



The application is supported by the affidavit of Nebye Steven Rutaro, one of the applicants herein who stated as follows;

- i. That the respondent has no authority to make any law or rule for dismissal nor have they made any rule for dismissing the applicant on a post Graduate Bar Course.
- ii. That the respondent's decision to dismiss the applicants from the Bar Course is illegal, unfair and inequitable considering that the respondent is the only institution established to conduct the Bar Course.
- iii. That the respondent's decision to dismiss the applicants from the Bar Course contrary to the law or in absence to any law in effect amounts to denial of their constitutional right to education and to practice their profession.
- iv. The purported 3 year rule as drawn to the attention of the applicants on the respondent's notice board does not exist and even if it exists its null void and ab initio as it is ultra vires the powers, duties and authority ceased with the respondent.
- v. The applicants have the charisma, interest, capacity and ability to pass the bar course so as to practice their profession.
- vi. The dismissal of the applicants by the respondent being a statutory body was not based on any enforceable rule of law.

For the respondent, Joyce Werikhe opposed the application in her capacity as the respondent's secretary and deponed as follows;

- i. That the application is misconceived and untenable; none of the applicants is entitled to any of the remedies sought.
- ii. That under the Law Development Centre Act, the respondent is statutorily mandated to organise and conduct courses of instruction for the acquisition of legal knowledge, professional skill and experience by persons intending to practice as attorney's (advocates) in subjects determined by the Law council; conduct examination and confer inter alia diplomas in accordance with any law in force or as may be required by the Law Council.
- iii. That under the Advocates Act Cap 267 (as amended) the Law Council through its Committee on Legal Education and training is statutorily mandated to; exercise general supervision and control over professional legal education in Uganda including continuing legal education for persons qualified to practice law in Uganda; and approve courses of study and provide for conduct of qualifying examinations for the purposes of the Act.
- iv. That like any other educational institute, the respondent has right from its inception always had and still has rules governing the conduct of its courses and examinations and the effect of failure by a candidate, which rules have been amended from time to time.
- v. That the respondent's said rules are contained in the syllabus for the post graduate bar course that was previously expressly referred to but is now incorporated in the annual LDC prospectus which is issued to every applicant for any of the respondent's courses; and at any one time there are copies of the Prospectus in the respondent's library and in each of its departments, including the department of Post Graduate legal Studies, where the applicants pursued the Bar Course.
- vi. That when the applicants were severally admitted to the respondent's Bar Course for the 2006/2007 Academic Year 2006/2007 there were in force the law Development Centre

- Standing Orders, 2003 which established inter alia a Board of Examiners; and Rules governing the passing of the Bar Course contained in the said syllabus, the said prospectus advised was on sale at the respondent's book shop.
- vii. That the respondent's said rules clearly spelt out the powers of Board of Examiners, limited the period a student could spend on the Bar Course to three years, with an option to apply to repeat the course thereafter; and restricted the number of supplementary examination in a particular subject to two.
  - viii. That the duration of the Bar course is only one year, but in all fairness the respondent's rules allow a student to remain on the course for up to three years while doing supplementary examinations, in addition to the said option.
  - ix. That though constrained by physical facilities, the respondent has been pursuing a policy of expanding the intake of the Bar Course to cater for the thousands of Law graduates from the numerous universities that have sprung up over the last decade, taking care not to compromise the quality of legal education offered or the integrity of its awards; and the policy has worked, and the number of students admitted has risen ten folds between the 1980's and the current intake.
  - x. That to allow particular students like the applicants, to do supplementary examinations and remain on the Bar course for an unlimited numbers of years; frustrates the said policy, is unreasonable and inequitable and does not serve the public interest, its effect being to clog the respondent's system and deny other eligible graduates an opportunity to be admitted to the same course; compromises the integrity of the respondent's awards and the quality of Bar Course Graduates, as the respondent would in effect eventually unleash onto the innocent public "fresh" Bar Course graduates with knowledge of outdated law in subjects passed several years earlier; would lead to untold administrative problems in the eventual compilation of marks scored by a particular candidate over a period spanning several years.
  - xi. That in consonance with the usual practice, the Director of the respondent addressed the applicants and their colleagues within the first three weeks of commencement of the course for the academic year 2006/2007. He also drew their attention specifically inter alia to the rules governing the passing of the Bar Course and the effect of falling foul of any one of those rules.
  - xii. That pursuant to the bar Course syllabus including the said rules, the applicants embarked on the course: did weekly individual assessment and clerkship; sat for oral and written examinations; sat for final and supplementary examinations and eventually some of them and/or their colleagues successfully applied to repeat the course and are on the current bar course for the academic year 2009/2010.
  - xiii. That the respondent's said Rules engender an orderly manner in which the respondent's courses and examinations are conducted, eliminate arbitrariness in the process and ensure the quality of legal education offered by the respondent and the integrity of its awards; have withstood the test of time for nearly four decades now and their propriety has never been questioned by the Law Council which is statutorily vested with supervisory jurisdiction over the respondent's legal training activities; compare favourably with rules applied in other educational institutions.
  - xiv. That the applicants were all given ample opportunity to complete their courses but they all severally failed, and their results were effectively communicated to them on the respondent's notice board in accordance with the said rules.

- xv. That the ultimate result was that the applicants failed the Bar Course and were at liberty to apply to repeat the same, not that they were dismissed by the respondent as alleged; and the question or reinstatement of the applicants does not arise and would even serve no useful purpose.
- xvi. That the respondent's decision and action on the basis of the said rules is valid and not illegal, ultravires or otherwise improper as alleged; nor has there been any denial of the applicants' right to education.
- xvii. That the complaint raised in the applicants' application is a private matter for each applicant that is referable to their respective dismal performance in the examinations set by the respondent on a number of occasions.
- xviii. That none of the applicants has suffered any loss or damage at the respondent's hands, as it was at all material times incumbent upon them to individually work hard and pass the examinations set by the respondent.

When the hearing commenced before my learned brother, His Lordship Yorokamu Bamwine (as he then was), the applicants in HCMC No.35 of 2010 were joined to HCMA No. 135 of 2009 to make the number 18 instead of 5. Mr. Kandeebe, Counsel for the applicant also sought leave of court (orally) to join four more persons who wished to be joined as parties to this case hence bringing the number of applicants to 23. With joinder of the applicants in HCMC No.132 and 135 of 2009; the total number of all the applicants in all Causes is 74. Court therefore directed that the joint scheduling memorandum of the parties should be changed accordingly i.e. Isaac C Lubogo & 73 others versus The Law Development Centre.

In their joint memorandum, the parties agreed on the following facts;

- a. The respondent is the only Government Institution established under the law Development Centre Act Cap 132 that is (inter alia) mandated to conduct the post graduate bar Course leading to the award of a diploma in Legal practice, which is one of the requirements for enrolment as an advocate in Uganda
- b. The applicants are law graduates from various universities. They were severally admitted and registered as students on the respondent's post Graduate Bar Course for the academic year 2006/2007 which commenced on 25<sup>th</sup> September 2006. As at the end of 24<sup>th</sup> September 2009, three years had lapsed from the time of the applicants' said admission and registration.
- c. The applicants severally sat the Bar examinations in various subjects and subsequently did supplementary examinations in some subjects. The results of the last supplementary examinations for the applicants were released on 28/07/2009 and the next lot Bar Course students commenced their studies in September 2009.
- d. The respondent made a decision that the applicant had all severally failed the Bar Course, and notified her decision on her notice board.
- e. The applicants were not satisfied with the respondent's said decision, hence the application for judicial review.

The **agreed issues** by the parties were;

1. Whether the action of the applicants or some of them is tenable.
2. Whether the applicant or any of them failed and were dismissed by the respondent; and if so whether the dismissal
  - i. Was lawful, fair and equitable.
  - ii. Amounted to a denial of the applicants' right to education and to practice their profession.
3. Whether there are any rules for passing the Bar Course and if so whether the said rules –
  - i. Are ultra vires and unenforceable.
  - ii. Include the impugned three year rule;
  - iii. Were correctly applied against the applicants.
4. Whether the applicants are entitled to the remedies prayed for.

The applicants however sought to add another issue thus; whether the respondent trained and examined the applicants undertaking the Bar Course as provided by Law.

The applicants sought to rely on the following documents during the trial;

- a. Annexures to the affidavits sworn in support of the applicants' case.
- b. All documents availed by the respondent on notice to produce documents.
- c. Letter dated 25<sup>th</sup> march 2010, written by the applicant's counsel to the respondent's counsel.
- d. Letter dated 29<sup>th</sup> March 2010, written by the respondents counsel to the applicants' counsel.

While the respondents documents included;

- a. Annexures to the affidavits in reply and to the affidavit i n sur-rejoinder, sworn in support of the respondents case.
- b. Letter dated 29<sup>th</sup> march 2010, written by respondent's counsel to the applicants' counsel.
- c. Notice of change of advocates filed by the present applicants' counsel in H/C Civil Application No.168 of 2009 ( Musinguzi Kenneth & others v Law Development Centre).
- d. Notice of change of advocates filed by the present applicants' counsel in H/C Civil Application No. 170 of 2009 ( Nuwagaba Winston Katungi & Anor v Law Development Centre).
- e. Notice to inspect Documents (salvo jures) filed by the respondent's counsel on 19.2.2010.

At the trial Mr. Kandebe sought to cross examine the respondent's secretary who had deponed an affidavit in reply to the application.

In his submission, Mr. Kandebe submitted as follows;

Judicial review is well founded in Article 42 of the Constitution and Section 36 of the Judicature Act as amended by Act No.5 of 2002 to replace the old sections which appear in the 2000 edition, Laws of Uganda. This court has on several occasions discussed judicial review, history, grounds and remedies. (see **Fr. Francis B Muntu v Kyambogo University MA No 643 of 2005; Hajji Nasser Takuba v Kawempe Local Government Council MA No 164 of 2008; Nandala Mafabi v Registrar Co-orp & Anor MA 223 of 2010**)

Citing Takuba (supra) to the effect that the prerogative orders of certiorari and prohibition often go hand in hand. They issue from the high Court..... against statutory bodies making administrative decisions that affect rights of citizens. Certiorari issues to quash decisions that are ultra vires or which are vitiated by error on face of the record or are arbitrary, oppressive or outright unlawful...

It was his submission that the decision in the cited authority covers all the seven complaints in the grounds of the application i.e. ultra vires, absence of rules, hence arbitrariness; outright illegality, oppressive and arbitrary decision that is not based on the law; these are expounded in the affidavit of Nebye ( the 1<sup>st</sup> applicant).

He went ahead to lay down the law relating to the bar course. He thus cited Sections 3 (1) (a), 4 (c), 1 (f); 32 (1) (2) of the Law Development Centre Act; Sections 3; 6A; 6C and 8 (9) (13) of the Advocates Act. He also cited Sections 14 and 16 of the Interpretation Act Cap 3 in conjunction with Section 6 of the Advocates Act.

As to whether the actions of the applicants or some of them is tenable; Mr. Kandebe contended that as shown at the beginning of this submission, LDC is a statutory body established by an Act of Parliament; its functions and duties are statutory and regulated by Law Council. Section 3 thereof requires that the respondent conducts courses of instruction:

***...to practice as attorneys in subjects which shall have been determined by Law Council under any Law in force...***

While section 4 (c) provides thus;

***...to conduct examinations and confer diplomas in accordance with any law in force or as may be required by Law Council.***

He thus submitted that no law has ever been made by Law Council or other lawful authority to provide that the applicants must pass all subjects offered by the respondent. Sec 3(1) (a) does not provide that all subjects must be passed; has the Law Council pronounced itself on this nor is there any subsidiary law under Sec. 4 (C) of Cap 132 to that effect. There is statutory provision to the effect that the examinations must be at a certain level of a measured pass in terms of marks. It is admitted by the respondent that by its own estimation or grading, the applicants are said to have passed majority of the subjects. Where there is no law as to the minimum number of subjects to be passed prescribed by any law, it would not be disputed that a student with majority subjects passed the course. In the instant case majority of the applicants passed at least 3 subjects out of five offered. The applicants attempted the examinations at least twice and each time the respondent declared on its notice board that they had failed the course. It is this alleged failure that they seek to challenge as the same is based on nonexistent rules. Mr Kandeebe was of the view that given the above analysis, the action is tenable.

On whether the applicants or any of them failed and were dismissed by the respondent; and if so, whether the said dismissal;

- i. Was lawful, fair and equitable.
- ii. Amounted to a denial of the applicants' right to education and to practice their profession.

It was communicated through the respondent's notice board that the applicants among other students who are not necessarily applicants had failed the course in accordance to the respondent's *rules*. The applicants however averred that the said rules do not exist. Learned counsel thus contended that since the respondent alleges that the applicants indeed failed, it has the burden to discharge this duty. To this end the respondent ought to state the law that specifies the marks to be obtained, the minimum pass; when and by whom the said law was made; whether the said Law meets the requirement in Section 32 (1) and (2) of the LDC Act and Sections 14 and 16 of the Interpretation Act Cap 3.

He further contended that during cross examination, Mrs. Werikhe admitted that at one time previously, passing the bar course was 40% per subject. It is not clear under what circumstances the same was passed to 50% and by whom. He contended that the Rules of passing the bar course must be in accordance with the law in force (section 4 of the LDC Act). There is neither a statutory legislation nor a publication in the gazette. He maintained that the rules are thus illegal,

he referred this court to Wade 6<sup>th</sup> Edition, pp 858-859 footnote 55 & 881 footnote 2; **R v Home Secretary exp. Zamir (1980) AC 930; Johnson v Sargant & Sons (1918) 1 KB 101.** He further cited **Simmonds v Newell (1953) 1 WLR 826 at 830** where Lord Goddard stated that *...it is certainly a very reasonable attitude....it is not desirable, in criminal matters, that people should be prosecuted for breaches of orders unless the orders can fairly be known to the public.*

Mr. Kandebe contended that the increase from 40 to 50 was not sanctioned and yet the majority of the applicants had not only passed majority of the subjects but had actually scored above 40%. Although the respondent had been asked to avail the applicants authentic results and/or answer sheets the same had already been destroyed as evidenced in the respondent's secretary's testimony; she only produced unsigned and uncertified sheets whose authenticity was not proved. It was his submission that in such instances, to declare a student as having failed the Bar Course without proof is not only dangerous but also scandalous; it is comparable to convicting an innocent man without trial. He thus invited this court to discard the so called consolidated mark sheet and declare that the respondent has failed to prove that the applicant or any of them failed.

As to whether the applicants were dismissed; Mr Kandebe contended that the applicants were not told that they would repeat the Course but that they could not sit further examination and thus had failed the course. The information that they could re-apply, contained in Werikhe's affidavit of 8<sup>th</sup> February, 2010, five months after commencement of another course, was an afterthought to be used to defeat this case, had such an opportunity been there, it would be contained in some regulation.

As to whether the dismissal was lawful, fair and equitable; learned counsel contended that there is no law to the effect that the course must be completed in 3 years and that even if the same is in existence, the applicants were dismissed before the expiry of three years. The three years would only expire on 24<sup>th</sup> September, 2009 and not 28<sup>th</sup> July, 2009 as stated by the respondent. The applicants could have been given exams before that expiry date as there is no law prohibiting this. He went ahead to submit that dismissal and repeating the course as an option is not equitable at all as this subjects the candidate to humiliation and double jeopardy. When repeating, one has to pay fresh fees, hence financial ruin to some of the young, unemployed candidates.

As to whether there are any rules for passing the Bar Course and if so, whether the said rules;

- i. Are ultra vires and unenforceable;
- ii. Include impugned three year rule;



iii. Were correctly applied against the applicants

The applicants contended in their application that there are no Rules at all for passing the Bar Course as required by law. Mr Kandebe stated that where an Act of Parliament imposes a duty on an authority, Committee or body created by such Act, the power to provide or prescribe for the same is exercised by making the rules or regulations or by whatever name called, the same must be published in the Uganda Gazette for them to be judicially noticed or to be deemed to have acquired the force of law. He cited a number of authorities among which included UPU v NCHE where Arach J found that standards and guidelines of the NCHE which were not published in the Gazette were unenforceable. He maintained that the power to make any rules/regulations in the instant case is a preserve of the Law Council as stipulated in sections 3 and 4 of the LDC Act, to do otherwise would be to usurp the powers of the Council. In the instant case the so called rules are illegal, ultra-vires; null and void as there is no scintilla of evidence that they were approved by the Attorney General as required by S.32 (1) and (2) of the LDC Act; he referred this court to the authority of Dr. Julius C. Enos v Makerere University M.A No. 381 of 2005 and Nathan Mafabi & Anor v Registrar of Co-operative Societies & Anor MA No.223. Furthermore, Mr. Kandebe contended that the alleged standing orders that were made by LDC fell short of the required procedure and the same too, are a nullity. He thus invited court to have the alleged Rules and Standing Orders quashed.

It was his contention that the LDC Management Committee is not like a University Council under the Universities' & Tertiary Institution Act which creates its own Rules (statute) as to grading of its degrees. This is so since LDC the standards of the Law Council in awarding Diplomas.

Counsel contended that the alleged 3 year rule even if it existed could not be correctly applied, as at the time the applicants were dismissed on 27/7/2009, the 3 years had not lapsed from the date of their admission on 24/09/2006. He further contended that the rule was also ambiguous as it did not specify whether it meant 3 calendar years; 3 academic years or 3 course years. He thus cited Roe v Russel (1928) 2 KB 138 where Lord Sargant stated that:-

*“...the whole legislation on this subject ...bears marks of having been passed in some haste...it is a patchwork legislation, has not been framed with any scientific accuracy of language and presents great difficulties of interpretation to the courts that have to give practicality to it..”.*

Mr. Kandebe while adopting the decision in the above authority was of the view that indeed the 3 year rule was very ambiguous and difficult to comprehend notwithstanding the fact that they are ultra vires the LDC Act, uncirculated and lack prior approval of the Attorney General. He cited the authority of Merkur Island Shipping Corp V Laughton & Ors (1983) 2 AC at 612

where Lord Diplock stated that absence of clarity is destructive of the rule of law; it is unfair for those who wish to preserve the rule of law, it encourages those who wish to undermine it.

Mr. Kandebe sought to paraphrase the issue that had been framed as, whether the respondent trained and examined the applicants undertaking the Bar Course, as provided by law, to, whether there were conducive conditions and facilities at the respondent's centre to train a prospective Advocate under S3(1) (a) of the LDC Act. He thus cited Sections 3(1)a and 4 (c). He contended that Mrs. Werikhe, the deponent of the respondent's affidavit is neither a lawyer nor has she ever taught any subject at LDC, as such she was not competent at all under O.19 R 3 of the CPR to depone a believable affidavit on standards or quality of professional legal education at LDC. He invited court to thus have her affidavit expunged from the record.

Counsel was also of the view that there is no subsidiary legislation that provides that diplomas shall be granted/conferred on a person who has passed all the exams; given the increase in numbers tenfold between 1980 and present, Mr Kandebe contended that the respondent is overwhelmed and this in turn affects the standard of the respondent. He invited court to answer this issue in the negative.

On the issue of remedies he reiterated the prayers in the application while for damages, counsel contended that the applicants are entitled to damages for the unjustified redundancy they have been subjected to. He invited court to award damages at a higher scale of shs 50 million per applicant plus interest at 21% from date of judgment till payment in full. Regarding costs for this application, learned counsel contended that the submissions made were not only overwhelming but also lengthy and involved a lot of research. He thus prayed that a certificate to charge instruction fees and costs on a higher scale is granted as required under the Taxation Rule.

In reply, Mr. Tibajuka opposed the applicants' consolidated applications. He also stated that the applicants had cunningly departed from the heading that appears in the joint scheduling memorandum as a result of consolidation; he thus invited court to maintain the said heading. It was also his contention that applications No.168 of 2009 (Musinguzi Kenneth & 7 others v LDC) and No. 170 of 2009 (Nuwagaba Winston Katungi & Anor v LDC) were not served to the respondent and were thus not consolidated with the rest of the applications, they do not therefore form part of the present proceedings.

Mr Tibajuka contended that the applicants' submissions were flippant and incessantly repetitive, an approach that could well be described as a fishing expedition. He cited instances where the

applicants dwelt on the respondents' Standing Orders in an effort to show that they are null and void although these were not in issue in the pleadings; the applicants further portrayed the Law Council as an inept institution yet the same is neither a party to the proceedings nor has it been availed an opportunity to defend itself in the circumstance.

The applicants' pleaded complaint in the motion is about the decision that they failed the Bar Course under the limitation imposed by the impugned Rules, which they contend are non-existent/invalid. However in their written submissions, they contended that the respondent had the burden to prove that they failed by producing the individual mark sheets of the examiners, a matter that clearly relates to the failure of individual subjects examined rather than the said limitations of the impugned rules. Mr. Tibaijuka was of the view that the applicants cannot tacitly acknowledge their failure and seek to complete their studies while at the same time challenging their failure. The respondent's only 'burden' would be to justify the impugned Rules, the applicability of those rules to the applicants and not the grades attained in each subject by the applicants.

As to whether the actions of the applicants are tenable; Mr. Tibaijuka had this to say;

Segawa Derrick, Kamugisha Edson and Kisekka Lawrence who were joined to Application No.135 of 2010 are strangers to the cause of action pleaded in the motion as none of them appears in annexure "B" which specifies the affected persons. He invited court to have the said names struck out with costs.

The applicants that were allowed to repeat the Bar Course in 2009/2010 are deemed to have approbated the respondent's decision that they had failed the Course, otherwise they would not have repeated the same. It is however unfortunate that they have instead purported to reprobate the very same decision by bringing the present proceedings to challenge it. Learned counsel was of the view that the actions of the said applicants is barred by common law principle, based on public policy, that bars a party from approbating and at the same time reprobating a particular decision or action. Approbation has the effect of extinguishing an existing right of action, the approbating party being held to have impliedly waived that right. (see **Ddegeya Trading Stores (U) Ltd v URA (1997) 3 KALR 108 and Habyene v AG (1996) 3 KALR 23**). It is on the common law principle of approbation that Mr. Tibaijuka invited this court to strike out the applicants whose right was lost by virtue of them accepting to repeat the course.

Mr Tibaijuka further contended that the applicants ought to be non- suited as the right being sought to be enforced is a private matter rather than a public right as admission and passing of the Bar Course is based on individual private basis. The applicants' prayer is to be reinstated so that they complete their studies and be graduated forthwith. This is tantamount to seeking a reversal of the respondent's decision that the applicants actually failed the Bar Course. To do this would be to go into the merits of the decision which is offensive to the rationale of judicial review.

Judicial review is not an appeal from a decision, rather, it is a review of the manner in which the decision was made; its purpose is not to ensure that the decision making body reaches a conclusion that is correct in the eyes of the court. The court limits itself to the decision made; otherwise, it would amount to usurping the powers of the decision making body. The court is thus not entitled to consider whether the impugned decision as opposed to the decision making process was fair and reasonable; and it cannot substitute its own decision or impose its own conditions, but it must leave this to the decision making body. Mr Tibaijuka cited a number of authorities for this preposition (e.g. see **YWCA & Ors V National Council for Higher Education & Anor Misc Cause No.579 of 2005**).

It was submitted by the applicants that the Rules for passing the Bar Course do not exist, and that if they do, then they are invalid. There is however no prayer in any of the applications to have the said rules quashed. Mr. Tibaijuka thus contended that it would not be proper to quash the impugned rules when the respondent's statutory supervisor i.e. the Law Council's said committee has not been pleaded and neither was the alleged invalidity of the rules put to the Chairperson when he appeared before court. Learned counsel thus invited court to decline to intervene in the matter brought before it by the applicants.

Counsel further contended that the applicants were trapped by their own ambivalence; having spurned the option to repeat the whole Course, the applicants pleaded quest is for an order of mandamus to reinstate them on the Bar Course so that they complete their studies by limitlessly sitting supplementary examinations until all the failed subjects are eventually passed, no matter how many years this may take. It is not acceptable for the applicants herein to equivocate and ambivalently regard the impugned rules as being valid in respect of favourable assessments and examinations results as being invalid as regards their failure of the Bar Course. The arguments that the impugned rules are invalid creates an insuperable barricade for the applicants, it precludes them from claiming that they have ever validly pursued any part of the Bar Course or had any valid assessment or examinations therein; the only available option would be to repeat the entire course which option the applicants are totally averse to.

Although the applicants seek to be reinstated there is no law/rule making provision to this end apart from the impugned rules, it would thus be illogical, unreasonable and untenable to reinstate them as they claim under the same rules that they have rubbished.

Learned counsel for the respondent contended that it is settled that the legal relationship between an educational institution and her students is a contractual one. (see **Herring v Templeman & Ors (1973) 3 All ER 569** and **Judicial Control of Universities (1969) 85 LQR 468-472**). Under this special type of contract, a student is bound by the terms on which the educational institution admitted them or offers the course and cannot insist on remaining in the institution on their own terms. (See **Dimanche Sharon & Ors v Makerere University Cons. Appeal No.2 of 2004**).

Additionally the contractual relationship between the parties is buttressed by an ‘undertaking by students on admission’ where among other provisions, the students (applicants inclusive) undertook to study diligently and comply with all the course regulations as stipulated by the Centre from time to time. The course regulations that the applicants undertook to comply with include the impugned rules. The claim by the applicants therefore that these rules are nonexistent is an insincere after thought intended to breach the said undertaking. He invited this court to consider the decision in **University of Ceylon v Fernando (1960) 1 All ER 631** and **Dimanche (supra)** when the court was deliberating on the issue of the respondent’s Freshers’ joining instruction which were not in a form of a gazetted statutory instrument, Twinomujuni JA opined;

***“If I admit you to live in my house under specified conditions and you accept to do so, you will be held to be out of order if you subsequently attempt to replace the conditions with those that suit your own peculiarities...”***

And Kitumba JA (as she then was);

***“The petitioners freely chose to go to Makerere University and therefore have to abide by the conditions. The right to education provided by Article 30 of the Constitution does not in any way mean the right to attend the respondent university at the students’ own terms...”***

Learned counsel thus contended that the impugned rules which are administrative and internal regulations incorporated in the respondent’s syllabus are contractually binding on the applicants. By purporting to challenge them, the applicants are in effect attempting to replace the conditions under which they were admitted with those which suit their peculiarities. He maintained that the applicants are bound by the conditions under which they were admitted including the impugned rules and their constitutional right to education does not in any way mean the right to attend the respondent’s institution on their own terms. He invited court to find the 1<sup>st</sup> issue in favour of the respondent.

Submitting on the 2<sup>nd</sup> and 3<sup>rd</sup> issues, Mr Tibaijuka had this to say;

The applicants' pleaded case is not whether they passed or failed individual subjects, but rather their failure of the Bar Course as a result of the rules which limit its duration. The burden is on the applicant to prove that they were dismissed and not on the respondent (sections 101-103 of the Evidence Act). They have however failed to discharge this burden; they admittedly pursued the Bar Course, sat for examinations and eventual supplementary examinations, failure of which culminated in their failure of the course; this is what they have the effrontery to call a dismissal. Failure of the course results in the lapsing of a pre-existing student status, the unsuccessful individual ceases to be a student and is incapable of being dismissed but has the option to repeat the course. The applicants' sentimental approach that favours passing a majority of the subjects offered by the respondent as opposed to all the subjects is not only illogical but also untenable and bizarre. The applicants can only graduate from the respondent's institution on passing all the subjects as specified in the syllabus within a prescribed period. Mr. Tibaijuka invited court to find that the applicants were never dismissed but severally failed the course when their student status lapsed.

As to the existence of the impugned rules, these are embedded in the Bar Course Syllabus. Expressly included in these rules is the three year rule that limits the number of supplementary examinations (see rules 7.5.1 and 9 (c) and (d)). From the onset, the impugned rules were sufficiently brought to the attention of the applicants in three different ways (i.e the prospectus which was available in the respondent's bookshop, the applicants' commitment to the *undertaking by students on admission* and the Director's address to the applicants). Learned counsel thus maintained that as a matter of fact, the rules were in existence and the applicants were aware of this.

Replying to the applicants' contention that the impugned rules ought to have been made in form of Standing Orders and approved by the Attorney General; Mr. Tibaijuka opined that this was misleading as the applicants erroneously assumed that the impugned rules were made under Section 32 of the LDC Act. He maintained that the specific academic functions of the respondent are not canvassed by Sections 8 and 32 rather by Sections 3 and 4 of the said Act. The Act does not require provisions for the respondent's academic to be made by way of Standing Orders as such no approval of the Attorney General is required in respect of regulations relating to academic functions.

Conversely, the role of the Law Council goes as far as approving courses of study and prescribing the professional requirements for admission, it does not extend to the actual

organisation and conduct of the course for this is a preserve of the respondent under Section 3 (1) (a).

Citing Sections 4 (c) and 6 C (1) (b) of the Advocates Act and Section 4 (c) of the LDC Act, learned counsel contended that the role of the respondent under the LDC Act is complementary to that of the law Council. He thus submitted that the applicants' comparison of a secondary school Board of Governors with UNEB was very inapposite. The Board does not examine A-Level students unlike the respondent who both trains and examines the Bar Course students. He further contended that although there is no law that expressly enjoins the respondent to make the syllabus and the rules in issue; Section 3 (1) (a) confers general power to organise and conduct examinations and confer diplomas under section 4(c). It is unfortunate that the ambit of *general power* is not defined.

Learned counsel further submitted that the opening part of Section 4 of the LDC Act is instructive as it gives the respondent wide powers to do all such things calculated to facilitate, or are conducive in carrying out its functions. It is under these wide powers that the syllabus and the impugned rules were made by the respondent. That Section 23 of the Interpretation Act read together with Sections 3(1) (a) and 4 (c) gives the spring board to the respondent to make the rules to facilitate the better carrying out of the respondent's academic functions. Additionally, he cited the authority of **Meade v London Borough of Haringey (1979) 2 All ER 1016** for the proposition that;

***“If a statute imposes a duty on a public authority, or entrusts it with a power, to do this or that in public interest, but expresses it in general terms so that it leaves it open to the public authority to do it in one or several ways or by one of the several means, then it is for the public authority to determine the particular way or the particular means by which the performance of the statute can be fulfilled. If it honestly so determines, by a decision which is not entirely unreasonable, its action is then intra vires and the courts will not interfere with... but if the public authority flies in the face of the statute, by doing something which the statute expressly prohibits, or by failing to do something which the statute expressly enjoins, or otherwise so conducts itself, by omission or commission, as to frustrate or hinder the policy and objects of the Act, then it is doing what it ought not to do- it is going outside its jurisdiction – it is acting ultra vires...”***

On the facts of the present applications, the respondent was right to determine the particular way or means by which her educational functions under the LDC Act could best be fulfilled. This she did by administratively making the Bar Course syllabus and its attendant rules that would enable her promote performance of the LDC Act for the effective grooming of prospective legal practitioners.

Before reaching a decision on the question whether a regulation is intra vires, court is bound to examine the nature, objects and scheme of the piece of legislation as a whole, and in light of that examination, consider what exactly the area over which powers are given by the section under which the competent authority is purporting to act. Learned counsel invited court to consider the decision in **Commissioner for Customs and Excise v Cure & Deely Ltd (1962) 1 QB 342 at page 367** as approved in **His Worship Aggrey Bwire v Attorney General & Anor SCCA No 8 of 2010 at page 15.**

Learned counsel further contended that the applicants' contention that the impugned rules are invalid because they have not been made in the form of a statutory instrument is published in the gazette and the lack of the language associated with legal instruments is not erroneous but also untenable. This is because of the provisions of Sections 3 (1)(a) (2) and 4(c) of the LDC Act. Had it been intended that these functions should take the form of a statutory instrument, the Act would have expressly stated so, as it did in Section 3 (2). Additionally there is no syllabus of any school, college or university in Uganda that has ever been made by way of delegated Legislation in the form of a Statutory Instrument.

The respondent's act was purely administrative and the said rules are merely rules of practice intended to guide those entrusted with the administration of Bar Course matters; to say the least, they are not rules in nature of delegated authority so as to amount to strict rules of law. In **National Insurance Corporation v National Social Security funds (2004) KALR 646,** Musoke Kibuuka J stressed the fact that not every duty imposed upon a Minister by law is exercisable by the issuance of a Statutory Instrument. Mr. Tibaijuka thus contended that rules may be made under an Act of Parliament and yet regarded as validly administrative rather than legislative. Non publication of the said rules in the gazette does not make them invalid as this is directory rather than a mandatory requirement see; **Catholic Diocese of Moshi v Attorney General (2000) 1 EA 25.** With the above, learned counsel maintained that the rules were in existence and the same are valid having come in force through the general power conferred on the respondent as discussed above.

Learned counsel further submitted that the argument that the applicants have been denied the right to education and to practice their profession is untenable, as chance was given to them to pursue the same. Better still, the applicants have a chance to repeat the course so as to be able to practice their profession; as such there is no infringement of any of the named rights. I agree with learned counsel on this point.



On the three year and the supplementary examination rule, it is contended that the normal duration of the Bar Course is one year and those that do not pass all the subjects at 1<sup>st</sup> instance are given an opportunity to do supplementary examination. As a policy measure to regulate the duration of the course, a maximum period of 3 years was devised by the respondent within which the course would be reasonably expected to be completed, short of which the affected person would be deemed to have failed the course. The rule is also to the effect that whether an unsuccessful student has or has not sat supplementary examinations, the three year rule applies. The rationale of this rule was to expand the intake for the Bar Course which entailed unclogging the respondent's system by exercising some form of control over students who might continuously fail to pass their examinations. The respondent also intended to maintain the integrity of the respondent's awards by avoiding a spectre of having fresh graduates with outdated knowledge of the law in subjects many years earlier. Learned counsel maintained that the said policy objectives that led to the three year rule are reasonable and fall squarely within the respondent's mandate; Article 30 and Directive principle XVIII of the Constitution.

Citing the proposition laid out in Njuguna (supra) which is to the effect that, in discharging the mandate and policy as per the Act and the supporting Regulation it must be appreciated that the council for Legal Education is the best judge of merit pertaining to academic standards and not the courts. Parliament clearly vests the power of formulating the policy of training and examining of Advocates on the council of legal education and it would be wrong in the view of this court to intervene with the merits of the decision by council on legal education. Council of Legal Education is Parliament's delegate; the other reason why court declined to intervene is one of principle in that in academic matters involving issues of policy the courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by Statute or Legislation.

Mr. Tibaijuka thus submitted that the respondent's three year rule compares favourably with the rules applicable to other institutions of higher learning for instance, Reg. 5 of the 1998 Uganda Management Institute's Assessment and Examination Regulations, and the Regulations Regarding Cheating and Plagiarism.

Learned counsel also maintained that since the applicants were not dismissed by the respondent but merely failed the Bar Course, the question of whether the alleged dismissal was lawful does not arise.

As regards the additional issue raised by the applicant, Mr. Tibaijuka submitted that since by their application, the applicants sought reinstatement and to retain the benefits of all favourable assessments and examination results so as to simply complete their studies by pursuing only the failed subjects, they in effect admitted that they were indeed trained and examined as required by law.

Further, the applicants' complaint about the manner in which they are taught, standards, facilities and quality is a matter whose redress lies elsewhere, but not court.

As to whether the applicants are entitled to the remedies prayed for; Mr. Tibaijuka had this to say;

The applicants' desire for a partial certificate covering the subjects passed is not only untenable but also falls outside the prayers in the Notice of Motion/pleading. For the remedy of certiorari, there is no decision dismissing the applicants that is capable of being quashed. It neither makes sense to quash the impugned decision when no order is sought to quash the impugned rules, on which that decision is based.

Courts usually refuse to exercise discretion to grant a remedy in judicial review proceedings in the face of futility. In **Sanghani Investment Ltd v O/C Nairobi Remand and Allocation Prison (2007)1 EA 354** it was held that an impugned notice may be irregular or unlawful and an order of certiorari deemed necessary, but it is not in every case that the court will grant an order of judicial review even though it is deserved. The order granted should be able to serve the purpose for which it is granted. Mr. Tibaijuka thus invited court to disallow this remedy.

Touching on the remedy of mandamus, learned counsel contended that the applicants are not entitled to this remedy aimed at their reinstatement as students in the respondent's institution. They are wrongly invoking the prerogative order to determine a right, instead of seeking to enforce an already existing right. The applicants have not got any order for reinstatement; as such there is nothing that they are enforcing. Mr. Tibaijuka citing the case of **Opoloto V Attorney General (1969) EA 631** submitted that the declaration being sought by the applicants was in vain.

On the remedy of general damages, learned counsel contended that any injury suffered by the applicants was a result of their failure of the Bar Course which cannot be attributed to the respondent. He therefore prayed that the applicants' prayer for general damages and interest be rejected by this court accordingly. He thus invited court to dismiss the application with costs.

In rejoinder, Mr. Kandebe maintained that the heading of the application was adopted as it appeared on the cause list (i.e. Nebye Steven Rutaro & Ors V the Law Development Centre).

Responding to paragraphs 16- 19 of the respondent's submission; Mr Kandebe contended that repetition of the course by the applicants does not validate the respondent's illegal rules in issue. He thus cited the authority of **Makula International v His Eminence Cardinal Emmanuel Wamala & Anor (1982) HCB 11** for the proposition that illegality once brought to the attention of court overrides all questions of pleadings including all admissions. He submitted that the respondent's argument of approbation and reprobation is a misplaced one.

It was his contention that the relationship between the applicant and the respondent is statutory in nature and not contractual as alleged by Mr. Tibaijuka since anyone intending to practice as an advocate must fulfil the statutory requirements.

Conclusively, he reiterated the arguments in his earlier submission.

The thrust of this application rotates around rules that were made by the respondent institution to govern the administration of examinations for the grant of Post Graduate Diploma (Bar Course). It is these rules that are being disputed by the applicants in one way or another.

Before in I delve into the merits of the application, I propose to outline the scope of judicial review.

According to **Black's Law Dictionary 8<sup>th</sup> Edition, page 864**; judicial review is the court's power to review the actions of other branches or levels of government especially the court's power to invalidate legislative and executive actions as being unconstitutional.

In **Semwo Construction Company Vs Rukungiri District Local Government HCMC No. 30 of 2010** where Justice Yorokamu Bamwine stated that;

***“essentially judicial review involves an assessment of the manner in which a decision is made, it is not an appeal and the jurisdiction is exercised in a supervisory manner, not to vindicate rights as such, but to ensure that public powers are exercised in accordance with the basic standards of legality, fairness and rationality. In applications for judicial review, the orders be they for declaration, mandamus, certiorari or prohibition are discretionary in nature and that in exercising that discretion with respect to the prerogative orders, the court must act judicially and according to settled principles. (see; John Jet Tumwebaze v Makerere University Council & 3 others Civil Application NO 353 of 2005.”***

The application in the instant case is premised on the ground that the respondent made a decision depending on non-existent or unknown rules of passing the Bar Course.

The purpose and effect of the said rules as clearly indicated by Mr. Tibaijuka was to limit the duration that a student would be required to finish the course. The respondent gave the applicants an alternative of repeating the subjects that they had failed. The applicants were given option but were never denied a right to practice their profession and right to education. They only did not meet the requirements to qualify to practice.

It is also correct as observed by Mr. Tibaijuka that the rules were made under the general powers conferred on the respondent for its internal management and smooth operation, as such I am inclined to find that these rules are not inconsistent with the LDC Act. The applicants were thus bound by the rules.

I am persuaded by the opinion of Twinomujuni JA in the case of Dimanche where he stated;

***“If I admit you to live in my house under specified conditions and you accept to do so, you will be held to be out of order if you subsequently attempt to replace the conditions with those that suit your own peculiarities...”***

From the evidence on record, the respondent took measures to accommodate the applicants’ concern by allowing them to do supplementary examinations in the subjects they had failed and those who still failed the supplementary examination on the 2<sup>nd</sup> attempt were at liberty of repeating the course. In effect their right to education and the right to practice their profession were not in any way denied by the respondent.

I wish to observe that some of the issues raised by the applicants are beyond the comprehension of this court. First of all this court does not comprehend as to how a student admitted to do a one year course as I understand the Diploma in Legal Practice to be, spends more than a year doing the course, is allowed more time beyond the one year to do supplementary papers and on failure to satisfy the requirements of the Respondent for the Award of the Diploma attacks the respondent claiming that he/she has not been afforded the right to practice his/her chosen profession. What is the respondent required to do beyond planning and managing the course which was done in this case.

Secondly there is an issue regarding whether there are rules regarding the number of subjects a student is supposed to pass. While it may be arguable that a student who passes all his papers, may not necessarily be a better lawyer than the one who fails one or two papers for as long as that is the measure established by the Respondent for the Award of the Diploma in Legal Practice, every student who gets admitted at the LDC must meet with the requirement that all the exam papers have to be passed. Otherwise I do not see how else the qualifications for the Diploma would be determined. Perhaps by way of reform the Law Council may in future consider subjecting students who fail one or two papers to a period of pupillage in addition to the duration of the course at LDC so that after a period of pupillage a student is assessed further for his/her suitability to be enrolled as an advocate instead of relying entirely on the academic performance of the aspiring advocate. But as of now the requirements set by the respondent that apply to all entrants for the course are part of the measures to regulate the course and unless they are satisfied, the applicant should not be heard to say that the requirement is irregular especially when it is raised when they have tried the course and failed.

Thirdly is the issue as to whether the pass mark of 50% and not 40% is applicable. After going through the course where the pass mark is 50% the applicants should again not be heard to question the pass mark of 50% set by the Respondent because the Respondent is entitled to regulate the course and set the mark so long as it is known to the students. In this case the applicants had been doing exams some of which they passed on the basis of the 50% mark that applied to all including those who repeated some examinations and I do not see how a different standard can be set for the applicants.

The last issue is as whether the three year rule refers to an Academic year, Calender year or course year. This question should have been put to the Secretary of the Respondent who was cross examined on her affidavit. All I have to state is that unless the course starts in January and ends in December I cannot see how the reference to a three year rule would apply to a Calender year and I do not appreciate the difference between an Academic year or Course year.

Regarding the issue of remedies available, to accede to the applicants' prayers and granting the remedies being sought would impose a very heavy burden on LDC given the available resources and in the end this would make operation and administration of the Centre difficult.

Given the nature of the application, I decline to make any orders as to costs.

**Eldad Mwangusya**

**J U D G E**

**05.04.2013**

Delivered by the Deputy Registrar this ..5<sup>th</sup>.. day of..**April**.. 2013.

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**Asimwe Tadeo**

**DEPUTY REGISTRAR**

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