REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 126 OF 2011

BETWEEN

OKENYO OMWANSA GEORGE ..... 1ST PETITIONER

MARCLUS NDEGWA NJIRU .....2ND PETITIONER

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

THE LAW SOCIETY OF KENYA.....2ND RESPONDENT

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

JUDGMENT

Introduction

1. This case is about the legal profession and particularly about the qualification required by advocates to set up an independent legal practice. It also challenges the prohibition against advertising by the legal profession.

2. The petitioners are both duly qualified advocates of the High Court of Kenya. The 1st petitioner was admitted to the bar on 11th March 2010 and the 2nd petitioner on 20th January 2011. They are both currently employed.

Facts

3. In the petition dated 22nd July 2011, the petitioners state that since their enrolment they have not been able to start their own private practices due to the unconstitutional constraints and limitations imposed by **section 32** of the ***Advocates Act*** **(Chapter 16 of the Laws of Kenya)**.

4. The petitioners state that they have undergone extensive, rigorous and thorough legal training in their undergraduate law programme, spending four years in credible and accredited institutions and one year training under the Advocates Training Programme at the Kenya School of Law. In addition they have undergone pupillage training.

5. Notwithstanding the training, the petitioners aver that they have been subjected to unreasonable and unwarranted scrutiny over a period of two years before they can be allowed to operate their private law firms. In their view, this imports uncertainty as to when the legal training programme commences and the time it ends.

6. The petitioners also aver that **rule 2** of the ***Advocates (Practice) Rules*** of the ***Advocates Act (Chapter 16 of the Laws of Kenya)*** imposes unreasonable restrictions that bar advocates from advertising.

Section 32 of the Advocates Act

7. **Section 32** of the ***Advocates Act*** provides as follows;

32. (1) Notwithstanding that an advocate has been issued with a practising certificate under this Act, he shall not engage in practice on his own behalf either full-time or part time unless he has practised in Kenya continuously on a full-time basis for a period of not less than two years after obtaining the first practising certificate in a salaried post either as an employee in the office of the Attorney-General or an organization approved by the Council of Legal Education or of an advocate who has been engaged in continuous full-time private practice on his own behalf in Kenya for a period of not less than five years.

(2) The person employing an advocate under this section shall in the prescribed form notify the secretary to the Council of Legal Education and the Registrar of the High Court of the commencement and the termination of the employment at the time of commencement and at the termination.

(3) This section shall come into operation on 1st January, 2000.

8. The provisions of **section 32** of the Act came into force on 1st January 2000 as the date appointed by the Attorney General by **Legal Notice No. 94 dated 2nd July 1999**.

Rule 2 of the Advocates (Practice) Rules

9. ***Rule 2*** of the ***Advocates (Practice) Rules*** provides as follows;

No advocate may directly or indirectly apply for or seek instructions for professional business, do or permit in carrying on his practice any act or thing which can be reasonably regarded as advertising or as calculated to attract business unfairly.

Petitioner's Case

10. Apart from the averments in the petition, the petitioners relied on the supporting affidavit of Marclus Ndegwa Njiru, the 2nd petitioner, sworn on 2nd July 2011. In addition, the petitioners adopted the written submissions dated 10th February 2012.

11. The petitioners seek the following reliefs in their petition;

(a) A declaration that the petitioners herein are entitled to the full protection from being subjected to slavery or servitude and the same right has been violated.

(b) A declaration that the petitioners herein are entitled to the full protection from being subjected to forced labour and same right has been violated.

(c) A declaration that the petitioners herein are entitled to the full protection from discrimination and the same right has been violated.

(d) A declaration that the petitioners herein and other members of the public are entitled to the full enjoyment of the right to access information and the same right has been violated.

*(e) A declaration that **section 32** of the **Advocates Act** derogates the petitioners rights as guaranteed under **Article 30** of the Constitution.*

*(f) A declaration that **section 32** of the **Advocates Act** is in conflict, inconsistent and contravenes **Article 25(b)** of the Constitution and therefore null and void.*

*(g) A declaration that **section 32** of the **Advocates Act** is in conflict, inconsistent and contravenes **Article 30** of the Constitution and therefore null and void.*

*(h) A declaration that **rule 2** of the **Advocates (Practice) Rules** of the **Advocates Act** is in conflict, inconsistent and contravenes **Article 46** of the Constitution and therefore null and void.*

*(i) A declaration that **rule 2** of the **Advocates (Practice) Rules** of the **Advocates Act** is in conflict, inconsistent and contravenes **Article 35(b)** of the Constitution and therefore null and void.*

(j) An order for compensation.

(k) Costs of the suit.

12. Mr. Ndegwa, the 2nd petitioner concentrated his submissions by attacking **section 32** of the ***Advocates Act*** (hereinafter **"section 32"**) **.** He submitted that the petition impugns the constitutionality of **section 32** on the ground that it subjects young advocates to forced labour. He referred to the ***International Convention on Forced Labour 1930 (No. 29)***, which is part of our law by dint of **Article 2(5)** of the Constitution, and which defines forced labour at **Article 2(1)** as, ***'all work or services which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'***

13. The petitioners also relied on the ***Forced Labour Convention (No. 105), 1930*** which provides that forced labour shall not be used as means of political coercion or education. The petitioners contend that since **section 32** requires a young advocate to work under an advocate of five years standing and above so as to acquire skills of advocacy, legal practice and management, it is thus used as a means of education which is prohibited by the Constitution and is therefore unconstitutional.

14. The petitioners contended that when analysing the question of forced labour there are two tests that should guide the court. These are; whether there is the menace of penalty and whether there is voluntary acceptance. These concepts form part of our domestic law by virtue of **Article 2** of the Constitution. The petitioners emphasised that prohibition against slavery and forced labour has attained the force of *jus cogens* and is therefore part of general principles of international customary law due to the operation of the principle of universality.

15. In applying the first test, the petitioners assert that a young advocate who is in breach of **section 32** is subjected to a penalty by virtue of **section 31** of the Act which imposes a penalty for such infringement and that it is this penalty that makes compliance with this provision forced labour. The petitioners referred to the case of ***Harbans Singh Soor v Mathew Ouma Oseko t/a Oseko & Company Advocates*** **Nairobi Misc. App. No. 901 of 2007 (Unreported)** in which an advocate was jailed for opening a practice prior to the completion of the two year period provided under **section 32**. The petitioners therefore submit that **section 32** meets the definition of forced labour as defined under our law and thus it is in conflict with **Article 30(2)** of the Constitution which prohibits force labour.

16. The petitioners also contend that the Committee of Experts in the ***Forced Labour Convention 1930 (No. 29)*** were of the view that thephrase 'forced labour' should be construed broadly. It, *'need not be in the form of penal sanctions but might take the form of loss of rights or privileges such as promotion, transfer access to new employment etc.'*

17. The petitioners also aver that **section 32** constrains young advocates from accessing meaningful employment and thus flies in the face of **Article 55(c)** which obliges the state to take measures including affirmative action measures to ensure that youths access employment and are protected from exploitation.

18. The petitioners contend that a young advocate is compelled by **section 32** to work in the three institutions prescribed by the Act against his or her will so attain an expected learning and experience in the legal profession. It is further contended that the provisions of the Act or any other written law do not set the perimeters of training or the mode of evaluation or assessment.

19. The petitioners submitted that **section 32** is not only unconstitutional as it violates **Article 30** but it also offends **Article 25(b)** of the Constitution which provides that the freedom from slavery and servitude cannot be limited. The freedom from slavery is one of the rights that is non derogable and the court should frown upon legislation that purports to do so.

20. The petitioners attack the provisions of **section 32** on the basis that it is discriminatory and contravenes **Article 27** of the Constitution. The petitioners affirm that the provisions of **section 32** have subjected them to unwarranted and wanton discrimination by barring them from establishing their own professional practices on the flimsy ground of their age and accordingly the older members of the legal profession are granted preferential treatment and consequently **section 32** is clearly incompatible with **Article 27** of the Constitution which guarantees equality before the law as well as prohibiting any sort of discrimination.

21. The petitioners relied on the case of ***James Nyasora Ngarangi & Others v Attorney General*** **Nairobi HC Petition No. 298 of 2008 (Unreported)** where it was held that discrimination which is forbidden by the Constitution is unfair or prejudicial treatment of a person or group of persons based on certain characteristics and the case of ***President of Republic of South Africa & Another v John Phillip Hugo*** **[1994] 4 ZACC**. The court was also referred to the cases of ***R v Turpin*** **[1989] 1 SCR 1296**, ***Willis v The United Kingdom*** **ECHR App. No. 360942** and ***Okpisz v Germany*** **ECHR App. No. 159140**.

22. The petitioners maintained that it is only by examining the larger context that a court can determine whether differential treatment results inequality or whether on the other hand, it would be identical treatment which would in the particular context result in inequality or foster disadvantage. In the petitioners' view, differential treatment discriminates against young advocates in this country.

23. The petitioners also contend that the difficulties and hardship caused to a young advocate by application of **section 32** is not proportionate to the vice to be corrected. It is the petitioners' case that the difficulties and hardship caused by **section 32** prevents a young advocate from accessing meaningful employment hence curtailing their efforts to access a reasonable means of earning a livelihood.

24. The constitutionality of **rule 2** of the ***Advocates (Practice) Rules*** (hereinafter **"rule 2"**)was argued by Mr Omwansa, the 1st petitioner who submitted that **Article 46** of the Constitution provides for consumers right to the information to gain the full benefit of goods and services offered by either *'a public entity or a private person.'* The petitioners argue that

legal services are included in the definition and by prohibiting advertising, **rule 2** essentially suffocates and constrains a consumer's right to have access to information regarding where, when, from whom and how to get the services of an advocate or even what issues can be dealt with by an advocate.

25. The petitioners also contend that the consequence of non-advertisement by advocates is that the public is left in the dark and this denies them public access to justice which is a right guaranteed under **Article 48** of the Constitution which obligates the state to ensure access to justice to all persons. A law that denies the public information and therefore access to justice is unconstitutional.

26. The petitioners also attack ***rule 2*** on the basis of **Article 35** which provides for the right to access to information.

27. The petitioners referred the court to several cases from the United States where the courts in that country determined that the prohibition was unconsitutional and an infringement of the freedom of speech. Counsel referred to the following cases; ***Bates v State Bar of Arizona*****, 433 US 350 (1977)**, ***Virginia State Pharmacy Board v Virginia Citizens Consumer Council*****, 425 US 748 (1976)** and ***Central Hudson Gas & Hudson Corporation v Public Service Commission***, **477 US 557 (1980).**

28. The petitioners urged this court to hold that **section 32** of the ***Advocates Act*** and **rule 2** of the ***Advocates (Practice) Rules*** are unconstitutional. The petitioners also pray for costs of the petition.

1st respondent's case

29. Mr. Wamotsa, who appeared for the 1st respondent, opposed the petition. He relied on skeleton submissions dated 10th February 2012. Counsel was of the view that the petitioners have misconstrued the provisions of **section 32**. He submitted that legal profession is a calling and one of its core functions is to offer legal services to the public. It is regulated profession and it operates within a statutory regime.

30. Counsel contended that **section 32** was enacted in the context of risk and fiduciary duties an advocate owes to the public in general and to his or her clients in particular in the

context of offering legal advice. That section is intended to support consumers of legal services but also to support its independence and safeguarding the unique role it played by advocates who provide legal services to the public.

31. Mr Wamotsa stated that **section 32** provides for a supervised legal practice by which the legal practitioner is required to take a period of restricted legal practice. The purpose of **section 32** is to enable young advocates gain experience under the tutelage of senior advocates. There is also an element of protecting the public which is the overriding interest. **Section 32** also protects young advocates by ensuring that their legal work is reviewed by a senior advocate. It therefore prepares young advocates to discharge their calling.

32. Counsel contended that supervised legal practise is neither new nor restricted to Kenya. This was a common practise all over the world where a legal practitioner is required, according to the ***Supervised Legal Practice Guidelines of Western Australia***, to, *'undertake a period of restricted legal practice which the practitioner cannot engage in the practice of law unless supervised by a legal practitioner holding an unrestricted practising certificate.'* During this period the supervising advocate will and does instruct and guide the advocate as well as review his or her work. During this two year period newly qualified advocates are exposed to high professional and ethical standards of their senior colleagues which enables them acquire discipline before allowing them to practice on their own.

33. It is the 1st respondent's position that **section 32** does not prohibit an advocate with less than two years from practising law. An advocate who wishes to practise must do so under a person. There is no element of "forced labour" or "slavery." The relationship between the newly enrolled advocate and his supervisor is not involuntarily. It is an employer/employee relationship, there is a requirement for payment for services and nothing has been shown to support the unconstitutionality in this respect.

34. Mr Wamotsa drew the court's attention to the fact that under **section 32** the Council for Legal Education may approve institutions under which the advocate man be offered employment so as to meet the terms of the Act. It has not been shown that the 3rd respondent has refused to licence any institution when it has been requested to do so.

35. The 1st defendant denied that **section 32** was discriminatory on account of age. Mr Wamotsa contended that **section 32** is concerned with experience, skills and competence and not the age of the advocate. Further, he stated, that there is no preferential treatment which **section 32** offers to older members of the profession since they can only practise if they comply with that provision.

36. It is the 1st respondent's position that ***Rule 2*** dealing with advertising is not unconstitutional and the court should not be declared unconstitutional. Mr Wamotsa stated that the rule was authorised by the Council of the Law Society of Kenya exercising its statutory power to regulate the profession and therefore it should be given the liberty to change the rule should it require.

37. Mr Wamotsa urged the court to dismiss the petition with costs to the the 1st respondent.

The 2nd respondent's case

38. The 2nd respondent, the Law Society of Kenya (hereinafter **"the Society"**), opposed the petition on the basis the replying affidavit sworn on 8th December 2011 by Apollo Mboya, the Chief Executive Officer of the Society.

39. Mr Mboya depones that the LSK was consulted prior to the enactment of **section 32** of the Act pursuant to its mandate under **section 4(a)(b)(e)** and **(f)** of the ***Law Society of Kenya Act***. It is the position of the Society that **section 32** does not expose newly admitted advocates to slavery, servitude or forced labour nor is the provision unconstitutional as alleged or at all.

40. The Society contends that **Section 32** conforms with **section 7(1)** of **the Sixth Schedule** of the Constitution and **Articles 21, 22, 23** and **46** of the Constitution and was enacted to infuse professionalism and professional responsibility within the legal profession.

41. Mr Mboya depones that between the year 2000 and October 2011 a total of 4,382 advocates have been entered on the Roll of Advocates and as the Secretary to the Society, no representation written or otherwise has been received from the membership that the provisions of **section 32** of the Act has exposed advocates to slavery, servitude, or forced labour and nor has his office received any representation from the petitioners in that regard.

42. According to the Society, **section 32** also seeks to ensure that members of the profession acquire necessary skills and experience before practising on their own account and the provisions only prescribes conditions to be satisfied before an advocate proceedings to practice on his own account and this is the same position with respect to other professionals in Kenya and particularly Architects, Quantity Surveyors, Doctors, Pharmacists and Dentists.

43. Counsel for the Society, Mr N Amolo adopted the deposition and arguments made on behalf of the 1st respondent. The deposition on the Society's behalf did not make any comment on ***rule 2***. He urged the court to dismiss the petition.

3rd respondent's case

44. The 3rd respondent, Council of Legal Education (hereinafter **"the CLE"**) also opposed the petition. Mr Kuyo, representing the CLE relied entirely on the written submissions filed on its behalf dated 8th February 2012. The submissions substantially reiterate the position agitated by the 1st respondent.

45. According to the 3rd respondent, it is established under **section 3** of the ***Council of Legal Education Act*** **(Chapter 16a of the Laws of Kenya)** and is constituted to organise and ensure training of lawyers and advocates of the High Court of Kenya and beyond that it has no jurisdiction or control over legislation or implementation of **section 32** and **rule 2**.

46. The 3rd respondent contends that the petitioners have not demonstrated any breach of their rights or fundamental freedoms as required by the law as against the 3rd respondent. In this respect the case of ***Matiba v Attorney General*** **Nairobi HC Misc. App. No. 666 of 1990 (Unreported)** as elucidated in the case of ***CJK v KK*** **Nairobi Petition No. 12 of 2011 (Unreported)** is relied upon.

47. The 3rd respondent in its submissions also opposed the petitioners' plea in respect of **rule 2**. According to the submissions, the ban on advertising was properly founded. It was argued that this rule banishes commercialisation of legal practice in order to preserve its dignity and efficacy. Conversely, advertising, if allowed, will have serious implications for the profession. By allowing the legal profession to advertise, the duty of selfless service will be subordinated to the profit objective.

48. It is also argued that the quality of service will suffer. An advocate who accepts a brief is required to use the best of his skill regardless of the amount he or she is paid thus commercialisation of legal practice will lead to cut throat competition where the profit will be the dominant objective and therefore service to the client and the cause of justice will be diminished.

49. The 3rd respondent is also concerned that advertisement will cause unnecessary division between the brotherhood of officers of the court. Rich and well funded lawyers will have the capacity to advertise in more expensive and effective media to the detriment. The result is that low income law firms will be pushed out of business. This will affect the distribution of law firms consequently affecting access to justice.

50. Finally, it is argued that the nature of legal services does not lend itself to advertising. Advertising by its nature guarantees success and advocates can only guarantee provision of quality service and not success.

51. The 3rd respondent urges the court to dismiss the petition with costs.

Issues for determination

52. The Court is also required to apply the provisions of **Article 259(1)** of the Constitution which provides that the Constitution shall be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and the human rights and fundamental freedoms in the Bill of Rights and permits development of the law and contributes to good governance. I am alive to these principles and cases that enunciate them (See ***Centre for Rights and Awareness & Others v Attorney General*** **Nairobi Petition No. 16 of 2011 (Unreported**) and ***Harun Mwau v The Attorney General & Others*** **Nairobi Petition No. 146 of 2011 (Unreported)**).

53. Furthermore, I am required to have regard to the preliminary matters or general provisions relating to the Bill of Rights set out in **Part 1** of **Chapter 4** to the task of interpreting the Bill of Rights. Similarly the values set of in **Article 10(2)** are by virtue of **Article 10(1)** applicable to the court in handling the task of applying and interpreting the Constitution.

54. I also intend to apply the principles of constitutional interpretation set out in ***Olum & Another v Attorney-General of Uganda*** **[2002] 2 EA 508** where the Uganda Supreme Court held that in order to determine the constitutionality of a statute, it had to consider the purpose and effect of the impugned statute or section thereof. If the purpose was not to infringe a right guaranteed by the Constitution, the court had to go further and examine the effect of its implementation. If either the purpose or the effect of its implementation infringed a right guaranteed by the Constitution, the statute or section in question would be declared unconstitutional. (See also ***Peter Njoroge & Others v Attorney General*** **Nairobi Petition No. 73 of 2010 (Unreported)**)

55. Another principle to be applied in instances where the constitutionality of a statute is challenged is that every statute passed by the legislature enjoys a presumption of constitutionality and the court must aim to preserve the statute rather than invalidate it. Therefore, a party who seeks to challenge the validity of a statute under our Constitution bears the burden of showing that the act is an affront to the Constitution.

56. Having perused the pleadings, depositions and written submissions and listened to the oral argument two issues fall for determination:

(i) Whether section 32 of the *Advocates Act* is unconstitutional for being inconsistent with and in violation of the rights guaranteed by Articles 25(b), 27 and 30 of the Constitution.

(ii) Whether Rule 2 of the Advocates (Practice) Rules made under the Advocates Act is unconstitutional for being inconsistent with and in violation of the rights guaranteed by Articles 35(b), 46 and 48 of the Constitution.

Whether section 32 of the Advocates is Unconstitutional

Freedom for Slavery and Servitude

57. The petitioners argue that **section 32** of the ***Advocates Act*** breaches the provisions of **Article 36** of the Constitution which provides;

30 (1) A person shall not be held in slavery or servitude.

(2) A person shall not be required to perform forced labour.

By virtue of **Article 25,** the freedom from slavery and servitude cannot be limited.

58. The petitioners' argument is that the requirement of **section 32(1)** that prohibits an advocate from engaging in practice of his own without meeting the requirements of **section 32** amounts to slavery.

59. The parties referred to various conventions which by virtue of **Article 2(5)** now form part of our law. The generally accepted definition of slavery is contained in the ***Slavery Convention of 1927*** at **Article (1)** which defines slavery as, ***"the status or condition of a person over whose any or all powers attaching to the right of ownership are exercised."*** **Article 4** of the **Universal Declaration of Human Rights** prohibits slavery and servitude.Servitude refers to ***"slavery-like practices."***

60. The definition of forced labour set out by ***International Labour Organisation Forced Labour Convention of 1930*** which I have set out at paragraph 12 above has voluntariness as a key though not decisive element.

61. I would also add that it is now well established that the international prohibition against slavery and servitude is one of the pre-emptory norms in international law (*jus cogens*) and which apply to Kenya as part of the general rules of international law by dint of **Article 2(5)** of the Constitution.

62. In my view, the provisions of **section 32** can hardly be termed as slavery or forced labour for several reasons. Firstly the pursuit of a legal career is a voluntary act and those who choose to join the legal professions do so out of choice and therefore agree to abide by the terms of engagement which are regulated by statute. These terms include regulation of training, qualification and practice.

63. Secondly, once a person has qualified as an advocate, he or she is entitled to practice and whether one chooses to do so is a matter of choice. The only condition imposed by **section 32(1)** is that engaging in practice on one's own is regulated for a limited period. It does not prevent an advocate from earning a living. Such an advocate may for the first two years opt for a salaried position in the office of the Attorney General or be engaged by an advocate in private practice who has practiced for not less than five years.

64. Slaves or persons under servitude do not have the privilege of voluntary service. An advocate who is under salaried position at the office of the Attorney General or is engaged by an advocate is entitled to the full protection conferred by the Constitution and the laws regarding labour relations. There is nothing in **section 32** that limits enjoyment to these rights.

65. The imposition of a penalty by **section 31** of the Act is not to force the newly admitted enrolled to work but is a penalty for non-compliance with **section 32**. Since the employment for the two years is voluntary the imposition of penalty for breach **section 32** cannot be the reason why the advocate makes an effort to comply with statute.

66. I therefore find and hold that **section 32** of the ***Advocates Act*** is not in violation of **Article 30** of the Constitution.

Freedom from Discrimination

67. **Article 27** of the Constitution protects equality and prohibits discrimination. **Article 27** provides as follows;

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need.

(8) In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

68. A plain reading of **section 32(1)** shows that the provision is age neutral. It does not discriminate on account of any of the classifications set out in **Article 27(4).** All advocates, young or old, male or female, white or back, from whatever region of the country are subjected to the same requirements of **section 32(1)** of the Act.

69. Even if I were to find, that its effect on account of age was discriminatory to young advocates. I would still hold that any differentiation on account of age serves a rational legitimate purpose (see the case of ***James Nyansora Ngarangi and Others v Attorney General* (Supra)**).

70. The pursuit of law and legal practice is not just a business. It is a profession which values ethics, professional responsibility and is committed to the highest ideals of justice. I agree with the contention by the Society that **section 32** is necessary to enable newly admitted advocates acquire experience and skills for a limited period of tutelage under their more experienced colleagues. It is a concession that raw knowledge gained outside the confines of real life experience does not guarantee the provision of quality service to the public.

71. This requirement applies to most learned professions, doctors, engineers and accountants. As the 3rd respondent submits, *"public interest does not allow a fresh graduate from medical school to conduct heart or brain surgery."* I agree with this sentitment and it represents a rational decision by the legislature to ensure that before newly admitted advocates are entitled to practice on their own, they must have acquired some skill and knowledge from their more senior and experienced colleagues for a limited period.

72. The petitioners have not discharged the burden of showing that **section 32** is unconstitutional. I find that **section 32(1)** of the ***Advocates Act*** does not violate the provisions of **Article 27** of the Constitution.

Whether rule 2 of the Advocates Practice Rules is unconstitutional

73. **Rule 2** is made pursuant to the provisions of **section 81** of the ***Advocates Act*** which enables the Council of the Law Society of Kenya with the approval of the Chief Justice to make rules with regard to, *"the professional practice, conduct and discipline of advocates."*

74. **Rule 2** may be fairly interpreted to impose a complete ban on advertising or may encompass a prohibition on a wide range of activities which would be construed as falling within the realm of advertising or attracting business in whatever manner.

75. The legal profession has historically looked down upon any activity that is seen as representing solicitation of business. The legal profession has seen itself as the noble and learned profession where anything, like advertising, that implies that law is merely a business cheapens the image of lawyers. This fear of advertising was expressed by Warren Burger, the former Chief Justice of the United States in a speech where he chastised members of the legal profession in the United States for taking the freedoms to advertise as a release from all professional restraint as they used the same modes of advertising as other commodities, *"from mustard, cosmetics and laxatives to used cars."* (see **Burger, *The State of Justice*, 70 A.B.A J. 52 (March 1984)**)

76. Whatever the reasons for the prohibition of advertising, one thing is becoming clear the prohibition of advertising has come under considerable challenge both locally and internationally.

77. In the United States of America, the challenge was mounted on the basis of the First Amendment of the United States Constitution which protects the freedom of speech. The Supreme Court in the case of ***Bates v State Bar of Arizona* (1977) 433 US 350** held that a state may not prohibit advertisement. Advertising has become a fact of life for the legal profession in that country. It is not uncommon to find lawyers advertising on television, newspapers and the billboards.

78. Jurisdictions that have lifted the ban on advertising by lawyers have adopted a regulatory approach that attempts to maintain public confidence in the legal profession by allowing lawyers to freedom to inform the public of their nature of their services subject to rules that prevent false, misleading or deceptive representation practises and conduct that undermines the administration justice.

79. The question before the court is whether the **rule 2** breaches the fundamental rights of the petitioner or any member of the public. This question must be determined in accordance

with the provisions of the Constitution. Unfortunately, I did not have any argument by the Society on this issue. The submissions filed on behalf of the CLE were in support of the ban on advertising for advocates.

80. The petitioners have alleged that **rule 2** contravenes the rights protected under **Article 35 (1)(b)**, the right of access to information, **Article 46**, consumer rights, and **Article 48**, the right of access to justice.

Rule 2 and Freedom of information

81. **Article 35(1)(b)** provides as follows;

35 (1) Every person has the right of access to –

(b) information held by any other person and required for the exercise or protection of any right or fundamental freedom.

82. I think the argument made for the unconstitutionality of **rule 2** on the basis of **Article 35(1)(b)** is rather strained and tortured. The ban on advertising includes what may be fairly be said to be dissemination of information. I do not think it restricts access to information in the manner contemplated by **Article 35(1)(b)**. Irrespective of the ban on advertising, any citizen can assert the right to seek information and **rule 2** cannot be used as a shield to avoid the obligations of **Article 35(1)(b)**.

Rule 2 and Consumer rights

83. **Article 46** of the Constitution protects consumer rights. It provides;

46(1) Consumers have the right -

(a) to goods and services of reasonable quality;

(b) to the information necessary for them to gain the full benefit from goods and services;

(c) to the protection of their health, safety, and economic interests; and

(d) to compensation for loss or injury arising from defects in goods or services.

(2) Parliament shall enact legislation to provide for consumer protection and for fair, honest and decent advertising.

(3) This Article applies to goods and services offered by public entities or private persons.

84. This provision of the Constitution entitles every consumer, including consumers of legal services to certain rights. Legal services are not excluded from the purview of **Article 46** and neither are lawyers and law firms which are private entities for purposes of **Article 46(3)**.

85. Consumers require sufficient and accurate information to enable them assess the nature and quality of services necessary to enable then gain full benefit of legal services. In order to generate efficient market outcomes, consumers must know what it available to in order to make informed choices. This is the right guaranteed under **Article 46** of the Constitution.

86. I agree with the petitioners that the prohibition of advertising under **rule 2** in essence constrains the consumers of legal services to such information as is necessary for them to make informed choices. Advertising enables the consumers to have information regarding where, when, from whom and how to get legal service of an advocate.

Rule 2 and Access to Justice

87. The right of access to justice is protected by **Article 48** of the Constitution which provides as follows;

48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

88. In the case of ***Dry Associates Limited v Capital Markets Authority and Another*** **Nairobi Petition No. 358 of 2011 (Unreported)** the court stated, ***'[110] Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one's rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.'***

89. Advocates play a key role in the provision of justice. They act as intermediaries between the citizen and the law. They perform tasks which enable individuals meet their legal obligations and facilitate not only business but also personal relationships. Access to legal services is an indispensable element of access to justice. It is through the provision of legal services that Kenyans are able to understand the law, their rights and legal obligations. Any law or regulations prevents an advocate from imparting information necessary for increased awareness of law, legal rights and obligation does, in my view, limit access to justice.

90. For purposes of legal services, I think the consumer rights and right of access to justice are interwoven. I concur with the petitioners that a consequence of the ban on advertising of legal service is that the consumer is left in the dark about the nature and extent of legal services that can be offered by an advocate thereby undermining the right of access to justice.

91. In ***Bates v State Bar of Arizona*** **(Supra)**, the Supreme Court of the United States recognised that the though advertising does not provide a complete foundation on which to select an attorney, it does enable a consumer make an informed choice. The court also noted that advertising, which is a traditional mechanism in a free market economy for a supplier to inform a potential purchaser of the availability and terms of exchange, may well benefit the administration of justice.

92. The preamble to the Constitution recognises the aspirations of all Kenyans for a government based on essential values of human rights, equality, freedom, democracy, social justice and the rule of law. This vision is underpinned by the values and principles contained in **Article 10** of the Constitution and an extensive Bill of Rights. In order to achieve a just society that meets the expectations of Kenya, legal services offered by advocates must be available and the people must have the necessary information to access these services, a ban on advertising by advocates is inimical to these broad of objectives of the Constitution.

93. I therefore find and hold that a complete ban on advertising by advocates such as that contained in **Rule 2** of the ***Advocates Practice Rules*** undermines the right of access to justice and is therefore a violation of that right.

Disposition

94. In respect of the two issues framed for determination I have determined as follows;

(a) Whether section 32 of the *Advocates Act* is unconstitutional for being inconsistent with and in violation of the rights guaranteed by Articles 25(b), 27 and 30 of the Constitution.

Section 32 of the ***Advocates Act*** is not inconsistent with or in violation of **Articles 25(b), 27** and **30** of the Constitution.

(b) Whether Rule 2 of the *Advocates (Practice) Rules* made under the Advocates Act is unconstitutional for being inconsistent with and in violation of the rights guaranteed by Articles 35(b), 46 and 48 of the Constitution.

Rule 2 of the ***Advocates (Practice) Rules*** made under the **Advocates Act** in so far as to constitutes a complete ban on advertising by advocates is inconsistent with the provisions of **Articles 46(1)** and **48** of the Constitution.

95. In the circumstances I allow the petition to the extent that I declare **rule 2** of the ***Advocates (Practice) Rules*** made under the **Advocates Act** in so far as it constitutes a complete ban of advertising by advocates is unconstitutional and inconsistent with **Articles 46(1)** and **48** of the Constitution.

96. Each party shall bear their own costs.

DELIVERED and **DATED** at **NAIROBI** this 29th day of March 2012.

D.S. MAJANJA

JUDGE

Petitioners in person.

Mr Wamotsa, Litigation Counsel, instructed by the State Law Office for the 1st respondent

Mr N. Amolo instructed by Amolo & Kibanya Advocates for the 2nd respondent

Mr C. Kuyo instructed by Ochieng' Onyango Kibet and Ohaga Advocates for the 3rd respondent

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