaning. First impression meaning is meaning that spontaneously comes to mind when a person reads a text relying on nothing but the text and his/her own linguistic competence. Post-interpretation meaning is meaning constructed by a person through interpretation, by relying on factors other than the text itself -- factors like the imagined purpose of a text, or its possible consequences, or extrinsic aids like legislative history. According to the plain meaning rule, when a person sets out to resolve a dispute about the correct interpretation of a legal text, the first thing he/she must do is read the text and form an impression of its meaning based on reading alone. He/she must then judge whether this meaning is plain. A text has a plain meaning if a competent reader would judge, on the basis of reading alone, that her first impression meaning is the only meaning the text can plausibly bear. A text is ambiguous if a competent reader could plausibly read it in more than one way.When a legislative text has a plain meaning, the courts are bound by the words of the text. The key feature of the plain meaning rule, and the feature that sets it apart from other approaches to statutory interpretation, is its claim that the court's first responsibility is to give effect to the apparent meaning of a legislative text whenever this meaning is plain. If there is a conflict between what the text appears to say and what the legislature seems to have intended, the text wins. Intention governs only when the text itself is ambiguous.

The great advantage of the plain meaning rule is that, in theory at least, it creates a zone of certainty -- an interpretation-free zone, in effect. It tells the public that if the text is plain, it means what it says and it is safe to rely on it. This emphasis on text at the expense of intention ensures that the law is certain and that the public has fair notice, both of which are prerequisites for effective law.

A second advantage of the theory is that it supports formal equality. If the courts are bound by plain meaning, and plain meaning is the same for everyone, it follows that a rule whose meaning is plain expresses the same law for everyone and will be applied in the same way, to the same effect to everyone. Plain meaning thus creates a level playing field on which we all have equal opportunity to score.

A third advantage of the plain meaning rule is that it can be used as an apparently neutral proxy for strict construction. By claiming that the text is plain and does not require interpretation, a court purports to base the outcome in a case on linguistic competence alone.

However, we need not forgot that the touchstone of interpretation is the intention of the legislature. The legislature may reveal its intentions directly, for example by explaining them in a preamble or a purpose statement. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[32]To properly understand and interpret a statute, one must read the text closely, keeping in mind that the initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one.[33] Courts generally assume that the words of a statute mean what an “ordinary” or “reasonable” person would understand them to mean.[34] I personally adhere to the principle that if the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute.

The other issue for this court to satisfy itself is the question of jurisdiction. Article **165 (3) (d) (i) & (ii)** of the Constitution provides that the High Court has power to hear any question respecting the interpretation of the Constitution including the determination of the question whether or not any law is inconsistent with or in contravention of the constitution and also the question whether anything said to be done under the authority of this constitution or of any law is in consistent with, or in contravention of, this constitution. An unconstitutional statute is not law; and more important judicial function includes the power to determine and apply the law, and this necessarily includes the power to determine the legality of purported statutes.

I now examine the relevant provisions of the Advocates Act. Section 12 on the qualification for admission as advocate stated that:-

12. Subject to this Act, no person shall be admitted as an advocate unless—

(a) he is a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania; and

(b) he is duly qualified in accordance with section 13.

Applying the plain meaning rule, section 12 (a) is clear on the categories of persons who qualify for admission, that is, "unless he is a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania."The above provision requires no explanation.

Section 13 on Professional and academic qualifications provides as follows:-

13. (1) A person shall be duly qualified if—

(a) having passed the relevant examinations of any recognized university in Kenya he holds, or has become eligible for the conferment of, a degree in law of that university; or

(b) having passed the relevant examinations of such university, university college or other institution as the Council of Legal Education may from time to time approve, he holds, or has become eligible for conferment of, a degree in law in the grant of that university, university college or institution which the Council may in each particular case approve; and thereafter both—

(i) he has attended as a pupil and received from an advocate of such class as may be prescribed, instruction in the proper business, practice and employment of an advocate, and has attended such course or tuition as may be prescribed for a period which in the aggregate including such instruction, does not exceed eighteen months; and

(ii) he has passed such examinations as the Council of Legal Education may prescribe; or

(c) he possesses any other qualifications which are acceptable to and recognized by the Council of Legal Education;

(d) he is an Advocate for the time being of the High Court of Uganda, the High Court of Rwanda, the High Court of Burundi or the High Court of Tanzania;

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

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

(ii) is a member in good standing of the relevant professional body in that country:

Provided that the Council may, in addition, require that a person to whom this paragraph applies undergo such training, for a period not exceeding three months, as the Council may prescribe for the purpose of adapting to the practice of law in Kenya.

(2) The Council of Legal Education may exempt any person from any or all of the requirements prescribed for the purposes of paragraph (i) or paragraph (ii) of subsection (1) upon such conditions, if any, as the Council may impose

Section 13 (d) seems to be the bone of the different interpretation adopted by the parties. While section 12 (a) is clear as explained above, to me section 13 (d) creates another category of admission for persons already admitted as advocates in Uganda, Tanzania, Burundi, & Rwanda. If Parliament intended otherwise, in my view section 13 (d) could have been worded in clear terms such as "notwithstanding the provisions of section 12 (a) above" and then proceed to state that "must first be admitted as an advocate in the countries mentioned in section 12 (a)." In absence of clear provisions to the contrary, I find that the plain meaning of section 12 (a) and section 13 (d) is that the two provisions create two avenues for persons from the countries in question, and had parliament intended otherwise, it could have said so in clear terms. In fact I find nothing in the above provisions to suggest that Parliament intended otherwise other than the plain meaning of the words in the two provisions. While enacting section 13 (d), Parliament was already aware of section 12 (a) and if at all the intention was otherwise, nothing prevented it from saying so in clear terms. The assertion that for decades the admission of students from the countries in question was premised on the wrong interpretation of the law is in my view incorrect.

On the constitutionality of the challenged decision, this court cannot deviate from its own duty of determining the constitutionality of an impugned decisions. In my view, every law or decision made by public officials in performance of their duties must pass through the test of constitutionality which is stated to be nothing but a formal test of rationality. The foundation of this power of judicial review, as explained by Indian nine-judge bench in the case of the Supreme Court *Advocates on Record Association & Others vs Union of India*[35]is the theory that the Constitution which is the fundamental law of the land, is the **'will'** of the **'people'**, while a statute is only the creation of the elected representatives of the people while public officials are entrusted to perform their duties inconformity with the law; when, therefore, the **"will"** of the legislature as declared in the statute, or decision by a public official stands in opposition to that of the people as declared in the constitution-the **"will"** of the people must prevail.

I find associate myself with the words of the Supreme Court of India in the case of *Namit Sharma vs Union of India*[36] where the court had this to say:-

“An enacted law may be constitutional or unconstitutional. Traditionally, this court had provided very limited grounds on which an enacted law could be declared unconstitutional. They were legislative competence, violation of the constitution and reasonableness of the law. The first two were definite in their scope and application while the cases falling in the third category remained in a state of uncertainty. With the passage of time, the law developed and the grounds for unconstitutionality also widened.....”

I find that the interpretation of the above provisions adopted by the Kenya School of Law represents the correct interpretation of the law and I find myself in agreement with the said position. I also agree with the position taken by the Kenya School of Law that the action to bar foreign nationals offends the provisions of Article 126 of the Treaty Establishing the East African Community.

The Kenya School of Law also confirms that in the past it has admitted and trained students from the East African countries, Cameroon, Malawi, Nigeria and Gambia. The court notes that the interested party in these proceedings is a Ugandan National who studied in Uganda and successfully went though the Kenya School of Law and was admitted as an advocate and now practices law in Kenya. The explanation by the Council of Legal Education or the alleged Task Force that *"the hither construction of the law was erroneous"* is totally unsupported by the provisions of law enumerated above whose plain meaning in clear, hence the purported decision of the Task Force contained in the letter dated 25th October 2016 is in my view premised on the wrong interpretation of the above provisions, violates the rights of the petitioners and is therefore, is null and void for all purposes.

The relevant part of the communication complained of reads:-

"As per the aforementioned provisions of the law, the Kenya School of Law should not admit any foreign candidates from the other East African Community member states to the Advocates Training Programme (ATP) for qualifying as advocates for automatic admission to the Roll of Advocates in Kenya under sections 12 and 13 of the Advocates Act, cap 16 of the Laws of Kenya unless such persons have been similarly admitted in their respective countries of origin"

In my view, the above decision offends the provisions of section 12 of the Advocates Act explained above.

The first petitioner in Pet. No. 509 of 2016 is a Sudanese citizen who has studied in Kenya from nursery to University and even secured admission at the Kenya School of Law as evidenced by the letter dated 10th November 2016 only to be told later that non-Kenyans are not eligible for admission on grounds stated in the letter dated 25th October 2016. The Kenya School of Law is on record stating that they have trained students from as far as Nigeria and Gambia and it was also submitted that the mandate of the Council of Legal Education will only fall after the candidates petition for admission to the Roll of Advocates. I find nothing in the law to bar her Student or any of the petitioners from admission the Advocates Training Programme.

A law or decision which violates the constitution is void. In such cases, the Court has to examine as to what factors the court should weigh while determining the constitutionality of the decision complained of. The court should examine the decision complained of in light of the provisions of the Constitution. When the constitutionality of a decision is challenged on grounds that it infringes the constitution or fundamental rights as in the present case, what the court has to consider is the *“direct and inevitable effect*” of such a decision, the rights violated, the reasonableness or otherwise of the decision complained of guided by the "constitutionality test". This would help the court in arriving at a more objective and justifiable approach.

It is the duty of the court to interrogate the policy or decision and where it is inconsistent with the provisions of the Bill of Rights or the fundamental values in the Constitution to declare that policy or decision to be inconsistent with the Constitution. First, it must be understood that the Bill of Rights protects all persons including foreign nationals in Kenya and they are entitled to protection under the law and enjoyment of the fundamental rights.

The decision in question affects the petitioners. They were not informed or given the opportunity to present their case. The right to fair administrative action is enshrined in the Constitution of Kenya 2010 and has been given content and meaning by the Fair of Administrative Act, 2015. The Act gives effect to the scope and meaning of this constitutional right to procedural fairness by prescribing particular procedures, from which the public official must choose to ensure that administrative action affecting the public is procedurally fair. The aspiration of the requirements of procedural fairness to the public is to create a public administration that is justifiable and accountable in an open and democratic society. Sections 4, 5 and 7 of the *Fair Administrative Action Act, 2015* not only elaborates on the right to fair administrative action but also prescribes the grounds under which an administrative action can be challenged.

The scope of Article 47 of the Constitution and the unyielding rigour with which the protection it affords are to enforced have been the subject of several decisions of this Honourable Court, such as ***Geothermal Development Company Limited vs. Attorney General & 3 others.[37]*** Also relevant is the South African decision in ***President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others.[38]***Article 47 gives fair administrative action a constitutional standing.

A decision that does not make provision for examination of individual circumstances and anticipated exceptions is unreasonable and a breach of **Article 47(1)** is not fair and reasonable within the meaning of **Article 47(1)** in so far as it does not provide for application of due process in adjudicating the rights of persons it may affect.

I find, as I hereby do, that the decision complained of in this petition violated the provisions of Article **47** of the constitution and the Fair Administrative Act, and consequently, such decision, to the extent that it affects, or purport to affect the rights of the petitioners herein cannot be allowed to stand and the same is null and void in that it violates the above clear provisions of the law.

Article 27 prohibits discrimination. It is important to emphasize that the Bill of Rights applies to all persons within our borders,[39]thus, the petitioners herein are entitled to enjoy the constitutionally guaranteed rights while within our borders.

In considering the nature and extent of these rights, the Court is obliged by **Article 259(1)** to interpret the Constitution in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance.[40] **Article 259(1)** commands a purposive approach to interpretation of the Constitution. My discernment from the foregoing jurisprudence is that in interpreting the Constitution, the court should attach such meaning and interpretation that meets the purpose of guaranteeing Constitutionalism, non-discrimination, separation of powers, and enjoyment of fundamental rights and freedoms.

The provisions that protect rights must also be infused with the values and principles of governance articulated in **Article 10**. These values include human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized. In all honesty, I believe

social justice would not permit a student who has studied in Kenya from nursery to University to be denied admission to the Law School. The fundamental duty of the court is to do justice between the parties. The court has, therefore, where the circumstances so require, as in the present case, to act upon the assumption of the possession of an inherent power to act *ex debito justiciae*, and to do real and substantial justice for the administration, for which alone, it exists.[41]

Article 19(1) reminds us that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Equally important is that under **Article 19(3)(a)** the petitioners are entitled to enforce any other rights recognized or conferred by law, except to the extent that they are inconsistent with the Bill of rights.

In conclusion, I find that the decision complained of is not supported by the law, that the Council of Legal Education misconstrued the provisions of sections 12 and 13 of the Advocates Act, hence the impugned decision is a nullity. Secondly, the decision offends the petitioners constitutionally guaranteed rights discussed above. I find that these two petitions are well grounded in law and substance and I allow the two petitions and make the following declarations/orders:-

*a. **That** a declaration be and is hereby issued declaring that **(a)** the letter dated 25th October 2016 (Ref CLE/INS/23/Vol.11/(14) authored/signed by Prof. W. Kulundu-Bitonye, EBS, Secretary/Chief Executive Officer, Council of Legal Education, addressed to Prof. P.L.O. Lumumba, Director/Chief Executive & Secretary, Kenya School of Law, directing the Kenya School of Law not to admit non-Kenyans into the Advocates Training Programme **and** **(b)** the internal memo dated 17th November 2016 issued by the Kenya School of Law addressed to all non-Kenyans to the Advocates Training Programme (ATP) **and** **(c)** the decision or purported decision by the Admission Committee refusing and or declining to consider applications for admission to the Advocates Training Programme submitted by non-Kenyans violates the petitioners rights enshrined under Articles 19, 20, 22, 23, 27, 28, 43 and 47 of the constitution of Kenya, 2010 and is therefore null and void for all purposes.*

*b. **That** an order of certiorari be and is hereby issued calling into this court and quashing **(a)** the decision contained in the letter dated 25th October2016 (Ref CLE/INS/23/Vol.11/(14) authored/signed by Prof. W. Kulundu-Bitonye, EBS, Secretary/Chief Executive Officer, Council of Legal Education, addressed to Prof. P.L.O. Lumumba, Director/Chief Executive & Secretary, Kenya School of Law, directing the Kenya School of Law not to admit non-Kenyans into the Advocates Training Programme for qualifying as advocates candidates for automatic admission to the Roll of Advocates in Kenya, and, **(b)** and also quashing the internal memo dated 17th November 2016 issued by the Kenya School of Law addressed to all non-Kenyans to the Advocates Training Programme (ATP) and, **(c)** and further quashing the decision or purported decision by the Admission Committee refusing and or declining to consider applications for admission to the Advocates Training Programme.*

*c. **That** an order of mandamus be and is hereby issued compelling the admission committee of the Kenya School of Law to forthwith admit the petitioners herein to Advocates Training Programme(ATP), namely:-*

***(i)** Jonnah Tusasirwe,*

***(ii)** Amaziah Martin Otim,*

***(ii)** Ssebadduka Abdulsalaam,*

***(iv)** Amongin Margaret Okalo,*

(v) *Twesigye Nelson,*

(vi) *Nambirige Lilliane,*

(vii) *Kobusinge Martha,*

(viii) *Kamulegeya Mohammed,*

(ix) *Victoria Modong Taban,*

(x) *Nattabi Florence Peninah and*

(xi) *Atuhairwe Benaidine.*

d. ***That*** *no orders as to costs.*

Orders accordingly. Right of appeal 30 days.

Dated at Nairobi this **20th** day of **February** 2017

John M. Mativo

Judge

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[1] Act No. 27 of 2012

[2] Cap 16, Laws of Kenya

[3] Act No. 26 of 2012

[4] Ibid

[5] Supra

[6] Cap 16 Laws of Kenya

[7] Ibid

[8] Ibid

[9] Ibid

[10] Ibid

[11] Ibid

[12] Ibid

[13] Ibid

[14] Ibid

[15] Ibid

[16]These are R. vs. KSL & 2 others {2014}eKLR, R vs. CLE & Another {2014}eKLR, LSK vs a.g & 2 Others {2013}eKLR

[17] See The Institute of Social Accountability & others vs The National Assembly & Others, Pet No. 497 of 2014

[18] See Ndyanabo vs A. G of Tanzania {2001} E. A. 495

[19] See Tinyefunzavs A G of Uganda, Constitutional Petition No. 1 of 1997 { 1997}, UGCC 3

[20] {1991} 20 SA 805, Cited in Petition no 71 of 2013, see note 7, supra

[21] See Wechsler, {1959}. Towards Neutral Principles of Constitutional Law, Vol 73, Havard Law Review P. 1.

[22] {1979} 3 ALL ER 21

[23] Nairobi Criminal Application no. 701 0f 2001

[24] {2004 } 1 KLR 232, {2008} 2 KLR (EP) 624 (HCK)

[25]Ndyanabovs A. G of Tanzania {2001} E. A. 495

[26] {1960} 554

[27] {1987} 1 SCC 424

[28] Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992). The Court takes much the same approach when it chooses congressional intent rather than statutory text as its touchstone: a canon of construction

should not be followed "when application would be tantamount to a formalistic disregard of congressional intent." Rice v. Rehner, 463 U.S. 713, 732 (1983).

[29] K. Bhagirathi G. Shenoy and others v. K.P. Ballakuraya and another {1999} 4 SCC 135

[30]Quintin Johnstone, An Evaluation of the Rules of Statutory Interpretation, Kansas Law Review, {1954} Vol 3 at page8-9

[31] Ibid page 9

[32]Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, "A guide to reading, interpreting and applying statutes"https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf

[33] Christopher G. Wren and Jill Robinson Wren, THE LEGAL RESEARCH MANUAL:AGAME PLAN FOR LEGAL RESEARCH AND ANALYSIS(2d. ed. 1986)

[34] Plain meaning should not be confused with the “literal meaning” of a statute or the “strict construction” of a statute both of which imply a “narrow” understanding of the words used as opposed to their common, everyday meaning. Supra note 1

[35] {1993} 3SCC 441

[36] Writ Petition (Civil) No. 210 of 2012

[37] **{2013} eKLR**

[38] **(CCT16/98) 2000 (1) SA 1,** at paragraphs135 -136.

[39] Kituo Cha Sheria & 8 others v Attorney General [2013] eKLR

[40]Ibid

[41] Sir Dinshah Mulla, The Code of Civil Procedure 18th Edition Reprint 2012