

Approved for tabling in the House.

REPUBLIC OF KENYA



Bat SNA
12/10/2021

THE NATIONAL ASSEMBLY

PARLIAMENT
OF KENYA
LIBRARY


TWELFTH PARLIAMENT – FIFTH SESSION – 2021

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT

ON THE CONSIDERATION OF THE PETITION REGARDING AMENDMENT OF
THE ADVOCATES ACT, CHAPTER 16, TO ALLOW ADMISSION OF LAW
PRACTITIONERS FROM THE REPUBLICS OF RWANDA AND BURUNDI TO THE
ROLL OF ADVOCATES IN KENYA

CLERK'S CHAMBERS
DIRECTORATE OF DEPARTMENTAL COMMITTEE SERVICES
PARLIAMENT BUILDINGS
NAIROBI

 THE NATIONAL ASSEMBLY PARLIAMENT BUILDINGS	
DATE: 12 OCT 2021	
DAY: Tuesday	
TABLED BY:	Chairperson, JAC Hon. Muturi
CLERK-AT THE-TABLE:	A. Aaremba Q. Kampanji

OCTOBER 2021

RECEIVED
MAY 15 1964
U.S. DEPARTMENT OF
HEALTH, EDUCATION &
WELFARE

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
BUREAU OF COMMUNITY HEALTH SERVICES
COMMUNITY HEALTH CENTER
1000 ...
WASHINGTON, D.C. 20001

RECEIVED
MAY 15 1964
U.S. DEPARTMENT OF
HEALTH, EDUCATION &
WELFARE

Contents

LIST OF ANNEXURES	3
CHAIRPERSON’S FOREWORD	4
CHAPTER ONE	5
1.0 PREFACE	5
1.1 Mandate of the Committee	5
1.2 Committee Membership	6
Chairperson	6
Hon. Clement Muturi Kigano, M.P.	6
Hon. Robert Gichimu Githinji, M.P.	6
1.3 Committee Secretariat	7
CHAPTER TWO	8
2.0 CONSIDERATION OF THE PETITION BY THE COMMITTEE.....	8
2.1 Submissions by the Petitioners.....	8
2.4 Submissions by the Attorney General and Department Of Justice	16
CHAPTER THREE.....	17
3.0 COMMITTEE’S OBSERVATIONS	17
CHAPTER FOUR.....	20
4.0 COMMITTEE RECOMMENDATION.....	20

LIST OF ANNEXURES

Annexure 1: Minutes of Committee sittings on the consideration of the Petition

Annexure 2: Signed list of Members who attended the sitting that considered and adopted the report.

Annexure 3: Submissions on the Petition

CHAIRPERSON'S FOREWORD

The petition was conveyed to the house on Wednesday, June, 9th, 2021. This is in accordance with the provisions of Standing Order No. 225 (2) (a). The Petition relates to the amendment of the Advocates Act, Chapter 16, Laws of Kenya, to allow the admission of law practitioners from the Republics of Rwanda and Burundi to the roll of advocates in Kenya. The Petition was referred to the Departmental Committee on Justice and Legal Affairs for consideration and thereafter report to the House.

In considering the Petition, the Committee, during its sitting, held on Wednesday 7th July, 2021 met with three of the thirteen petitioners namely; Mr. Francis Kimani Kanyora, Mr. Javan Kiche and Mr. Chemao Hillary Barasa. The meeting was aimed at inquiring into the issues raised in the Petition. The Committee held another meeting on 21st July, 2021 with the representatives of the Office of the Attorney General and Department of Justice, the Chief Registrar of the Judiciary (CRJ) and the Chief Executive Officer of the Council for Legal Education (CLE) for their comments on the Petition.

May I take this opportunity to express gratitude to Committee Members for their resilience and devotion to duty which made the consideration of the Bill successful. May I also appreciate the Speaker and Clerk of National Assembly for always providing guidance and direction to Committees in the discharge of their mandate. Finally, I commend the secretariat for exemplary performance in providing technical and logistical support to the Committee.

On behalf of the Committee, and pursuant to Standing Order, 227 it is my duty to table before House the Report of the Committee on the petition.

Hon. Muturi Kigano, M.P.

Chairperson, Departmental Committee on Justice and Legal Affairs

CHAPTER ONE

1.0 PREFACE

1.1 Mandate of the Committee

1. The Departmental Committee on Justice and Legal Affairs derives its mandate from Standing Order No. 216(5) which provides for the functions of Departmental Committees as follows-
 - a) Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
 - b) Study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
 - c) Study and review all legislation referred to it;
 - d) Study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;
 - e) Investigate and enquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;
 - f) Vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments)
 - g) Examine treaties, agreements and conventions;
 - h) Make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
 - i) Consider reports of Commissions and Independent Offices submitted to the House pursuant to provisions of Article 254 of the Constitution; and
 - j) Examine any questions raised by Members on a matter within its mandate.
2. The Second Schedule of the Standing Orders on Departmental Committees further outlines the subjects of the Committee as follows-
 - a. Constitutional affairs;
 - b. The administration of law and Justice
 - c. The Judiciary;
 - d. Public prosecutions;
 - e. Elections;
 - f. Ethics, integrity and anti-corruption; and
 - g. Human rights.

1.2 Committee Membership

3. The Committee was constituted on Thursday, 14th December, 2017 and comprises the following Honourable Members-

Chairperson

Hon. Clement Muturi Kigano, M.P.
Kangema Constituency

Jubilee Party

Vice Chairperson

Hon. Francis Tom Kajwang', M.P.
Ruaraka Constituency

Orange Democratic Movement (ODM)

Hon. Emmanuel Wangwe, M.P.
Navakholo Constituency

Jubilee Party

Hon. John Olago Aluoch, M.P.
Kisumu West Constituency

FORD-Kenya

Hon. Roselinda SoipanTuya, M.P.
Narok County

Jubilee Party

Hon. W. Kamoti Mwamkale, M.P.
Rabai Constituency

Orange Democratic Movement (ODM)

Hon. Jennifer Shamalla, M.P.
Nominated MP

Jubilee Party

Hon. John Munene Wambugu, M.P.
Kirinyaga Central

Jubilee Party

Hon. Anthony Githiaka Kiai, M.P.
Mukurueni Constituency

Jubilee Party

Hon. John Kiarie Waweru, M.P.
Dagoretti South Constituency

Jubilee Party

Hon. Robert Gichimu Githinji, M.P.
Gichugu Constituency

Jubilee Party

Hon. Junet Sheikh Nuh Mohamed, M.P.
Suna East Constituency

Orange Democratic Movement (ODM)

Hon. George Peter Kaluma, M.P.
Homa Bay Town Constituency

Orange Democratic Movement (ODM)

Hon. Josephine Naisula Lesuuda, M.P.
Samburu West Constituency

KANU-Kenya

Hon. Zuleikha Hassan, M.P.
Kwale County

Orange Democratic Movement (ODM)

Hon. Adan Haji Yussuf, M.P.
Mandera West Constituency

Economic Freedom Party (EFP)

Hon. George Gitonga Murugara, M.P.
Tharaka Constituency

Democratic Party (DP)

Hon. Japheth Mutai, M.P.
Bureti Constituency

Jubilee Party

Hon. Anthony Oluoch, M.P.
Mathare Constituency

Orange Democratic Movement (ODM)

1.3 Committee Secretariat

4. The Committee secretariat comprises the following staff-

Mr. Abenayo Wasike
Principal Clerk Assistant
Lead Clerk

Mr. Denis Abisai
Deputy Director, Legal Services

Ms. Halima Hussein
Clerk Assistant II

Ms. Emma Essendi
Legal Counsel I

Dr. Donald Manyala
Research Officer II

Mr. Omar Abdirahim
Fiscal Analyst II

Ms. Roselyne Ndegi
Serjeant-at-Arms I

Mr. Joseph Okongo
Media Liaison Officer

5. Minutes of sittings of the Committee on the consideration of the Petition are attached to this report as **annexure 1**.

CHAPTER TWO

2.0 CONSIDERATION OF THE PETITION BY THE COMMITTEE

6. The Committee commenced its consideration of the Petition by meeting with the Petitioners on 7th July, 2021. During the meeting, written and oral evidence was adduced as noted hereunder:-

2.1 Submissions by the Petitioners

7. In their petition dated 8th March, 2021 and presented to the National Assembly by Mr. Njenga Mwaniki George and twelve others, the petitioners sought to draw the attention of the House to the following;
 - i) THAT, the petitioners are citizens of Kenya and are currently practicing advocates of the Rwanda Bar Association (RBA) and are also Members of East African Law Society (EALS) within the EAC Treaty.
 - ii) THAT, it is in the public interest that they lodged the petition following the **judgment** delivered by the Court of Appeal, vide **Appeal No. 96 of 2014 (Law Society of Kenya vs The Attorney General & 2 Others)** on 27th September, 2019, whereby the sections of the **Statute Law (Miscellaneous Amendments) Act, 2012 that included Rwanda and Burundi** within the provisions of Sections 12 and 13 of the Advocates Act were *struck down* by the Court of Appeal citing lack of public participation and the ongoing reform process.
 - iii) The Constitution of Kenya, 2010, iii) reposes all sovereign authority in the People of Kenya;
 - iv) The People of Kenya have delegated legislative authority to Parliament as the representatives of the People;
 - v) The Petitioners appreciate the work Parliament has done in passing laws in compliance with the dictates of the Constitution;
 - vi) Any treaty or Convention ratified by Kenya shall form part of the law of Kenya as provided for in the Constitution.
 - vii) In 2012, the Statute Law (Miscellaneous Amendments) Act of 2012 was enacted by the Parliament of Kenya. The amendments in the Act included amendments to the Advocates Act, Cap. 16, Laws of Kenya whereby persons admitted as advocates in Rwanda and Burundi were allowed to be admitted as Advocates of the High Court of Kenya pursuant to Sections 12(a) and 13(1)(d) of the Advocates Act and in conformity with Article 2(6) of the Constitution.
 - viii) The Petitioners are affected and concerned that the amendments tabled by them through the Statute (Miscellaneous Amendment) Act of 2012 was in the spirit of integration in EAC on movement of services.

- ix) The petitioners stated that they are aware that Parliament can fast track the inclusion of Rwanda and Burundi in the **Advocates Act Cap 16** so as to enable the Hon. Chief Justice to swear and enroll the Practitioners from Rwanda and Burundi to the roll of Advocates of the High Court of Kenya without any form of biasness and blatant discrimination.
- x) Some of the petitioners were on 4th December 2019 barred by the Hon. Chief Justice of the Republic of Kenya from being enrolled as Advocates of the High Court of Kenya despite being qualified Advocates of the High court of Rwanda, a Partner state with EAC.
- xi) The Hon. Chief Justice of the Republic of Kenya had previously admitted practicing Advocates from the Republic of Rwanda to the roll of advocates of High Court of Kenya.
- xii) The Hon. Chief Justice of the Republic of Kenya has continued to enroll practicing Advocates from other Partner member states of E.A.C to the roll of Advocates of the High Court of Kenya which acts and actions not only discriminates practicing advocates from Rwanda and Burundi but also offends the E.A.C Treaty duly ratified and domesticated by Kenya.
- xiii) The various amendments in the Statute (Miscellaneous Amendment) Act, of 2012 which had included Rwanda and Burundi were alive to the realization of the interests and expectations of diverse Kenyans scattered in the EAC region. The petitioners further submitted that the letter, purpose and spirit of the Constitution and EAC Treaty had been strongly pronounced by the Kenyan Constitutional Court vide **Petition No. 69 of 2018** where the Hon Judge held that *“once she was allowed to practice in Rwanda, she became fit to practice in Kenya. Her admission fulfills the requirement for standardization of services, including legal services within the East African Community”*;
- xiv) Some of the Petitioners have on several occasions engaged the Law Society of Kenya, the Honorable Attorney General of Kenya and the Minister in charge of the E.A.C in an effort to remedy the situation but their efforts had borne no fruits so far.
- xv) One of the Petitioners at one point having exhausted all necessary avenues, filed a **Constitutional and Human Rights petition on Judicial Review Petition No. 4 of 2020 at Nakuru High Court**, which has since been concluded and the Presiding Judge directed that they engage Parliament for re- enactment of the repealed sections.

8. The Petitioners prayed that;

- i) The Petition be considered owing to the urgency of the matter factoring in Covid-19 pandemic’s impact on the petitioners lives, academics, careers and right to

work.

- ii) The House proceeds to *initiate and fast track the re-enactment of Section 13(1) (d) of the Advocates Act, Chapter 16, to reinstate Rwanda and Burundi with equal status with Tanzania and Uganda, as both countries are member states of East Africa community (EAC) breathing life into the Constitution and the Bill of Rights;*
- iii) Parliament focuses its energy with a view of strengthening the realization of the economic and socio-cultural rights now enshrined in the Constitution to enable the petitioners to provide for their families, parents/guardians and live befitting life by investing in their education and legal careers.

2.2 Submission by the Chief Registrar of the Judiciary

9. Further to oral submissions during the Committee sitting on 21st July, 2021, the CRJ made written submissions to the Committee that;

- i) In accordance with the Advocates Act, the Chief Registrar receives and processes petitions from persons seeking admission to the Kenyan Bar before submitting them for hearing before the Chief Justice. In their encounters with persons seeking admission, they have noted numerous areas that are due for reform and have offered some proposals for resolving these issues.

Qualifications for admission to practice law in Kenya

- ii) The qualifications for admission to practice law in Kenya are laid out in sections 12 and 13 of the Advocates Act. Section 12 provides that one is qualified if she or he is a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania and has met the educational qualifications in section 13. Uganda and Tanzania were introduced via an amendment in 2002, while Rwanda and Burundi were added via an amendment in 2012.
- iii) Section 13 of the Advocates Act then stipulates the educational requirements for admission. Unfortunately, this section is not the epitome of elegant draftsmanship, leading to numerous court cases against the Kenya School of Law, the Council of Legal Education, and – in some instances – the Chief Justice and the Chief Registrar of the Judiciary. The Petition is timely as it now presents Parliament with the perfect opportunity to re-examine the law with a view to bringing more clarity on the qualifications for admission to practice law in Kenya with regard to nationality and academic qualifications.
- iv) As stated in the Petition, the Court of Appeal struck out the amendment that introduced Rwanda and Burundi in response to a case lodged by the Law Society of Kenya which complained that the amendments were passed without public participation.
- v) A plain reading of Section 13 of the Advocates Act is that one who is an Advocate of the High Court of Uganda, the High Court of Rwanda, the High

Court of Burundi or the High Court of Tanzania is automatically qualified to be admitted to the Kenyan Bar. The High Court has read this section to mean that there is no room to examine the secondary school grades of persons who have been admitted to practice law in these countries. The assumption is that their university entry is governed by the law in the respective state and once those countries have deemed them qualified to study and practice law, they also qualify to practice law in Kenya by virtue of Section 13.

- vi) It is apparent that the objective of Parliament was to allow the free movement of legal professionals within the EAC in accordance with the EAC Treaty. If that be the case, the law should be amended so that all EAC Member States are treated equally. This will accord with the recent decision of the High Court in *Steve Isaac Kawai & 2 others v Council of Legal Education & 2 others [2021] eKLR* where it was held that it was discriminatory for Kenya to allow applicants from Uganda and Tanzania to be admitted to the Kenyan Bar on the strength of their membership in the EAC when citizens of South Sudan are not accorded the same privilege yet it is also a member of the EAC.
- vii) In the meantime, concerns have been raised by other stakeholders due to the lack of uniformity in the qualifications for admission to study the law degree and to join the respective bars of the EAC Member States. As a result of this, Kenyan students who may have missed out on admission to study law in Kenyan Universities seek admission in universities in the region then proceed to join the bar of the other member states before returning to petition to join the Kenyan bar on the strength of their admission in another EAC member state. This is the predicament that some of the Petitioners have found themselves in.
- viii) If the EAC is truly one economic zone, then Kenyans should be at liberty to pursue higher education in any member state and those who take this route should not be subjected to any differential treatment from citizens of those member states who qualify to practice law in their states before seeking admission to practice law in Kenya. The Judiciary therefore supports an amendment to the Advocates Act to give the same benefits to all EAC States.
- ix) That perhaps what is needed is;
 - (a) a more robust mechanism for ensuring uniformity in the regulation of legal education across the region so that the entry requirements and the quality standards observed by legal education providers in the region are comparable and satisfactory to Kenyan authorities, and
 - (b) reciprocal mechanisms for ensuring Kenyan lawyers enjoy the same benefits in other EAC Member States.
- x) The challenges highlighted above are not limited to Kenyans who study in other EAC countries before returning to apply for admission to KSL, or directly to the bar having been admitted to practice in those other countries. Kenyans who have received their law degrees from local universities have

also been denied admission at the Kenya School of Law on the grounds that their KCSE grades fall below the minimum statutory requirements for studying law at degree level. This has resulted in numerous cases against KSL and CLE in recent years.

- xi) One such case is *Republic v Kenya School of Law & another Ex parte Otene Richard Akomo & 41 others* where the High Court blamed the multiplicity of suits on the variance between the KSL Act and the Legal Education Act on the admission requirements, and conflicting interpretations of Section 16 of the KSL Act as read with paragraphs 1 (a) & (b) of the Second Schedule by CLE, KSL and the High Court itself. Again, they are of the view that Section 16 of the KSL Act could be drafted differently to bring more clarity on the minimum qualifications for studying law. There is no gainsaying that the provisions of the CLE Act and the KSL Act with regard to the requirements for admission to study the law degree should be brought to harmony.
- xii) In view of the foregoing and the perennial litigation against KSL and CLE, there is need for amendments to the Legal Education Act – and the regulations made thereunder, the Kenya School of Law Act – and the regulations made thereunder, and the Advocates Act to clarify the following:
 - (a) Minimum secondary school qualifications for entry into the LLB programme in Kenya;
 - (b) Applicability of these minimum secondary school qualifications to persons who obtain their LLB degrees abroad before returning to join KSL;
 - (c) Applicability of these minimum secondary school qualifications to Kenyans who are already admitted to practice law in other countries before returning to petition to join the Kenyan Bar;
 - (d) Eligibility and minimum requirements for non-Kenyans who are already admitted to practice law in the EAC or the Commonwealth (and beyond) before seeking admission to practice law in Kenya.
- xiii) The Draft Advocates Bill 2015 could offer some useful pointers as to how such clarity could be achieved.

2.3 Submissions by the Council of Legal Education

- 10. Further to oral submissions during the committee sitting on 21st July 2021, the Chief Executive Officer of the Council of Legal Education made written submissions to the committee that;
 - i) The applicable and relevant laws to the matter are;
 - (a) Article 2(5) and (6), Constitution of Kenya;
 - (b) The Treaty for the establishment of the East African Community Act, No. 2 of 2000, Laws of Kenya (the Treaty);

- (c) Article 11 of the Protocol on the establishment of the East African Community Common Market on the Harmonization and mutual Recognition of Academic and Professional Qualifications ('the Protocol');
 - (d) Sections 12 and 13 of the Advocates Act, Cap. 16 Laws of Kenya;
 - (e) Sections 8 (1) (e), Legal Education Act, 2012;
 - (f) Statute Law (Miscellaneous Amendment) Act, 2012
- ii) Prior to the promulgation of the Constitution, Kenya adopted a dualist approach to the application of international law. A treaty or international convention which Kenya ratified could only apply nationally if Parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular Article 2(5) and 2(6) gave new color to the relationship between international law and international instruments and international law. Article 2(5) provides that 'the general rules of international law shall form part of the law of Kenya' and Article 2(6) provides that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this constitution'. This position has been affirmed in several Court decisions.
- iii) In view of the foregoing, the Treaty establishing the East African Community together with its Protocols and Annexures have the force of law in Kenya even without corresponding domestication. Therefore, Article 11 of the Protocol on the establishment of the East African Community Common Market which provides for the Harmonization and Mutual Recognition of Academic and Professional Qualifications is legally enforceable in Kenya. It is in this realization that the Statute Law (Miscellaneous Amendments) Act, 2012 was enacted which amongst other amendments, amended sections 12 and 13 of the Advocates Act, Cap. 16, Laws of Kenya by introducing Rwanda and Burundi to the list of countries whose advocates could be admitted in to the Roll of Advocates in Kenya by reciprocation.
- iv) However, the Law society of Kenya challenged the constitutionality of Statute Law(Miscellaneous Amendment) Act, 2012 and resultantly, the Court of Appeal in *LSK v AG, JSC and Chief Justice* arguing that opening Kenya's market for trade in legal services in favor of non-Kenyans without a reciprocal market access for the Kenyan advocates was an abuse of the legislative power vested in Parliament by the Constitution; a violation of relevant World Trade Organization (WTO) and other agreements applicable to Kenya that call for market access on a reciprocal basis. The Court of Appeal found and held that the amendments introduced by the Statute Law (Miscellaneous Amendment) Act, 2012 were substantive and not minor and that the legislature overreached in passing substantive amendments in an un-procedural and non-participatory manner. This effectively rendered the Statute Law (Miscellaneous Amendments) Act, 2012 unconstitutional.
- v) The effect of the Court of Appeal judgement which found the Statute Law (Miscellaneous Amendments) Act, 2012 to be unconstitutional vis-à-vis Article 2(5) and (6) of the Constitution as concerns enforceability of Article 11 of the Protocol as Kenyan law in the absence of domestication is moot.

- vi) The Mischief at the core of the Law Society of Kenya's initial petition and subsequent appeal in Civil Appeal No. 96 of 2014 was the concern that opening up Kenya's market for trade in legal services in favour of non-Kenyans without a reciprocal market access for the Kenyan advocates was an abuse of the legislative power vested in parliament by the Constitution; a violation of relevant World Trade Organization(WTO) and other agreements applicable to Kenya that call for market access on a reciprocal basis.
- vii) The issue of reciprocation is one that must be addressed and considered by Parliament in the legislative process to ensure that before sections 12 and 13 of the Advocates Act, Cap. 16, Laws of Kenya are harmonized with Article 11 of the Protocol, all other East African Members states must similarly and mutually reciprocate by domesticating Article 11 of the Protocol in their own national laws at least to a degree equivalent and identical to sections 12 and 13 Advocates Act, Laws of Kenya. Without mutual and equivalent harmonization, there should not be reciprocity.
- viii) **Admission to the Roll of Advocates in Kenya.** The substantive and procedural aspects for admission to the Roll of Advocates in Kenya are prescribed principally in the Advocates Act [Cap. 16] Laws of Kenya. The Legal Education Act, 2012 may apply to the extent of approval and recognition of foreign legal education qualifications as envisaged by section 8(1) (e) thereof.
- ix) Sections 12 and 13, Advocates Act (cap 16) Laws of Kenya prescribe several categories of academic and professional qualifications permissible for purposes of admission to the roll of Advocates in Kenya. Currently, only citizens of the specific countries listed in section 12 of the Advocates Act are admissible as advocates in Kenya. Those countries are Kenya, Uganda and Tanzania (and by virtue of article 11 of the protocol, Rwanda and Burundi).
- x) If an applicant qualifies under section 12 of the Advocates Act, the applicant must possess the academic and professional qualifications prescribed in section 13. Advocates admitted in the prescribed East African Community Countries may be qualified for admission to the Roll of Advocates in Kenya under sections 12 and 13 (1)(d) of the Advocates Act, Cap.16 subject to undergoing such training as prescribed by the Council of Legal Education for a period not exceeding three months for the purpose of adapting to the practice of law in Kenya.
- xi) There are several High Court decisions that confirm the foregoing position. The High Court (Mativo, J) in Monica Wambui & others v CLE & others[2017] eKLR found inter alia that "one can only be admitted as an Advocate in this country, firstly, if he is a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania" and that citizens must comply with section 13. Importantly, in Javan Kiche Otieno & Anor v CLE & Anor it was held that persons with law qualifications obtained within the EAC do not have an automatic right of admission to the Roll of Advocates in Kenya.

- xii) In terms of procedure, section 15 of the Advocates Act, Cap 16 prescribes the applicable procedure. This process is driven by the Judiciary and the Law Society of Kenya and once again, is subject to meeting the eligibility requirements for admission to the Roll of Advocates spelt out in sections 12 and 13 Advocates Act.
- xiii) Unequivocally, the Council of Legal Education does not play any role in petitions for admission to the Roll of Advocates in Kenya save in the exceptional cases where the Chief Justice may discretionally refer specific petitions to the Council for comment on a particular candidate's legal education qualifications. Administratively, Petitions for admission to the Roll are lodged through the Law Society of Kenya to the Chief Justice in person although this may change from time to time.
- xiv) The Council of Legal Education has no role in admissions to the Roll of Advocates in Kenya. This was upheld in *Naomi Achieng Okello v Council of Legal Education & 3 others* (2019) where Korir J. held that 'a petition by an advocate from a Partner State of the East African community has no conditionality. All that is required is for one to be admitted as an Advocate in a partner State of the East African Community. The High Court also held that regulation 7 of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 which provides for recognition and approval of foreign qualifications in law "is only applicable to advocates whose application to be admitted to the Roll of advocates of the High Court of Kenya is premised on section 13(1)(e) of the Advocates Act" that is ,advocates of a commonwealth country and that "applying regulation 7 to persons seeking admission to the Roll of Advocates pursuant to section 13(1)(d) of the Advocates Act will amount to introducing conditions that are not found in the parent Act through subsidiary legislation. "It was also held that the Council of Legal Education "has no authority to vet Kenyan advocates admitted in other partner States with a view to determining whether they are qualified to be admitted to pursue law degrees that led to their admission to the rolls of advocates of those countries". Council's role with respect to applications for admission to the Roll of Advocates Act was found to be "peripheral duty".
- xv) That because sections 12 and 13 Advocates Act,[Cap.16] Laws of Kenya are unequivocally prescriptive by listing the specific EAC countries whose Advocates are eligible for admission to the Roll of Advocates in Kenya ,the principle of monism may have limited applicability in this instance. Therefore, article 11 of the protocol should apply in Kenya only to the extent that there is mutual and equivalent reciprocity by all EAC member States in harmonizing each of their national laws to make it possible for reciprocal admissibility of advocates of other EAC states to the same standards as that found in sections 12 and 13(1)(d) of the Advocates Act [Cap.16]Laws of Kenya.

2.4 Submissions by the Attorney General and Department Of Justice

11. The Office of the Attorney General and Department of Justice made oral submissions during the committee sitting on 21st July 2021. The OAGDOJ submitted that they are working on two bills-the Kenya School of Law Bill and the Council for Legal Education Bill that will address the issues raised in the petition before the committee.

CHAPTER THREE

3.0 COMMITTEE'S OBSERVATIONS

12. The Committee observed the following in the consideration of the Petition-THAT

- i) The qualification for admission to practice as an advocate in Kenya are set out in sections 12 and 13 of the Advocates Act, as follows,

12. Qualification for admission as advocate

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

- (a) he is a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania; and
(b) he is duly qualified in accordance with section 13.*

13. Professional and academic qualifications

(1) A person shall be duly qualified if—

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

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

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

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

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

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

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

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

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

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

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

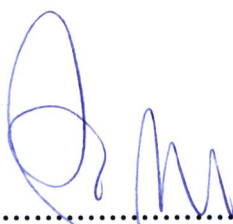
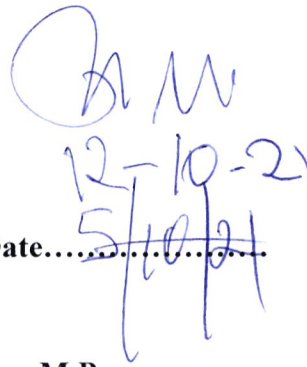
- ii) The petitioners are citizens of Kenya and are currently practicing advocates of the Rwanda Bar Association (RBA) and are also Members of East African Law Society (EALS) within the EAC Treaty.
- iii) The Statute Law (Miscellaneous Amendments) Act, 2012 amendments to Statute Law included amendments to the Advocates Act, Cap. 16, Laws of Kenya whereby persons admitted as advocates in Rwanda and Burundi were allowed to be admitted as Advocates of the High Court of Kenya pursuant to Sections 12(a) and 13(1)(d) of the Advocates Act.
- iv) The petitioners lodged the petition following the judgment delivered by the Court of Appeal, vide **Appeal No. 96 of 2014 (Law Society of Kenya vs The Attorney General & 2 Others)** on 27th September, 2019, whereby the sections of the Statute Law (Miscellaneous Amendments) Act, 2012 that included Rwanda and Burundi within the provisions of Sections 12 and 13 of the Advocates Act were *struck down* by the Court of Appeal citing lack of public participation and the ongoing reform process.
- v) The petitioners' prayers were that the House proceeds to initiate and fast track the re-enactment of Section 13(1) (d) of the Advocates Act, Chapter 16, to reinstate Rwanda and Burundi with equal status with Tanzania and Uganda, as both countries are member states of East Africa community (EAC);
- vi) The objective of Parliament in enacting the Statute Law (Miscellaneous Amendments) Act, 2012 was to allow the free movement of legal professionals within the EAC in accordance with the EAC Treaty. The law should thus be amended so that all EAC Member States are treated equally. This will also accord with the recent decision of the High Court in ***Steve Isaac Kawai & 2 others v Council of Legal Education & 2 others [2021] eKLR*** where it was held that it was discriminatory for Kenya to allow applicants from Uganda and Tanzania to be admitted to the Kenyan Bar on the strength of their membership in the EAC when citizens of South Sudan are not accorded the same privilege yet it is also a member of the EAC.

- vii) The concerns have been raised by many stakeholders on the lack of uniformity in the qualifications for admission to study the law degree and to join the respective bars of the EAC Member States. As a result of this, Kenyan students who may have missed out on admission to study law in Kenyan Universities seek admission in universities in the region then proceed to join the bar of the other member states before returning to petition to join the Kenyan bar on the strength of their admission in another EAC member state.
- viii) In view of the foregoing and the perennial litigation against KSL and CLE, there is need for amendments to the Legal Education Act – and the regulations made thereunder, the Kenya School of Law Act – and the regulations made thereunder, and the Advocates Act to clarify the following:
- a) Minimum secondary school qualifications for entry into the LLB programme in Kenya;
 - b) Applicability of these minimum secondary school qualifications to persons who obtain their LLB degrees abroad before returning to join KSL;
 - c) Applicability of these minimum secondary school qualifications to Kenyans who are already admitted to practice law in other countries before returning to petition to join the Kenyan Bar;
 - d) Eligibility and minimum requirements for non-Kenyans who are already admitted to practice law in the EAC or the Commonwealth (and beyond) before seeking admission to practice law in Kenya.
- ix) The issue of reciprocation is one that must be addressed and considered by Parliament in the legislative process to ensure that before sections 12 and 13 of the Advocates Act, Cap. 16, Laws of Kenya are harmonized with Article 11 of the Protocol, all the other East African Member states must similarly and mutually reciprocate by domesticating Article 11 of the Protocol in their own national laws at least to a level equivalent and identical to sections 12 and 13 Advocates Act, Laws of Kenya. Without mutual and equivalent harmonization, there should not be reciprocity.

CHAPTER FOUR

4.0 COMMITTEE RECOMMENDATION

2. In response to the prayers by the petitioners, the Committee finds that the petition is merited and that there is need for Parliament to amend the Advocates Act, Chapter 16, Laws of Kenya, for the purposes of addressing the gaps in the law setting out the qualifications for admission to practice as an advocate in Kenya in accordance with the East African Community Treaty and the Protocol on the Establishment of the East African Community Common Market on the Harmonization and Mutual Recognition of Academic and Professional Qualifications (“the Protocol”).

Signed..........Date..........

Hon. Clement Muturi Kigano, M.P.

Chairperson, Departmental Committee on Justice and Legal Affairs



Annex 1

—

Minutes

1. 1991
2. 1992
3. 1993
4. 1994
5. 1995
6. 1996
7. 1997
8. 1998
9. 1999
10. 2000
11. 2001
12. 2002
13. 2003
14. 2004
15. 2005
16. 2006
17. 2007
18. 2008
19. 2009
20. 2010
21. 2011
22. 2012
23. 2013
24. 2014
25. 2015
26. 2016
27. 2017
28. 2018
29. 2019
30. 2020
31. 2021
32. 2022
33. 2023
34. 2024
35. 2025
36. 2026
37. 2027
38. 2028
39. 2029
40. 2030

**MINUTES OF THE SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE
AND LEGAL AFFAIRS HELD ON THURSDAY 7TH OCTOBER 2021 AT 11:00 AM. IN
COMMITTEE ROOM 9, PARLIAMENT BUILDINGS**

PRESENT-

1. Hon.Muturi Kigano, M.P - **Chairperson**
2. Hon. Tom Kajwang, M.P -**Vice-Chairperson**
3. Hon. Mwamkale Kamoti, M.P
4. Hon. Zuleikha Hassan, M.P.
5. Hon. Jennifer Shamalla, M.P.
6. Hon. Adan Haji Yussuf, M.P
7. Hon. George Gitonga Murugara, M.P
8. Hon. Japheth Mutai, M.P
9. Hon. Peter Opondo Kaluma, M.P
10. Hon. Anthony Githiaka Kiai, M.P
11. Hon. John Munene Wambugu, M.P.
12. Hon.Robert Gichimu Githinji, M.P.

ABSENT WITH APOLOGIES-

1. Hon.Emmanuel Wangwe, M.P
2. Hon. Junet Sheikh Nuh Mohammed, M.P.
3. Hon. Josephine Naisula Lesuuda,M.P
4. Hon. Roselinda Soipan Tuya, M.P
5. Hon. John Kiarie Waweru, M.P.
6. Hon. Anthony Oluoch, M.P - Virtual
7. Hon. John Olago Aluoch, M.P -Virtual

IN ATTENDANCE-

COMMITTEE SECRETARIAT-

1. Mr. Abenayo Wasike - Principal Clerk Assistant
2. Mr.Dennis Abisai - Deputy Director, Legal Services
3. Ms. Emma Essendi - Legal Counsel
4. Mr.Boniface Kataa - Intern

MIN NO.JLAC/01/2021: -

PRELIMINARIES

The meeting commenced at 11:30 a.m with a word of prayer from the Chairperson and thereafter Members considered reports on Petition to amend the advocates Act and Waqf Bill, 2019 as per the agenda.

MIN NO.JLAC/02/2021: - ADOPTION OF REPORT ON WAQF BILL, BILL 2019

The Committee adoption of the report was proposed by Hon.Adan Haji and seconded by Hon.Kamoti Mwamkale. The Committee recommended that;

The Committee having facilitated public participation and considered the Waqf Bill (NA No.73), 2019 recommends to the House to pass the Waqf Bill (NA No.73), 2019 subject to inclusion of the amendments proposed in Chapter four of this Report.

**MIN NO.JLAC/03/2021: - ADOPTION OF REPORT ON THE PETITION TO AMEND
THE ADVOCATES ACT**

The Committee adoption of the report was proposed by Hon.Jeniffer Shamalla and seconded by Hon.Japheth Mutai.

The Committee recommended that;

In response to the prayers by the petitioners, the Committee finds that the petition is merited and that there is need for Parliament to amend the Advocates Act, Chapter 16, Laws of Kenya, for the purposes of addressing the gaps in the law setting out the qualifications for admission to practice as an advocate in Kenya in accordance with the East African Community Treaty and the Protocol on the Establishment of the East African Community Common Market on the Harmonization and Mutual Recognition of Academic and Professional Qualifications (“the Protocol”).

MIN NO./03/2021:-

ANY OTHER BUSINESS

Members approved the advert on vetting of nominees to the EACC. The nominees will be vetted on 19/10/2021

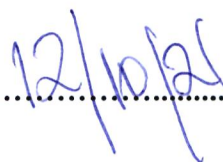
MIN NO./04/2021:-

ADJOURNMENT

The meeting was adjourned at 12:45 pm.

Signed.....Date.....


Hon.Clement Muturi Kigano
Chairperson



Annex 2



Adoption List

1947

1948

KENYA NATIONAL ASSEMBLY



DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

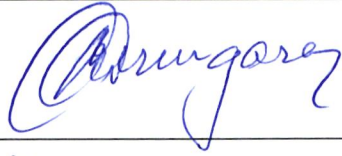

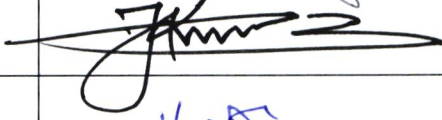

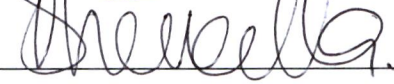

ATTENDANCE REGISTER FOR MEMBERS

DATE... 7/10/2021



VENUE... Room 9

AGENDA... ADOPTION OF REPORT ON PETITION
To AMEND THE ADVOCATES ACT

NO.	NAME	SIGNATURE
1.	Hon. Clement Muturi Kigano, M.P. - Chairperson	
2.	Hon. T.J. Kajwang - Vice Chairperson	
3.	Hon. Emmanuel Wangwe	
4.	Hon. Junet Sheikh Nuh Mohamed, M.P.	
5.	Hon. John Olago Aluoch, MP.	
6.	Hon. Roselinda Soipan Tuya, MP.	
7.	Hon. Peter Opondo Kaluma, MP.	
8.	Hon. Mwamkale Kamoti, MP.	
9.	Hon. Zuleikha Hassan, MP.	

10.	Hon. Josephine Naisula Lesuuda, M.P.	
11.	Hon. George Gitonga Murugara, MP.	
12.	Hon. Adan Haji Yussuf, MP.	
13.	Hon. Japheth Kiplangat Mutai, MP.	
14.	Hon. Anthony Githiaka Kiai, MP.	
15.	Hon. Jennifer Shamalla, MP.	
16.	Hon. John Kiarie Waweru, MP.	
17.	Hon. John Munene Wambugu, MP.	
18.	Hon. Anthony Oluoch, M.P.	
19.	Hon. Robert Gichimu Githinji, M.P	

COMMITTEE CLERK


.....

.....

DIRECTOR DEPARTMENTAL COMMITTEES

Annex 3

Submissions

by the

Judiciary

الماء

الماء

الماء

الماء

Telephone Nairobi 2221221
Email: chiefregistrar@court.go.ke



CHIEF REGISTRAR'S CHAMBERS, JUDICIARY
SUPREME COURT BUILDING
P.O. Box 30041 - 00100
NAIROBI

When replying please quote

Ref: CRJ/23

THE JUDICIARY

8th August, 2021

Hon. Clement Muturi
Chairperson, Justice & Legal Affairs Committee
The National Assembly
Parliament Buildings
NAIROBI

Dear Sir,

**RE: PETITION ON THE LAW GOVERNING THE ADMISSION OF ADVOCATES
OF THE HIGH COURT OF RWANDA & BURUNDI TO PRACTICE IN KENYA**

We acknowledge receipt of the Petition from Njenga Mwaniki and others calling on the National Assembly to re-examine the law on the licensing of Advocates of the High Court of Rwanda and Burundi to practice in Kenya.

Further to our oral submissions before the Justice & Legal Affairs Committee on 21st July 2021, we now submit herewith a detailed memorandum on the Petition, requesting the National Assembly to re-examine the Advocates Act and other statutes touching on the work of Advocates.

Aside from the Advocates Act, the requirements to study and practice law in Kenya are provided under the Legal Education Act and the regulations made thereunder, as well as the Kenya School of Law Act and the regulations made thereunder. The Petition is now an opportunity to streamline the law on the requirements to practice law in Kenya which has been the subject of an inordinately large number of court cases, some of which have been highlighted in the Petition.

We are grateful for the opportunity to comment on the Petition.

Yours Sincerely,

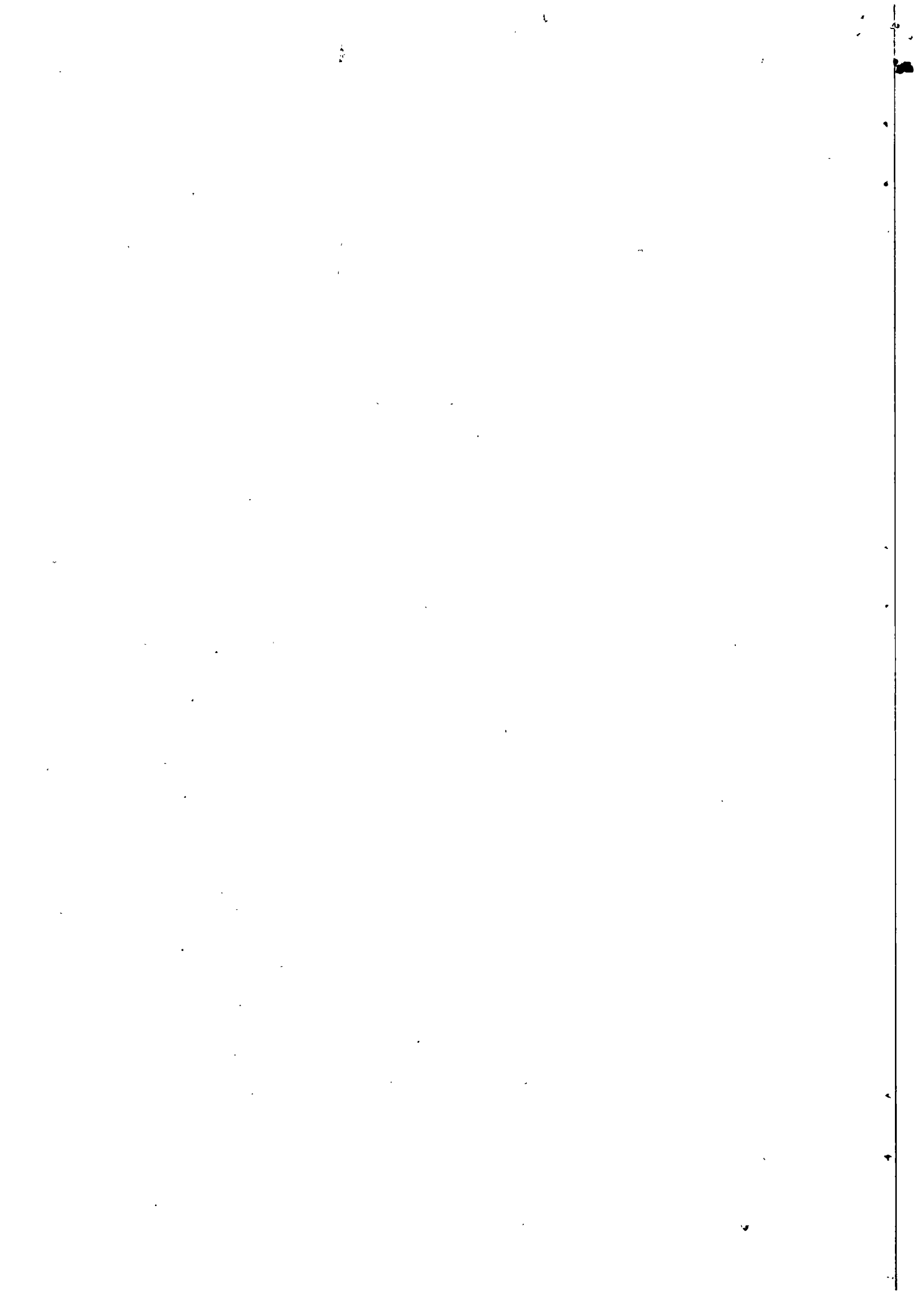
A handwritten signature in black ink, appearing to read 'Anne A. Amadi'.

ANNE A. AMADI, CBS
CHIEF REGISTRAR OF THE JUDICIARY

Encl.

Copy to: The Hon. Chief Justice/President
Supreme Court of Kenya
NAIROBI

aaa/ko





**MEMORANDUM FROM THE CHIEF REGISTRAR OF THE
JUDICIARY ON THE PETITION FROM NJENGA MWANIKI GEORGE
& OTHERS ON THE LAW GOVERNING THE ADMISSION OF
ADVOCATES OF THE HIGH COURT OF RWANDA & BURUNDI TO
PRACTICE IN KENYA**

Contents

INTRODUCTION.....	1
PART I - QUALIFICATIONS FOR ADMISSION TO PRACTICE LAW IN KENYA	1
PART II - OTHER MATTERS	4
A. Advocates of the High Court? Supreme Court?	4
B. Role of Chief Registrar vis-à-vis Registrar of the High Court in Managing the Affairs of Advocates	6
C. Regulations on Admission of Advocates	7
D. Gazettement by CLE & Public Display of Notice of Petition for Admission.....	9

INTRODUCTION

In accordance with the Advocates Act, the Chief Registrar receives and processes petitions from persons seeking admission to the Kenyan Bar before submitting them for hearing before the Chief Justice. In our encounters with persons seeking admission, we have noted numerous areas that are due for reform and have offered some proposals for resolving these issues.

**PART I - QUALIFICATIONS FOR ADMISSION TO PRACTICE LAW
IN KENYA**

1. The qualifications for admission to practice law in Kenya are laid out in Sections 12 and 13 of the Advocates Act. Section 12 provides that one is qualified if s/he is a citizen of Kenya, Rwanda, Burundi, Uganda or Tanzania and has met the educational qualifications in Section 13. Uganda and Tanzania were introduced via an amendment in 2002, while Rwanda and Burundi were added via an amendment in 2012.



2. Section 13 then stipulates the educational requirements for admission. Unfortunately, this section is not the epitome of elegant draftsmanship, leading to numerous court cases against the Kenya School of Law, the Council of Legal Education, and – in some instances – the Chief Justice and the Chief Registrar of the Judiciary. We therefore welcome this Petition which now presents Parliament with the perfect opportunity to re-examine the law with a view to bringing more clarity on the qualifications for admission to practice law in Kenya with regard to nationality and academic qualifications.
3. As stated in the Petition, the Court of Appeal struck out the amendment that introduced Rwanda and Burundi in response to a case lodged by the Law Society of Kenya which complained that the amendments were passed without public participation.
4. A plain reading of Section 13 of the Advocates Act is that one who is an Advocate of the High Court of Uganda, the High Court of Rwanda, the High Court of Burundi or the High Court of Tanzania is automatically qualified to be admitted to the Kenyan Bar. The High Court has read this section to mean that there is no room to examine the secondary school grades of persons who have been admitted to practice law in these countries. The assumption is that their university entry is governed by the law in the respective state and once those countries have deemed them qualified to study and practice law, they also qualify to practice law in Kenya by virtue of Section 13.
5. It is apparent that the objective of Parliament was to allow the free movement of legal professionals within the EAC in accordance with the EAC Treaty. **If that be the case, the law should be amended so that all EAC Member States are treated equally.** This accords with the recent decision of the High Court which found that it was discriminatory for Kenya to allow applicants from Uganda and Tanzania to be admitted to the Kenyan Bar on the strength of their membership in the EAC when citizens of South Sudan are not accorded the same privilege yet it is also a member of the EAC.
6. In the meantime, concerns have been raised by other stakeholders due to the lack of uniformity in the qualifications for admission to study the law degree and to join the respective bars of the EAC Member States. As a result of this, Kenyan students who may have missed out on admission to study law in Kenyan Universities seek admission in universities in the region then proceed to join the



bar of the other member states before returning to petition to join the Kenyan bar on the strength of their admission in another EAC member state. This is the predicament that some of the Petitioners have found themselves in.

7. *If the EAC is truly one economic zone, then Kenyans should be at liberty to pursue higher education in any member state and those who take this route should not be subjected to any differential treatment from citizens of those member states who qualify to practice law in their states before seeking admission to practice law in Kenya. We therefore support an amendment to the Advocates Act to give the same benefits to all EAC States.*
8. *Perhaps what is needed is*
 - a. *a more robust mechanism for ensuring uniformity in the regulation of legal education across the region so that the entry requirements and the quality standards observed by legal education providers in the region are comparable and satisfactory to Kenyan authorities, and*
 - b. *reciprocal mechanisms for ensuring Kenyan lawyers enjoy the same benefits in other EAC Member States.*
9. The challenges highlighted above are not limited to Kenyans who study in other EAC countries before returning to apply for admission to KSL, or directly to the bar having been admitted to practice in those other countries. Kenyans who have received their law degrees from local universities have also been denied admission at the Kenya School of Law on the grounds that their KCSE grades fall below the minimum statutory requirements for studying law at degree level. This has resulted in numerous cases against KSL and CLE in recent years.
10. One such case is *Republic v Kenya School of Law & another Ex parte Otene Richard Akomo & 41 others* (attached), where the High Court blamed the multiplicity of suits on the variance between the KSL Act and the Legal Education Act on the admission requirements, and conflicting interpretations of Section 16 of the KSL Act as read with paragraphs 1 (a) & (b) of the Second Schedule by CLE, KSL and the High Court itself. Again, we are of the view that Section 16 of the KSL Act could be drafted differently to bring more clarity on the minimum qualifications for studying law. There is no gainsaying that the provisions of the CLE Act and the KSL Act with regard to the requirements for admission to study the law degree should be brought to harmony.



11. *In view of the foregoing and the perennial litigation against KSL and CLE, there is need for amendments to the Legal Education Act - and the regulations made thereunder, the Kenya School of Law Act - and the regulations made thereunder, and the Advocates Act to clarify the following:*
- a. Minimum secondary school qualifications for entry into the LLB programme in Kenya;*
 - b. Applicability of these minimum secondary school qualifications to persons who obtain their LLB degrees abroad before returning to join KSL;*
 - c. Applicability of these minimum secondary school qualifications to Kenyans who are already admitted to practice law in other countries before returning to petition to join the Kenyan Bar;*
 - d. Eligibility and minimum requirements for non-Kenyans who are already admitted to practice law in the EAC or the Commonwealth (and beyond) before seeking admission to practice law in Kenya.*
12. The Draft Advocates Bill 2015 could offer some useful pointers as to how such clarity could be achieved.

PART II - OTHER MATTERS

13. The Chief Registrar also welcomes the opportunity presented by this Petition to call on Parliament to look into a number of other issues that have arisen in the management of the affairs of Advocates. These are discussed below:

A. Advocates of the High Court? Supreme Court?

14. The highest court in Kenya before independence was the Supreme Court which had unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law. The Chief Justice of Kenya sat on the High Court during this period. Appeals were handled by the Court of Appeal for Eastern Africa, and further to the Judicial Committee of the Privy Council which handled appeals from across all British colonies.



15. Because the Supreme Court was the highest court in territorial Kenya, it was only natural that persons admitted to practice law in Kenya were admitted as Advocates of the Supreme Court of Kenya. The Certificate of Admission licensed such lawyers to practice in the Supreme Court and all courts subordinate thereto. The Certificate was also signed by the Chief Justice who was the head of the Supreme Court.
16. Because Advocates of the Supreme Court had no automatic right of appearance before higher courts, the Rules made under the Appellate Jurisdiction Act specifically gave audience to Advocates of the Supreme Court of Kenya to appear before the Court of Appeal for Eastern Africa and, subsequently, Court of Appeal for East Africa. Rule 25(4) of the **Court of Appeal for East Africa Rules, 1972** provided that:

Every Advocate who is for the time being entitled to practice before the superior court of any of the partner states shall have the right of audience before the Court:

17. When the Supreme Court was renamed the High Court by virtue of the Constitution of Kenya (Amendment) Act, 1965, lawyers were subsequently admitted as Advocates of the High Court of Kenya. Once again, their Certificates of Admission as Advocates of the High Court of Kenya granted them automatic permission to practice before the High Court and courts subordinate thereto. The Certificate of Admission was also signed/issued by the Chief Justice who was the head of the High Court.
18. With the establishment of the Court of Appeal through the Constitution of Kenya (Amendment) Act, No. 13 of 1977 and the enactment of the Appellate Jurisdiction Act, 1977, Rules were made granting Advocates of the High Court of Kenya the right of appearance before the Court of Appeal. Consequently, Rule 25 of the Court of Appeal Rules now provides that *"Every advocate who is for the time being entitled to practice before the High Court shall have the right of audience before the Court."*
19. Following the promulgation of the Constitution of Kenya, 2010, the highest Court is now the Supreme Court. However, our Advocates are still admitted as Advocates of the High Court of Kenya, and their Certificates of Admission still license them to practice only before the High Court and the courts subordinate



thereto. Additionally, the Certificate of Admission is still issued/signed by the Chief Justice who is no longer a Judge of the High Court.

20. These Advocates get a right of audience before the Court of Appeal by virtue of Rule 25 of the Court of Appeal Rules, 2010. Although the Supreme Court Rules permit parties to appear either in person or by advocate, there is no express provision in the Supreme Court Rules granting audience to Advocates of the High Court of Kenya who are only licensed to practice before the High Court and courts subordinate thereto.

21. *Consequently, we propose legislative reform to give Advocates of the High Court of Kenya audience before the Supreme Court as a matter of right through one of the following options:*

- a. Parliament considers amending the Advocates Act so that lawyers are admitted simply as "Advocates" as opposed to "Advocates of the High Court of Kenya." This way, all advocates will be automatically authorized to practice in all courts; or*
- b. Parliament considers amending the Advocates Act so that lawyers are admitted as "Advocates of the Supreme Court of Kenya" so that they are automatically authorized to practice before the Supreme Court and courts subordinate thereto. This way, their Certificates of Admission will rightfully be issued by the Chief Justice/President of the Supreme Court; or*
- c. As was done with the Court of Appeal, the Supreme Court Rules be amended to give Advocates of the High Court of Kenya audience before the Supreme Court.*

B. Role of Chief Registrar vis-à-vis Registrar of the High Court in Managing the Affairs of Advocates

22. The Chief Registrar of the Judiciary manages the affairs of Advocates by virtue of the Advocates Act, the Notaries Public Act and the Oaths and Statutory Declarations Act. However, all three statutes refer to the **Registrar of the High Court of Kenya** as opposed to the Chief Registrar of the Judiciary. This is because constitutional changes in the structure of the Judiciary have not been complemented with statutory amendments to reflect these changes.



23. As already indicated, the highest court in Kenya before independence was the Supreme Court. During this period, the Registrar of the Supreme Court had the mandate of managing the affairs of Advocates, including the issuance of Practicing Certificates and the custody of the Roll of Advocates, the Roll of Notaries and the Roll of Commissioners for Oaths. When the Supreme Court was renamed the High Court by virtue of the Constitution of Kenya (Amendment) Act, 1965, these statutes were subsequently amended to rename the Registrar from Registrar of the Supreme Court to Registrar of the High Court.
24. The Constitution of Kenya, 2010 now establishes the office of the Chief Registrar of the Judiciary who is the chief administrator and accounting officer of the Judiciary. Upon the establishment of this office, the Chief Registrar took over the functions that were previously performed by the Registrar of the High Court who was previously the accounting officer for the Judiciary. Among the functions taken over by the Chief Registrar was the issuance of practicing certificates and the maintenance of the Roll of Advocates, Notaries Public and Commissioners for Oaths as provided under the Advocates Act, the Notaries Public Act and the Oaths & Statutory Declarations Act, respectively.
25. **We propose that the Advocates Act, the Notaries Public Act and the Oaths and Statutory Declarations Act be amended to bestow these functions on the Chief Registrar of the Judiciary.**

C. Regulations on Admission of Advocates

26. Legal education in Kenya was previously governed by the Advocates Act which used to have provisions for the Council of Legal Education and the Kenya School of Law. The Advocates (Admission) Regulations which were made under the Advocates Act made provision for admission and attendance at the Kenya School of Law as well as the KSL curriculum, examinations and exemptions. These regulations also had the procedure for the admission of persons who had met the qualifications for admission to the Bar. **Part VIII of the Advocates (Admission) Regulations, 1997** provided *specifically* for:
- a. The obligation/power of the Council of Legal Education to publish in the Kenya Gazette, without undue delay, the names of persons who had satisfied the academic requirements for admission to the bar (Regulation 17),



- b. The prescribed form for petitioning the Chief Justice for Admission (Regulation 18 & Form C in the Schedule),
 - c. The fees for filing the Petition (Regulation 18),
 - d. The prescribed form for the statutory declaration by which persons seeking admission solemnly declare the truth of what they state in the Petition (Regulation 19)
 - e. The consequences of making a false declaration (Regulation 19).
27. Due to the reforms in legal education, provisions of the Advocates Act that established the Council of Legal Education were repealed when the Council was established through a stand-alone statute (the Council of Legal Education Act No. 12 of 1995). Among the regulations made under this statute were the Council of Legal Education (Admission) Regulations, 2007 which made provision for admission to, and attendance at the Kenya School of Law, as well as the KSL curriculum and examinations.
28. Although the KSL (Admission) Regulations, 2007 revoked the Advocates (Admission) Regulations, 1997, **no provision was made in the KSL (Admission) Regulations, 2007 for the procedure for the admission of persons who had met the qualifications for admission to the Bar which had previously been covered under Part VIII of the Advocates (Admission) Regulations, 1997.**
29. Following the revocation of the Advocates (Admission) Regulations, 1997, the Council of Legal Education cited Regulation 13 of the Council of Legal Education (Kenya School of Law) Regulations, 2009 as the basis for the gazetting of persons who had qualified for admission to the Bar. It is worth noting that this provision does not mention any obligation/power of the Council to gazette persons.
30. The Council of Legal Education (Kenya School of Law) Regulations, 2009 were in turn revoked through the Kenya School of Law (Training Programme) Regulations, 2015. Thereafter, the Kenya School of Law undertook the gazetting, citing the provisions of Section 19 and 20 of the Kenya School of Law Act. Again, these provisions did not mention any power/obligation on KSL to gazette persons.



31. Following the enactment of the Legal Education Act of 2012, the Council of Legal Education now cites Section 8(1)(f) as the statutory basis for the gazettelement. However, there is nothing in this Section to do with gazettelement of persons who have met the academic requirements for admission.
32. Consequently, it is evident that there is currently no statutory basis for:
- The obligation/power of the Council of Legal Education to publish in the Kenya Gazette the names of persons who have satisfied the academic requirements for admission to the bar,
 - The prescribed form for petitioning the Chief Justice for Admission,
 - The prescribed form for the statutory declaration by which persons seeking admission solemnly declare the truth of what they state in the Petition.
33. This gap in the law was highlighted in *Javan Kiche Otieno v Chief Justice & 2 Others* where the High Court lamented that "There are no laws governing admissions of advocates under the Advocates Act."
34. *In order to fill this gap, we propose that Regulations are made to govern the admission of Advocates to the Bar separate from the regulations governing legal education.*

D. Gazettelement by CLE & Public Display of Notice of Petition for Admission

35. Under Section 15 of the Advocates Act, persons seeking admission to the Bar are required to submit to the Chief Registrar a Petition addressed to the Chief Justice, together with a Notice intimating that the petition has been so filed. The law requires that the Notice of the Petition shall be **publicly exhibited by the Registrar** for one month before any order shall be made on the Petition. It is presumable that this display was to enable any member of the general public who had a comment on the suitability of the Petitioner to be admitted to practice law to submit such comment.
36. However, the law does not say exactly how the Notice is to be publicly exhibited by the Registrar. At the time the Advocates Ordinance was first enacted, there were only a handful of people who sought admission as Advocates and it made sense to display their petitions publicly. Today, hundreds of persons apply for admission on a yearly basis and a public display of each of their Notices may not be feasible.

37. As already indicated, CLE publishes a Gazette notice with the names of persons who have qualified for admission. Although there appears to be no express statutory basis for this gazette, the Gazette Notice is one of the documents petitioners are required to submit to the Chief Registrar as evidence of their qualification. However, it is worth noting that CLE also issues a Certificate of Compliance to each of the persons who have met the requirements for admission, and this Certificate is also submitted alongside the Petition for admission.
38. As such, we are of the view that the process of admission can be made more efficient and less painful for students if:
- a. CLE issues the Certificate of Compliance to each qualified student, but does not gazette;
 - b. Qualified students present their Petitions to the Chief Registrar, attaching the Certificate of Compliance issued by CLE as evidence of their qualifications;
 - c. The Chief Registrar publishes in the Gazette the names of persons who have submitted petitions for admission to the Roll of Advocates.
39. *Consequently, we propose that Regulations be made to give the Chief Registrar the power to publish in the Gazette the names of persons who have petitioned the Chief Justice for admission to the Roll of Advocates, and that their Petitions be heard by the Chief Justice after 30 days have lapsed following the Gazette Notice.*
40. Gazette,ment by the CRJ will cover all persons seeking admission to the Roll of Advocates, including those who have not taken the KSL/CLE bar exam and who are currently not issued with the Certificate of Compliance by CLE and are therefore not gazetted.

Submission
by Council
for Legal
Education
(CLE)

1912

1913

1914

1915

1916



MEMORANDUM BY THE COUNCIL OF LEGAL EDUCATION

IN RESPONSE TO

A PETITION TO PARLIAMENT DATED 8TH MARCH 2021 UNDER ARTICLES 119 AND 37 OF THE CONSTITUTION; PETITION TO PARLIAMENT (PROCEDURE) ACT, 2012; AND STANDING ORDERS NO. 219 & 223 OF THE NATIONAL ASSEMBLY ON INVOLVEMENT IN THE LEGISLATIVE AND OTHER BUSINESS OF THE PARLIAMENT IN ACCORDANCE WITH ARTICLE 118(b) OF THE CONSTITUTION THROUGH THE MISCELLANEOUS AMENDMENT ACT, 2012 TO THE ADVOCATES ACT, CAP. 16

A. Applicable and Relevant Law

1. Article 2(5) and (6), **Constitution of Kenya**
2. **The Treaty for the Establishment of the East African Community Act**, No. 2 of 2000, Laws of Kenya ('the Treaty')
3. Article 11 of the **Protocol on the Establishment of the East African Community Common Market** on the Harmonization and Mutual Recognition of Academic and Professional Qualifications ('the Protocol')
4. Sections 12 and 13 of the **Advocates Act**, Cap. 16 Laws of Kenya
5. Section 8(1)(e), **Legal Education Act**, 2012.
6. **Statute Law (Miscellaneous Amendment) Act**, 2012

B. Background

- 1.1 Prior to the promulgation of the Constitution, Kenya adopted a dualist approach to the application of international law. A treaty or international convention which Kenya ratified could only apply nationally if Parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular Article 2(5) and 2(6) gave new colour to the relationship between international law and international instruments and national law. Article 2(5) provides that 'the general rules of international law shall form part of the law of Kenya' and Article 2(6) provides that 'any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.' This position has been affirmed in several Court decisions.¹
- 1.2 In view of the foregoing, the Treaty establishing the East African Community together with its Protocols and Annexures have the force of law in Kenya even without corresponding domestication. Therefore, Article 11 of the Protocol on the Establishment of the East African Community Common Market which provides for the 'Harmonization and Mutual Recognition

¹ *Beatrice Wanjiku & Another vs. The Attorney General*, Petition 190 of 2011; *George Arab Muli vs. Senior Resident Magistrate Kangundo & 2 Others*, Misc. Civil Application No. 175 of 2019; *Karen Njeri Kandie vs. Alssane Ba & Shelter-Afrique*, Civil Appeal No. 20 of 2013.

of Academic and Professional Qualifications' is legally enforceable in Kenya. It is in this realization that Statute Law (Miscellaneous Amendment) Act, 2012 was enacted which amongst other amendments, amended Sections 12 and 13 Advocates Act, Cap. 16, Laws of Kenya by introducing Rwanda and Burundi to the list of countries whose advocates could be admitted into the Roll of Advocates in Kenya by reciprocity.

- 1.3 However, the Law Society of Kenya challenged the constitutionality of Statute Law (Miscellaneous Amendment) Act, 2012 and resultantly, the Court of Appeal in *LSK v AG, JSC and Chief Justice*² arguing that opening up Kenya's market for trade in legal services in favour of non-Kenyans without a reciprocal market access for the Kenyan advocates was an abuse of the legislative power vested in Parliament by the Constitution; a violation of relevant World Trade Organization (WTO) and other agreements applicable to Kenya that call for market access on a reciprocal basis. The Court of Appeal found and held that the amendments introduced by Statute Law (Miscellaneous Amendment) Act, 2012 were substantive and not minor and that the Legislature overreached in passing substantive amendments in an un-procedural non-participatory manner. This effectively rendered Statute Law (Miscellaneous Amendment) Act, 2012 unconstitutional.
- 1.4 The effect of the Court of Appeal judgement which found Statute Law (Miscellaneous Amendment) Act, 2012 to be unconstitutional vis-à-vis Article 2(5) and (6) of the Constitution as concerns enforceability of Article 11 of the Protocol as Kenyan law in the absence of domestication is moot.

C. The Mischief:

- 1.5 At the core of the Law Society of Kenya's initial petition and subsequent appeal in Civil Appeal No. 96 of 2014 was the concern that opening up Kenya's market for trade in legal services in favour of non-Kenyans without a reciprocal market access for the Kenyan advocates was an abuse of the legislative power vested in Parliament by the Constitution; a violation of relevant World Trade Organization (WTO) and other agreements applicable to Kenya that call for market access on a reciprocal basis.
- 1.6 The issue of reciprocity is one that must be addressed and considered by Parliament in the legislative process to ensure that before Sections 12 and 13 of the Advocates Act, Cap. 16, Laws of Kenya are harmonized with Article 11 of the Protocol, all other East African Member States must similarly and mutually reciprocate by domesticating Article 11 of the Protocol in their own national laws at least to a degree equivalent and identical to sections 12 and 13 Advocates Act, Laws of Kenya. **Without mutual and equivalent harmonization, there should not be reciprocity.**

D. Admission to the Roll of Advocates in Kenya

- 1.7 The substantive and procedural aspects for admission to the Roll of Advocates in Kenya are prescribed principally in the Advocates Act [Cap. 16] Laws of Kenya. The Legal Education Act, 2012 may apply to the extent of approval and recognition of foreign legal education qualifications as envisaged by section 8(1)(e) thereof.

² Civil Appeal No. 96 of 2014.



- 1.8 Sections 12 and 13, Advocates Act [Cap 16] Laws of Kenya prescribe several categories of academic and professional qualifications permissible for purposes of admission to the Roll of Advocates in Kenya. Currently, only citizens of the specific countries listed in Section 12 of the Advocates Act are admissible as Advocates in Kenya. Those Countries are **Kenya, Uganda and Tanzania (and by virtue of Article 11 of the Protocol, Rwanda and Burundi)**.
- 1.9 If an applicant qualifies under Section 12 Advocates Act, the applicant must possess the academic and professional qualifications prescribed in Section 13, Advocates Act. For instance, qualified Advocates **admitted in the prescribed East African Community Countries** may be qualified for admission to the Roll of Advocates in Kenya under sections 12 and 13(1)(d) Advocates Act, Cap. 16 subject to undergoing such training as prescribed by the Council of Legal Education for a period not exceeding three months for the purpose of adapting to the practice of law in Kenya.
- 1.10 There are several High Court decisions that confirm the foregoing position. The High Court (Mativo, J.) in *Monica Wamboi & others v CLE & others* [2017] eKLR found inter alia that “one can only be admitted as an Advocate in this country, firstly, if he is a citizen of the East African Community member countries of Kenya, Rwanda, Burundi, Uganda or Tanzania” and that such citizens must also comply with Section 13. Importantly, in *Javan Kiche Otieno & anor v CLE & anor*³ held that persons with law qualifications obtained within the EAC do not have an automatic right of admission to the Roll of Advocates in Kenya.
- 1.11 In terms of procedure, Section 15 Advocates Act, Cap. 16 prescribes the applicable procedure. This process is driven by the Judiciary and the Law Society of Kenya and once again, is SUBJECT to meeting the eligibility requirements for admission to the Roll of Advocates spelt out in Sections 12 and 13 Advocates Act.
- 1.12 Unequivocally, **the Council of Legal Education does NOT play any role in petitions for admission to the Roll of Advocates in Kenya** save in exceptional cases where the Chief Justice may discretionally refer specific petitions to the Council for comment on a particular candidate’s legal education qualifications. Administratively, Petitions for admission to the Roll are lodged through the Law Society of Kenya to the Chief Justice in person although this may change from time to time.
- 1.13 At the risk of repetition, the Council of Legal Education has no role in admissions to the Roll of Advocates in Kenya. This was upheld in *Naomi Achieng Okello v Council of Legal Education & 3 others*⁴ where Korir, J. held that “a petition by an advocate from a Partner State of the East African Community has no conditionality. All that is required is for one to be admitted as an Advocate in a Partner State of the East African Community.” He also held that regulation 7 of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 which provides for recognition and approval of foreign qualifications in law “is only applicable to advocates whose application to be admitted to the Roll of Advocates of the High Court of Kenya is premised on Section 13(1)(e) of the Advocates Act” that is, advocates of a Commonwealth

³ Petition 20 of 2016. This has been affirmed in *Monica Wamboi & others v CLE & others*, Petitions 450, 448 & 462 of 2016 (consolidated).

⁴ Petition No. 69 of 2018.



Country and that “applying regulation 7 to persons seeking admission to the Roll of Advocates pursuant to section 13(1)(d) of the Advocates Act will amount to introducing conditions that are not found in the parent Act through subsidiary legislation.” It was also held that **the Council of Legal Education** “has no authority to vet Kenyan Advocates admitted in other Partner States with a view to determining whether they are qualified to be admitted to pursue law degrees that led to their admission to the advocates training programmes of those countries and the consequent admission to the rolls of advocates of those countries.” Council’s role with respect to applications for admission to the Roll of Advocates under section 13(1)(e) of the Advocates Act was found to be a “peripheral duty.”

E. Conclusion

1.14 In conclusion, because Sections 12 and 13 Advocates Act, [Cap. 16] Laws of Kenya are unequivocally prescriptive by listing the specific EAC Countries whose Advocates are eligible for admission to the Roll of Advocates in Kenya, the principle of monism may have limited applicability in this instance. Therefore, Article 11 of the Protocol should apply in Kenya only to the extent that there is mutual and equivalent reciprocity by all EAC Member States in harmonizing each of their national laws to make it possible for reciprocal admissibility of Advocates of other EAC States to the same standard as that found in Sections 12 and 13(1)(d) Advocates Act [Cap. 16] Laws of Kenya.

Dated 6th August 2021.


Ag. Secretary / Chief Executive Officer

Council of Legal Education