



**Badawi v Kenya School of Law (Constitutional Petition E033 of 2019)
[2021] KEHC 306 (KLR) (23 November 2021) (Judgment)**

Neutral citation: [2021] KEHC 306 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E033 OF 2019
JM MATIVO, J
NOVEMBER 23, 2021**

BETWEEN

SABRINA JELANI BADAWI PETITIONER

AND

KENYA SCHOOL OF LAW RESPONDENT

JUDGMENT

1. The Petitioner, Sabrina Jelani Hajji Badawi is an adult female of sound mind residing in Mombasa.
2. The Respondent, the Kenya School of Law (herein after referred to as the KSL) is a body corporate with perpetual succession and a common seal established under section 3 of the [Kenya School of Law Act](#)¹ (the KSL Act). In its corporate name it is capable of suing and being sued, taking, purchasing or otherwise acquiring, holding or disposing of movable and immovable property, entering into contracts and doing or performing such other things or acts necessary for the proper performance of its functions under the Act. KSL is the successor of the Kenya School of Law established under the Council of [Legal Education Act](#).²
3. Pursuant to section 4 of the KSL Act, the School is a public legal education provider responsible for the provision of professional legal training as an agent of the Government. Without the generality of the forgoing, it trains persons to be advocates under the [Advocates Act](#),³ it ensures continuing professional development for all cadres of the legal profession; it provides para-legal training and other specialized training in the legal sector; it develops curricular, training manuals, conduct examinations and confer academic awards; and undertakes projects, research and consultancies.

¹ Act No. 26 of 2012.

² Act No. 9 of 1995.

³ Cap 16, Laws of Kenya.



4. The Petitioner graduated from the University of Nairobi with a Bachelors of Law Degree in 2019. Prior to obtaining her LLB degree, she undertook a diploma in Human Resource Management which she completed in 2015 at the same University attaining an overall credit grade. In her Kenya Certificate of Education, she obtained an overall grade C Plain with a B Plus in English. Her case is that she has satisfied the requirements for admission into the Advocates Training Program (ATP) as spelt out in section 16 of the KSL Act as read with the 2nd Schedule to the said act and the Council of [Legal Education Act](#).⁴
5. She states that being in possession of a LLB degree from the University of Nairobi as provided under the 2nd Schedule, paragraph 1 (a) of the Act, she applied to the Respondent's ATP but the Respondent rejected her application on the grounds that she had not met the criteria for admission because she scored a mean grade of C (Plain) in her KSCE as opposed to the minimum requirement of a C Plus. She avers that she met the requirements for admission to the said program as set out in section 5 (c), Part 11 of the Schedule to the [Legal Education Act](#)⁵ which allows for admission to the ATP where one has: -
 - a. A Bachelor of Laws Degree (LLB) from a recognized university;
 - b. Attained a minimum grade of C -Plus in English and a Minimum aggregate of C -Plain in the Kenya Certificate of Secondary Education.
 - c. Holds a higher qualification eg "A" levels, "IB," relevant "Diploma" other "undergraduate degree" or;
 - d. Has attained a higher degree in law after the undergraduate studies in the Bachelor of Laws Programme.
6. Additionally, she avers that in addition to holding a LLB degree, she holds a Diploma in Human Resources Management whereby she undertook a core course as stated in Part 1 of the 2nd Schedule of the [Legal Education Act](#). She contends that her Diploma in Human Resource Management meets one of the minimum requirements for admission into an undergraduate degree programme stipulated in the *Council of Legal Education (Accreditation of Legal Education Institutions) Regulation of 2009* and Council of [Legal Education Act](#).
7. Also, the Petitioner states that Regulation 18 as well as the 2nd Schedule of the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations of 2009 provides for the criteria and legal requirements for admission into the undergraduate degree programme which requirements are: -
 - i. A degree from a recognized university;
 - ii. At least two principal passes at an advanced level or an equivalent qualification;
 - iii. A mean grade of C- plus in Kenya Certificate of Secondary Education;
 - iv. A diploma of an institution recognized by the Commission for Higher Education; and the applicant shall have obtained at least credit pass.
8. The Petitioner avers that her application for admission into the ATP was declined alleging that she did not satisfy the admission requirements despite her aforesaid qualifications. She avers that the refusal

⁴ Act No. 27 of 2012.

⁵ Act No. 27 of 2012.



lacks basis in law and it is a breach of her right to education, discriminatory, and a breach of Article 10 of the *Constitution*. As a consequence of the above, she prays for: -

- a. A declaration that she has met the minimum requirements for admission to the Respondent's ATP.
 - b. A declaration that her fundamental rights and freedoms as enshrined under Articles 27(1), 43 (1) (f), and 47 of the Constitution have been contravened and infringed by the Respondents.
 - c. An order quashing the Respondent's decision declining to admit her to the ATP.
 - d. An order of mandamus compelling the Respondent to admit the Petitioner to the ATP for the Academic year 2021/2022 or for any other academic period.
 - e. Costs of the Petition.
9. On 20th September 2021, the Respondent's advocate asked for 14 days to file their response to the Petition which was allowed. The court also granted the Petitioner leave to file a supplementary affidavit and submissions within 7 days. The Respondent was also granted 7 days to file their submissions and the matter was fixed for highlighting on 3rd November 2021. However, on the said date, the Respondent's counsel did not attend court nor did they file a reply to the Petition or submissions as directed by the court, so this Petition was unopposed
10. The Petitioner's counsel submitted that admission to the ATP is governed by the KSL Act which sets out the minimum requirements and the Legal Education (Accreditation and Quality Assurance) Regulations, 2016. She cited section 16 of the KSL Act which provides that 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 2nd Schedule for that course. She reproduced Paragraphs 1(a) & (b) of the 2nd Schedule which provides: -

(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 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.

and argued that the word “or” deployed in the above provision is disjunctive. In support of this proposition, she cited *Raila Amolo Odinga v Independent Electoral and Boundaries Commission & 42 others*⁶ in which the Supreme Court construed the word “or” as disjunctive and creating two limbs. She argued that paragraph 1 (a) requires an applicant to have passed the examination offered by an institution prescribed by the council and subsequently hold or is eligible for the conferment of a Bachelor of laws degree. She submitted that the Petitioner holds a LLB degree from the University of Nairobi which is a university prescribed by the Council of Legal Education, hence, she meets the requirements provided under paragraph 1 (a) above.

11. Additionally, counsel submitted that apart from possessing the above qualifications, an applicant should have attained a minimum entry requirement for admission to a university in Kenya and 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 has sat and passed the pre-bar examination set by the school.
12. Counsel submitted that the Petitioner has attained a minimum entry requirement for admission into a university in Kenya as set out in paragraph 2 (b) (i) of the 2nd Schedule to the KSL Act, the Council of Legal Education Regulations, 2009 which were in force when the Petitioner obtained her Diploma in 2015 which provided one of the grounds for admission to an undergraduate degree program under Schedule 2, paragraph 2 (d). Also, counsel submitted that the Petitioner has a Diploma in Human Resource Management from a University duly recognized by the Commission for Higher Education, which means that she qualified to be admitted to an LLB program which is an accredited institution. As consequence, counsel submitted that the Petitioner meets the requirements in Schedule 2, Paragraph 1 (b) (ii).
13. Further, counsel submitted that in its letter dated 10th December 2019, the Respondent stated that its reason for declining the Petitioner’s application was that she obtained a C plain grade in her KCSE instead of the stipulated C Plus. She submitted that the Petitioner has satisfied the requirements in paragraph 1(a) of the 2nd Schedule. In addition, she argued that the Petitioner satisfied the requirements in Council of Legal Education Regulations, 2009, Schedule 2 Paragraph 2 (d) by obtaining a credit pass in her diploma. She submitted that the Petitioner met the two requirements for admission into the ATP.
14. Counsel submitted that the Respondent’s refusal to admit the Petitioner based on the reasons that she did not obtain the minimum required grade in her KCSE exam is discriminatory. She argued that the Respondent has chosen to selectively apply the requirements disregarding the obvious provisions of Schedule 2 paragraph 1 (a) and purporting to read paragraph 1(a) (b) together. Further, counsel argued that the Respondents refusal to admit the Petitioner is biased and illogical. She cited *Republic v Kenya School of Law & another ex parte Richard Akomo & 41 other; Council of Legal Education (Interested*

⁶ (content missing)



*Party*⁷ in which the court dismissed the Respondent's contention that paragraphs 1 (a) & (b) are to be read together holding that the said provisions create two distinct categories.

15. Further, counsel submitted that the KSL is bound to discharge its duties and functions in accordance with the law and by failing to do so, it violated Articles 10, 27 (1) and 47 of the Constitution. Lastly, counsel urged the court to be guided by *Equity Bank Limited v West Link MBO Link Ltd*⁸ in support of the proposition that courts of law exist to administer justice and in so doing they must of necessity balance between competing rights and interests of different parties but within the confines of the law, to ensure that the ends of justice are met.
16. For starters, the issues presented in this case have been litigated before and determined in numerous cases filed against the Respondent by students seeking to be admitted into the ATP. Notwithstanding the many judicial pronouncements interpreting the law governing qualifications for admission into the ATP and faulting the Respondent for misapprehending the law governing credentials for eligibility into the ATP, the Respondent has persisted in misconstruing the provisions of Paragraph 1 (a) & (b) of the 2nd Schedule to the KSL act to the chagrin of helpless students. For instance, the High Court in *Adrian Kamotho Njenga v Kenya School of Law*⁹ addressed the subject with admirable clarity as follows: -

41. This is so because paragraph 1(a) does not prescribe any university entry requirements for the simple reason that entry requirements for LLB programmes in local universities are known and no one can be admitted to undertake this degree without meeting the basic KCSE grades required for this course. Furthermore, paragraph 1(a) contains the disjunctive word "or" at the end of the paragraph just before the beginning of paragraph 1(b). That means qualifications under paragraph 1(a) are distinct from those under paragraph 1(b). That can only mean one thing- that the two sub-paragraphs apply to two different and distinct categories of applicants.
42. This interpretation is supported by the Supreme Court's interpretation of section 83 of the Election Act, 2012, a provision with the disjunctive word "or". The Supreme Court stated that "the use of the word "or" clearly makes the two limbs disjunctive under our law. It is, therefore, important that, while interpreting Section 83 of our *Elections Act*, this distinction is borne in mind."- (see *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another*, petition No 1 of 2017)
43. This interpretation is further buttressed by the fact that prior to the 2014 amendment, the Second Schedule contained paragraph 2, which made pre-bar examination optional. The removal of paragraph 2 and, in place thereof, the introduction of clause (iii) in paragraph 1(b), with the conjunctive word "and" at the end of paragraph 1(b)(ii) and just before the beginning of clause 1(b) (iii), means pre-bar examination is now mandatory for category 1(b) applicants as opposed to those in paragraph 1(a). Any other interpretation of paragraph 1(a) that would make pre-bar examination compulsory for applicants falling

⁷ {2020} e KLR.

⁸ {2016} e KLR.

⁹ {2017} eKLR.



under paragraph 1(a) would result into an absurdity because the word “or” cannot, by stretch any of imagination, be read to mean “and”.

44. ...However as stated above, a plain reading of paragraph 1(a) and 1(b) is clear that these are two distinct qualification requirements and the legislature must have intended them to be so.

48. ...In the absence of any other provision, I therefore find and hold that applicants under paragraph 1(a) that is; those who obtained LLB degrees from universities in Kenya, having attained required grades to pursue LLB degree locally, do not have to sit and pass pre-Bar examination as a pre-condition to their joining ATP at the respondent school.

17. As the Apex Court held in *Raila Amolo Odinga v Independent Electoral and boundaries Commission and 42 Others*,¹⁰ the word “or” as used in a statutory provision clearly makes the two limbs disjunctive. A similar position was held in *Bernard Ndeda & 6 Others v Magistrates and Judges Vetting Board & 2 Others*,¹¹ *Wilson Kaberia Nkuja v Magistrates and Judges Vetting Board & another*¹² and *Edward Njoroge Mwangi v Francis Muriuki Muraguri & Another*¹³ among other cases all of which held that the word “or” is normally disjunctive and it is used to introduce another alternative.

18. Despite the above explication of the provisions of the law implicated in the said excerpt, clearly supported by a lucid exposition of the meaning of the letter “or”, the KSL, an institution charged with the responsibility of teaching law has consistently misconstrued the two-letter word. Article 163(7) provides in peremptory terms that decisions of the Supreme Court are binding to all courts in this country. The said Article is an edict addressed to all courts in this country decreeing that its decisions are binding upon them. That being the case, the said decision enjoys the force of the law and one wonders why the KSL has persistently maintained an interpretation which is contra to statute and against clear judicial pronouncements.

19. I am aware of the High Court decision in *Peter Gitthaiga Munyeki v Kenya School of Law*¹⁴ which contradicted numerous High Court decisions among them *Adrian Kamotho Njenga v Kenya School of Law*.¹⁵ In the former case, it was held: -

25. 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

¹⁰ {2017} e KLR.

¹¹ {2018} e KLR.

¹² {2018} e KLR.

¹³ {2017} e KLR.

¹⁴ {2017} e KLR.

¹⁵ {2017} eKLR.



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).
40. Allowing people to join ATP at KSL on the basis that they had a degree prior to joining LLB degree programme would be to circumvent clear provisions of a statute and would result into discrimination and application of double standards. The upshot is that the petitioner was not qualified for admission to ATP hence, the respondent was right in declining to admit him.
20. Certainty, the High Court in Peter Githaiga Munyeki v Kenya School of Law¹⁶ contradicted not only decisions rendered by courts of coordinate jurisdiction, but also it went against the Supreme Court decision in Raila Amolo Odinga v Independent Electoral and boundaries Commission and 42 Others,¹⁷ which construed the word “or” as disjunctive, creating two categories. The said decision cannot be good law. Section 16 of the KSL Act bears the short title “admission requirements.” It provides that 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 Paragraph 1 of the 2nd Schedule reproduced earlier.
21. At the center of the Respondents refusal to admit the Petitioner is the meaning of the word “or” in legal parlance. As stated above, courts have consistently construed the word “or” to be disjunctive introducing another possibility. It would be a waste of judicial time and ink to add to what the numerous cases have decided. In this long list of decided cases on the same subject, I can usefully add Republic v Kenya School of Law & another ex parte Richard Akomo & 41 other; Council of Legal Education (Interested Party)¹⁸and Republic v Kenya School of Law¹⁹ both of which following the Supreme Court decision and a long chain of jurisprudence on the subject held that the word “or” as used in paragraph 1 (a) is disjunctive and it creates two distinct categories.
22. In *Natarajan K.R. v Personnel Manager, Syndicate Bank, Industrial Relation Division*²⁰ the apex Court of India construed the word "or" as follows:-

“In ordinary use the word 'or' is a disjunctive that makes an alternative which generally corresponds to the word 'either'. In face of this meaning, however, the word 'or' and the word 'and' are often used interchangeably. As a result of this common and careless use of the two words in legislation, there are occasions when the Court, through construction,

¹⁶ {2017} e KLR.

¹⁷ {2017} e KLR.

¹⁸ {2020} e KLR.

¹⁹ {2019} e KLR.

²⁰ {2003-I-LLJ-384, 387



may change one to the other. This cannot be done if the statute's meaning is clear, or if, the alteration operates to change the meaning of the law..."

23. Further, the Supreme Court of India in *J. Jayalalitha vs Union of India*²¹ held that the term "or" which is a conjunction, is normally used for the purpose of joining alternatives and also to join rephrasing of the same thing but at times to mean "and" also. It stated:-

"The dictionary meaning of the word 'or' is : "a particle used to connect words, phrases, or classes representing alternatives". The word 'or', which is a conjunction, is normally used for the purpose of joining alternatives and also to join rephrasing of the same thing but at times to mean 'and' also. Alternatives need not always be mutually exclusive. Moreover, the word "or" does not stand in isolation and, therefore, it will not be proper to ascribe to it the meaning which is not consistent with the context.... It is a matter of common knowledge that the word 'or' is at times used to join terms when either one or the other or both are indicated.... In our opinion, the word 'or' as used... would mean that the ... the power to do either or both the things..."

24. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the legislature. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, or the more extended of two meanings.²² It remains that the intention of a statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted for courts to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute. The implied intention of Parliament is adequate to overcome the express words of the statute. The rule of strict construction is not violated by permitting the words of the statute to have their full meaning, but the words should be taken in such a sense as will best manifest the legislative intent. Decided cases have recognized that a broader construction may be permissible on the basis of contextual factors that make clear the legislative intent where it is within the fair meaning of the statutory language.²³
25. Since no legislature ever intends to give two simultaneous inconsistent commands, every statute must if possible be reduced to a single, sensible meaning before it is applied to any case. When Lord Brougham said that we must ascertain the "... intention from the words of the statute and not from any general inferences to be drawn from the nature of the objects dealt with by the statute" he must have been referring to statutes susceptible of but one sensible meaning that is plain and explicit. But, if a statute is susceptible of another interpretation- a contextual or implied meaning-which is derived from the whole text itself with or without the use of extrinsic aids and if such contextual meaning is a fair one in that it accords with the ordinary use of language and with the object and purpose of the statute, it is clearly superior to any obvious or literal meaning which does not fulfil these demands.²⁴ Thus, if Parliament in its wisdom intended both possibilities to apply, then, nothing prevented it from using

²¹ {1999} (3) SC 573, 583

²² *U.S. v. Hartwell*, 73 U.S. 385, 395 (1868) (analyzing whether the statute's language of "any banker, broker, or other persons not an authorized depository of the public moneys" includes a clerk in the office of the U.S. assistant treasurer so that the clerk is subject to the penalties prescribed in the statute for misconduct by officers).

²³ 503 U.S. 291 (1992) (analyzing whether Congress intended courts to treat upper limit of penalty as "authorized" in case involving juveniles convicted as adults when proper application of mandated sentencing guideline in adult case would bar imposition up to the limit).

²⁴ Frederick J. De Sloovere, *Contextual Interpretation of Statutes*, 5 Fordham L. Rev. 219 (1936).



the word “and” immediately after the end of paragraph 1 (a) instead of the word “or.” A reading of the Petitioner’s qualifications leaves no doubt that she qualified under paragraph 1 (a). In addition to the requirements set out in the Regulations.

26. The Petitioner argued that the refusal to admit her is an affront to her right to education under Article 43 (1) (f) of the Constitution. From the material before me, I am clear in my mind that the impugned decision cannot be read in a manner that is consistent with the fundamental right to education. On the contrary, the refusal is a breach of the Petitioner’s right to education guaranteed under the Constitution. The Constitution provides that the Bill of Rights binds all state organs. Thus, the Respondent has an obligation to respect the Bill of Rights. Article 19 provides that: -

- (1) The Bill of Rights is an integral part of Kenya’s democratic state and is the framework for social, economic and cultural policies.
- (2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.
- (3) The rights and fundamental freedoms in the Bill of Rights—
 - (a) belong to each individual and are not granted by the State;
 - (b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and
 - (c) are subject only to the limitations contemplated in this Constitution.

27. Article 21 places provides that:-

- (1) It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights.
- (2) The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43.

28. It is evidently clear that the applicant has a breach of her constitutionally guaranteed right to education under Article 43 (1) (f) the Constitution. Any action that limits or diminishes this right is a violation of the Constitution, unless it can pass the tests provided in Article 24 of the Constitution. There is nothing before be to suggest that the breach of the Petitioner’s rights meets an aticle 24 Analysis test.

Conclusion

29. In view of my conclusions herein above, I find that the Petitioners Petition is merited. Indeed, this court is empowered by Article 23 (3) of the Constitution to grant appropriate reliefs in any proceedings seeking to enforce fundamental rights and freedoms such as this one. Perhaps the most precise



definition "appropriate relief" is the one given by the South African Constitutional Court in *Minister of Health & Others vs Treatment Action Campaign & Others*²⁵ thus: -

"...appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case, the relief may be a declaration of rights, an interdict, a mandamus, or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the court may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...the courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if need be, to achieve this goal."

30. I fully adopt this definition of "appropriate reliefs" and shall deploy it in my disposition of this Petition. Arising from the findings of evidence, conclusions of facts and law, constitutional and statutory interpretations and various pronouncements of law, I hereby the following orders:-

- a. An order of Certiorari be and is hereby issued quashing the Respondent's decision contained in the letter dated 10th December 2019 declining to admit the applicant into the Advocates Training Programme (ATP) at the Kenya School of Law.
- b. An order of prohibition be and is hereby issued prohibiting the Respondent from enforcing, implementing or in any other manner whatsoever from effecting its decision contained in its letter dated 10th December 2019.
- c. An order of Mandamus be and is hereby issued compelling the Respondent to forthwith admit the applicant into the Advocates Training Programme (ATP) at the Kenya School of Law in accordance with the provisions of paragraph 1 (a) of the Second Schedule of the KSL Act.
- d. No orders as to costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 23RD DAY OF NOVEMBER 2021

**JOHN M. MATIVO
JUDGE**

²⁵ (2002) 5 LRC 216 at page 249.

