Kenya School of Law v Kamote (Civil Appeal E389 of 2022)
[2024] KEHC 9396 (KLR) (Civ) (30 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9396 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E389 OF 2022

DKN MAGARE, J

JULY 30, 2024

BETWEEN

KENYA SCHOOL OF LAW ..... APPELLANT

AND

PATIENCE KATHAMBI KAMOTE ..... RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of the Legal Education Appeals Tribunal given in Tribunal Case No. E016 of 2022 given on 3/6/2022.
2. The Appellant set out grounds of appeal in the Memorandum of Appeal dated 9/6/2922 as follows.
    a. The Tribunal erred in law and fact in failing to find that it lacked jurisdiction to determine the Appeal.
    b. The Tribunal erred in law and fact in exceeding its mandate.
    c. The Tribunal erred in law and fact in failing to properly apply the law and principles on eligibility for admission to the Advocates Training Program.
3. In her appeal to the tribunal vide the memorandum of appeal dated 4/4/2022, the Respondent sought a declaration that she qualified for admission to the ATP by dint of Section 1(a) of the Second Schedule to the *Kenya School of Law Act*.
4. The Appellant also prayed that the tribunal compels the Appellant to admit the Respondent to the ATP for the 2022 academic year.
5. In its Response, the Appellant maintained that the Respondent did not meet the minimum requirements as required under the *Kenya School of Law Act* 2012. Further, that the jurisdiction of the

tribunal was limited to matters relating to *legal education act* and not admission requirements for the students.

6. The tribunal considered the case and rendered its judgment on 3/6/2022 allowing the Respondent's appeal.

Submissions

7. The Appellant relied inter alia on the cases of *Law Society of Kenya v Centre for Human Rights and Democracy & 13 Others* (2013)e KLR and *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR to submit that the tribunal acted without jurisdiction. On the basis of Owners of the Motor Vessel "Lillian S" (supra) it was submitted as follows: -

> "Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
>
> > "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

8. It was submitted that the Respondent did not meet the requirement under Section 16 of the *Kenya School of Law Act*, 2012.

9. In rejoinder the Respondent submitted that her revocation was erroneous and the tribunal was correct in its finding. It was further submitted that the Respondent invoked Section 31 of the *Legal Education Act* to seek intervention of the Tribunal. Further that use of the word or in Section 1(a) of the Schedule to the *Kenya School of Law Act*, made it eligible for the Respondent to be admitted as two criteria were created for qualification either based on 1(a) or 1(b).

Analysis

10. This court is under the duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

11. In the cases of *Peters vs Sunday Post Limited* [1958] EA 424 , the court therein rendered itself as follows:-

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

12. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

13. However, in cases where documents are involved or affidavits were used, this court has a wider latitude. In the case of *Sugut v Jemutai & 3 others* (Civil Appeal 110 of 2018) [2023] KECA 202 (KLR) (17 February 2023) (Judgment) Neutral citation: [2023] KECA 202 (KLR Kiage JA stated as doth: -

> " I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29(1) of the Court of Appeal Rules 2010; *Selle Vs Associated Motor Boat Co* [1968] EA 123). I do accord due respect to the factual fndings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

14. The duty of the court is not to substitute the court's discretion for its own. In *Mercy Kirito Mutegi v. Beatrice Nkatha Nyaga & 2 Others* [2013] e KLR, the Court of Appeal held:

> " An appellate court will not ordinarily differ with the findings on a question of fact, by a trial Judge who had the advantage of hearing and seeing the witnesses. Our role is to review the evidence and determine whether the conclusions reached are in accordance with the evidence and the law. A conclusion although based on primary factual evidence that is erroneous becomes a point of law. This is a demonstration that there will be occasion when facts or evidence matter in determining a question of law".

15. The interpretation of the law must accord with the constitutional imperatives. No interpretation shall be made in a way that allows discrimination or is discriminatory in its effect. In *Matindi v CS, National*

Treasury & Planning & 4 others (Constitutional Petition E280 of 2021) [2023] KEHC 1144 (KLR) (Constitutional and Human Rights) (17 February 2023) (Judgment), this court posited as doth: -

> " Kenya's struggle against racism was enshrined in article 27 of the *Constitution* that provided that every person was equal before the law and had the right to equal protection and equal benefit of the law. Article 27 prohibited discrimination by the State based on race. Article 27(6) sought to realize the right to equality by undertaking the State to 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. Any measure under article 27(6) shall adequately provide for any benefits to be on the basis of genuine need. That was need for existence for the disclosure of the reason for waiver to ascertain genuine need."

16. The issue is whether the Tribunal acted with jurisdiction and if so, whether the tribunal erred in allowing the Respondent's appeal.

17. Before venturing into the merits, the Appellant raised an issue that the tribunal acted without jurisdiction. I do know better the response to this issue per the finding of the court in *Republic v Kenya School of Law & 2 others Exparte Kgaborone Tsholofelo Wekesa* (2019) eKLR where Mativo J (as he then was) held as doth:

> " The preamble to the *Legal Education Act* provides that it is an Act of Parliament to provide for the establishment of the Council of Legal Education; the establishment of the Legal Education Appeals Tribunal; the regulation and licensing of legal education providers and for connected purposes. Section 31 of the act provides for the jurisdiction of the Tribunal. A reading of the section leaves me with no doubt that the Tribunal's jurisdiction is to determine an appeal made to it in writing by any party or a reference made to it by the Council or by any committee or officer of the Council, on any matter relating to the Act. The ex parte applicant's dispute distilled above in my view squarely falls within the Tribunal's jurisdiction."

18. The foundation upon which the tribunals in Kenya are established is Article 169(1) of the *Constitution* of Kenya, 2010. It provides,

> " The Subordinate Courts are –

a. the magistrates courts.

b. the Kadhi's courts;

c. the courts martial; and

d. any other Court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162 (2)."

19. Parliament has pursuant thereto enacted the *Legal Education Act*, No. 27 of 2012 which recognizes in its preamble as follows:

> " An Act of Parliament to provide for the establishment of the Council of Legal Education; the establishment of the Legal Education Appeals Tribunal; the regulation and licensing of legal education providers and for connected purposes."

20. Furthermore, Section 2 of the *Legal Education Act* provides for the term 'Tribunal' to mean the Legal Education Appeals Tribunal as established by Section 29 of the Act. The jurisdiction of the tribunal is provided for in section 31 of the Act as follows:

> " The Tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the council or any committee or officer of the council, on any matter relating to this Act, inquire into the matter and make a finding thereupon, and notify the parties concerned."

21. Consequently, the tribunal was clothed with the requisite jurisdiction. To hold that the tribunal herein is devoid of jurisdiction on a matter relating to the admissibility of students into the Kenya School of Law is to constrict the wide delineation of the powers granted under statute that necessitate the exhaustion through the tribunal of consequential disputes by not necessarily filing originating actions in court.

22. Having found that the tribunal had jurisdiction, the court also finds whether the tribunal erred in allowing the Respondent's appeal. In *Peter Githanga Munyeki v Kenya School of Law*, (2017) eKLR Mwita, J held that a holistic interpretation had to be accorded to the schedule of the Act. He held as doth:

> " The respondent is obliged to follow the law as enacted by parliament unless such law is found to contravene the *Constitution*. In enacting the eligibility criteria under *Kenya School of Law Act*, parliament must have intended to promote high standards in the training and practice of the law."

23. On merit the question before the court was whether the Appellant erred in refusing revoking provisional admission to Kenya school of law. The Respondent herein scored a C-Plain in her Kenya Certificate of Secondary Education. She proceeded to acquire a Diploma in Law, paralegal studies and eventually attained a Bachelor's Degree in Law. Subsequently, the Kenya School of Law granted her a provisional admission to the Advocate Training Program but which was revoked when she went for admission on the grounds that she did not meet the minimum requirements for the admission into the Advocate's Training Program.

24. The Appellant's case is that the tribunal erred in its finding that the revocation of the Respondent's provisional admission was improper and ordered for admission of the Respondent so that the finding was in error and without jurisdiction as the Respondent had not attained the minimum qualification for admission into the Kenya School of Law for the Advocates Training Program.

25. On the other hand, the Respondent maintained that the tribunal was correct as she clearly qualified for admission to the Kenya School of Law for the Advocate's Training Program so that the revocation of admission was unlawful within the meaning of Section 1(a) of the Schedule to the *Kenya School of Law Act*.

26. The Second Schedule of the *Kenya School of Law Act*, 2012 as amended by Statute Law (Miscellaneous Amendments) Act, 2014 by sections 1(a) and (b) provides for the admission qualifications to the School as follows:

> " A person shall be admitted to the School if—
>
> (a) having passed the relevant examination of any recognized university in Kenya, or of any university, university college or any other institution prescribed by

the Council, holds or becomes eligible for the conferment of the Bachelor of Laws (LLB) degree of that university, university college or institution; or

(b) having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) in the grant of that university, university college or other institution—

(i) attained a minimum entry requirement for admission to a university in Kenya; and

(ii) obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent; and

(iii) has sat and passed the pre-bar examination set by the school."

27. The court notes that the provisional admission letter was dated and issued on 2/3/2022 and the revocation letter was dated and issued on 22/3/2022. The registration process commenced on 7/3/2022 and was expected to last up to 25/3/2022. Therefore, the Respondent's admission was revoked within the admission window. As such, the revocation was at the earliest juncture before the classes could commence.

28. The court notes that the Respondent sought to benefit under clause 1(a) of the second schedule to the *Kenya School of Law Act* in order to be granted direct entry into the programme. Even though the tribunal found that the Respondent could derive benefit from clause 1(a) of the Second Schedule to the *Kenya School of Law Act*, the Respondent was notwithstanding clearly ineligible as she did not meet the minimum K.C.S.E mean grade requirements because she had not attained the minimum qualification Grade of C-plus applicable to all Universities in Kenya. To do otherwise was tantamount to flaunting the standards of education as regulated under statute. In Court of Appeal in Civil Appeal No. E472 of 2021 - *Kenya School of Law v Otene Richard Akomo & 41 others*, the court of Appeal [Asike - Makhandia, J. Mohammed and Kantai JJA] stated doth:

> " It was submitted that section 1 (a) of the Second Schedule to the Act, is clear that upon being eligible for an award of a Bachelor of Laws degree from a Kenyan University an applicant would be eligible for admission to the ATP. Further, sections 1 (a) and 1 (b) of the Second Schedule to the *KSL Act*, distinguishes applicants who hold a Bachelor of Laws degree from Kenyan University and those from a foreign University. We are of the view that with the use of semi-colon between 1(a) and (b) of the Act then the conditions follow which to us means that you are eligible, firstly, based on your LL.B degree either from a Kenyan University or as in (b) from a foreign university but in all situations, the conditions are same and are enlisted therein which are mandatory to all irrespective of whether you have a degree from within or without Kenya."

29. It therefore follows that the Court of Appeal adopted a conjunctive interpretation of Sections 1(a) and (b) of the Second Schedule of the *Kenya School of Law Act*, 2012. Based on this, the Respondent not only needed to prove that she acquired or was eligible for a Bachelor's Degree in Law from a recognized university in Kenya but also that she obtained the minimum KCSE grades of C+ (Plus) and a B Plain in English or Kiswahili.

30. As was held in *Victor Juma v Kenya School of Law, Council of Legal Education (Interested Party)*, (2020) eKLR:

> " The right to education can only be enjoyed in the context of the laws of the country. One can only pursue a course of his choice if he qualifies for that course. Being denied the opportunity to pursue a course that one does not qualify for cannot be said to be a violation of the rights to education."

31. The raison d'etre for differentiating the (a) and (b) is that the country cannot control university admission criteria in other countries. This country at least, it can be taken judicial notice that minimum university entry is C plus. The foreign universities have their own criteria. That is why the foreign degrees are to be equated under the *Kenya National Qualifications Framework Act*, No. 22 of 2014.

32. Under section 3 of the Act, the guiding principles for the Respondent is stated to be:-

> " The guiding principles for the framework shall be, among others, to promote access to and equity in education, quality and relevance of qualifications evidence based competence, and flexibility of access to and affordability of education, training assessment and qualification.

33. Some universities can admit if they so wish based on winning a beauty pageant or sports prowess. They cannot impose those qualification on this country. Kenya's standards are already set and cast in stone. The country can control qualifications and entry level behaviour for students in the country. However, whether there are foreign or locally trained, there must as a corollary be the same entry behaviour.

34. In *Maalim v Kenya National Qualifications Authority* (Petition E124 of 2022) [2023] KEHC 2002 (KLR) (Constitutional and Human Rights) (17 February 2023) (Judgment), this court posited as follows: -

Further, the *Kenya National Qualifications Framework Act*, No. 22 of 2014 was enacted on 14th January, 2015 to;-"establish the Kenya National Qualifications Authority to provide for:-

a. The development of Kenya Qualifications Framework.

b. Establish standards for recognizing qualifications obtained in Kenya and outside Kenya.

c. Develop a system of compliant lifelong learning and attained of National Qualifications.

d. Align qualifications obtained in Kenya with global benchmarking in order to promote National and Transnational mobility of workers.

e. Strengthen the national quality assurance system for national qualifications and

f. Facilitate mobility and progression within education, training and career paths.

89. Therefore, the Respondent has a mandate to develop standards for recognizing qualification. There has been no challenge on the Constitutionality of the KNQR Act, 2014.

The Court therefore shall presume the statute as valid law. The foregoing is based on tenets on interpretations clearly enunciated in *Kenya Human Rights Commission Versus Attorney General* (2018) eKLR. "There is a general but rebuttable presumption that a statute or statutory provision is Constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or its provision is constitutionally invalid. This is because it is assumed that the legislature as peoples' representative understands the problems people they represent face and, therefore enact legislations intended to solve those problems. In

Ndynabo v Attorney General of Tanzania [2001] EA 495 it was held that an Act of Parliament is constitutional, and that the burden is on the person who contends otherwise to prove the country."

90. As a result, the Respondent established various Regulations to carry out its mandate. The last in respect of the matters covered by the petition is the Kenya National Regulations 2018. The said regulations provide in Regulation as doth in Regulation 18:-

18.

(1) The Authority may recognize competencies or attainment through the following qualification types —

(a) a Certificate;

(b) a Diploma;

(c) a Bachelor's Degree;

(d) a Postgraduate Certificate or Diploma;

(e) a Master's Degree; and

(f) a Doctorate Degree.

(2) The recognition of attainment referred to in sub regulation

(1) shall be guided by the volume of learning assessed based on credits earned, with one credit being equal to ten notional hours.

(3) The volume of learning referred to in sub regulation

(2) shall be specified in terms of the total minimum number of credits required, and in terms of the minimum number of credits required at its specified exit level on the National Qualifications Framework and, where appropriate, the maximum number of credits from the preceding level may be specified.

(4) The credits rating of a qualification shall not depend on the mode of delivery of learning.

91. The regulations go ahead and specify qualifications needed to attain a decree as doth:-(5) In determining the volume of learning for a qualification, the following guidelines on credits shall apply —

(d) for a craft certificate, the minimum number of credits shall be one hundred and twenty;

(e) for a Diploma, the minimum number of credits shall be two hundred and forty;

SUBA(f)for a Bachelor's Degree, the minimum number of credits shall be four hundred and eighty;

92. Regulation 21(8) provides as doth:-(8)The Authority shall promote recognition of qualifications attained in Kenya through various mechanisms that include — (a) aligning the National Qualifications Framework and progression pathways with best practices which supports internationally recognized standards;

35. The quality assurance part is an imperative that must be respected in an open and democratic society. When a university sets its own admission criteria, it cannot impose the same upon the Appellant. Not all who train intend to practice. It could be for fun or other need. However minimum qualification are imperative. The Respondent did not have them.

36. There are two issues that came up that need unbundling, that is, the degree alone is sufficient and that a diploma in paralegal studies is a subset of LLB and can be used to admit students to the Appellant institution. LLB is a base qualification without a diploma subset. A diploma in paralegal studies can only lead to a degree in paralegal studies once established.

37. Award of the underlying degree by the University of Nairobi cannot be questioned. It cannot however be a basis for admission to Kenya School of Law.

38. Consequently, I find that the tribunal erred in its finding that the Respondent had qualified for admission to the Kenya School of Law in the glare of the requirement that the minimum university entry was grade C-Plus and for which it was not in dispute that the Appellant had not achieved. In the Indian case of *Maharashtra State Board -VS- Kurmarsheth & Others* [1985] CLR 1083, it was stated as follows:

> "So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations...to be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formatted by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and departments controlling them."

39. I find merit in the appeal and allow it. Section 27 of the *Civil procedure Act* provides as follows: -

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

40. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the

> preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

41. The Respondent was led down a garden path by institutions that should have known better. The Respondent innocently or otherwise followed the path to her ruin. The best order should be that each party bears its own costs.

Determination

42. In the upshot, I make the following orders:

    a. The Judgment of the Tribunal dated 3/6/2022 is set aside and substituted thereof with an order dismissing the Appeal in LEAA No. E016 of 2022.

    b. No order as to costs.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 30TH DAY OF JULY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

No appearance for parties

Court Assistant – Jedidah