



Case Number:	Petition 487 of 2017
Date Delivered:	17 Sep 2018
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	Enock Chacha Mwita
Citation:	Dennis Kabuaya Mucheke v Kenya National Examination Council & 2 others [2018] eKLR
Advocates:	Mr. Anyoka, learned counsel for the petitioner Miss. Chiringa, Learned counsel for the 1st respondent Mr. Oduor, learned counsel for the 2nd respondent
Case Summary:	<p><b>The Kenya National Examinations Council has the mandate to equate foreign certificates that were acquired from local institutions.</b></p> <p><b>Dennis Kabuaya Mucheke v Kenya National Examinations Council &amp; 2 others</b></p> <p><b>Petition No 487 of 2017</b></p> <p><b>High Court at Nairobi</b></p> <p><b>E C Mwita, J</b></p> <p><b>September 17, 2018</b></p> <p><b>Reported by Beryl A Ikamari</b></p> <p><i><b>Constitutional Law-fundamental rights and freedoms-right to equality and freedom from discrimination-where equation of foreign</b></i></p>

*qualifications was offered to IGCSE candidates who received their qualifications from institutions outside Kenya and denied in the case of IGCSE candidates who acquired their foreign qualifications from institutions within Kenya-whether such treatment was discriminatory-Kenya National Examinations Council (Equation of Certificates) Rules 2015, rule 6(b).*

**Statutes-interpretation of statutory provisions-inconsistency between an enabling statute and the rules made under it-interpretation of section 10(2)(g) of the Kenya National Examinations Council Act as compared to rule 6(b) of the Kenya National Examinations Council (Equation of Certificates) Rules 2015-whether the mandate of the Kenya National Examinations Council included equation of foreign certificates that were acquired from local institutions-Kenya National Examinations Council Act, No 29 of 2012, section 10(2)(g); Kenya National Examinations Council (Equation of Certificates) Rules 2015, rule 6(b).**

**Statutes-interpretation of statutory provisions-interpretation of section 17 & the second schedule of the Kenya School of Law Act-qualifications for admission to the Advocates Training Program at the Kenya School of Law-mandate to assess whether a candidate met the university entry mark-whether the Council of Legal Education had the mandate to assess whether a candidate met the university entry mark-Kenya School of Law Act, No 26 of 2012, section 17 & second schedule.**

### **Brief facts**

The Petitioner sat and passed International General Certificate of Secondary Education, IGCSE, and was admitted to study law at Keele University. He graduated on July 6, 2017 with an LLB degree. He sought to join the Advocates Training Program, ATP, at the Kenya School of Law, KSL. The petitioner's application to have his 'O' Level qualifications equated by the 1<sup>st</sup> respondent was declined and he was casually informed that the 1<sup>st</sup> respondent did not equate foreign qualifications obtained locally. Additionally, the petitioner's application for recognition and

approval of his degree for purposes of admission to ATP at KSL was declined by the 2<sup>nd</sup> respondent on grounds that it did not recognize his pre-university foundation qualifications.

Against the respondents' decisions, the petitioner sought various reliefs while stating that there had been violations of his fundamental rights and freedoms and legitimate expectations. Particularly, violations of the right to equality and freedom from discrimination, right to education and right to fair administrative action were alleged.

### **Issues**

1. Whether the Kenya National Examinations Council had the mandate to equate foreign certificates that were acquired from local institutions.
2. Whether in allowing the equation of foreign qualifications obtained outside the country while declining to equate the same qualifications where there were obtained from local institutions, rule 6(b) of the Kenya National Examinations Council (Equation of Certificates) Rules 2015 was discriminatory.
3. What were the qualifications required for a candidate to join the Advocates Training Program at the Kenya School of Law?
4. Who had the mandate to determine whether a candidate seeking admission to the Advocates Training Program at the Kenya School of Law had obtained the requisite university entry mark?

### **Held**

1. Under section 10 of the Kenya National Examinations Council Act, the 1<sup>st</sup> respondent had the mandate to equate foreign acquired certificates to ensure that they met local standards. Accordingly, anyone with foreign secondary education who intended to pursue further education locally had to have his/her certificates

equated by the 1<sup>st</sup> respondent.

2. Section 10(1)(g) of the Kenya National Examinations Council Act provided that the council had to promote the international recognition of qualifications conferred by the council while subsection 2(g) of that provision stated that the council had power to equate certificates issued by accredited foreign examining bodies with the qualifications awarded by the council. That provision gave the 1<sup>st</sup> respondent a statutory obligation to equate foreign certificates but it did not prohibit equation of foreign certificates that were acquired locally.
3. Rule 6(b) of the Kenya National Examinations Council (Equation of Certificates) Rules 2015 provided that the 1<sup>st</sup> respondent should not equate foreign qualifications obtained from institutions based in Kenya. Therefore, while the parent Act did not prohibit equation of foreign certificates from institutions in Kenya, the rules made under the Act prohibited it. To that extent, the rules went against the general scheme of the parent Act and were unreasonable. Arguing that foreign qualifications obtained from local institutions could not be equated because they would encourage exodus from local examinations was unfair, unjustifiable and unreasonable.
4. Section 24(2) of the Statutory Instruments Act stated that it was mandatory for a statutory instrument not to be inconsistent with the provisions of the enabling legislation or any Act and that where there was an inconsistency, the statutory instrument would be void to the extent of the inconsistency. Section 2 of the Statutory Instruments Act defined “statutory instrument” to include a rule. If indeed a rule was found to be inconsistent with the parent Act, it should be declared void.
5. There was an element of discrimination arising from rule 6(b) of the Kenya National Examinations Council (Equation of Certificates) Rules 2015. It allowed the equation of foreign qualifications obtained

outside the country while declining the equation of the same qualification where there it was obtained from local institutions. There was no compelling or reasonable justification for such a rule.

6. People who had done the same examinations should be treated equally regardless of where they sat for those examinations. Doing otherwise entailed acting in a discriminatory manner and in violation of the principles of equality recognized in the Constitution.
7. Under section 8(1)(e) of the Legal Education Act, 2012, it was within the 2<sup>nd</sup> respondent's mandate to recognise and approve qualifications obtained outside Kenya. That entailed determining whether the university attended by the petitioner was recognised to offer the course taken and whether the petitioner sat and passed the core courses required to be offered in local universities. In the petitioner's case, the 2<sup>nd</sup> respondent was required to decide whether Keele University was recognized and allowed to offer LLB degree programmes and whether the petitioner attended the core courses contained in part 11 of the second schedule to the Legal Education Act.
8. The question as to whether the petitioner had attained the required university entry mark was a matter for the interested party, the Kenya School of Law (KSL), to determine. That was clearly provided for under the Kenya School of Law Act.
9. A reading of section 17 and the second schedule of the Kenya School of Law Act indicated that the qualifications for admission to the ATP were that one had to have an LLB degree from a recognized university and to have attained a C plus in KCSE with B plain in English or Kiswahili languages. Those who attended foreign universities had to have similar or equivalent qualifications, and to also sit and pass pre-bar examinations set by the school.
10. The 2<sup>nd</sup> respondent was in dereliction of its duty when it declined to recognize and approve the petitioner's degree on grounds

that he had not qualified to join university. Questions relating to qualifications for joining a university were within the interested party's mandate and not the 2<sup>nd</sup> respondent's mandate.

11. The 2<sup>nd</sup> respondent breached the petitioner's legitimate expectation that his degree qualification would be recognized and approved. Although there could be no legitimate expectation that was contrary to the law, the law had to be reasonable and justifiable in an open and democratic society and not to infringe on fundamental rights and freedoms. In making the impugned decision, the 2<sup>nd</sup> respondent violated the petitioner's legitimate expectation to be treated fairly.

*Petition allowed.*

*Orders:-*

1. *A declaration was issued to the effect that rule 6(b) of the Kenya National Examinations Council (Equation of Certificates) Rules, 2015 (Legal Notice No 130 of 2015) and clause 1.8 of Circular No KNEC/GEN/R&QAS/A&R/EQN/16/0004 circular on guidelines on equation of foreign certificates (Revised Edition IV) dated October 26, 2016 were unconstitutional and invalid.*
2. *An order of certiorari was issued to quash the 1<sup>st</sup> respondent's decision contained in its letter dated September 26, 2017 declining to equate the petitioner's IGCSE Certificate.*
3. *An order of certiorari was issued to quash the 2<sup>nd</sup> respondent's decision contained in its letter dated September 11, 2017 declining to recognize and approve the petitioner's degree on grounds that he had not attained university entry requirements which was outside its mandate.*
4. *An order was issued to direct the 1<sup>st</sup> respondent to equate the petitioner's O-Level qualifications within thirty (30) days from the date of the judgment.*
5. *An order was issued to direct the 2<sup>nd</sup> respondent to make a decision whether or*

	<i>not it recognized and approved the petitioner's LLB degree qualification within thirty (30) days from the date of the judgment.</i> 6. Costs were awarded to the petitioner.
Court Division:	Constitutional and Human Rights
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Petition allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NUMBER 487 OF 2017**

**DENNIS KABUAYA MUCHEKE.....PETITIONER**

**VERSUS**

**KENYA NATIONAL EXAMINATION COUNCIL.....1<sup>ST</sup> RESPONDENT**

**COUNCIL OF LEGAL EDUCATION.....2<sup>ND</sup> RESPONDENT**

**KENYA SCHOOL OF LAW.....INTERSTED PARTY**

**JUDGMENT**

1. The petitioner is a holder of LLB. Degree from Keele University, United Kingdom, having graduated on 6<sup>th</sup> July 2017. He had attended secondary education at Light Academy in Nairobi, where he sat and passed International General Certificate of Education, IGCE, and was admitted to study law at Keele University. Instead of joining law training programme in the United Kingdom after graduation, the petitioner preferred to join the local Advocate Training Programme, ATP at the Kenya School of Law, KSL.

2. The petitioner avers that on 25<sup>th</sup> September he made an application to the 1<sup>st</sup> respondent for equation of his 'O' Level qualifications but the 1<sup>st</sup> respondent declined and casually informed the petitioner that it does not equate foreign qualifications obtained locally. A letter from his advocates also failed to elicit much from the 1<sup>st</sup> respondent.

3. The petitioner further avers that he also made an application to the Counsel for Legal Education, the 2<sup>nd</sup> respondent, for recognition and approval of his degree for purposes of applying for admission to ATP at the KSL, the interested party herein but the 2<sup>nd</sup> respondent declined to recognize and approve his degree qualifications on grounds that it does not recognize pre-university foundation qualifications and for that reason the 2<sup>nd</sup> respondent concluded that the petitioner had not met the threshold for university entry.

4. The petitioner contends that the 1<sup>st</sup> and 2<sup>nd</sup> respondent's actions are unconstitutional; that they violate his rights and fundamental freedom and are against his legitimate expectation. He filed his amended petition seeking the following reliefs;

*a. An order of MANDAMUS be issued, compelling the 1<sup>st</sup>, 2<sup>nd</sup> respondents to clear the petitioners to apply to the Kenya School of Law for his advocate training programme Pre-bar Examination for the next intake forthwith.*

**b. An order of CERTIORARI to remove into this Honourable Court and quash the decision contained in letters dated 11<sup>th</sup> September 2017 by the 2<sup>nd</sup> respondent and 26<sup>th</sup> September 2017 by the 1<sup>st</sup> respondent.**

**c. AN ORDER OF PROHIBITION, restraining the 2<sup>nd</sup> respondent from barring the petitioner from applying, being admitted, attending and participating in the Advocates training programme at the Kenya School of Law.**

**d. A Declaration that the petitioner's rights under Articles 27, 33, 34, 43, 47 of the Constitution have been infringed and**

threatened with violation by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and that in the discharge of its statutory mandate the 1<sup>st</sup> and 2<sup>nd</sup> respondents cannot act in a manner that infringes, violates or denies the petitioner his right to freedom from discrimination, right to Education and fair Administrative Action.

e. An order directing the 1<sup>st</sup> respondent to equate the petitioner's O- Level qualifications as required by the 2<sup>nd</sup> respondent, 2<sup>nd</sup> respondent to allow the petitioner apply and join the Kenya School of Law for ATP.

f. A declaration that section 6(b) of the Legal Notice No 130 of 2015, clause 1.8 of Circular No KNEC/GEN/R&QAS/A&R/EQN/16/0004 circular on guidelines on equation of foreign certificates (Revised Edition IV) dated 26<sup>th</sup> October 2016 is unconstitutional.

g. This Honourable Court should find and deem it fit to award Exemplary Damages, special damages and the costs of this petition other costs incidental to this Suit.

h . Any further reliefs that this Honourable Court deems fit in the interests of justice to grant.

#### 1<sup>st</sup> respondent's response

5. The 1<sup>st</sup> respondent filed a replying affidavit by *Mercy G. Karogo*, sworn on 13<sup>th</sup> November 2017 and filed in Court on 14<sup>th</sup> November 2017, deposing that the 1<sup>st</sup> respondent has rules and guidelines governing equation of certificates namely; Legal Notice No. 130 of 2015-, the Kenya National Examination Council (Equation of Certificates) Rules 2015, and the Kenya National Examination Council Guidelines on Equation of Foreign Certificates. It was deposed that the 1<sup>st</sup> respondent's decision declining to equate the petitioner's certificate was founded on its rules and guidelines and that the letter from the petitioner's advocates was received after the petitioner had already applied to the 2<sup>nd</sup> respondent for admission to ATP and the application declined on grounds that he had not met the requirements for enrolling at the interested party.

6. **Ms. Karogo** contended that the 1<sup>st</sup> respondent's decision declining to equate the petitioner's qualifications was founded on its rules and according to her, section 10(2) (g) of the Kenya National Examination Council Act requires the 1<sup>st</sup> respondent to equate certificates issued by accredited institutions while section 48 empowers the 1<sup>st</sup> respondent to make rules for purposes including determining examinations that may be equated.

7. **Ms. Karogo** further deposed that rule 3 of the Rules gives the 1<sup>st</sup> respondent discretion to equate certificates if the applicant meets conditions prescribed by it for purposes of equation and that rule 6 is clear that the 1<sup>st</sup> respondent may not equate a certificate for a course offered within Kenya and which is identical or similar to that offered by the 1<sup>st</sup> respondent and for that reason, the 1<sup>st</sup> respondent declined to equate the petitioner's IGCE since the examination was taken in Kenya relying on Paragraph 6(b) of the rules and clause 1.8 of the guidelines. It was therefore contended that the 1<sup>st</sup> respondent acted within the law.

#### 2<sup>nd</sup> respondent's response

8. The 2<sup>nd</sup> respondent filed grounds of objection dated 15<sup>th</sup> November 2017 and filed in Court on the same day, contending that admission to ATP at the interested party is superintended by law and not discretion; that the minimum threshold provided to is mandatory and not discretionary as contained in requirements set in section 16 of the Kenya School of Law Act as read with the Second Schedule to the Act.

9. It is contended that as the regulator of Legal Education, the 2<sup>nd</sup> respondent is enjoined to observe the minimum mandatory requirements with utmost fidelity hence compliance with the minimum requirements is not a matter of discretion; that the petitioner's qualifications were considered against the minimum threshold but he was found to be unqualified for enrolment in the ATP. On the contention that the respondents violated the petitioner's legitimate expectation, the 2<sup>nd</sup> respondent contended that legitimate expectation must be measured against the provisions of the law, and that the 2<sup>nd</sup> respondent's decision was not unreasonable, unfair or discriminatory. It was the 2<sup>nd</sup> respondent's contended that there was no violation of the right to fair administrative action or any other right for that matter.

### **Petitioner's Submissions**

10. **Mr. Anyoka**, learned counsel for the petitioner, submitted highlighting their written submissions dated 17<sup>th</sup> May 2018, that the petitioner holds LLB. Degree from Keel University in the UK; that prior to joining university, the petitioner completed IGCSE at Light Academy, Nairobi in 2012 and that at Keel University the petitioner did and passed pre-university entry examinations at Brook House School.

11. Learned counsel submitted that the petitioner applied to the 2<sup>nd</sup> respondent for recognition and approval of his degree to enable him apply to join ATP at the interested party but in a letter dated 11<sup>th</sup> September 2017, the 2<sup>nd</sup> respondent informed the petitioner that he did not meet entry requirement for LLB. Degree because he did not do 'A' Level.

12. **Mr. Anyoka** submitted that the petitioner's attempt to have his 'O' level qualifications equated by the 1<sup>st</sup> respondent were also declined through letter dated 26<sup>th</sup> September 2017 citing rule 6(b) of its rules and clause 1.8 of the guidelines. Referring to the petitioner's further affidavit sworn on 16<sup>th</sup> April 2017 and filed on the same day, learned counsel contended that Keel University had even written letter dated 23<sup>rd</sup> August 2017 confirming that the petitioner was qualified to join that University.

13. Learned counsel faulted the 2<sup>nd</sup> respondent for failing to recognize and approve the petitioner's degree arguing that it is not the 2<sup>nd</sup> respondent's mandate to question university entry qualifications hence in making that decision, the 2<sup>nd</sup> respondent exercised its mandate wrongly. He also contended that the 1<sup>st</sup> respondent's regulations are irrational and unreasonable.

### **1<sup>st</sup> respondent's response**

14. **Miss. Chiringa**, Learned counsel for the 1<sup>st</sup> respondent, submitted orally relying on their grounds of opposition, replying affidavit and supplementary affidavit, that the 1<sup>st</sup> respondent is guided by KNEC Act and in particular section 10 thereof. According to learned counsel, the petitioner's certificate was not equated as the examination was not done in the country of origin and relied on the 1<sup>st</sup> respondent's letter dated 26<sup>th</sup> September 2017 for that explanation. She also relied on paragraph 5.4 of the annexure "JAB" report on equation of foreign qualifications undertaken KNEC. **Miss Chiringa** contended that the 1<sup>st</sup> respondent acted in accordance with its mandate under the law and informed the petitioner accordingly hence there was no violation of rights and fundamental freedoms.

### **2<sup>nd</sup> Respondent's Submissions**

15. **Mr. Oduor**, learned counsel for the 2<sup>nd</sup> respondent, submitted also highlighting their grounds of objection dated 15<sup>th</sup> November 2017 and filed in Court on the same day; that the 2<sup>nd</sup> respondent declined to recognize and approve the petitioner's Degree because the petitioner did not meet the threshold for joining KSL. Counsel contended that the 2<sup>nd</sup> respondent had received the request and did respond to it by letter dated 11<sup>th</sup> September 2017. **Mr. Oduor** relied on Section 8(1) (a) and (e) of the Legal Education Act and Section 16 of the Kenya School of Law Act as read with the Second Schedule to that Act as well as Legal Education (Accreditation Regulations), Part III thereof.

16. Counsel relied on a number of authorities and argued that for the 2<sup>nd</sup> respondent to approve foreign degree qualifications, it had to be satisfied that the applicant qualifies to join Kenya School of Law. According to learned counsel, if the applicant does not have a minimum of C+ (C Plus), the 2<sup>nd</sup> respondent would not recognize and approve his degree certificate. He contended that the 2<sup>nd</sup> respondent acted within the law and urged that this petition be dismissed with costs.

### **Determination**

17. I have considered this petition, the responses and submissions. I have also considered the authorities relied on by both sides. The issue raised in this petition is whether the 1<sup>st</sup> and 2<sup>nd</sup> respondent's acted within their mandate when they declined to equate the petitioner's O-level certificate and recognize approve his degree qualification respectively.

18. The petitioner obtained an LLB degree from Keel University after he had attended IGCSE locally. He applied to the 1<sup>st</sup> respondent for equation of his Secondary School Certificate and to the 2<sup>nd</sup> respondent for recognition and approval of his LLB

degree but both declined. Whereas the 1<sup>st</sup> respondent declined to equate the certificate arguing that the examination was done locally, the 2<sup>nd</sup> respondent contends that the petitioner had not obtained minimum requirements for joining university education. The petitioner has faulted the respondents' actions contending that they acted unreasonably, did not follow their mandate and that as a result, they violated his rights and fundamental freedoms.

19. The 1<sup>st</sup> respondent is a public body responsible for administering national examinations within the country. In that capacity, it has mandate under section 10 of its legislation to equate foreign acquired certificates to ensure that they meet local standards. In that regard, anyone who attended foreign secondary education and intends to use that qualification for further education locally, he has to have it equated by the 1<sup>st</sup> respondent. In that respect, the 1<sup>st</sup> respondent discharges statutory mandate which has to be done within the law.

20. The 1<sup>st</sup> respondent received the petitioner's request to equate his O-level certificate and in its letter dated 26<sup>th</sup> September 2017 the 1<sup>st</sup> respondent refers to the petitioner's request for equation and apart from simply stating that it has reviewed the contents of the letter, the 1<sup>st</sup> respondent's letter goes on to refer to section 10(2) (g) of the Act which mandates it to equate foreign certificates; the fact that section 48 allows it to make rules and that rules of equation were developed and gazetted. The 1<sup>st</sup> respondent attached the rules and Guidelines to its affidavit. However, the conclusion of that letter was not attached hence the court is unable to ascertain what the 1<sup>st</sup> respondent's decision on the petitioner's request for equation was.

21. That notwithstanding, at paragraph 15 of the replying affidavit sworn by the 1<sup>st</sup> respondent's Acting Chief Executive Officer, *Mrs Karogo*, she deposed that the 1<sup>st</sup> respondent declined to equate the petitioner's IGCSE certificate relying on rule 6(b) of the rules contending that the petitioner sat the IGCSE examination at Light Academy, a local institution. According clause 1.8 of the Guidelines on equation, foreign qualifications obtained locally will not be equated. The report on equation on foreign qualifications undertaken makes general observations on why IGCSE done locally should not be equated.

22. The reasons range from narrow content level in a number of subjects; disparity in terms of subject content in a majority of the subjects, difference in administration of the examination; that equation would lead to exodus from the Kenya system; that paper format for the two systems is different; that candidates willingly choose to do that system despite the choice to do the Kenya education system and that candidates sit a number of papers in several sittings over a number of years unlike the Kenya system where candidates take all examination papers once.

23. Most importantly, the 1<sup>st</sup> respondent contends that the KNEC Act does not allow equation of locally acquired qualifications. The 1<sup>st</sup> respondent argues that equating those certificates would be a breach of the law. Save for the contention that the KNEC Act does not permit equation of foreign qualifications obtained in local institutions, the 1<sup>st</sup> respondent did not point out the provision in the Act that prohibits it from equating foreign qualifications obtained locally.

24. Does the law really prohibit equation of foreign qualifications obtained locally" The 1<sup>st</sup> respondent has relied on KNEC Act and rule 6 of the Equation Rules and its Guidelines. Section 10(1) (g) of the Act provides that the Council *shall promote the international recognition of qualifications conferred by the Council*; while section 10(2)(g) states that the council shall have power to *equate certificates issued by accredited foreign examining bodies with the qualifications awarded by the Council*. From the text and tenor of section 10 the 1<sup>st</sup> respondent has a statutory obligation to equate foreign certificates. An examination of the entire section 10 reveals no prohibition on equation of foreign qualifications even those acquired locally.

25. However rule 6 of the Equation rules provides that the council shall not equate –a) a certificate for a course offered within Kenya and identical or similar to that offered by the council; *b) foreign certificates awarded within Kenya* and c) any other certificate that in the opinion of the council may be non-equatable. It would appear that whereas the Act does not prohibit equation of foreign certificates including those obtained locally, the 1<sup>st</sup> respondent's rules do prohibit equation of foreign certificates from institutions in Kenya. No reasons are given for this but it would seem that this is founded on the general observations contained in at Paragraph 5.4 of the report on equation of foreign qualifications already adverted to herein above.

26. In my view, rule 6(b) which provides that the 1<sup>st</sup> respondent should not equate foreign qualifications obtained from institutions based in Kenya, is against the general scheme of the parent Act and, therefore, unreasonable. The examinations concerned are not offered and administered by the 1<sup>st</sup> respondent. They are offered by foreign examination bodies while the local institutions only act as training institutions and examination centres. To argue that foreign qualifications obtained from local institutions cannot be equated because they would, for instance, encourage exodus from the local examinations and the only way to avoid or prohibit such

a scenario is to decline to equate them using rules, is unfair, unjustifiable and unreasonable.

27. Despite the weaknesses the 1<sup>st</sup> respondent has identified at clause 5.4 of the Report on equation of foreign qualifications, the 1<sup>st</sup> respondent does equate similar qualifications obtained in foreign institutions. If the observations at clause 5.4 of the Report are anything to go by, the 1<sup>st</sup> respondent would have to take those observations into account when equating these certificates. Barring clear provisions in the parent Act to the contrary, those observations on their own would not be grounds for declining to equate the petitioner's certificate or that of any other person.

28. The 1<sup>st</sup> respondent's action clearly brings to the fore the element of discrimination in its rules allowing it to equate foreign qualifications obtained outside the country while declining to equate the same qualifications but obtained from local institutions. To my mind, there is no compelling or reasonable justification for such a rule.

29. People who have done the same examination(s) should be treated equally regardless of where they sat for those examination(s). Doing otherwise is acting in a discriminatory manner which violates the principles of equality in our Constitution. Article 27 of the Constitution guarantees protection of rights including the right to equality before the law; equal protection of the law and the right not to be discriminated against on any grounds. In *Eric Gitari v Non-Governmental Organization Co-ordination Board & 4 others* [2015] eKLR the court did observe, and I agree, that the wording of Article 27 is clear the right to equality and non-discrimination applies to "every person" and in addition, Article 27(2) provides no internal qualifier and is written in broad terms of "equal enjoyment of all rights and fundamental freedoms."

30. The 1<sup>st</sup> respondent relied on a rule that prohibits it from equating foreign qualifications obtained locally but that rule is not anchored on the section of the Act that allows it to equate foreign qualifications. Parliament cannot be said to have intended to prohibit that equation as nothing can be gleaned from the applicable section 10. In that regard the court stated in the English case of *Reg vs. Secretary of State for the Home Department ex-parte Doody* [1994] 1 AC 531 that **"The rule of law in its wider sense has procedural and substantive effect...Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural."**

31. I entirely agree with the above legal position and the reading of section 10 of the KNEC Act, does not reveal the slightest hint that Parliament intended to prohibit equation of foreign qualifications obtained locally. That being the case, rule 6(b) negates the spirit, purport and intent of section 10(2) (g) of the parent Act.

32. Section 24(2) of the Statutory Instruments Act, No 23 of 2013, is also clear that **a statutory instrument shall not be inconsistent with the provisions of the enabling legislation or any Act and that the statutory instrument shall be void to the extent of the inconsistency.** Section 2 of the Act defines "**statutory instrument**" to include a rule. If indeed a rule is found to be inconsistent with the parent Act, it should be declared void.

33. For my part, I am satisfied that rule 6(b) of the Kenya National Examinations Rules, 2015, in so far as it provides that the 1<sup>st</sup> respondent cannot equate foreign qualifications obtained locally, is not only constitutionally invalid for being discriminatory contrary to Article 27(1), it also has irreconcilable inconsistency and tension with the parent Act. Unlike rule 6(a) which states that the 1<sup>st</sup> respondent should not equate **a foreign certificate for a course offered within Kenya and identical or similar to that offered by the council**, because it would not make sense to equate a course similar to that offered locally and examined by the 1<sup>st</sup> respondent, rule 6(b) is a total prohibition thus is discriminatory and therefore unconstitutional and invalid.

## **2<sup>nd</sup> respondent's decision**

34. The petitioner's complaint against the 2<sup>nd</sup> respondent is that its failure to recognize and approve his degree certificate was unreasonable and wrong exercise of mandate. According to the petitioner, it was not the 2<sup>nd</sup> respondent's mandate to determine whether he had qualified to join university or not since that is the mandate of another body namely; the Kenya School of Law. The 2<sup>nd</sup> respondent on its part has argued that it acted within its mandate under section 8 of its Act and section 16 of the KSL Act as read with the Second Schedule to that Act. The 2<sup>nd</sup> respondent therefore maintained that it acted properly.

35. The 2<sup>nd</sup> respondent is established under section 4 of the Legal Education Act, 2012. Its functions are enumerated in section 8 (1)

of the Act which include to (e) **recognise and approve qualifications obtained outside Kenya for purposes of admission to the Roll**. One of the 2<sup>nd</sup> respondent's mandates is therefore to recognize and approve foreign degree qualifications. In doing so, section 8(3) requires the 2<sup>nd</sup> respondent to establish **criteria for the recognition and equation of academic qualifications in legal education**. Section 23 provides that (1) a legal education provider offering a course for the award of a degree in law shall, in addition to any other courses offered, provide instruction and examination for each of the core courses set out in the **Second Schedule**, and that (2) a legal education provider may offer any other programmes that it may consider necessary, taking into account the developments in the law and society generally.

36. The core courses in Part 11 of the Second Schedule are; Legal Research, Law of Torts, Law of Contract, Legal Systems and Methods, Criminal Law, Family Law and Succession, **Law** of Evidence, **Commercial** Law (including Sale of Goods, Hire Purchase and Agency), **Law** of Business Associations (to include Insolvency), Administrative Law, Constitutional Law, Jurisprudence, Equity and the Law of Trusts, Property Law, Public International Law and Labour Law.

37. The petitioner applied for recognition and approval of his LLB. Degree qualification and by letter dated 11<sup>th</sup> September 2017, the 2<sup>nd</sup> respondent informed the petitioner that a review of his application revealed that he did not meet the threshold for entry into LLB programme; that he did not have at least 2 principal passes in A-Level and that the 2<sup>nd</sup> respondent does not recognize pre-university foundation qualifications.

38. I have perused the 2<sup>nd</sup> respondent's mandate under the Act and considered the submissions by counsel for both parties. It is clear to me that from the reading of the 2<sup>nd</sup> respondent's mandate under section 8(1) (e), it is to recognise and approve qualifications obtained outside Kenya. Recognition and approval, in my view, would entail determining whether the university the petitioner attended is recognized to offer the course taken and if the petitioner sat for and passed the core courses that are to be offered in local universities. In this case, the 2<sup>nd</sup> respondent was required to decide whether Keele University is recognized and allowed to offer LLB degree programmes and that the petitioner attended the core courses contained in Part 11 of the Second Schedule to the Legal Education Act.

39. On whether the petitioner had attained university entry mark, is in my view, a matter for the interested party, the KSL. As the public legal education provider responsible for the provision of professional legal training as an agent of the Government, KSL has among other objects, to train persons to be advocates. The view that it is the duty of the interested party to decide whether or not one met university admission grades is not only clear from the reading of the KSL Act, but also from the fact that even the 2<sup>nd</sup> respondent's counsel relied on section 16 of the KSL Act as read with the Second Schedule to that Act which set the minimum qualifications for entry to the ATP, to contend that the petitioner did not meet the threshold for joining the university.

40. For avoidance of doubt, section 16 of the KSL Act provides that **a person shall not qualify for admission to a course of study at the School, unless that person has met the admission requirements set out in the Second Schedule for that course.** As regards applications for admission to KSL, section 17 states that a person who wishes to be admitted to a course of study at the School should apply in the prescribed form and pay prescribed application fees. The School is then to consider the application and if it is satisfied that the applicant **meets the admission criteria**, admit the applicant to the School.

41. The second schedule contains qualifications for admission to the ATP for both those who attended local and foreign institutions. One has to have LLB. Degree from a recognized university and must have attained at least C Plus in KCSE with B plain in English or Kiswahili languages. Those who attended foreign universities must, have similar or equivalent qualifications and in addition, sit and pass Pre-Bar examinations set by the school.

42. It is therefore clear to me that the 2<sup>nd</sup> respondent was in dereliction of its duty when it declined to recognize and approve the petitioner's degree on grounds that he had not qualified to join university, a decision to be made by the interested party should the petitioner apply for admission to ATP. The 2<sup>nd</sup> respondent cannot abdicate its mandate and hide under that of the interested party despite the fact that both discharge different duties and perform different functions under different legal regimes.

43. In **The Matter of an Application for Judicial Review Orders between the Republic and Transgender Education and Advocacy, Misc Appl 308A of 2013**, the court rendered itself thus;

**“When an officer is exercising statutory powers he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters.” ... concerning irrelevant considerations, where a body takes**

**account of irrelevant considerations, any decision arrived at becomes unlawful.”**

44. Counsel for the 2<sup>nd</sup> respondent relied on section 8(1)(e) of the Legal Education Act to argue that the 2<sup>nd</sup> respondent acted properly. Even then, the long title of the Act is clear that the Act is 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, Section 8 of the Act details the 2<sup>nd</sup> respondent’s functions, and according to section 8(1) (e), one of the functions is to recognise and approve qualifications obtained outside Kenya for purposes of admission to the Roll.

45. Before one is admitted to the Roll he/she must attend ATP at the interested party and at that stage the interested party has to decide whether the applicant meets qualifications in section 16 as read with the Second Schedule to its Act. It cannot therefore be the mandate of the 2<sup>nd</sup> respondent to determine whether or not the person who seeks recognition and approval of his/her foreign qualification had attained university admission criteria otherwise the interested party would have nothing to do in terms of section 16 of the Act as read with the Second Schedule to the Act. If it had been the intention of the legislature that the 2<sup>nd</sup> respondent performs such a function, it would not have conferred on the Interested party mandate together with qualifications and elaborate application procedures to follow while considering applications from those seeking admission to ATP.

46. I agree with the petitioner’s submission that the 2<sup>nd</sup> respondent acted unreasonably and violated his legitimate expectation that he would have his degree qualification recognized and approved or advised otherwise than being told that he did not qualify to join LLB. Degree programme. In *Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others* [2007] KLR 240 it was held that:

**“...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation... Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way.....Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised”**

47. In President *of the Republic of South Africa and others v South Africa Rugby Football Union and Others* 2000(1) SA I CC the constitutional court of South Africa stated that *“Legitimate expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.”* And in *Canada (Attorney General) v Mavi* 2011 SCC 30 [2011] 2 SCR 504, the Supreme Court of Canada observed that *“it will be a breach of the duty of fairness for the decision maker to fail in a substantive way to live up to its undertaking.”*

48. In the present case the 2<sup>nd</sup> respondent failed in a substantial manner to perform its legitimate duties towards the petitioner. Although legitimate expectation cannot override the law, that law must be reasonable and justifiable in an open and democratic society but not one that infringe on rights and fundamental freedoms. To that extent therefore, the 2<sup>nd</sup> respondent actions violated the petitioner’s legitimate expectation of its duty of fairness to him.

49. In conclusion, having considered the petition, the responses, submissions authorities and the law, I am satisfied that the petitioner has a legitimate complaint against the respondents. The first respondent un reasonably failed equate his foreign qualification, while the 2<sup>nd</sup> respondent committed a dereliction of duty when it declined to recognize and approve his foreign degree on ground that he had not qualified to join university, a mandate that did not belong to it, thus committed an error of law.

50. For the above reasons I find that the amended petition dated 24<sup>th</sup> November 2017 is meritorious and is allowed as follows:

**I. A declaration is hereby issued that section 6(b) of The Kenya National Examinations Council (Equation of Certificates)Rules, 2015 (Legal Notice No 130 of 2015 and clause1.8of Circular No KNEC/GEN/R&QAS/A&R/EQN/16/0004 circular on guidelines on equation of foreign certificates (Revised Edition IV) dated 26<sup>th</sup> October 2016 are unconstitutional and invalid.**

**II. An order of certiorari is hereby issued quashing the 1<sup>st</sup> respondent's decision contained in its letter dated 26<sup>th</sup> September 2017 declining to equate the petitioner's IGCE Certificate.**

**III. An order of certiorari is hereby issued quashing the 2<sup>nd</sup> respondent's decision contained in its letter dated 11<sup>th</sup> September 2017 declining to recognize and approve the petitioner's degree on grounds that he had not attained university entry requirements which was outside its mandate.**

**IV. An order is hereby issued directing the 1<sup>st</sup> respondent to equate the petitioner's O- Level qualifications within Thirty (30) days from the date of this Judgment.**

**V. An order is hereby issued directing the 2<sup>nd</sup> respondent to make a decision whether or not it recognizes and approves the petitioner's LLB. Degree qualification within Thirty (30) days from the date of this Judgment.**

**VI. Costs to the petitioner.**

**Dated Signed and Delivered at Nairobi this 17<sup>th</sup> September 2018**

**E C MWITA**

**JUDGE**



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