



Republic v Council of Legal Education & another; Opondo (Exparte) (Miscellaneous Application 115 of 2019) [2022] KEHC 3106 (KLR) (Judicial Review) (18 February 2022) (Judgment)

Neutral citation: [2022] KEHC 3106 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
MISCELLANEOUS APPLICATION 115 OF 2019
J NGAAH, J
FEBRUARY 18, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

COUNCIL OF LEGAL EDUCATION 1ST RESPONDENT

KENYA SCHOOL OF LAW 2ND RESPONDENT

AND

AMRAM ODONGO OPONDO EXPARTE

JUDGMENT

1. The application before court is the applicant’s motion dated 25 of April 2019. The application is brought under Order 53 Rule 3 of the [Civil Procedure Rules](#), 2010.
2. The applicant seeks the following orders:
 - “
 1. An order of certiorari to remove into this court the decision of the 2nd respondent’s decision dated 7 December 2018 that denies the applicant’s application to be admitted into the Advocates Training Programme at the Kenya School of Law on the ground that the applicant had scored grade 9 (nine) in English in the Kenya Certificate of Education (KCE) for the purpose of quashing it, and quash it.
 2. An order of mandamus compelling the 1st and 2nd respondents to admit the applicant to the Advocates Training Programme at the Kenya school of law.



3. Aggravated and exemplary damages be and is hereby awarded against the 1st and 2nd respondents to the applicant on account of the 1st and 2nd respondents' impugned numerous irrational, unreasonable and ultra vires decisions to deny the applicant admission to the Advocates Training Programme at the Kenya School of Law.
 4. That costs be to the applicant.
 5. Any other relief or order that is just and equitable.”
3. The application is based upon a statement of facts dated 15 April 2019 and verified by an affidavit sworn by the applicant on even date.
 4. To the extent I understand the application, the applicant's case is that he joined Moi University to study law in the 2011 and, in the year 2016, he graduated from the same University with a bachelor of laws degree.
 5. Prior to joining university, he had studied at Mau Summit Secondary School and Sengeru Manga High School for his Kenya Certificate of Education (Ordinary level) and Kenya Advanced Certificate of Education (Advanced Level) respectively. Based on the grading system at the time, he passed with second division in his Ordinary level examinations while he obtained two principal passes and two subsidiary passes at the Advanced level examinations.
 6. Upon graduation from Moi University, and more particularly on 14 November 2016 (though he has erroneously indicated in his affidavit the date to be 16 December 2016), he applied to be enrolled into the 2nd respondent's Advocates Training Program. By a letter dated 2 December 2016, the 2nd respondent rejected the applicant's application on the ground that the applicant had not obtained clearance from the Council of Legal Education with respect to the applicant's high school qualifications.
 7. The 1st respondent, on the other hand, informed the applicant that the applicant's qualifications did not meet the prescribed threshold for admission to the bachelor of laws degree program since the applicant had not obtained at least three principal passes in the Ordinary level examinations.
 8. The applicant was dissatisfied with the respondents' response and by his letter dated 10 March 2017, apparently addressed to the 1st respondent, he protested against the decision not to admit him and insisted that he qualified to undertake a law degree course based on the criteria set by the Commission of University Education. According to that criteria, the applicant has urged, two principal passes and a subsidiary at the A-level were sufficient qualifications for enrolment into an undergraduate law degree program.
 9. It is the applicant's case that in the year 2011 when the applicant sought for admission to undertake the bachelor of laws degree at Moi university, the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations 2009, gazetted as Legal Notice No. 170 under the Council of Education Act, 1995, the qualification for admission into an undergraduate degree course was at least two principle passes at the Advanced level examination; even then, this was in respect of foreign students only of which the applicant was not.
 10. According to the applicant, Regulation 5 of the Council of Legal Education (Accreditation and Quality Assurance Regulations) 2016 which the 1st respondent invoked to reject his application only came into force on 6 February 2016 long after the applicant had been admitted to the law degree



program and therefore it was not applicable to him. The applicant urges that the 1st respondent applied the regulation retrospectively to the applicant's detriment.

11. In the same breath, the applicant urged that the *Kenya School of Law Act*, 2012 which came into force on 15 January 2013 did not apply to those students who, like the applicant, had enrolled into the undergraduate law degree programme at the material time.
12. Aggrieved by the positions the respondents had adopted against his application, the applicant sought the recourse of the courts, and to that end, he lodged in this Honourable Court a judicial review application registered as Nairobi High Court Miscellaneous Application No. 249 of 2018. This suit was later to be withdrawn apparently after the applicant and the respondents reached some agreement that the applicant was free to apply for review of the decisions rejecting his application for admission. He followed this agreement through and on 15 October 2018, he made a fresh application for admission to the Advocates Training Programme.
13. Aggrieved by the positions the respondents had adopted against his application, the applicant sought the recourse of the courts, and to that end, he lodged in this Honourable Court a judicial review application registered as Nairobi High Court Miscellaneous Application No. 249 of 2018. This suit was later to be withdrawn apparently after the applicant and the respondents reached some agreement that the applicant was free to apply for review of the decisions rejecting his application for admission. He followed this agreement through and on 15 October 2018, he made a fresh application for admission to the Advocates Training Programme.
14. But by a letter dated 7 December 2018, the 2nd respondent rejected the applicant's application, this time round on the ground that he had scored grade 9 in English language in his Ordinary level examinations.
15. The applicant argues that the decision to reject his application on this ground was spurious since, according to his understanding, the language qualifications in the requirements is in the alternative. It is his argument that any applicant for admission into the Advocates Training Program would be eligible for the admission as long as he had a pass either in English language or in Swahili language.
16. Dr. J.K. Gakeri, the then 1st respondent's Chief Executive Officer, swore a replying affidavit opposing the applicant's application. According to Dr. Gakeri, the Council of Legal Education is established under section 4 of the *Legal Education Act*, No. 27 of 2012 and under section 8 of this Act, the Council, *inter alia*, regulates legal education and training in Kenya; it establishes the criteria for recognition and equation of academic qualifications in legal education and also advises and makes recommendations to the Government and any other relevant authority on matters relating to legal education and training that require the consideration of the Government.
17. Dr. Gakeri swore that the applicant applied to be admitted to Moi University in 2011 and completed his degree course in 2015.
18. According to section 16 of the *Kenya School of Law Act* which came into operation in 2013, a person shall not qualify for admission to a course of study at the school, unless that person has made the admission requirements set out in the 2nd schedule for that course. The second schedule to the Act, is central to admission to Advocates Training Programme.
19. Among other requirements which an applicant to the program must meet is for the applicant to have a bachelor of laws degree from a recognised university, and a mean grade C+ (plus) with B (plain) in English or Kiswahili language in the Kenya Certificate of Secondary Education (KCSE) or its equivalent. And for those who attended foreign universities, they must also sit and pass pre-bar examination set by the school.



20. Before the Kenya School of Law Act came into force, the applicable law was the Council of Legal Education Act cap. 16 A and the Kenya School of Law Regulations, 2009. According to that Act, regulations 4 and 5 that are central to the applicant's application provided as follows:
4. A person shall not qualify for admission to a course of study at the school, unless that person has met the admission requirements, set out in the First Schedule to these Regulations for that course.
 - 5.(1) Any person who wishes to be admitted to any course of study at the school, shall make an application to the school in Form KSL No. 1 set out in the Third Schedule and pay the fees set out in the Fourth schedule to these Regulations.
 2. The application under paragraph (1) shall be accompanied by-
 - a) ...
 - b) ...
 - c) ...
 - d) ...
 3. The school shall consider an application submitted under paragraph 2 and if it is satisfied that the applicant meets the admission requirements, admit the applicant to the school.
21. Part II of the First Schedule to the regulations with regard to admission for Advocates Training Program requirements stated:
- 1) a person shall not be eligible for admission for the Post Graduate Diploma (Advocates Training Programme) unless that person has-
 - a) passed the relevant examination of any recognised university in Kenya, he holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL. B) of that University;
 - b) passed the relevant examinations of a university, university college or other institutions prescribed by the council, he holds or has become eligible for the conferment of the Bachelor of Laws Degree in in the in the grant of that university, university college or other institution, had prior to enrolling at that university, university College or other institution-
 - c) attained minimum entry requirements for admission to a university in Kenya; and
 - d) a minimum grade B (plain) in English language and a mean of grade C+ (plus) in the Kenya Certificate of Secondary Examination or its equivalent;
 - e) Bachelor of Laws Degree (LL. B) from a recognised university and attained a minimum grade of C+ (C plus) in English and a minimum aggregate grade C (plain) in the Kenya Certificate of Secondary Examination, holds a higher qualification e.g. "A" levels, "IB", relevant "Diploma", other "undergraduate degree" or has attained a higher degree in law after the undergraduate studies in the Bachelor of Laws Programme; or
 - f) a Bachelor of Laws degree LL. B from a recognised university and attained a minimum grade of C- (C minus) in English and a minimum of aggregate grade of C- (C Minus) in the Kenya Certificate of Secondary Examination sits and passes the Pre-Bar Examination set by the Council of Legal Education as a precondition for admission.
22. The applicant was admitted at Moi University in 2011 and completed his degree course in 2015.



23. Following the judgement of this Honourable Court in *Kevin K. Mwiti & Others versus Kenya School of Law & 2 Others* (2015) eKLR, the Council of *Legal Education Act* cap. 16A and the Kenya School of Law Regulations 2009 applied to the applicant. The regulations provided for minimum of grade C- (C-minus) in the English and did not provide for qualifications in Swahili language as urged by the applicant. The applicant failed in English language.
24. The *Kenya School of Law Act* 2012, which introduced the aspect of qualification of either B plain in English or Kiswahili only came into force on 15 January 2013, and therefore did not apply to those who had already enrolled for the law degree course at the time, including the applicant.
25. Dr. Gakeri reiterated that according to the Council of *Legal Education Act* and the Kenya School of Law Regulations 2009, to which the applicant was subject, the applicant did not meet the minimum qualifications for admission into the advocates training programme (ATP) at the Kenya School of Law.
26. Fredrick Muhia, the 2nd respondent's academic manager also swore a replying affidavit on 28 September 2020, opposing the applicant's application. He stated that in assessing the applicant's application, the 2nd respondent was guided by the Council of Legal Education (Kenya School of Law) Regulations, 2009. Based on this criterion the applicant was found ineligible for admission and in particular, he failed in English language in his O-level examinations. The applicant was informed accordingly.
27. Like Dr. Gakeri, Mr. Muhia swore that the Council of Legal Education (Kenya School of Law) Regulations, 2009 which applied to the applicant, did not provide for Swahili language as an alternative qualification in English language examination.
28. Having read the applicant's application, the responses thereto and the submissions of the learned counsel for the parties, I have come to the conclusion that the resolution of the applicant's application centres on the law and, therefore, the criteria applicable to his application at the time he sought to be admitted to the Kenya School of Law. Two sets of laws are in focus in this respect; the Council of *Legal Education Act*, No. 12 of 1995 together with the regulations made thereunder and the *Kenya School of Law Act* No 16 of 2016. The task at hand is to determine which of these two sets was applicable to the applicant's application and ultimately whether the applicable law was correctly applied in rejecting the applicant's application for admission to the Advocates Training Program.
29. In exercise of the powers conferred by section 14 of the Council of *Legal Education Act*, No. 12 of 1995, the Council of Legal Education made regulations relating to accreditation of legal education institutions in 2009. The regulations, more particularly described as "the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009" got the nod of the Minister for Justice, National Cohesion and Constitutional Affairs and were duly gazetted on 27 November 2009 vide Gazette Notice No. 170 of even date.
30. The Council of *Legal Education Act* and the Regulations made thereunder remained in force until 12 September 2012 when the *Legal Education Act*, 2012 came into force. Section 47 of this latter Act repealed the Council of *Legal Education Act*, 1995.
31. There should not be any dispute, therefore, that both the *Legal Education Act* and the Regulations applied in 2011 when the applicant enrolled to undertake a bachelor of laws degree at Moi University. It follows that the applicant, or any other person who may have enrolled to study law while the *Legal*



Education Act and the regulations made thereunder were in force was subject to admission criteria set in those regulations. To this end, regulation 18 of the regulations provided that:

18. A student shall not be eligible for admission to a legal education training programme under these Regulations, unless that student has attained the required minimum qualifications set out in the Second Schedule.
32. Only two minimum qualifications have been prescribed in the 2nd schedule referred to and they read as follows:
1. A student shall not be eligible for admission into the Diploma in Law (Para-Legal Studies) Programme, unless that student has –
 - (a) a mean grade of C (C plain) in the Kenya Certificate of Secondary Education (KCSE) or its equivalent examination and a minimum grade C+ (C plus) in English;
 - (b) at least one principal pass at the Kenya Advanced Certificate of Education (KACE) examinations; or
 - (c) a distinction or credit pass in the Certificate in Law course conducted at the Kenya School of Law between the year 2000 to 2003 or any other Certificate or Diploma in a relevant field.
 2. A student shall not be eligible for admission into an Undergraduate Degree Programme unless that student has –
 - (a) a degree from a recognized university;
 - (b) at least two principal passes at an advanced level or an equivalent qualification;
 - (c) a mean grade of C+ (C plus) in Kenya Certificate of Secondary Education (KCSE); or
 - (d) a diploma of an institution recognized by the Commission for Higher Education and the applicant shall have obtained at least credit pass.
33. The first of these two qualifications is more pertinent to the question at hand because it relates to the language qualification. It is express that for one to qualify for admission for a diploma in law he must have obtained a minimum of grade C+ (C plus) in English.
34. The applicant obtained Grade 9 in the Kenya Certificate of Education examinations. According to the system of grading at the time, grade 9 was categorised as “fail”. This is explained in the certificate issued to the applicant by the Kenya National Examination Council, a copy of which the applicant exhibited to his own affidavit. Part of the explanation with respect to the grades reads as follows:
- “Very Good - Grades 1 and 2
Pass with credit - Grades 3, 4,5 and 6
Subject pass - Grades 7 and 8
Fail - Grades 9”
35. The applicant’s own certificate shows that he failed in English language and that being the case he did not qualify for admission for a diploma course at the Kenya School of Law based on the applicable criteria at the time.



36. The applicant's argument that he did not have to pass English language if he passed Swahili is obviously contrary to the qualification prescribed in the Second Schedule which is clear that it is the qualification in English that counts; no mention is made about Swahili language.
37. The qualification in Swahili language as an alternative to English was introduced [Kenya School of Law Act](#)
38. Section 16 of that Act states as follows:
16. Admission requirements
- A person shall not qualify for admission to a course of study at the School, unless that person has met the admission requirements, set out in the Second Schedule for that course.
39. The relevant part in the Second Schedule to which reference is made states as follows:
40. The Admission requirements will be as follows—
- (a) Admission Requirements into the Advocates Training Programme
- (1) 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 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.(Emphasis added).
41. The applicant invoked this particular provision in the affidavit in verification of the facts to support his case. As a matter of fact, the applicant's case was centred around this provision insisting that he did not have to pass English language. In the affidavit, he swore as follows:
42. However, in a shocking about turn, the 2nd respondent, in its letter dated 7th December 2018...again rejected my application on a completely different and new ground, that is that I had scored grade 9 (nine) in English in the Kenya Certificate of Education.
43. That I contend that this decision was spurious because the admission requirement on language qualification is in the alternative, i.e. passing English or Kiswahili language, and in his case, I passed my Kiswahili Language at KCE in which I had attained Grade 3 for Lugha ya Kiswahili and Grade 5 for Fasihi ya Kiswahili and that refusing his application was thus malicious and discriminatory for section 16 as read with schedule 2 Clause 1 (b)(ii) of the [Kenya School of Law Act](#) provides that a person qualifies to join the Advocates Training programme having been conferred with an LL.B Degree,



attained a minimum entry requirements for admission into a university in Kenya and further obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in KCSE or its equivalent, which the which (sic) I had matched or had surpassed. Indeed, I teach Swahili at Secondary level as is evident from my nomination to attend a Kiswahili Teacher's seminar by the Provincial Director of Education Rift Valley Province.

44. But the submissions by the learned counsel appear to contradict this statement by the applicant. Speaking of the inapplicability of the [Kenya School of Law Act](#) to the applicant, the learned counsel submitted as follows:

11 ...

- (a) The first criteria under Schedule 2 Paragraph 5 (a) applies to those students with LL.B Degrees from Kenyan Universities like the applicant who has one from Moi University, and is complete in the sense that everyone who has an LL.B Degree from a University in Kenya qualifies without more for admission into the ATP, and this is made more relevant considering the decision in Kevin Mwiti & Others v Kenya School of Law & 2 Others (2015) eKLR, decided on 19th November 2015, that the [Kenya School of Law Act](#) did not apply to the students who had enrolled for the LL.B Programme such as the applicant who had enrolled in the year 2011 and obtained LL.B Degree dated 16th December 2016.

45. On the one hand, the applicant says that [Kenya School of Law Act](#) applies to his case and to that extent he did not have to pass English examination at the Kenya Certificate of Education level.

46. On the other hand, he concedes that going by the decision in Kevin Mwiti case (*supra*) the Kenya School of Law does not apply to him.

47. Indeed, the latter position is the correct position, at least as far as the decision in the Kevin Mwita case(*supra*) is concerned.

48. In that case the court (Odunga, J.) made several orders in the determination of the dispute before it and one of the orders was in respect of the application of the [Kenya School of Law Act](#) to persons or students who, like the applicant, had enrolled for the bachelor of laws degree when the Act came into force. The court ordered that:

3. A declaration that the Petitioners who were already in the LL.B Class prior to the enactment of the [Kenya School of Law Act](#) are to be treated in the manner contemplated by the guidelines issued by the School prior to the enactment of the Amendment Act. For avoidance of doubt those who had not been admitted in the LL.B Class prior to the enactment of the [Kenya School of Law Act](#) are to comply with the provisions of the said Act.”

49. It is apparent from this order that the court was clear the [Kenya School of Law Act](#) did not apply to the applicant and, in particular, the 2nd Schedule to the Act on the language qualifications for admission to the Advocates Training Programme.

50. The applicant was always subject to the Council or [Legal Education Act](#) and the Regulations made thereunder which, as noted earlier in this judgment, insisted on qualification in English language before one could be admitted for a diploma course at the Kenya School of Law.



51. This position is consistent with section 29(3) (a) of the savings and transition provisions of the [Kenya School of Law Act](#) which effectively validates actions taken by the Kenya School of Law under any law prior to the coming into effect the [Kenya School of Law Act](#). That section provides as follows:

Nothing in this Act shall affect any other instrument or thing done in relation to the former School and every such instrument or thing shall continue in force and shall, so far as it would have been made or done under this Act, have effect as if made or done under this Act.

52. The simple and straight answer to the applicant's application is that he fell short of the threshold for admission to the Kenya School of Law based on the criteria that was applicable to his application for admission. And having so failed, none of the respondents can be blamed for declining to admit the applicant to the Advocates Training Programme.

53. To be precise, and narrowing down to the application for judicial review, none of the judicial review grounds of illegality, irrationality and procedural impropriety has been demonstrated to exist as for this Honourable Court to exercise its discretion in favour of the applicant. The decision to reject the applicant's application was legally sound, it is rational and was not tainted with procedural impropriety.

54. And with that I have no hesitation in dismissing the applicant's application with costs to the respondents. It is so ordered.

SIGNED, DATED AND DELIVERED ON 18 FEBRUARY, 2022

NGAAH JAIRUS

JUDGE

