



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

MISCELLANEOUS APPLICATION NO. E028 OF 2021

LEON KAMAU KIMANI.....APPLICANT

VERSUS

KENYA SCHOOL OF LAW.....RESPONDENT

AND

COUNCIL OF LEGAL EDUCATION.....INTERESTED PARTY

R U L I N G

1. This Ruling is in respect of the Notice of Motion dated 8th September 2021 and the respondent's Notice of Preliminary Objection (P.O) dated 23rd September 2021.

2. The applicant filed the Notice of Motion under Sections 1A, 3A of the Civil Procedure Act, Cap 21, the Legal Education Act No. 27 of 2012, the Kenya School of Law Act No.26 of 2012 and the Constitution of Kenya. The application accordingly seeks the following orders:

i. Spent;

ii. That the judgement entered by the Legal Education Appeal Tribunal, Case No.E002/2021, Leon Kamau Kimai v Kenya School of Law and the Council of Legal Education be admitted as judgement of this court;

iii. That an order of mandamus be issued against the respondent compelling it to comply with the Legal Education Appeal Tribunal's judgement and to immediately admit the applicant to the Advocate Training Programme 2021/2022;

iv. That contempt of court proceedings be allowed against the Director of the Kenya School of Law for a warrant of arrest against him, to personally attend court and to be committed to civil jail for contempt of court;

v. That the respondent do pay the cost of this application; and

vi. Any other relief that this Honourable Court may deem just and fit to grant.

3. The application is premised on the applicant's sworn affidavit of even date. He also filed replying affidavit in response to the respondent's Notice of Preliminary Objection dated 4th October 2021. The applicant's case as founded in the averments therein is that he was denied admission to the Advocate Training Programme for the academic year 2021/2022 by the respondent. He took his case to the Legal Education Appeal Tribunal, which entered judgment in his favour on 21st August 2021 and ordered that he be admitted into the programme.

4. He avers that the respondent has refused to comply with the Tribunal's order, hence being in contempt of court. He urges the court to issue a warrant of arrest against the Respondent's director. He, therefore, prays for issuance of the orders sought to prevent further delay by the respondent.

5. The respondent in opposing the application filed a notice of P.O. dated 23rd September 2021 stating that:

i. This court lacks jurisdiction to hear and determine this matter on account of Section 30 and 31 of the Civil Procedure Act, as read together with Section 33(3) and 38(1) of the Legal Education Act.

ii. The application is not properly before this court.

iii. The subject matter of the application is res judicata.

iv. The application offends the doctrine of constitutional avoidance.

v. The application is malicious, vexatious and an abuse of the court process.

6. In addition filed a replying affidavit dated 13th October 2021 sworn by Fredrick Muhia, it's principal officer, Academic Services.

7. The respondent's account is that being aggrieved by the Legal Education Appeals Tribunal's decision, lodged a memorandum of appeal dated 9th September 2021. It avers that the Tribunal exceeded its statutory mandate in considering matters under the Kenya School of Law Act while its jurisdiction is limited to matters under the Legal Education Act.

8. The deponent deposes that the Advocate Training Programme takes 33 weeks to complete and the one for the 2021/2022 academic year commenced in May 2021. It is its view that even if the applicant were to be admitted into the school, he would not be eligible and prepared to sit for the bar examinations. To add on to all this, it is averred that the applicant while pursuing his cause has resorted to threats, intimidation and uncivil language.

9. The deponent avers that an appeal has been lodged in the High Court under *HCCA/E573/2021 Milimani High Court* and an application for stay of execution filed under *HCCCMISC/E456/2021 Milimani High Court*. (NOTE: 'FM 5' is not attached to the replying affidavit.)

10. It is its argument basically that the applicant did not take the necessary steps required prior to execution of the Tribunal's order since the Tribunal has not transferred the decree to this court for execution adding that execution is a preserve of the Tribunal. In closing the respondent avers that this is a civil matter and does not meet the constitutional threshold.

11. The applicant filed written submissions dated 21st October 2021 in person. He listed the issues for determination to be as follows:

i. Whether the application for execution of the judgment of the Legal Education Appeal Tribunal is a Constitutional matter or a Civil matter.

ii. Whether the Director of the Kenya school of law should be held in contempt of court and a warrant of arrest issued against him.

iii. Whether the court should declare the Director of the Kenya School of Law as unfit to hold any public office.

iv. Whether the court should issue an order of Mandamus against the respondent and Dr. Henry Mutai, compelling them to comply with the judgement of the tribunal dated 20th August 2021.

v. Whether the respondents are bound to admit the applicant to the Advocates Training Program.

12. On the first issue, he submits that the respondent has failed to obey the Tribunal's decision. This he says has infringed his constitutional right to education and fair administrative action. In effect, he seeks orders to enforce this decision since according to him the Tribunal cannot enforce its own judgment. He argues that the application meets the constitutional threshold since it is not commercial in nature but is between a government institution and a private citizen. He argues that this court is a civil court.

13. Moving over to the second issue, the applicant submits that the respondent is run by Dr. Henry Kibet Mutai, the director of the school. According to him the director's refusal to obey the Tribunal's judgement is unconstitutional, illegal and unwarranted, and an arrest warrant ought to be issued against him for his committal to civil jail.

14. The petitioner further submits that the functions of the respondent's director are clearly stipulated in the Kenya School of Law Act under Section 14. One of those functions is to manage the budget of the school while ensuring that its funds are properly expended and accounted for. It is his assertion in light of this that instigation of litigation by the respondent's director is at the expense of these public funds.

15. The petitioner argues that issues relating to legal education are a preserve of the interested party and not the director. In essence he argues that the respondent has no basis to deny him entry into the program while pursuing litigation. He contends that the litigation by the respondent's director is a waste of public funds. That the issues relating to legal education are a preserve of the interested party not the director. In essence he argues that the respondent has no basis for denying him entry into the program. It is on this ground he says that the respondent's director is not fit to hold the office.

16. On the fourth issue, the applicant submits that failure to grant an order of mandamus will render the Tribunal's decision ineffective. It is his argument that orders ought to be given in the interest of justice and to avoid infringement of his rights. Moving over to the final issue he submits that the respondent has caused him delay in joining the programme which continues to infringe upon his rights. It is accordingly his submission that the court should compel the respondent to admit him into the program as ordered by the Tribunal.

17. The respondent through Dr. Henry K. Mutai filed its submissions which are undated. Counsel identified the issues for determination to be as follows: -

- i. *Whether the preliminary objection is purely on a point of law;*
- ii. *Whether this court has jurisdiction to entertain this matter;*
- iii. *Whether the application offends the doctrine of constitutional avoidance; and*
- iv. *Whether the orders can be granted.*

18. On the first issue counsel submits that the P.O. has satisfied the requisite threshold as it only raises points of law pegged on the provisions of the law. In support he relied on the *loci classici* case of **Mukisa Biscuits Manufacturing Company Limited v West End Distributors [1969] EA 696** where it was held that:

“...a preliminary objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings and which if argued as a preliminary point will dispose of the suit.”

He also relied on the case of **John Musakali v Speaker County of Bungoma & 4 Others [2015] eKLR** and **Oraro v Mbaja [2005] KLR 141** which expounded on this issue.

19. On this court’s jurisdiction, counsel submits that according to the Black’s Law Dictionary 9th edition, jurisdiction is the Court’s power to entertain, hear and determine a dispute before it. Likewise, comparison was made to definitions of jurisdiction as adopted in Halsbury’s Laws of England (4th Ed.)Vol.9 and Words and Phrases Legally Defined Vol.3. He thus submits that although the High Court has inherent jurisdiction the same must be conferred upon it by statute.

20. Reliance was placed on the Supreme Court Case of **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others [2012] eKLR** where it was held that:

“...the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits.”

Additional reliance was placed on the cases of:

- (i) **Owners of Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1**
- (ii) **Jamal Salim v Yusuf Abdulahi Abdi & another [2018] eKLR.**

21. Counsel contends that the application is an abuse of the court process since it seeks execution of the Legal Education Appeals Tribunal’s decision which is within the Tribunal’s jurisdiction, to deal. That the same can only be transferred to the High Court as provided under Sections 30 and 31 of the Civil Procedure Act as read together with Section 33(3) and 38(1) of the Legal Education Act. Further that the court can only have jurisdiction over the matter through a transfer by the Tribunal or as an appeal.

22. On the principle of constitutional avoidance, he submits that the applicant’s case does not meet the minimum threshold for constitutional ripeness and avoidance. He argues that the applicant ought to have brought the matter to court as a last resort, since there exists another remedy provided in law which the applicant has not utilized. Fundamentally he submits that what the applicant has done is an affront to Article 159 of the Constitution. To emphasize this points counsel relied on the cases of:

- (i) **Communications Commission of Kenya & 5 others v Royal Media Services Ltd & 5 others Pet.14A,14B & 14C of 2014 [2014] eKLR**
- (ii) **Kiriro wa Ngugi & 19 others v Attorney General & 2 others 2020] eKLR.**

23. Lastly, he submits that the application has not met the threshold for contempt proceedings as there is no intentional attempt to disobey the court orders. He urged the court not to grant the orders sought.

Analysis and Determination

24. I have considered the application, affidavits, submissions, the authorities cited and the law. The central issue falling for determination is whether this court has jurisdiction to execute the Legal Education Appeals Tribunal Order, and if so whether the applicant is entitled to the reliefs sought.

25. This court’s jurisdiction to hear the applicant’s application has been challenged by the respondent who basically argues that this court lacks jurisdiction on account of Sections 30 and 31 of the Civil Procedure Act as read together with Sections 33(3) and 38(1) of the Legal Education Act. This court will first deal with the question of jurisdiction as is required by the law.

26. The Supreme Court in the case of **Samuel Kamau Macharia** (*supra*) while addressing the issue of jurisdiction opined as follows:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

27. Likewise the Court in **The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011** made a clear statement on jurisdiction as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14): “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

28. In light of this, the jurisdiction of this court to entertain matters before it is grounded in Article 165(3) of the Constitution which states as follows:

(3) Subject to clause (5), the High Court shall have--

a) unlimited original jurisdiction in criminal and civil matters;

b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

iv. a question relating to conflict of laws under Article 191; and

e) any other jurisdiction, original or appellate, conferred on it by legislation.

29. Counsel for the respondent while contesting this court’s jurisdiction argues that although the High Court has inherent jurisdiction it cannot extend to assumption of jurisdiction not conferred upon it by statute. He explains this to be because the applicant did not adhere to the provisions of Section 38 of the Legal Education Act No. 27 of 2012 (the Act) prior to seeking execution of the Tribunal’s order. Moreover, it is noted that the Tribunal’s decree was never transferred to this court for execution.

30. An examination of the Legal Education Appeal Tribunal’s mandate and jurisdiction at this juncture is necessary. The Tribunal is established under the Legal Education Act No. 27 of 2012 under Section 29. The Tribunal’s jurisdiction is spelt out under Section 31 as follows:

(1) The Tribunal shall, upon 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 this Act, inquire into the matter and make a finding thereupon, and notify the parties concerned.

(2) For the purposes of hearing an appeal, the Tribunal shall have all the powers of the High Court to summon witnesses, to take evidence on oath or affirmation and to call for the production of books and other documents.

(3) Where the Tribunal considers it desirable for the purposes of avoiding expenses, delay or for any other special reasons, it may receive evidence by affidavit and administer interrogatories within the time specified by the Tribunal.

(4) When determining any matter before it, the Tribunal may take into consideration any evidence, which it considers relevant to the

subject of an appeal before it, notwithstanding that such evidence, would not otherwise be admissible under the law relating to evidence.

31. The Tribunal in carrying out its mandate is vested with the following powers as envisaged under Section 35 of the Legal Education Act: -

Upon hearing an appeal the Tribunal may-

(a) confirm, set aside or vary the order or decision in question;

(b) exercise any of the powers which would have been exercised by the Council, in the proceedings in connection with which the appeal is brought; or

(c) make any other order, including an order, for costs, as it may consider just.

32. Once such a determination is made under Section 35, the Act under Section 38 provides as follows: -

(1) Any party to proceedings before the Tribunal who is dissatisfied by a decision or order of the Tribunal on a point of law may, within thirty days of the decision or order, appeal against such decision or order to the High Court.

(2) The Tribunal may of its own motion or on the application of an interested person, if it considers it appropriate in the circumstances, grant a stay of execution of its award until the time for lodging an appeal has expired or where an appeal has been commenced until the appeal has been determined.

33. The applicant through his application seeks an order to have the Tribunal's decision dated 21st August 2021 admitted as this Court's judgment. This means this court will have to first convert the decision into a judgment and decree and proceed to execute it. From the above provisions and my interpretation, it is clear that Sections 31 and 35 of the Act empower the Tribunal to exclusively make determinations for the matters before it, and issue appropriate orders with no limitations stated.

34. Section 38 of the Act discloses that the High Court's role in the Tribunal's findings lies on matters of appeal. In addition, Section 38(2) of the Act provides that the Tribunal during the period of the 30 days or where an appeal is ongoing can stay execution of its own award until the matter is determined.

35. Nothing in this section bestows on the High Court powers of execution of the Tribunal's orders. A reading of these provisions clearly shows the intention of the drafters of the above statute to be the conferment of appellate powers only, from the orders of the Tribunal as envisaged in Article 165 (3) (c) of the Constitution. Also see section 31 of the Legal Education Act.

36. The Court of Appeal in the case of **County Government of Nyeri & another v Cecilia Wangechi Ndungu [2015] eKLR** made this principle clear by stating as follows:

“14. Alive to the fact that we are called upon to interpret the aforementioned provisions, we remind ourselves of the cardinal rule for construction of a statute; that is, a statute should be construed according to the intention expressed in the statute itself. Halsbury's Laws of England, 4th Edition (Reissue), Butterworths, 1995, Vol. 44(1), para 1372 provides:-

“The object of all interpretation of a written instrument is to discover the intention of its author as expressed in the instrument. Therefore the object in construing an Act is to ascertain the intention of Parliament as expressed in the Act, considering it as a whole in its context...”

37. Guided by the above principles, I am inclined to come to the conclusion that there is no specific provision under the Legal Education Act No. 27 of 2012 which confers upon this court jurisdiction to admit the Tribunal's orders for the purposes of execution. The Court of Appeal in the case of **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR** emphasized this principle by stating as follows:

“2. In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.”

38. The Respondent has exercised its right of appeal as provided for under Section 38 of the Act. It availed the memorandum of Appeal (FM2) Plus copy of a letter requesting for proceedings (FM3).

39. It is therefore my finding that this court does not have the requisite jurisdiction to entertain the applicant's application, which is hereby struck out with costs.

Orders accordingly.

Delivered online this 16th day of December, 2021 in open court at Milimani Nairobi.

Hedwig I. Ong'udi

Judge of the High Court