**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JR MISC. APPLICATION NO. E068 OF 2021**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KENYA SCHOOL OF LAW.....1ST RESPONDENT**

**THE HONORABLE ATTORNEY GENERAL.....2ND RESPONDENT**

***EX PARTE OKOTH SCARLET SUSAN***

**JUDGMENT**

1. The Ex parte Applicant is before this Court vide a Notice of Motion application dated 10th May,2021 seeking the following orders;

*(i)* ***AN ORDER OF DECLARATION*** *that the 1st Respondent has breached the Ex parte Applicant's constitutionally guaranteed rights to education and fair administrative action provided under Articles 43(1)(f) and 47 of the Constitution of Kenya,2010.*

*(ii)* ***AN ORDER OF CERTIORARI*** *to remove to this Honourable court to be quashed the decision of the 1st Respondent contained in the letters of 26th April,2021 and 5th May,2021 rejecting the Ex parte Applicant's application for admission to the 1st Respondent and the subsequent appeal respectively.*

*(iii)* ***AN ORDER OF MANDAMUS*** *compelling the 1st Respondent to admit the Ex parte Applicant to the Kenya School of Law.*

2. The suit as against the 2nd Respondent was withdrawn by on 24th January,2022.

3. The application is supported by a Statutory Statement dated 10th May,2021 and a Verifying Affidavit of even date sworn by Okoth Scarlet Susan.

4. The brief facts as stated are that the Ex parte Applicant having attained a mean grade of C+ (plus) and B-(Minus) in English went ahead to pursue a Bachelor of Arts at the University of Nairobi and a Master of Law degree at the University of Aberdeen. She also pursued a Bachelor of Law degree and upon completion applied join the Kenya School of Law to pursue the Advocates Training Programme(ATP).

5. Her application was declined by the 1st Respondent vide a letter dated 26th April,2021 on grounds that she had not obtained the minimum requirement of B(plain) in both English and Kiswahili as provided under the Kenya School of Law Act,2012. Her Appeal against the said decision was also rejected on the said grounds.

6. It is the Ex parte Applicant's case that she qualifies for admission by virtue of section 16 of the Kenya School of Law Act as read together with paragraph 1(a) of the Second Schedule of the said Act. The Ex parte Applicant argues that the 1st Respondent's decision prescribes an eligibility criterion which is not provided for under the Kenya School of Law Act or under case law and therefore it is unlawful, unreasonable, procedurally unfair, *ultra vires* and contrary to the 1st Respondent's mandate as provided under section 5 of the Act. The cases of **Otene Richard Akomo v. Kenya School of Law & Another JR NO.20,26,8,21,7 & 13 of 2020(Consolidated)** where the court held that the Applicants had qualified for admission were cited.

7. The 1st Respondent's decision is also alleged to be tainted with illegality contrary to Article 47 of the Constitution. It is the Ex parte Applicant's case that the arbitrary rejection will greatly impair her right to education guaranteed under Article 43(1) (f) of the Constitution.

The 1st Respondent is also said to have violated the Ex parte Applicant's rights as guaranteed under Articles 27(1)(2)(3)(4) and (5) of the Constitution. It is contended that the Ex parte Applicant had a legitimate expectation that the 1st Respondent would not deviate from the law and that it would subject her to the admission criteria as provided for under section 16 and affirmed by Court.

8. The 1st Respondent in its Replying Affidavit sworn by Fredrick Muhia, the Principal Officer, Academic Services on 4th January,2022, urged that upon publishing an advertisement inviting Applicants to apply for admission to the Advocates Training Programme for the year 2021/2022, which advertisement set out the eligibility criteria, the Ex parte Applicant made her application but failed to meet the said criteria as provided under section 16 as read together with paragraph 1 of the Second Schedule of the Kenya School of Law Act,2012.

9. It is urged that the 1st Respondent did not infringe on the Ex parte Applicant's rights or freedoms in any way by applying the eligibility criteria that is stipulated under the law. Mr. Muhia urged that he had been advised by his advocate on record that the requirements for admission to the Advocates Training Program in foreign institutions are equally applicable to admission in local universities. Further, that allowing persons to join the programme on the basis that they have a degree prior to joining the LLB degree programme would be a clear derogation of the provisions of law which would result in discrimination and application of double standards.

10. The Ex parte Applicant in her written submissions identified one issue for determination and that is *whether the Ex parte Applicant is qualified to join the 1st Respondent.* Learned counsel cited the cases of **Otene Richard Akomo v. Kenya School of Law & Another JR NO.20,26,8,21,7 & 13 of 2020(Consolidated)** *supra* and **Republic v. Kenya School of Law Ex parte Victor Mbeve Musinga [2019] eKLR** where the courts have interpreted section 16 of the Kenya School of Law Act as read with the paragraphs 1 (a) & (b) of the Second Schedule.

11. Learned counsel also cited the case of **Adrian Kamotho Njenga v. Kenya School of Law [2017] eKLR** where Mwita J held that paragraph 1(a) and (b) of the Second Schedule were distinct qualification requirements. It was the Ex parte Applicant's argument that paragraph 1(a) only requires a person to have passed the relevant examinations of any recognised university in Kenya offering a Bachelor of Law degree. It was urged that paragraph b did not apply to the Applicant as it relates to persons who have studied outside Kenya.

12. It is the applicant's case that the law does not prescribe any English requirement for students who studied in Kenya. Further, that requirement for admission to the Bachelor of Law degree programme can be found under the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations,2009, Rule 18 as read with paragraph 2 of the Second Schedule of the Council of Legal Education Act. It was urged that it would be absurd for one to qualify to do an Undergraduate degree in law but fail to qualify to join the Kenya School of Law on the basis of KCSE grades.

13. It is submitted that the 1st Respondent does not have unfettered discretion in exercising its powers and to buttress this argument the decision of **Republic v Registrar of Companies Ex Parte Independent Electoral Board of Kenya National Chamber of Commerce & Industry (KNCCI) [2016] eKLR** was cited. Reliance was also placed on the case of **Republic v Kenya Power & Lighting Company Ltd & Another [2013] eKLR.** The 1st Respondent, is said to have failed to provide the reasons why the grounds of the appeal were not applicable despite the Ex parte Applicant having written a detailed letter dated 30th April,2021.

14. The 1st Respondent also filed written submissions dated 2nd February,2022 and in the submissions it was urged that as was held in the case of **Kevin Mwiti & Others v Kenya School of Law & Others [2015]** eKLR applications to the Advocates Training Programme are to be evaluated pursuant to the law applicable at the time the applicants commenced their Bachelor of Laws at their respective Universities. Applicants who commence their LLB studies before the enactment of the Kenya School of Law Act,2012 could join the Programme on the basis of the admission criteria in force before the Act was enacted.

15. Learned counsel submitted that the term 'or' as used in the Second Schedule of the Kenya School of Law Act may be interpreted as either conjunctive or disjunctive and that where there is a defect or omission in the words used by the legislature the court cannot correct or make up the deficiency. It was urged that use of 'or' and the word 'and' in rules, laws or by-laws shall depend on the factual background. To support this argument counsel cited Maxwell on Interpretation of Statutes Edition,12th ed at page 228 where the author states as follows;

> "*Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship 0r injustice, which can hardly have been intended, a construction may be put upon it which modi?es the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, or by rejecting them altogether, on the ground that the legislature could not possibly have intended what its words signify, and that the modi?cations made are mere corrections of careless language and really give the true meaning. Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."*

16. Counsel submits that it is undeniable that, under 1(a), candidates must have obtained credentials in b(i) before being admitted to University to pursue a Bachelors of Law degree (ii). But, on its own, 1(a) lacks the explained qualifications that emerge in paragraph 1. (b). The question then becomes why did legislators construct two classes of qualifications that aren't literally different. If the case is made that 1(b) is intended for students from foreign institutions, the legislator may have simply said that 1(b) is intended for graduates from foreign universities. That isn't stated anywhere in 1. (b). If 1(a) were to be interpreted to apply to universities domiciled in Kenya, and the word 'OR' interpreted disjunctively, it would mean that all students who join any Kenyan university irrespective of the grades they hold will be allowed to join the ATP.

17. Subjecting the applicants from local and foreign universities to two different standards and measures amounts to discrimition. The cases of **Victor Juma v Kenya School of Law; Council of Legal Education (Interested Party) [2020] eKLR, Peter Githaiga Munyeki v. Kenya School of Law [2017] eKLR** and **R v Kenya School of Law Ex parte Daniel Mwaura Marai [2017] eKLR** were cited in this

regard.

18. Learned counsel went ahead to state that a purposive interpretation should be given to statutes so as to reveal the intention of the statute. The Supreme Court case of **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others** was cited where the Court cited with approval the case of **Pepper vs. Hart [1992]3 WLR** where it was held that "*The days have long passed when courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.*

19. On the interpretation of the word 'Or' learned counsel cited the Supreme Court case of **Raila Odinga & Another vs. IEBC & Others [2017] eKLR**. On the issue of academic progression, it was urged that the Kenya School of Law Act as amended by Statute Law Miscellaneous Amendments Act (No.18 of 2014) does not provide for academic progression. The Applicant having commenced her LLB degree on 13th January,2013 ought to have known that she was not eligible for admission to the Advocates Programme.

20. On the issue of Legitimate expectation, the Supreme Court case of **Communications Commission of Kenya & 5 Others v. Royal Media Services & 5 Others [2014] eKLR** together with **H.W.R. Wade & C.F. Forsyth, Administrative Law Oxford University Press,2000** were cited. Learned counsel submitted that the court emphasized that an exception whose fulfilment requires that a decision maker makes an unlawful decision as the ex parte is requesting the 1st Respondent herein to do cannot be a legitimate expectation. It was also urged that clear statutory words override an expectation.

**DETERMINATION**

21. From the pleadings and submissions before this court, three issues arise for determination namely; *whether the decision to deny the ex parte applicant admission to the 1st Respondent was based on an error of law, was irrational, unfair and in breach of the applicant's rights under Articles 27, 43 and 47 of the constitution. Secondly, what remedies if any, are available to the applicant.*

22. The common thread running through the Ex parte applicant's argument and the counter-argument by the 1st Respondent concerns the lawfulness of 1st Respondent's decision in declining to admit the Ex parte Applicant into the Advocates Training Programme (ATP). The recurring question of qualifications for admission to the ATP, as well as the correct application and construction of section 16 of the KSL as read with paragraphs 1 (a) and (b) of the Second Schedule, are at the heart of the discourse.

23. The Ex parte Applicant argues that Paragraph 1(a) and (b) ought to be interpreted distinctively and that 1(a) only requires a person to have passed the relevant examinations of any recognised university in Kenya offering a Bachelor of Law degree. She goes ahead to urge that paragraph (b) does not apply to her as it relates to persons who have studied outside Kenya.

24. The 1st Respondent in response argues that candidates under 1(a), must have obtained credentials in b(i) before being admitted to University to pursue a Bachelors of Law degree. In addition to this, the 1st Respondent argues that on its own, 1(a) lacks the explained qualifications that emerge in paragraph 1 (b). It is the 1st Respondent's case that if the word 'OR' is interpreted disjunctively it would mean that all students who join any Kenyan university irrespective of the grades they hold will be allowed to join the ATP. This would be subjecting Applicants to two different standards and measures which amounts to discrimination.

25. Section 16 of the Kenya School of Law Act,2012 provides as follows;

> "***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."*

26. The Second Schedule under subsection (a) provides for what the Admission requirements into the Advocates Training Programme are to be as follows;

> (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.*

27. The issues surrounding admission to the 1st Respondent and the applicable law are matters that have received attention from this court in various suits before different judges from time to time. Over the time, two schools of thought have emerged. I hasten to add that the decisions thereon are not binding on this court being from courts of concurrent jurisdiction. Counsels in this matter have extensively quoted relevant case law which I have dutifully considered even where I fail to reproduce the texts here. The first school fronts the position that requirements in paragraph 1(a) and 1(b) must be similar otherwise there shall be discrimination of the students falling within the two categories while the other school of thought is of the position that the two categories are different and ought to be treated as such.

28. In my considered view and aware of the decisions of this court by different judges, I take the view that the pertinent question is whether parliament could have intended to have two sets of qualifications for admission to the 1st Respondent. Given that the students at the 1st Respondent are trained to be suitable for the same profession, subjecting them to different academic qualifications would not only be illogical but clearly discriminatory. This in my view is far from the intention of the legislature.

29. Odunga j in Sollo Nzuki vs Salaries Remuneration Commission and 2 Others and 2 others [2019] eKLR in defining discrimination stated;

> **‘’The Petitioner’s contention calls for a determination of what constitute discrimination and under what circumstances the court can interfere in allegations of discrimination. In Peter K. Waweru vs. Republic [2006] eKLR discrimination was defined in the following terms:**
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> **“…Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to…restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description…Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex…a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured**.”

78. Similarly, in **Andrews vs. Law Society of British Columbia (1989) 1 SCR 321**, **Wilson J**., defined discrimination as a:

> **“distinction which whether intentional or not but based on grounds relating to personal characteristics of individual group (which) has an effect which imposes disadvantages not imposed upon others or which withholds or limits access to advantages available to other members of society.”**

30. I do not for a moment entertain the thought that parliament in its wisdom could have intended to have two standards of admission to the 1st Respondent. The playing ground must of necessity be level when it comes to such admission. A purposeful interpretation of the law clearly demonstrates that since the admission seeks to train the students to qualify and join the same profession, they must start on the same footing as regards the entry requirements to the institution. The rationale in the requirements, especially the requirement for high grades in English and Kiswahili, is easy to see when one considers the major component of communication, oral and written, in the legal profession. I agree with the holding of **Korir J in Victor Juma vs Kenya school of law** where he observed;

> **‘’The question I would ask myself therefore is whether the lawmaker intended to have two different standards for a law degree. In my view, the answer would be in the negative. I find it difficult to imagine that Parliament would enact a statute that requires one set of students to meet certain qualifications and allow another set of students aspiring to join the same profession not to meet similar qualifications.**
>
> **43. It cannot be that Kenyan universities offering studies leading to the award of a degree in law are allowed to set their individual admission qualifications but the qualifications for admission to foreign universities is set by the law. Such a law would in my view be discriminatory. I therefore do not agree with the suggestion by the Interested Party that whenever the Respondent is confronted with a law degree obtained from a Kenyan university then it must admit such a student without further interrogation. In my view, the requirements of Paragraph 1(b)(i) & (ii) as to the qualifications for admission for law studies in foreign institutions are equally applicable to admission to local universities.**
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> **44. I do not walk this path alone for it was clearly stated in R v Kenya School of Law, Ex-parte Daniel Mwaura Marai [2017] eKLR that:-**
>
> **“66. As regards the interest parties’ case, it is contended that they were in the LLB Programme in 2014. There is no indication when they joined the programme. As I have held hereinabove if they joined after the commencement of the amendments to the Second Schedule of the Kenya School of Law Act then they were bound by the same in which event they could only qualify for admission to the School if they had “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 not just the minimum qualifications prescribed in the Third Schedule of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016.”**

31. Weighing in on the issue **Mwita J** in **Peter Githaiga Munyeki vs Kenya school of law [2017] eKLR held;**

> **According to the Schedule, there are two categories of persons who can be admitted to the ATP. First are those who attended local universities who fall under paragraph 1(a). The other is persons who attended universities outside Kenya who fall under paragraph 1(b) of the Schedule. Paragraph 1(a) of the Schedule does not specifically state the KCSE grades one should have. but a reading of paragraph 1(b) shows that persons who obtained LLB degrees from outside Kenya should have**

**KCSE grades that would have enabled them join LLB programmes in universities in Kenya, and goes ahead to state those grades as a mean grade of C+ (plus),in KCSE, with B(plain) in either English or Kiswahili languages.**

**26. In that regard, therefore, applying the principle a holistic reading of a statute persons falling under paragraph 1(a) of the Schedule to KSL Act, must have obtained a mean grade of C+(plus) with B(plain) in English or Kiswahili languages to have qualified to join LLB programme in local universities. That is why there is reference of this requirement in paragraph 1(b) (ii) of the Schedule. (See *Adrian Kamotho Njenga v Kenya School of Law* (petition No 398 of 2017).**

32. In view of the above am satisfied that the 1st Respondent on receiving the applicant's application to join the institution and further in deliberating on the appeal lodged by the applicant afforded the applicant a fair administrative action and based its decision on the applicable law. The decision was thus not made in error of law, neither was it irrational unfair or unconstitutional.

In the premises, the motion herein lacks merit. The same is dismissed. In the circumstances of the case each party is to bear its own costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH 2022**

**A.K NDUNGU**

**JUDGE**