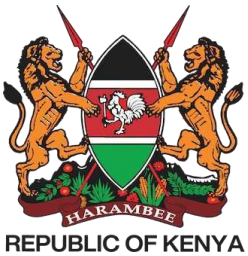

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. 20 OF 2020

REPUBLIC.....APPLICANT

AND

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

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

OTENE RICHARD AKOMO.....*EX PARTE* APPLICANT

CONSOLIDATED WITH

MISC CIVIL APP NO. 26 OF 2020

REPUBLIC.....APPLICANT

VS

KENYA SCHOOL OF LAW.....RESPONDENT

ESTHER WANJIRU KIMANI.....*EX PARTE* APPLICANT

AND

JUDICIAL REVIEW NO. 8 OF 2020

REPUBLIC.....APPLICANT

VS

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

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

GETRUDE MORAA ORINA & 30 OTHERS...*EX PARTE* APPLICANTS

AND

MISC APP NO 21 OF 2020

REPUBLIC.....APPLICANT

VS

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

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

MUKUNG TEMKO MERCY.....EX PARTE APPLICANT

AND

JR NO. 7 OF 2020

REPUBLIC.....APPLICANT

VS

THE KENYA SCHOOL OF LAW.....RESPONDENT

SHARON PURITY OTIENO.....EX PARTE APPLICANT

AND

JUDICIAL REVIEW APP NO. 13 OF 2020

REPUBLIC.....APPLICANT

VS

THE KENYA SCHOOL OF LAW.....RESPONDENT

THE COUNCIL OF LEGAL EDUCATION.....INTERESTED PARTY

GEORGE MOGIRE & 6 OTHERS.....APPLICANTS

JUDGMENT

Introduction

1. This judgment disposes six consolidated suits, namely; JR Nos. **20** of 2020, **26** of 2020, **8** of 2020, **21** of 2020, **7** of 2020 & **13** of 2020. The common thread between them is that the applicants challenge the legal and constitutional validity of decisions by the Kenya School of Law (herein after referred to as the KSL) declining to admit them into the Advocates Training Programme (ATP).

2. A common Respondent in all the suits is the KSL, a body corporate with perpetual succession and a common seal established under section **3** of the Kenya School of Law Act[1] (herein after referred to as 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 KSL Act. KSL is the successor of the Kenya School of Law established under the repealed Council of Legal Education Act.[2]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 providing 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, conducts examinations and confers academic awards; and undertakes projects, research and consultancies.

4. The Hon. Attorney General, the Principal government legal adviser and representative pursuant to Article **156** of the Constitution is named as the second Respondent in JR Nos. **21** of 2020 and **8** of 2020. He represents the national government in court or in any legal proceedings to which the national government is a party, other than criminal proceedings.

5. The Council of Legal Education (herein after referred to as the council) is named as an Interested in JR No. **13** of 2020. It is a body corporate with perpetual succession and a common seal established under section **4** of the Legal Education Act.[4] 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. It is the successor of the Council of Legal Education established under the Repealed Council of the Legal Education Act.[5]

6. The functions of the Council include regulating legal education and training in Kenya offered by legal education providers.[6] It also licences legal education providers; supervises legal education providers; advises the Government on matters relating to legal education and training; recognizes and approves qualifications obtained outside Kenya for purposes of admission to the Roll and administers such professional examinations as may be prescribed under section **13** of the Advocates Act.[7]

7. On **17th** February 2020, this court consolidated the six suits. As was held in *Korean United Church of Kenya & 3 Others v Seng Ha Sang*[8] consolidation of suits is done for the purposes of achieving the overriding objective of the Civil Procedure Act,[9] that is, for expeditious and proportionate disposal of civil disputes. Consolidation saves costs, time and makes the conduct of several actions more convenient by treating them as one action. Consolidation of matters avoids conflicting judgments, it saves time and costs by clubbing together matters involving common questions of fact and law.

8. Despite the striking factual similarity in the suits, for the sake of brevity, I here below summarize the facts and the core grounds cited in each case.

The factual and legal basis of the applications

9. Mr. Otene Richard Akomo, the applicant in JR No. **20** of 2020, M/s Mukung Temko Mercy, the applicant in JR No. **21** of 2020 and Mr. Getrude Moraa Orina & 30 others, the applicants in JR No. **8** of 2020 state that on **4th**September 2019, the KSL placed an advert in the local dailies inviting applications for admission into the ATP for the year 2020/2021 prescribing an eligibility criteria which is alien to the KSL Act or case law, unlawful, *ultra vires* and contrary to KSL's mandate under section **5** of the KSL Act.

10. They state that the Director of the KSL informed them in writing that their respective applications were unsuccessful because their Kenya Certificate of Secondary Education (KSCE) grades were below the grades stipulated in the KSL Act. They state that they hold Bachelor of Laws Degree (LLB) from local Universities which is the only requirement for admission to the ATP under section **16** of the KSL Act as read with paragraph **1 (a)** of the Second Schedule to the Act. They state that the applicants in JR No. **20** of 2020 were rejected on grounds that their the KCSE grades were below the grades stipulated in the KSL Act while the applicant in JR No. **21** of 2020 was informed that as per the KSL Act, the Diploma in Law Certificate cannot be considered for admission to the ATP, hence, his provisional admission letter dated **4th** December 2019 was revoked on grounds that it was issued in error.

11. They state that states that Article **43(1) (f)** of Constitution guarantees them the right to education which the KSL is illegally denying them. They also state that the KSL is the sole institution within the Republic offering the ATP, hence, the refusal, though discretionary, has to recognize this monopoly and their huge investment both in time and money. Lastly, they state the decision is unlawful, unreasonable, procedurally unfair and materially influenced by an error of law.

12. As a consequence of the foregoing, the applicants in JR No. **20** of 2020, JR No. **21** of 2020 and JR. No. **8** of 2020 pray for identical orders, namely, an order of *Certiorari* to quash the decision, an order of *Mandamus* compelling KSL to admit them into the ATP and any other relief the court may deem expedient. They also pray for costs of the case.

13. Mr. George Mogire & **6** others, the applicants in JR No. of **13** of 2020 state that they attained KCSE grades required for admission to the Law under the *Council of Legal of Education (Accreditation and Quality Assurance) Regulations 2012*. They state that they obtained credit passes in Diploma in Law as per the Council's criteria for admission to the LLB program and that they graduated with LLB Degrees and applied for admission into the ATP but the KSL sent them individual rejection letters dated **17th** December 2019.

14. They also state that their appeals to KSL were rejected and they wrote to the Council seeking its intervention and the Council responded to two of them confirming that they were qualified to apply for the ATP. In the rejection letters, the KSL stated:-

> *a. Nyaata George Mogire, Wekesa Davis Alex obtained grade **B-** in English and **C** plain in Kiswahili language which is below the stipulated grade **B** plain.*
>
> *b. Kimani James Hans and Otieno Nicholas Okoth had a KCSE mean grade **C** plain, **B-** in English and **C+** in Kiswahili language which is below the stipulated grade **C+** and **B** plain respectively.*
>
> *c. Karanja Terry Wangui, Kanyango Paul Martin had a KCSE mean grade **C** plain which is below the stipulated grade of **C+.***
>
> *d. Mwanzia Samuel was informed that as per the KSL Act the Diploma in Law Certificate cannot be considered for admission to the ATP, hence, his admission letter was revoked for having been issued in error.*
>
> *e. Nyaata George Mogire, Davis Alex Wekesa, Karanja Terry Wangui, Otieno Nicholas Okoth Diploma in Law Certificate cannot be considered for admission to the ATP.*

15. They contend that the Respondent misapplied section **16** of the KSL Act and paragraph **1 (a)** of the Second Schedule and arrived at decisions which are unconscionable, irrational, unreasonable, unjust and *ultra vires* its statutory mandate. They maintain that section **16** of the KSL Act read together with paragraph **1(a)** of the Second Schedule to the Act are not mutually exclusive to Section **8 (3) (a) & (c)** and **(4)** read together with paragraphs **4, 5** and **6** of the *Council of Legal Education (Accreditation and Quality Assurance) Regulations 2012* (Rev.2016) on the criteria for admissions to the diploma, LLB degree and ATP program.

16. They maintain that their applications fall under section **16** of the KSL Act as read together with paragraph **1(a)** of the Schedule to the KSL Act which provisions are qualified by the conclusive requirements set under sections **8 (3) (a)** and **(c)** of the Legal education Act[10] read together with paragraphs **4 (1) (a), 5(1)(d)** and **6(1) (a)** of the part **II** of the Third Schedule of the *Council of Legal Education (Accreditation and Quality Assurance) Regulations 2012.*They also state that the rejection is unreasonable, irrational and *ultra vires* KSL statutory powers and a breach of Articles **43 (f) & 47** of the Constitution and the Fair Administrative Action Act[11]and the right to legitimate expectation.

17. They (applicants in **JR Nos. 20, 21 & 8** of 2020) pray for an order of *Certiorari* to quash the impugned decision, an order of *prohibition* stopping the KSL from enforcing, implementing, or in any manner whatsoever, effecting its decision to barring them from joining the ATP. They also pray for an order of *Mandamus* compelling KSL to immediately admit them into ATP. Additionally, the applicants pray for a declaration that KSL has breached their constitutional rights *inter alia* to: - to dignity contrary under Article **28** of the Constitution, freedom from psychological torture under Article **29(d),** right to information under Article **35(3),** right to education under Article **43 (f),** right to fair administrative action under Article **47** and rights of the Youth under Article **55**. Lastly, they pray for costs of this suit and any other relief the court shall deem just and expedient.

18. Sharon Purity Otieno, the applicant in No. **7** of 2020 states that she holds a Diploma in Public Relations from the University of Nairobi and a LLB Degree from a local University. She states that her application was rejected on the grounds that she had a mean grade of **C** plain which is below the stipulated grade **C+** and her appeal to KSL was unsuccessful. She states that the rejection is unlawful because section **1(a)** of the Second Schedule to the KSL Act guarantees her admission. She states that the rejection goes against this court's judgments in JR No. **80** of 2018 and Misc. App No. **32** of 2019. She also states that KSL has previously admitted other applicants under the same criteria, hence the impugned decision is discriminatory, unreasonable and a violation of her right to legitimate expectation.

19. As a consequence, she prays for an order of *Certiorari* to quash the impugned decision, an order of *prohibition* prohibiting the KSL from barring her from registering, attending, undertaking and generally participating in the ATP and costs of the suit to be personally borne by the Director of the KSL.

20. Esther Wanjiru Kimani, the applicant in No. **26** of 2020 states that prior to her admission to study LLB at the University of Nairobi on **22nd** October 2014 she held a Diploma in Public Relations with a Credit Pass, and that on **20th** December 2019 she graduated with a LLB Degree. She states that her application for admission into the ATP was rejected on grounds that she did not attain a KCSE mean grade of **C** Plain which is below the stipulated grade C+ for admission into the programme. She states that her appeal to KSL was unsuccessful even after attaching her Diploma in Public in Relations Certificate as evidence that she met the requirements of clause **5(c)** of the First Schedule to the *Council of Legal Education (Accreditation of Legal Education Institution) Regulations, 2009*. She also states that she satisfied the requirements for admission into a law degree, namely, she held a Diploma with a credit pass, a mean grade **C** (plain) and a **B** (plain) in English in the KCSE, hence she satisfied the provisions of paragraph **11** of the *Second Schedule to the Council of Legal Education (Accreditation of Legal Education Institutions) Regulation, 2009* which provided the criteria for admission into the University's LLB Programme.

21. She also states that KSL rejected her appeal on **13th** January 2020 stating that a Diploma in Public Relations was not a "relevant Diploma" as envisaged under Legal Notice Number 168/2009 which is *"sensu stricto ipso facto a diploma in law."* She states that she made a further appeal stating that LN **169** of 2009 did not require a Diploma in Law under clause **5** of the Third Schedule of the *Legal Education (Accreditation and Quality Assurance) Regulations, 2016* which came into force after her admission into the University to study LLB. She further states that she undertook the Diploma in Public Relations in 2013 when the Council of Legal Education Act[12] and the LN **169** OF 2009 permitted the University to admit students into LLB with the said qualifications, hence, she acted under the representation that the Council recognized such requirements as sufficient for admission into the LLB Programme. She states that her further appeal was declined on the same grounds and that the failure to admit her violated her constitutional right to a fair administrative action.

22. As a consequence of the foregoing, she prays for an order of *Mandamus* directing KSL to admit her directly into the ATP academic year 2020/21 based on the criteria provided for by clause **5(c)** of the First Schedule to LN **169** of 2009. She also prays for an order of *prohibition* prohibiting KSL from excluding her from directly joining the ATP for the Academic year 2020/21. She also prays that the costs of and incidental to the application be in the cause and such further or other relief that this honourable court may deem just and fit to grant.

KSL's Notice of Preliminary Objection(s)

23. The KSL filed a Notice of Preliminary Objection in JR No. **20** of 2020 challenging this courts jurisdiction citing sections **31(1)** and **8(1) (f)** of the Legal Education Act[13] arguing that the applicant had not exhausted the alternative statutory remedy. It also filed a Notice of a Preliminary Objection in JR No. **8** of 2020 stating that the Notice of Motion is improperly before this court and that it is incurably defective. However, on **9th** July 2020 KSL's Mr. Simiyu, with the consent of the applicants' counsel withdrew the two Preliminary objections.

24. The Hon. Attorney General named as the second Respondent in JR Nos. **20** of 2020, **8** of 2020, **21** of 2020 and the Council sued as the Interested Party in JR No. **13** of 2020 did not file any responses nor did they participate in these proceedings.

KSL's Response to the consolidated suits

25. On **9th** July 2020, Mr. Simiyu, adopted the two Replying affidavits of Fredrick Muhia dated **6th** February 2020 and **25th** February 2020 filed in JR Nos. **8** of 2020 and **26** of 2020 respectively as KSL's response to all the consolidated suits.

26. Mr. Fredrick Muhia, who is KSL''s Principal Officer, Academic Services in his Replying Affidavit sworn on **6th** February 2020 deposed that on **4th** September 2019, KSL advertised in the local dailies applications for admission into the ATP for 2020/2021academic year premised on legal framework for admission to the ATP indicating the eligibility criteria.

27. He deposed that the KSL evaluated all the applications against the legal criteria and responded to the applicants through various letters rejecting their applications for failing to meet the prescribed KSCE requirements. He deposed that the applicants were relying on their Diploma in Law Certificates, yet the applicable law has no provision for academic progression particularly Diplomas in Law Certificate. He deposed that the KSL considered their appeals and advised them that the applicable law does not have a provision for academic progression.

28. In his Replying Affidavit dated **25th** February 2020 in opposition to JR No. **26** of 2020, he deposed that she did not satisfy the criteria

under LN No. **169** of 2009 against which her application was evaluated. He deposed that she is qualified under clause 5 **(c)** of the First Schedule of LN No. **169** of 2009, which provision provides for a Bachelor's Degree from a recognized university, a minimum grade of **C+** in English and a minimum aggregate of **C** plain in the KCSE, holds a higher qualification eg **"A"** levels, **IB**, relevant Diploma, other undergraduate degree or has attained a higher degree in law after undergraduate studies in the LLB.

29. He deposed that a Diploma in Public Relations is not a relevant Diploma for the purposes of the ATP Programme, but the relevant diploma for purpose of the ATP Programme is a Diploma in Law. He averred that if the applicant's application is allowed, anybody with a Diploma in any field would be eligible to join the ATP Programme, and that it was not the intention of the drafters of LN **169** of 2009 to have a holder with a Diploma not related to law to be eligible for admission into the ATP Programme.

The applicants' advocates' submissions

30. Mr. Munyua, counsel for the applicant in JR No. **7** of 2020 urged the court to consider the plain language of the provision to discern the legislative intent.[14] He urged the court to consider the plain language of the statute and to promote the intention of the legislature and purposes of the statute. He submitted that prior to being admitted to study LLB, his client held a Diploma in Public Relations but her application was rejected on grounds that she did not score a mean grade of C- in KCSE. He cited section **16** of the KSL Act and paragraph **1(a)** of the Second Schedule which prescribes the requirements for admission to the ATP and submitted that she satisfied the said requirements, hence the rejection is *ultra vires* the Act and discriminatory because it prefers certain applicants, and that the rejection is unlawful and unreasonable.[15]

31. He also argued that the impugned decision violates the applicant's right to legitimate expectation[16] because KSL failed to consider the criteria for admission under the act. To fortify his argument, he cited *Republic v KSL ex part Victor Mbeve Musinga*.[17] Lastly, he urged the court to grant the orders sought plus costs of the suit to be paid personally by the director of the KSL for acting unreasonably because the issues raised in this case have been resolved by the courts.

32. M/s Masinde, counsel for the applicants in JR Nos. **8**, **20** & **21** of 2020 associated herself with Mr. Munyua's submissions. She cited section **16** of the KSL Act as read with Paragraph **1 (a) (b)** of the Second Schedule and submitted that there are two categories under the said paragraphs. She argued that the impugned decision offends Articles **43 (1) (f)** & **55** of the Constitution and the right to legitimate expectation. She also argued that under section **4** of the KSL Act, the KSL is the only institution in Kenya offering legal education hence the refusal amounts to denying young Kenyans the right to access education. She relied on *Joy Brenda Masinde v LSK*[18] and submitted that the law on the subject is clear and has been interpreted by the courts including *Republic v KSL ex parte Victor Mbeve Musinga*[19] & *Kihara Mercy Wairimu v Kenya School of Law & 4 other*.[20] She argued that the impugned decision is irrational, and illogical and urged the court to grant the order sought plus costs of the case.

33. M/s Eunice Nganga, counsel for the applicants in JR No **13** of 2020 submitted that the Council confirmed that her client was qualified to join the ATP under section **16** of the KSL Act as read with paragraph **1 (a)** & **(b)** of the Second Schedule. She relied on *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others*[21]which construed the word "or" to be disjunctive. She also submitted that paragraph **1 (a)** has severally been construed by courts in several decisions such as *Republic v Kenya School of Law & another Ex Parte Kithinji Maseka Semo & another*[22]and *Republic v Kenya School of Law ex parte Victor Mbeve Musinga*[23] which held that paragraph **1 (a)** & **(b)** creates two distinct categories.

34. She argued that the law sets out the admission requirements, namely a Bachelor's Degree, completion of remedial studies, proof of academic progression as per the schedule and certificate of completion of pre-bar examinations. She argued that the KSL has continuously misconstrued the law and it has failed to take into account relevant considerations and it introduced non-existent requirements. It was her submission that the act cannot be read in isolation from the Council of Legal Education Act otherwise doing so would lead to absurdity. She argued that the decision is not proportionate to the purposes of the statute and cited *Adrian Kamotho Njenga v KSL and Engineer Martin Wanderi & others v The Engineers Registration Board & others.*[24] She submitted that having qualified for admission into the ATP, the applicants had legitimate expectation that they would be admitted.

35. She cited section **16** of the KSL Act and paragraph **1(a)** of the Second Schedule and argued that the KSL is importing a criteria which is alien to the law. It was her submission that KSL's mandate extends to ensuring that an applicant has a LLB from a recognized University. It was her position that the Council's criteria for admission is set out in paragraphs **4, 5** and **6** of Part **11** of the *Third Schedule to the Council of Legal Education (Accreditation and Quality Assurance) Regulations 2012.*

36. She submitted that the applicants qualified for admission into ATP, hence the rejection is unreasonable and a breach of the applicants' right under Article **47** of the Constitution. She relied on *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[25] and submitted that the KSL acted in excess of its jurisdiction by purporting to set the criteria for admission. She argued that the decision is unlawful, made in bad faith and violates the applicant's right to legitimate expectation. She cited *Kenya National Examination Council v Republic*[26] and *Adrian Kamotho Njenga v Kenya School of Law*[27] and urged the court to allow the prayers sought plus costs.

37. Esther Wanjiru Kimani, the applicant in No. **26** of 2020 represented herself. She filed written submissions which she highlighted orally during a virtual hearing. The crux of her submissions were that her Diploma in Public Relations attained a credit pass thereby meeting the minimum qualifications for admission into the LL.B Programme, as provided in Clause **2 (d)** of the *Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009* (Legal Notice 170 of 2009). She faulted the Respondent's interpretation that the "relevant Diploma" envisaged under Clause **5 (c)** of the First Schedule to the Legal Notice 169 of 2009 was *sensu stricto ipso facto* a Diploma in Law. She argued that even though both Regulations (Legal Notice 169 & 170 of 2009) are provided for under the Council of Legal Education Act (Repealed), the KSL is selectively interpreting the same. She argued that the decision to deny her direct admission to the ATP is unfair, and that having obtained LLB, she satisfied all requirements for admission into the ATP.

38. She submitted that the impugned decision violates her rights under Articles **43(1) (f)** & **47** of the Constitution, that the decision is unlawful, unreasonable, procedurally unfair, and that it was materially influenced by an erroneous interpretation of the law. She cited Clause **5 (c)** of the First Schedule of the *Council of Legal Education (Kenya School of Law) Regulations 2009* and submitted that her Diploma made her eligible for admission into the University of Nairobi's LLB Programme thereby meeting provisions of Clause **2 (d)** of the *Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009* contrary to KSL's view that her Diploma in Public Relations was not a ***relevant*** Diploma in Law. Further, she cited Clause **2 b** of the Second Schedule to the *Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009* which provides for the minimum qualifications for admission into an Undergraduate Degree Programme thus:-

> *"[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."*

39. She cited *Sydney Douglas Webuye v Kenya School of Law*[28] in which the court cited the *Black's Law Dictionary* definition of the word relevant as**:-** *"Logically connected and tending to prove or disprove a matter in issue, having an applicable probable value that is, rationally tending to persuade people of the probability or possibility of some alleged fact"* and submitted that there is no express provision in both of the *Council of Legal Education Regulations (Legal Notice 169 & 170 of 2009)* stating that the Diploma envisaged under the Council of Legal Education Act ***must*** be strictly a Diploma in Law. She placed further reliance on *Sydney Douglas Webuye* (Supra) which was emphatic that:-

> *"[24]…, I find that if the impugned rules intended that the term relevant diploma be construed to mean that a diploma in law, nothing would have been easier than for such a provision to be specifically expressed in the said legal notice. The same was not done even though the regulations are very specific of the specific subjects and the minimum entry grades required for the Advocates Training Programme.*

40. On the principles of statutory construction, she relied on *Republic v Kenya School of Law ex-parte Victor Mbeve* (supra) and submitted that the KSL has added words into provisions of Legal Notice 169 of 2009 which are not thereby adding of the words "***relevant*** Diploma" to mean "***sensu stricto ipso facto*** a Diploma in Law" against the intent and objects of the Council of Legal Education Act 2009. She submitted that the only express provision of law specifically requiring a Diploma in Law is for students who did not attain the stipulated B (Plain) in English and C (Plus) mean in grade in KCSE, is Clause **5** & **6** of the Third Schedule to the *Legal Education Act (Accreditations and Quality Assurance) Regulations, 2016***.** She argued that the said provision is not applicable in her case because the Regulations came into force in 2016 when she was already in her second year of her LLB studies and she cited Section **28** of the *Interpretation and General Provisions Act*[29] which provides that legislation cannot apply retrospectively.

41. She argued that in declining her application, the KSL advised her to sit for the Old Pre-bar Examinations as she did not qualify for direct admission and cited Clause **5 (d)** of the First Schedule to the Legal Notice 169/2009 which provides:-

> *"… [d] a Bachelor of Laws Degree (LL.B) from recognized university and attained a minimum grade of C- (C minus) in English and a minimum of an 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."*

42. She submitted that she attained a **B** (**Plain**) in English and a mean grade of **C** (**Plain**) which is above the stipulations in Clause **5 (d)** above for sitting for the Old Pre-Bar Examinations, hence, she is eligible for direct admission under Clause **5 (c)** of Legal Notice 169 of 2009. She also cited Section **6 (1)** of the Repealed *Council of Legal Education Act* which provided for the objects and functions of the Council to include, *inter alia*;

> *"[6 (1)] … to exercise general supervision and control over legal education in Kenya and to advise the Government in relation to all aspects thereof."*

43. She submitted that the Council of Legal Education sets admission requirements into the Universities Bachelors of Law (LL.B) Programmes and cited Clause **2 (d)** of the Second Schedule to the *Council of Legal Education (Accreditation of Legal Education Institutions) Regulations 2009* which provides for the minimum entry requirements into a University undergraduate degree programme and added it was on this basis that she was admitted on merit to study law at the University of Nairobi. She faulted the KSL for selectively applying the provisions of Legal Notice **169** of 2009 on admission into ATP while ignoring Legal Notice **170** of 2009 on admission into LLB Programme yet both are subsidiary legislations under the Council of Legal Education Act. Citing section **29** of the *Interpretation and General Provisions Act*[30] she submitted that subsidiary legislation cannot be construed in a way to create conflict with the Act creating it. (Citing *R vs Kenya School of Law ex-parte Victor Mbeve* (Supra) and *Republic v Kenya School of Law & Council of Legal Education ex parte Daniel Mwaura Marai).* Buttressed by the above authorities, M/s Kimani argued that Paragraphs **17 & 18** of KSL's replying Affidavit dated 25.02.2020 holds no water.

44. She argued that she acted on the representation that the Council had set the minimum entry requirements to study law, and upon graduating, she had a legitimate expectation that she was eligible for the ATP. She argued that the Council of Legal Education Act was

repealed by the Legal Education Act and despite the Legal Education Act being in force at the time she commenced her Diploma in Public Relations in October 2012, KSL intentionally avoided using the Act as the premise for rejecting her application.

45. She argued that the Second Schedule of the Legal Education Act sets out the core subjects required for the fulfilment and award LLB and argued that KSL ignored the said criteria yet she had qualified under both the repealed Council of Legal Education Act and the KSL Act. She cited section **16** as read together with the paragraph **(1) (a)** of the Second Schedule to the KSL Act and *Adrian Kamotho Njenga v Kenya School of Law*[31] which held that 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. She argued that Article **43 (1) (f)** the Constitution guarantees her the right to education, hence, the decision is a direct violation of her rights. She urged the court to award costs to her even though she had not prayed for the same.

KSL's Advocates' submissions

46. Mr. Simiyu & Miss Kungu both appearing for the KSL submitted in turns in a virtual hearing. Miss Kungu argued that all applications into the ATP are evaluated as provided under the law. She submitted that all the applicants except in No. **26** of 2020 joined LLB Degree after the commencement of the KSL Act and that they do not qualify because there is no room for academic progression.

47. She submitted that the applicants rely on paragraphs **3, 4** & **5** of the 2016 *Legal Education Accreditation & Quality Assurance Regulations, 2016*, which is an erroneous interpretation of the law because subsidiary legislation cannot override the substantive statute, i.e, the KSL Act. For this proposition she relied on *Evans Odhiambo Kidero v Fredrick Waititu & Republic v Kenya chool of Law ex parte Daniel Murei*. She also relied on *Victor Juma v KSL* which held that the petitioners could not benefit from the vertical qualification in the Regulations.

48. Regarding No. **26** of 2020, she argued that the core issue is the relevance of her Diploma. She argued that her application is governed by the Repealed *Council of Legal Education Act* and LN No 169 of 2009 which govern admission of students who completed LLB before the KSL came into force. She submitted that she had a mean grade of **C** plain, hence, she does not qualify for admission to the ATP under the first Schedule of LN No 169 of 2009. She argued that she was advised that the Diploma in Public Relation Relations as per paragraph **5** of LN No 169 of 2009 is not relevant, hence, she does not qualify, and, that she has to sit for a pre-bar examinations to qualify which she ignored and filed the instant case.

49. On the alleged violation of the right to legitimate expectation, she relied on *CCK v Royal Media Ltd* which held that legitimate expectation must be founded on promise and it is not enough that the expectation should exist. She argued that clear statutory words override the expectation and that the notification of the relevant statute destroys the expectation. Further, she submitted that any expectation that leads to an unlawful decision cannot be legitimate. It was her submission that the KSL made a lawful decision based on the relevant statute. She added that the KSL is being asked to make an unlawful decision. Lastly, she submitted that section **16** of the KSL Act as read with paragraph **1** of the second Schedule eliminates legitimate expectation howsoever founded. (*Citing Victor Juma v KSL*).

50. Mr. Simiyu's submitted that based on the *Kelvin Mwiti* case, he categorized the consolidated applications into two groups, one governed by the repealed *Council of Legal Education Act* and Legal Notice No. 169 of 2009 and the other is governed by the KSL Act in particular, section **16** as read with the second Schedule to the act. He identified **8th** December 2014 as critical because it separates the two groups arguing that is the date the KSL Act came into force which was the core issue in the *Kelvin Mwiti* case. He placed Esther Kimani (No. **26** of 2020) and Otieno Richard Akongo, No. **20** of 2020) in the first category and the rest in the second category. He submitted that guided by the *Kelvin Mwiti* case, the KSL advertised for interested persons to join the ATP. It was his position that the applicant in No. **26** of 2020 meets the admission criteria subject to taking the pre-bar examinations.

51. He argued that the other applications fall under the second category. He stated that the applicants in No. **21** of 2020, **13** and **7** of 2020 did not attain the required KCSE Qualifications hence they did not qualify. Also, he stated that the applicant in No. **8** of 2020 refused to attach her KSCE certificate.

52. Mr Simiyu submitted that the issue before the court is whether KCSE results matter and the interpretation of section **16** of the KSL Act as read with the second schedule. He referred to this court's decision in *Republic v KSL ex parte Victor Mbeve Musinga* and argued that he intended to give this court a different perspective. He referred to paragraph **1 (a)** of the second Schedule which he said says nothing about the KCSE grades and placed reliance on *Adrian K. Njenga* which he argued applies to local universities and submitted that under paragraph **1 (b)** of the Second Schedule, the KSCE grades are required.

53. He argued that paragraphs **1 (a)** & **(b)** apply to different situations, i.e foreign and local students which he argued causes discrimination. To him, there is no justification for the discrimination which he submitted could not have been the intention of the act. It was his view that if paragraph **1 (a)** is construed independently, it would mean that one does not need KCSE grades, which to him is an ambiguity. He contended that if **1(a)** is construed independently, it would bring discrimination. He relied on *Peter Githaiga Munyeki v KSL* which adopted a holistic statutory interpretation. He also cited *Republic v KSL ex parte Daniel Mwaura Marai* which held that the applicant could qualify if he held a **B** plain in English. He also cited Petition No. **20** of 2019 which he argued addressed the question whether the law intended to create two categories and answered in the negative. He disagreed with *Republic v KSL ex parte Victor Mbeve Musinga* which construed paragraph **1 (a)** & **(b)** of the Second Schedule as creating two categories arguing that such interpretation will create discrimination. He argued that in the *Raila Odinga* case relied upon in the *Victor Mbeve Musinga* case, the meaning of the word "**OR"** in the provision under discussion was plain and it did not create discrimination as in the instant case. He urged the court to walk away from the literal meaning and consider the resultant effects of the ambiguity and discrimination (citing *Peter Munya* Case).

Determination

54. The golden thread running through the applicant's argument and the counter-argument propounded by counsel for the KSL concerns the lawfulness of KSL's decision declining admitting the applicant's into the ATP. At the heart of the dispute lies the perennial issue of

qualifications for admission into the ATP and the proper application and construction of section **16** of the KSL as read with paragraphs **1 (a)** & **(b)** of the Second Schedule. In order to unravel the said issue, it is worth paying regard to the legal framework and legislative prescripts that govern admission into the ATP and the principles governing statutory construction.

55. Like all other public entities, KSL is duty-bound to discharge all its duties and functions in accordance with the law. Its conduct should be beyond reproach and is expected to measure up to its policy and legislative prescripts that concern the admission into the ATP and the correct application of the governing law.

56. I deem it appropriate to consider the broad principles that underlie the importance of lawful conduct on the part of public statutory bodies when discharging their public duties. In that regard, a brief survey of the applicable constitutional and legislative principles underscoring the importance of a transparent and lawful conduct is merited. The rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means.[32] On the contrary, the rule of law obliges an organ of state to use the correct legal process.

57. The foregoing principles are premised on the supremacy of the Constitution and the rule of law. The principle of legality is an aspect of the rule of law and the exercise of public power is only legitimate where lawful. The principle of legality requires that the exercise of public power must be rationally related to the purpose for which the power was given. This lies at the heart of the rationality test. Our courts have consistently held that rationality is a minimum requirement applicable to the exercise of public power in that decisions must be rationally related to the purpose for which the power is given otherwise they are in effect arbitrary and inconsistent with the requirement of rationality. The rational connection means that objectively viewed, a link is required between the means adopted by the person exercising the power and the end sought to be achieved.

58. The test therefore in relation to rationality requirements is twofold, being, first, that the decision-maker must act within the law and in a manner consistent with the Constitution, entreated not to misconstrue the nature of his or her powers and, second, that the decision must be rationally related to the purpose for which the power was conferred. This is because if it is not, the exercise of power would, in effect, be arbitrary and at odds with the rule of law.

59. It is with this in mind that it must be remembered that the KSL Act is the source of the powers of the KSL. Section **17** of the KSL Act provide that :-

> *(1)Any person who wishes to be admitted to any course of study at the School shall apply in the prescribed form and pay the prescribed application fees.*
>
> *(2) The School shall consider an application submitted under paragraph (1) and if it is satisfied that the applicant meets the admission criteria, admit the applicant to the School.*

60. The admission criteria referred in the above section is to be found in section **16** of the Act as read with Paragraph **1 (a)** & **(b)** of the Second Schedule. Exercise of this statutory power must be understood together with the constitutional precepts on administrative justice in the Fair Administrative Action Act[33] and the basic values governing exercise of public power. One of the primary reasons for the express inclusion of the criteria in the statute is to safeguard the legality, integrity and transparency of the admission process. It is in the public interest that officials comply diligently with statutory requirements, the applicable regulations and other directives, especially when those directives have in mind the attainment of transparency and accountability and the prevention of unfair practices. Compliance with the requirements of the set criteria provided under the legislative framework is thus legally required and it is not open to the KSL to simply disregard these at a whim. To hold otherwise, would undermine the demands of the principle of legality.

61. It is now necessary to examine the criteria for admission into the ATP. The starting point is section **16** of the KSL Act as read with paragraphs **1 (a)** & **(b)** of the Second Schedule. I had the occasion to interpret the above provisions in *Republic v Kenya School of Law ex parte Victor Mbeve Musinga*[34] a decision cited by both sides. In view of the similarity of the issues raised in the said case and the instant cases, I will profitably cite extensively from the said decision:-

> *23. 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 Section 1 of the Second Schedule to the KSL Act which provides that 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.*
>
> *24. Words, spoken or written, are the means of communication. Where they are possible of giving one and only one meaning there is*

no problem. However, where there is a possibility of two meanings, a problem arises and the real intention is to be sorted out. The Legislature, after enacting statutes becomes functus officio as far as those statutes are concerned. It is not their function to interpret the statutes. Legislature enacts and the Judges interpret. The difficulty with Judges is that they cannot say that they do not understand a particular provision of an enactment. They have to interpret in one way or another. They cannot remand or refer back the matter to the Legislature for interpretation. That situation led to the birth of principles of interpretation to find out the real intent of the Legislature. Consequently, the Superior Courts had to give the rules of interpretation to ease ambiguities, inconsistencies, contradictions or lacunas. The rules of interpretation come into play only where clarity or precision in the provisions of the statute are found missing. [13]

25. Therefore, a court must try to determine how a statute should be enforced. There are numerous rules of interpreting a statute, but, without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. [14]

26. Perhaps I should add that it is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it, which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The court of course adopts a construction, which will carry out the obvious intention of the legislature but cannot legislate itself. [15]

27. In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the court has to see at the very outset is what does the provision say" If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. Nevertheless, the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning, which cannot be warranted by the words employed by the Legislature.[16]

28. In interpreting the provisions of a statute, the court should apply the golden rule of construction. The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction, the words of a statute must be given their ordinary, literal and grammatical meaning. If by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless, it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction. Examples include where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent. [17] As the Supreme Court of India in Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others [18] stated:-

> *"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."*

29. It is correct to say that the touchstone of interpretation is the intention of the legislature. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[19] Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[20] If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.

30. While the object is to determine the meaning to be given to the words used, it remains the primary function of the court to gather the intention of the legislature by reference to those words. This can only occur if the object and purpose of the legislation (in which case it would include the mischief sought to be remedied) are brought into consideration when examining the words used in the context of both the document as a whole and the context or factual matrix in which the document came to be produced.

31. At the center of this determination is the meaning of the word "or" in legal parlance. In searching for its meaning, it is inevitable that I will consult dictionaries and judicial pronouncements. The practice of appealing to dictionaries simply as memory aids was deemed a function of judicial notice.[21] Words must receive their ordinary meaning. Of that meaning the court is bound to take judicial notice, as it does in regard to all words in our own tongue; and upon such a question dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court.[22]

32. Dictionaries may also serve an instantiating function, that is, they may be used by the court to confirm that a contested meaning has been employed in either speech or literature, and has thus been recognized as a valid meaning by lexicographers. Of this instantiating function, Professors Hart and Sacks said, "Unabridged dictionaries are historical records (as reliable as the judgment and industry of the editors) of the meanings with which words have in fact been used by writers of good repute. They are often useful in answering hard questions of whether, in an appropriate context, a particular meaning is linguistically permissible."[23]

33. In using a dictionary to instantiate a contested meaning, a judge searches the dictionary to determine what meanings have attained currency in the language at large and are thus linguistically permissible in a given context.[24]

34. The word "or" is defined in dictionary.com [25] as a word used to connect words, phrases, clauses representing alternatives, it's used in correlation such as either or. The Longman Dictionary of Contemporary English [26] defines "or" as - "Conjunction

used between two things or before the last in a list of possibilities, things that people can choose from, either… or… "The New Choice English Dictionary [27] defines "or" as- 'Conjunction denoting an alternative, the last in a series of choices' Conjunction is defined in the same dictionary as "a word connecting words, clauses or sentences…" The Oxford Advanced Learner's Dictionary of Current English [28] defines 'or' as a word "used to introduce another possibility". The Concise Oxford English Dictionary defines [29] "or" as a 'conjunction used to link alternatives.' The same dictionary defines the word 'conjunction' as a word used to connect clauses or sentences or to coordinate words in the same clause.

35. The use of the word "or" in a statutory provision has also received judicial construction. The Supreme Court of India [30] expressed the view that "the word 'or' is normally disjunctive and the word 'and' is normally conjunctive. However, at times they are read as vice-versa to give effect to the manifest intent of the legislature as disclosed from the context. It is permissible to read 'or' as 'and' and vice-versa if some other part of the same statute, or the legislative intent clearly spelled out, require that to be done." [31]

36. In Natarajan K.R. vs Personnel Manager, Syndicate Bank, Industrial Relation Division [32] 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 correspondents 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, 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..."*

37. Further, the Supreme Court of India in J. Jayalalitha vs Union of India [33] 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…"

38. Back at home, a Bench of five Judges in High Court in Bernard Ndeda & 6 Others v Magistrates and Judges Vetting Board & 2 Others[34]and Wilson Kaberia Nkuja v Magistrates and Judges Vetting Board & another[35] cited by the applicant's counsel adopted a similar construction. In addition, the High Court differently constituted in Edward Njoroge Mwangi v Francis Muriuki Muraguri & Anther[36] also relied upon by the applicant's counsel arrived at the same reasoning.

39. This position was appreciated by the Supreme Court of Kenya in Raila Amolo Odinga v Independent Electoral and boundaries Commission and 42 Others[37] cited by the applicant's counsel. The apex court construed the word "or" as used in a statutory provision as being disjunctive and making two limps. This reasoning is well enunciated in Crawford on Statutory Construction [38] where it is stated at page 322 thus:- "In ordinary use the word 'or' is a disjunctive that marks and 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…"

40. In its elementary sense the word 'or' is a disjunctive particle that marks an alternative, generally corresponding to 'either,' as 'either this or that.[39] But there are also some exceptions, situations "in which the conjunction 'or' is held equivalent in meaning to the copulative conjunction 'and.'[40] Normally, of course, "or" is to be accepted for its disjunctive connotation, and not as a word interchangeable with "and." However, this canon is not inexorable, for sometimes a strict grammatical construction will frustrate legislative intent. In the construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature. 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.[41]

41. This contextual approach is the rule of lenity. 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.

42. Lenity does not always require the "narrowest" construction. Decided cases have recognized that a broader construction maybe permissible on the basis of contextual factors that make clear the legislative intent where it is within the fair meaning of the statutory language.[42]

43. 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.[43]

44. From the dictionary and judicial precedents discussed above, it is clear that the word "or" is ordinarily used to introduce

another possibility or alternative, that is either or. Depending on context, it can also be used interchangeably with the word "and." It follows that in construing statutory provisions, the context is important so as to get the real intention of the legislature. Guided by the authorities cited above and the ordinary meaning of the word "or" in the context of the provision under consideration, it is my view that the use of the word "or" immediately after paragraph 1(a) introduces another possibility, the first possibility being the category referred to in paragraph (a). The second possibility is the category provided in paragraph 1 (b).

45. Further, guided by the dictionary meaning and judicial precedents, it is my conclusion that the use of the word "and" signifies that both conditions are required while 'or' signifies that only one condition must be met. Differently stated, 'and' corresponds to a simple addition, meaning, condition "A" and condition "B" must be reached to achieve the required standard. 'Or' on the other hand means that only one of the conditions must be reached: condition "A" or condition "B" must be reached to activate the required standard.

46. "And" provides inclusiveness. By saying "A and B", it means BOTH "A" and "B." In addition, "and" can be used in positive and negative sentences. On the contrary, 'or' provides exclusiveness between choices. By saying "A or B", it means ONLY ONE between "A" and "B" can be considered. If you choose "A", then it is not "B" and vice versa. One may use 'or' in positive and negative sentences. It is now clear that inclusive OR allows both possibilities as well as either of them. Thus, if Parliament in its wisdom intended both possibilities to apply, then, nothing prevented it from using the word "and" immediately after the end of paragraph 1 (a) instead of the word "or."

47. I am convinced beyond doubt that the above conclusion represents the correct interpretation of the provision under consideration, a position best captured by the following passage:- "And the law may be resembled to a nut, which has a shell and a kernel within; the letter of the law represents the shell, and the sense of it the kernel, and as you will be no better for the nut if you make use only of the shell, so you will receive no benefit by the law, if you rely only upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter."[44]

48. Before exiting the discussion on the paragraphs under consideration, I find it appropriate to comment of the High Court decision rendered in Peter Gaithaiga Munyeki v Kenya School of Law[45] relied upon by the Respondent's counsel. On his part, the applicant's counsel submitted that the said decision contradicted the position adopted by the same court in Adrian Kamotho Njenga v Kenya School of Law[46] and ignored the Supreme Court decision referred to above. in which the apex court construed the meaning of the word "or" in a statutory provision.

49. It is true the two High Court decisions apparently contradict each other. However, a decision of a court of co-ordinate jurisdiction is not binding. [47] Second, while decisions of co-ordinate courts are not binding, these decisions are highly persuasive. This is because of the concept of judicial comity, which is the respect one court holds for the decisions of another. As a concept, it is closely related to stare decisis. In the case of R. v. Nor. Elec. Co., [48] McRuer C.J.H.C. stated:- "...The doctrine of stare decisis is one long recognized as a principle of our law. Sir Frederick Pollock, in his First Book of Jurisprudence, 6th ed., p. 321: "The decisions of an ordinary superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of strong reason to the contrary…". (Emphasis added).

50. In my opinion, I think that "strong reason to the contrary" does not mean a strong argumentative reason appealing to the particular judge, but something that may indicate that the prior decision was "given without consideration of a statute or some authority that ought to have been followed." I do not think "strong reason to the contrary" is to be construed according to the flexibility of the mind of the particular judge.

51. Talking about consideration of a statute and authority or authorities that ought to have been followed, what comes into mind is the Supreme Court decision cited by the applicant's counsel in which the apex court construed the use of the word "or" in a statutory provision. I have also referred to numerous highly persuasive court decisions interpreting the meaning of the word "or" in a statutory provision and leading dictionaries defining the meaning of the word "or."

52. While the persuasive decision cited above may not be binding, Supreme Court decisions are binding on the High Court by virtue of Article 163 (7) of the Constitution.[49] I must emphasize that under Article 163 (7) of the Constitution, the binding nature of Supreme Court decisions is absolute. Article 163 (7) is an edict firmly addressed to all courts in Kenya, that they are bound by the authoritative pronouncements of the Supreme Court and that where the issues before the court were determined by the Supreme Court, it is not open to that court to examine the same with a view to arriving at a different decision.[50] (Foot notes omitted. Emphasis added)

62. In the above passage I reviewed authorities from various jurisdictions judicially defining the meaning of the word **"or"** when used in a statutory provision. I consulted several dictionaries to get its meaning and even explained the importance of dictionaries to instantiate meanings of words. Incidentally, in the said decision I reviewed and where appropriate distinguished the authorities cited by the Respondent's counsel. The authorities they cited were rendered by courts' of coordinate jurisdiction, hence, they are not binding to this ciourt. I was guided by a Supreme Court decision which defined the meaning of the word **"or."** I cited Article **163 (7)** of the Constitution which dictates that decisions of the Supreme Court are binding on all the courts in Kenya except the Supreme Court itself. The argument propounded by Mr. Simiyu is sufficiently addressed in the above passage. The use of the word **"or"** is disjunctive. It is not the duty of the court to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. If Parliament intended the two paragraphs to apply together, nothing would have been easier for it than to use the word **"and."** On the face of the clear dictionary meaning of the word **"or"** and the authorities cited in the above passage defining of the word **"or",** the erroneous argument propounded by the KSL, coming as it does from a law school is manifestly worrying.

63. The other argument propounded by Mr. Simiyu as I understood it was that interpreting paragraphs **1 (a) (b)** of the second Schedule as

creating two categories would lead to discrimination and ambiguity. He urged the court to adopt a holistic interpretation and find that it was not the intention of the legislature to create discrimination. Mr. Simiyu's argument sounds attractive. However, his argument collapses, not on one but several fronts. *First*, as elaborately explained in the above cited passage, the word **"or"** has judicially been defined as being disjunctive. This position extinguishes his argument.

64. *Second*, the inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.[35] The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. All that the court has to see at the very outset is, what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. The provisions of paragraph **1 (a)** & **(b)** are written in clear and simple language. Rules of statutory construction dictate that we revert to other interpretive aids only if the provisions are unclear. We cannot look for the drafters' intention elsewhere when the meaning of the word **"or"** is evident and beyond doubt.

65. *Third*, courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[36] The dictionary meanings discussed in the above passage attest to this. If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. Judicial inquiry is complete.

66. *Fourth*, Mr. Simiyu's argument that interpreting the provisions as creating two categories will lead to ambiguity is legally frail. There are important principles which apply to the construction of statues such as **(a)** presumption against "*absurdity" – meaning that a court should avoid a construction that produces an absurd result.* There was no attempt to demonstrate absurdity. **(b)** the presumption against unworkable or impracticable result - *meaning that a court should find against a construction which produces "unworkable or impracticable" result*. Again nothing was said or alluded to about this test. **(c)** Presumption against anomalous or illogical result, - *meaning that a court should find against a construction that creates an "anomaly" or otherwise produces an "irrational" or "illogical" result.* No attempt was made to demonstrate that creating two categories creates an illogical or irrational result. **(d)** Presumption against artificial result – *meaning that a court should find against a construction that produces "artificial" result.* There was no argument at all that creating two categories result in an illogical result.**(e)** The principle that the law should serve public interest –meaning *that the court should strive to avoid adopting a construction which is in any way adverse to "public interest," " economic", "social" and "political" or "otherwise*." The Respondents did not assaulted the decision from this perspective nor do I see any.

67. *Fifth*, the court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution and the statute to be construed. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it. The Respondent's counsel's argument flies on the face of the clear legislative intent. The argument ignores that prior to the introduction of the 8-4-4 system, there existed a different system which was referred to a 7-4-2-3 which was gradually phased out and Parliament was conscious not to lock out from the ATP those who went through the hitherto exiting system. It is common ground that there existed and still exists the IGCSE and IB systems of education. Students from these systems had to be considered. Parliament was also conscious of the fact that many students whether from the 8-4-4 system or any other systems could study a different degree course or a Diploma and qualify to be admitted into a University to study law. This reasoning is supported by the fact that admission requirement to study law do admit such students to study law. Conscious of this reality, Parliament created the two categories. The argument advanced by the KSL which ignores this reality is not only illogical, but if adopted it could lead to illogical results of depriving persons who have studied law the opportunity to be admitted into ATP. Such an interpretation is not only absurd but it ignores the fact that education is a continuous process through which learners are assisted to realize their full potential and aspirations. KSL's argument is so flawed that it seems to suggest that the journey to become an advocate starts at the law school. On the contrary it is a continuous process and once a student satisfies university requirements to study law, it is illogical to suggest that after satisfying examiners and graduating, such a student is not qualified to join the ATP to qualify to become an advocate. Conscious of this reality and in order to cater for the various categories, Parliament in its wisdom deliberately created the categories in paragraph **1 (a)** & **(b).**

68. KSL's argument also flies on the face of the cannon of statutory construction which dictates that the court must adopt a holistic approach. The functions of the Council of Legal Education include regulating legal education and training in Kenya offered by legal education providers.[37] It also licences legal education providers; supervises legal education providers; advises the Government on matters relating to legal education and training; recognizes and approves qualifications obtained outside Kenya for purposes of admission to the Roll and administers such professional examinations as may be prescribed under section **13** of the Advocates Act.[38] The Regulations made pursuant to this Act prescribe admission requirement to study law. Guided by these provision Universities admit students, teach them and examine them. The examiners upon being satisfied that they qualify for the award of LLB degree, confer the degree to them. It beat logic for the KSL to ignore the provisions of the Legal Education Act and unilaterally decide that the students were not qualified in the first instance to study law.

69. The causes and factors contributing to the perennial mass exam failure at the KSL, for which the KSL has become notoriously famous can be explained by many other factors. It cannot be blamed on the admission requirements at the University LLB programmes. It require a serious and genuine soul searching and self-evaluation by the KSL itself before it blames others. More important is the fact that its decision is at odds with the law.

70. *Sixth*, the argument propounded by Mr. Simiyu that the said provisions should be read as not creating two categories is not only absurd, but goes against the clear legislative intent. In fact, such an interpretation if up held would lead to discrimination. This is because a student may opt to study a degree of his choice and study law as a second degree. Others may obtain a Diploma or such certificates as are required by Universities to qualify for admission to study law. This was the wisdom behind the creation of the two categories clearly demonstrated by the use of the word **"or**.**"**

71. The KSL has been inconsistent in its interpretation of the same provisions. It has in the past admitted students from neighbouring countries whose qualifications fall under paragraph **1 (a).** It has in the past admitted many Kenyan students with similar qualifications as possessed by the applicants herein. This habit of interpreting and applying the same provisions differently is worrying coming as it does from a Law School.

72. *Seventh,* the term absurd represents a collection of values, best understood when grouped under the headings of reasonableness, rationality, and common sense.[39] Based on those values, courts reject certain outcomes as unacceptable, thereby rejecting the literal interpretations of statutes when they would result in those outcomes. Those values represented by the term absurd accordingly act as a pervasive check on statutory law, and are rooted in the rule of law.[40] The absurd result principle is both a surrogate for, and a representative of, rule of law values. Applying reasonableness, rationality, and common sense to the instant provision, I find that KSL's interpretation and application of the said provisions is absurd. It could not have been Parliament's intention to kill the ambition and dreams of Kenya students to realize their potential. It is absurd for the KSL to ignore the provisions of the Legal Education Act which prescribe admission requirements to Universities. Legal Education is governed by other statutes such as the Legal Education Act which KSL cannot ignore. A student can study BA or Education or any other degree course and decide to do LLB later. A student can obtain a Diploma and attain the admission requirements to study law. To lock out such students from the ATP is in my view an affront to the KSL Act, the Legal Education Act and the student's constitutional right to education. Such a narrow and erroneous interpretation of the law is an affront to the rule of law.

73. The term rule of law has been used to mean a variety of things. Two common components, however, are: **(1)** the predictability of the law, which enables people to rely on it in ordering their affairs, and to plan their conduct with some confidence and security;[41]and **(2)** the coherence of the legal system as a whole (that is, that one standard of law will not contradict another). The incessant inconsistent interpretation and application of the said provisions by the KSL offends the principle of the predictability of the law and the coherence of the legal system. The lack of predictability and coherence is an affront to the rule of law and the principle of legality which is least expected from a law school.

74. The common law principle of legality has hardened into a strong clear statement rule that is applied when legislation engages common law rights and freedoms. It has transformed a loose collection of rebuttable interpretive presumptions into a quasi-constitutional common law bill of rights.[42] If Parliament wishes to interfere where rights, liberties and expectations are affected, it must do so with clarity. Differently put, had Parliament intended otherwise, it could have done so with clarity, just like it clearly created two categories by using the word **"or"** which is disjunctive as opposed to **"and."** The clear statement principle is the critical way that the law of statutory interpretation reflects and implements the principle of legality. The principle is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. This hypothesis is an aspect of the rule of law.[43] One thing is clear, the provisions of paragraph **1(a)** & **(b)** are worded is very clear language that the legislative intent is manifestly clear. The invitation to this court to find that the provision are ambiguous fails.

75. The other ground of assault propounded by Mr. Simiyu is that interpreting paragraph **1 (a)** & **(b)** as disjunctive will discriminate students who attend local Universities.The guiding principles in a case of this nature are clear. The first step is to establish whether the law differentiates between different persons.[44]The second step entails establishing whether that differentiation amounts to discrimination. [45]The third step involves determining whether the discrimination is unfair.

76. In *Willis vs The United Kingdom*[46] the European Court of Human Rights observed that discrimination means treating differently, without any objective and reasonable justification, persons in similar situations. The Constitution prohibits unfair discrimination. Unfair discrimination is differential treatment that is demeaning. This happens when a law or conduct, for no good reason, treats some people as inferior or less deserving of respect than others. It also occurs when a law or conduct perpetuates or does nothing to remedy existing disadvantages and marginalization.

77. The test for determining whether a claim based on unfair discrimination should succeed was laid down by South Africa Constitutional Court in *Harksen v Lane NO and Others*[47] as:-

> *(a)Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate purpose? If it does not then there is a violation of the constitution. Even if it does bear a rational connection, it might nevertheless amount to discrimination.*
>
> *(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:-*
>
> > *(i)Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.*
> >
> > *(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation.……..*
>
> *(c)If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (…..of the ..Constitution).*

78. The clear message emerging from the above jurisprudence is that mere discrimination, in the sense of unequal treatment or protection by the law in the absence of a legitimate reason is a most reprehensible phenomenon. But where there is a legitimate reason, then, the conduct or the law complained of cannot amount to discrimination.The categories created by paragraphs **1 (a) & (b)** do in my view serve a legitimate purpose of affording opportunities to persons falling under the two categories to join the ATP. There is nothing discriminatory in the said provisions. On the contrary an interpretation suggested by KSL which bars the persons falling under paragraph from joining the ATP is highly discriminatory and an affront to Article **27**.

79. Mr. Otene Richard Akomo, the applicant in JR No. **20** of 2020, Mukung Temko Mercy, the applicant in JR No. **21** of 2020 and Getrude Moraa Orina & 30 others, the applicants in JR No. **8** of 2020 raised a pertinent question, that is the advertisement dated **4th**September 2019 indicated an eligibility criteria that is not provided for in the KSL Act. They described it as unlawful and *ultra vires* the KSL's mandate under section **5** of the KSL Act. Despite this formidable assault on the legal validity or otherwise of the advert and indeed the entire process, KSL's counsel did not address this challenge at all. In my view, legal conformity of the advertisement to the enabling statute is crucial and goes deep into the root of the validity of the entire process. A public invitation to any statutory process must as of necessity conform to the law. It must be founded on the governing law. Any deviation from the law renders the entire process legally frail and open to legal challenge. Compliance with the law at the advertisement stage is not an option. It is legally required.

80. Section **16** of the KSL Act provides in peremptory terms 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 Second Schedule for that course." Pursuant to the said provision, the Admission Requirements into the ATP are stipulated in paragraph **1 (a) & (b)** of the second Schedule which states:- *(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.*

81. The word "shall" which connotes a mandatory command is used in the above section. Parliament was very clear in prescribing the above criteria. Interestingly, a similar argument was advanced by the KSL in the *Kevin K. Mwiti & Others v Kenya School of Law & 2 others*[48] cited by Mr. Simiyu. Its argument as appears at paragraph **60** of the judgment was that section **16** does not accommodate any discretionary power to vary the admission criteria since the provisions are in mandatory terms. The core issue in the *Kevin K. Mwiti & Others v Kenya School of Law & 2 others*[49] was an assault on an advertisement, just like the issue under discussion. The facts were that the KSL by way of an advert published in the local dailies on **2nd** September 2015 invited the applicants to apply for a 'Pre-bar' examination as a prerequisite for admission to the School to undertake the programme. The said advert listed the eligibility criteria for applicants for the pre bar examinations as follows; **i.** Have attained a mean grade of C+ (Plus) with a minimum grade of **B** in English or Kiswahili at KCSE. **ii.** Be holders of an LLB degree from a university recognized in Kenya (or show evidence of eligibility of conferment). **iii.** Have passed all the **16** core subjects at the university level as provided under the Legal education Act 2012. The applicants from foreign universities were also required to provide written evidence of clearance from the Council of Legal Education. Further the said advert required applicants to have made their applications for Pre bar exams on or before **30th** September 2015 which exams were scheduled to be undertaken on 2nd November 2015. It was this advert that provoked the said case.

82. The learned judge declared that to the extent that the notification by the School only mentioned KSCE qualifications, the same notification did not conform to the Second Schedule to the Act, and to that extent alone, the same is unlawful and is set aside. He also declared that to the extent that the same notice talked of final transcripts, that requirement is not only unreasonable but outside the scope and contemplation of the Act and is set aside.

83. The question before me is whether the advertisement dated **4th**September 2019 conforms to the law. A reading of the advertisement and the above provision leaves no doubt that it does not conform to the provisions of paragraph **1 (a).** The KSL in the said advert varied the admission criteria to exclude persons falling under paragraph **1(a)**! As stated earlier, the rule of law does not permit an organ of state to reach what may turn out to be a correct outcome by any means.[50] On the contrary, the rule of law obliges an organ of state to use the correct legal process.

84. In the Mwiti case, KSL'argument as highlighted above was that section **16** does not accommodate any discretionary power to vary the admission criteria since the provisions are in mandatory terms. Had counsel for KSL carefully studied and understood the *Mwiti case*, they would have realized that it does not support their case. But one thing is clear from the said decision, KSL has no discretion to vary the admission criteria as it has purported to do in the instant case. That is the law.

85. Miss Kungu argued that the law does not provide for academic progression. I have no doubt that the admission criteria to the ATP is clearly stipulated in paragraphs **1 (a) & (b).** This is the provision upon which an application into the ATP is to be assessed. However, it is useful to add that Regulation **5** of Part **11** of the Third Schedule to the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 provides for the requirements for admission to a Bachelor of Laws Degree. The said provision provides that the requirements are - possession of a degree from a recognized University; or a Diploma in law with a credit pass; or three principal passes in the Kenya Advanced Certificate of Education examination.

86. Regulation **6** of Part **11** of the said Regulations stipulates the minimum admission requirements to the ATP. Under this provision, the the minimum requirements for admission to the ATP are — (a) a Bachelor of Laws (LLB) degree from a recognised university; (b) where applicable, a certificate of completion of a remedial programme; (c) proof of academic progression in accordance with paragraphs **3** and **4** of this Schedule; and (d) a certificate of completion of the Pre-Bar Examination. Clearly, paragraph (c) above extinguishes Miss Kungu's argument that the law does not provide for academic progression. I say no more.

87. It is imperative to point out that there is a variance between the KSL Act and the Legal Education Act[51] on the admission requirements provided in the KSL Act and the above Regulations. I addressed this conflict in detail in *Republic v Kenya School of Law ex prte Victor Mbeve Musinga (supra)* while discussing the doctrine of implied repeal, a concept in constitutional theory which states that where an Act of

Parliament (or of some other legislature) conflicts with an earlier one, the later Act takes precedence and the conflicting parts of the earlier Act becomes legally inoperable.

88. In the said case I observed that when Parliament repeals legislation, it generally makes its intentions both express and clear. Sometimes, however, Parliament enacts laws that are inconsistent with existing statutes. A. L. Smith J set out the courts' traditional response in cases of this nature in *Kutner v Philips.*[52] He said that "if … the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together, the earlier is abrogated by the later." That is, the later statute impliedly repeals the earlier one to the extent of the inconsistency.

89. Courts faced with apparently conflicting statutes should strive to reconcile them, only holding that there has been an implied repeal as a last resort.[53] There are a number of ways in which courts may avoid an implied repeal or at least may reduce an implied repeal's effect. For example, where the earlier statute is specific in application and the later one is general, the courts may conclude that Parliament has not intended that the later Act should apply to the circumstances to which the earlier one relates.[54] Conversely, where a later specific rule is inconsistent with an earlier general one, implied repeal operates only *"pro tanto"*, that is, only to the extent that the Acts are inconsistent, with the general rule preserved as much as possible.[55]

90. Regulation **5** of Part **11** of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 provide that (1) The minimum admission requirements for an undergraduate degree programme in law as follows:-

> *(a) a mean grade of C+ (Plus) in the Kenya Certificate of Secondary Education examination or its equivalent with a minimum grade of B Plain in English or Kiswahili;*
>
> *(b) at least three Principal Passes in the Kenya Advanced Certificate of Education examination; (c) a degree from a recognised university; or*
>
> *(d) a Credit Pass in a diploma in law examination from an accredited institution.*

91. Regulation **6** on the admission requirements to the ATP provides:-

> *(1) The minimum requirements for admission to the Advocates' Training Programme shall be —*
>
> *a) a Bachelor of Laws (LLB) degree from a recognised university;*
>
> *b) where applicable, a certificate of completion of a remedial programme;*
>
> *c) proof of academic progression in accordance with paragraphs 3 and 4 of this Schedule; and*
>
> *d) a certificate of completion of the Pre-Bar Examination.*

92. Clearly, the above Regulation creates different qualifications from those provided in paragraph **1(a)** and **(b)** of the Second Schedule to the KSL Act. The date of commencement for the KSL Act was **15th**January, 2013. The date of commencement for the Legal Education Act was 28th September, 2012. The above Regulation were promulgated under this later statute.

93. The two provisions are at variance. Under the above Regulation, an applicant must *possess* the requirements in paragraphs **(a)** to **(d)** above. On the contrary, paragraph **1 (a)** and **(b)** creates two distinct categories by using the word *"or"* instead of *and."* As Bennion on Statutory interpretation[56] states, the classic statement of the test for implied repeal was set out by A L Smith J in *West Ham (Churchwardens, etc) v Fourth City Mutual Building Society*[57] as follows:-

> *"The test of whether there has been a repeal by implication by subsequent legislation is this: are the provisions of a later Act are so inconsistent with, or repugnant to, the provisions of an earlier act that the two cannot stand together?"*

94. Aaccording to principles of construction if the provisions of a later act are so inconsistent with or repugnant to those of an earlier act that the two cannot stand together, the earlier act stands impliedly repealed by the latter Act.[58] The former must be taken to be repealed by implication. This principle was adopted in *Martin Wanderi & 19 others v Engineers Registration Board of Kenya & 5 Others.*[59] The requirement for a positive repugnancy between the conflicting statutes was explained in *United States v Borden Co*[60] where the court rendered itself as follows:-

> *"…There must be 'a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only, pro tanto, to the extent of the repugnancy'…"*

95. What emerges from decisional law is that the two statutes must be inconsistent to the extent that they cannot stand together.[61] In *Nzioka & 2 Others v Tiomin Kenya Ltd,*[62] it was held that the more recent act must be construed as repealing the old Act where there is inconsistency, *or* where the provisions of one statute are so inconsistent with the provisions of a similar but later one, which does not expressly repeal the earlier Act. A five-judge bench in *FIDA-Kenya & Others v Attorney General & Others*[63] held a similar position.

96. Laws are presumed to be passed with deliberation, and with full knowledge of all existing ones on the same subject. Thus, by enacting the later statute, which created the two categories and by carefully using the word *"or"* as opposed to *"and"* Parliament was aware of the other provisions, but expressed its clear intention in the later provisions. It is my finding that the doctrine of implied repeal applies in the circumstances of this case.

97. In *Republic v Kenya School of Law ex parte Victor Mbeve Musinga* (Supra), a decision which featured prominently in all the parties submissions and also in this judgment, I addressed the question whether the provisions of *Legal Education (Accreditation and Quality Assurance) Regulations, 2016* can override express statutory provisions.The said Regulations were promulgated by the Council of Legal Education pursuant to powers conferred upon it by section **46(1)** of the Legal Education Act, with the approval of the Cabinet Secretary. The Regulations provide for the admission requirements to the ATP which as explained earlier differ from the requirements provided under section **16** of the KSL Act contained in paragraphs **1 (a) (b)** of the Second Schedule.

98. In my view, by subjecting the applicants to the requirements under the Regulations as opposed to the category expressly provided under paragraph **1(a)** or **(b)** under which their qualifications fell, the KSL not only ignored the express provisions of section **16,** but also elevated the Regulations above the provisions of the act. As was held in *Republic vs Kenya School of Law & Council of Legal Education ex parte Daniel Mwaura Marai,*[64] the provisions of a subsidiary legislation can under no circumstances override or be inconsistent with an act of Parliament be it the one under which they are made or otherwise.***[65]** Also relevant is Section **31 (b)** of the *Interpretation and General Provisions Act*[66] which provides that no subsidiary legislation shall be inconsistent with the provisions of an Act of Parliament.

99. It is my conclusion that the provisions of the *Legal Education (Accreditation and Quality Assurance) Regulations, 2016* cannot override the express provisions of section **16** of the KSL Act, which prescribe the admissions requirements to the ATP to be those stipulated in the Second Schedule to the Act. Had Parliament desired any other qualifications to apply, nothing would have been easier that expressly providing so in section **16** of the KSL Act.

100. KSL's counsel argued that the Diploma in Public Relations is not a relevant Diploma and that the relevant Diploma is a Diploma in Law. This argument collapses on the simple reason that the applicant(s) satisfied the University admission requirements for admission to study LLB, which requirements satisfy the criteria for admission to the LLB as prescribed by the Council of Legal Education. Above all, the applicant(s) obtained a LLB degrees thus bringing their credentials within the clear provisions of paragraph **1 (a).** Interestingly, KSL's adopted an interesting position. Mr. Muhia in his Replying Affidavit deposed that the applicant in JR **26** of 2020 does not qualify because her Diploma is not "relevant." Also, Miss Kungu submitted that he does not qualify because her Diploma is not relevant but towards the end of her submissions she submitted that the same applicant only needs to sit for a pre-bar examination a position Mr. Simiyu also repeated. Thus their argument oscillated from "she does not qualify because her Diploma is not relevant to she only needs to sit for the pre-bar examination." The Regulations do to specifically refer to a Diploma in Law, hence the argument that she does not hold a "relevant" Diploma collapses.

101. The applicants' assaulted the decision for violating their rights under Articles **43** & **47** of the Constitution and the right to legitimate expectation. They argued that the decision was taken in excess of jurisdiction, was based on irrelevant considerations, and is unfair, unreasonable, irrational and illegal.

102. In response to a challenge to the legality of administrative action, courts generally need to consider the compliance of administrators with both substantive and procedural legal rules. This is because any administrative decision-making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures. The most basic rules of administrative law are first that decision makers may exercise only those powers, which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. This fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. A decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Also relevant is the concept 'error of law' which is mainly concerned with the erroneous applications of the law.

103. I have already construed paragraphs **1 (a)** and **1 (b)** as creating two distinct categories, with the applicants falling under the first category since they hold law degrees from recognized universities. I have also held that the doctrine of implied repeal applies in the circumstances of this case. It is my finding that provisions of subsidiary legislation cannot override express provisions of a statute. I have also faulted the advertisement(s) for prescribing a criteria not provided under section **16** of the KSL Act as read with paragraph **1 (a) & (b)** of the Second Schedule. On these grounds, I find and hold that the KSL failed to appreciate the law governing the requirements for admission into the ATP, hence the impugned decisions are tainted by an error of law. By ignoring the clear criteria set out in section **16** of the KSL Act and paragraph **1 (a)** & **(b),** KSL acted outside its powers; hence, the decision is *ultra vires* and or tainted with illegality.

104. Mr. Simiyu categorized the various application into two. In the first category is the applicants in JR No. **26** of 2020 and JR No. **20** of 2020. The basis for his categorization is the *Mwiti* case. He argued that the first group is governed by the repealed *Council of Legal Education* and Legal Notice No. **169** of 2009 and the other is governed by the KSL Act in particular, section **16** as read with the second Schedule to the said act. Mr. Simiyu identified **8th** December 2014 as critical and argued it separates the two groups. He argued that the said date is the date the KSL Act came into force which was the core issue in the *Kelvin Mwiti* case. He submitted that guided by the *Kelvin Mwiti* case, the KSL advertised for interested persons to join the ATP.

105. The Simiyu's categorization and the attendant argument collapses not on one but several fronts. *One*, the commencement date for the KSL Act was **15th**January, 2013 and not **8th** December 2014 as erroneously stated by Mr. Simiyu. *Two,* Esther Wanjiru Kimani graduated on **6th** December 2013 as evidenced by her degree certificate almost **12** months after the commencement date of the KSL Act. *Third*, both applicant in JR No. **20** of 2020 and **26** of 2020 hold Diplomas on the basis upon which they were admitted into LLB upon satisfying University admission requirements as laid down by the Council, the body that regulates legal training. The KSL cannot argue that the applicants were not qualified to study law. It is exercising a function not vested upon it by the law. Its mandate is to consider the admission requirements into the ATP under section **16** of the Act and paragraph **1 (a)** & **(b)** of the Second Schedule. *Fourth*, the argument that a "relevant" Diploma must be a Diploma in Law lacks legal basis. Had Parliament so desired, it could have provided so in the law and the

regulations.

106. The applicants in JR Nos **21** of 2020, **8** of 202013 of 2020, **7** of 2020 and **13** of 2020 are all LLB holders. They were admitted into the various Universities upon satisfying the legal requirements for the admission. A faithful reading of their qualifications and section **16** of the Act as read with paragraph **1 (a)** & **(b)** of the Second Schedule shows that they fall under the category contemplated by paragraph **1 (a).**

107. The applicants assert that the impugned decision violates their rights under Article **43 (1) (f)** of the Constitution. The applicants have a constitutionally guaranteed right to education under Article **43 (1) (f)** of 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 was no argument before me that KSL's argument can pass an Article **24** Analysis test nor do I find any in the circumstances of this case.

108. KSL has been so inconsistent in its interpretation of the same provisions. It has in the past admitted students from neighbouring countries having the same qualifications as possessed by the applicants in this case. Curiously, some of the cases ably cited by the KSL's counsel among them the *Mwiti* case and the *Adrian Kamotho* case involved similar issues as in these cases in which decisions were made and KSL admitted the applicants in the said cases. What is worrying is this habit of interpreting and applying the same provisions differently coming as it does from a Law School, an institution whose duty is to train lawyers. As earlier stated, there are two common components of the rule of law, namely, the predictability of the law and the coherence of the legal system as a whole. This incessant inconsistent interpretation and application of the same provisions by the KSL despite clear judicial pronouncements on the subject and selectively citing decisions or paragraphs which are perceived to be favorable to their position is a direct affront to the principle of the predictability of the law and the coherence of the legal system as a whole.

109. In view of my analysis and conclusion herein above, it is my finding that the applicants in these consolidated judicial review applications have established grounds for the court to grant the orders sought. Accordingly, I issue the following orders:-

*a. **That** KSL's decision to reject the applicants' applications into the ATP is illegal and ultra vires its statutory mandate.*

*b. **That** KSL's decisions declining each applicants' admission into the ATP is a gross violation of the applicants' constitutionally guaranteed rights to education provided under Article **43(1) (f)** of the Constitution.*

c. An order of certiorari be and is hereby issued quashing the decision by the Kenya School of Law declining each and every individual applicant's application for admission into the Advocates Training Programme (ATP) for the 2020/2021 academic year and or for any other academic period.

d. An order of mandamus be and is hereby issued compelling the Kenya School of Law to admit all the applicants in these consolidated judicial review applications into the Advocates Training Programme (ATP) at the Kenya School of Law.

*e. **That** each party shall his/her costs of his/her application.*

SIGNED, DATED & DELIVERED VIA E-MAIL AT NAIROBI THIS 28TH DAY OF AUGUST 2020

John M. Mativo

Judge

---

[1] Act No. 26 of 2012.

[2] Cap 16 A, Laws of Kenya

[3] Cap 16, Laws of Kenya.

[4] Act No. 27 of 2012.

[5] Cap 16A, Laws of Kenya.

[6] Section **8** of the Legal Education Act, Act No. 27 of 2012.

[7] Cap 16, Laws of Kenya.

[8] {2014} e KLR.

[9] Cap 21, Laws of Kenya.

[10] Act No. 27 of 2012.

[11] Act No. 4 of 2015.

[12] Cap 16A, Laws of Kenya, Repealed.

[13] Act No. 27 of 2012.

[14] Citing *Council of County Governors v Attorney General* {2017} e KLR

[15] Citing *Council of Civil Service Union v Minister for Civil Service* {1989} AC 370.

[16] Citing *KRA v Darasa Investments Ltd*.

[17] (2019} e KLR.

[18]{2015} e KLR.

[19](2019} e KLR.

[20] {2019} e KLR

[21]{2017} e KLR.

[22] {2019} e KLR.

[23] {2019} e KLR.

[24]{2018} e KLR.

[25] {1948} 1 KB 113.

[26]{1997} e KLR.

[27] {2017} e KLR.

[28] {2018} e KLR.

[29] Cap 2, Laws of Kenya.

[30] Cap 2, Laws of Kenya.

[31] {2016} e KLR

[32] As was held in *Head of Department, Department of Education, Free State Province v Welkom High School*, 2014 (2) SA 228 (CC).

[33] Act No. 4 of 2015.

[34] {2019} e KLR.

[35]See Wallis JA dealt with the matter as follows in *Natal Joint Municipal Pension Fund vs Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

[36] Plain meaning should not be confused with the “literal meaning” of a statute or the “strict construction” of a statute both of which imply a “narrow” understanding of the words used as opposed to their common, everyday meaning.

[37] Section **8** of the Legal Education Act, Act No. 27 of 2012.

[38] Cap 16, Laws of Kenya.

[39] Ibid

[40] Ibid

[41] See Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Cm. L. REv. 1175 (1989) (explaining that predictability is important factor in rule of law)

[42] Dan Meagher, The Principle of Legality as Clear Statement Rule: Significance and Problems, Associate Professor, School of Law, Deakin University.

[43] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ).

[44] See note 18 below (at para 48).

[45] Ibid Par 54

[46]No. 36042/97, ECHR 2002 – IV

[47] {1997} ZACC 12; 1998 (1) SA 300(CC); 1997 (11) BCLR 1489(CC) (Harksen) at para 48.

[48] {2015} e KLR.

[49] {2015} e KLR.

[50] As was held in *Head of Department, Department of Education, Free State Province v Welkom High School*, 2014 (2) SA 228 (CC).

[51] Act No. 27 of 2012.

[52] *Kutner v Philips* {1891} 2 QB 267 (QB).

[53] Ibid n 2, 272 A L Smith J? see also Paine v Slater (1883) 11 QBD 120, 122 (EWCA) Brett LJ.

[54] See for example, *Cox v Hakes* (1890) 15 AC 506, 517 (HL) Lord Halsbury? *Bishop of Gloucester v Cunningham* [1943] KB 101, 105 (CA) Lord Greene MR, Scott and MacKinnon LJJ.

[55] *Craton v Winnipeg School Division* (No 1) [1985] 2 SCR 150, para 8 McIntyre J.

[56] Section 6.10.

[57] {1892} 1 Q.B. 654.

[58] See *A O O & 6 others v Attorney General & another* {2017} e KLR.

[59] {2014} eKLR

[60] 308 US 188, (1939)

[61] See *Steve Thoburn vs. Sunderland City Council* 2002 EWHC 195.

[62] Mombasa Civil Case No. 97 of 2001

[63] Pet. 266 of 2015.

[64] {2017} eKLR.

[65]*See Republic v Council of Legal Education & another Ex parte Sabiha Kassamia & another* {2018} eKLR and *Republic v Council of Legal Education & another Ex-Parte Mount Kenya University* {2016} eKLR.

[66] Cap 2, Laws of Kenya.