REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 67 OF 2019

BISHAR ADAN MOHAMED.....PETITIONER

VERSUS

KENYA SCHOOL OF LAW.....RESPONDENT

JUDGEMENT

1. Through the amended petition dated 2nd April, 2019 the Petitioner, Bishar Adan Mohamed, is challenging the decision of the Respondent, Kenya School of Law, to deny him admission to the Advocates Training Program (ATP) despite being qualified for the same. He avers that he holds a bachelor of law degree from Mount Kenya University having graduated in 2017. It is his contention that the decision by the Respondent to deny him entry into the ATP is unlawful and breached his right to be subjected to fair administrative action and fair treatment pursuant to Articles 47 and 27 of the Constitution respectively.

2. The Petitioner therefore seeks the following reliefs:

a) A declaration that the refusal by the Respondent to admit the Petitioner into the Advocates Training Program is unlawful and a breach of the petitioner's fundamental rights.

b) A declaration that pursuant to the second schedule to the Kenya School of Law Act Number 26 of 2012, the Petitioner is entitled to be admitted to the Advocates Training Program without being subjected to pre-bar examinations.

c) An order directing the Respondent to admit the Petitioner into the next scheduled Advocates Training Program.

d) An order that all monies paid by the Petitioner to the Respondent being application fees be refunded.

e) An order of costs in favour of the Petitioner.

3. The Respondent opposed the petition through an affidavit sworn by its Academics Manager, Fredrick Muhia, on 25th November, 2019. Mr. Muhia averred that the Respondent is a State corporation established under Section 3 of the Kenya School of Law Act, 2012 (KSL Act), and a successor of the Kenya School of Law under the Council of Legal Education Act, 1995 and its mandate includes conducting the Advocates Training Program. It was his deposition that the Petitioner's application to join the ATP was rejected by the Respondent through a letter dated 10th November, 2017 since he had not met the prescribed Kenya Certificate of Secondary Education qualifications. The Petitioner was advised that the Respondent did not have a provision for academic progression which was one of the grounds upon which the Petitioner based his application to join the ATP.

4. Mr. Muhia further averred that the Petitioner appealed to the Respondent's Director through a letter dated 14th December, 2018 and on 12th January, 2019, the Petitioner was advised by the Respondent that the relevant High Court ruling applied to the persons enrolled into the law degree programme prior to coming into force of the KSL Act and to that extent his application still fell short of the requirements. He consequently deposed that the petition has no merit and prayed for its dismissal with costs.

5. Mr. Ingutya appearing for the Petitioner filed written submissions dated 18th July, 2019. Counsel submitted that the Petitioner's right to be subjected to fair administrative action was breached. It was further submitted that the ATP is regulated under the KSL Act and that Section 16 of the Act provides that those desirous of joining the ATP are eligible for admission if they are qualified as per the provisions of the Second Schedule. Counsel was of the view that the Petitioner being a law graduate of Mount Kenya University, a local university, guarantees

him the right to join the ATP without being required to sit for pre-bar examinations.

6. To buttress his argument, counsel cited the case of **Adrian Kamotho Njenga v Kenya School of Law [2017] eKLR,** where the Court after considering paragraph 1 of the Second Schedule held that applicants who are holders of local university law degrees are regulated by paragraph 1(a) of the Second Schedule. Further, that pursuant to that provision they cannot be subjected to pre-bar examinations but are entitled on application to be admitted to the ATP. In conclusion, counsel argued that the Petitioner being a degree holder from a local university and desirous of joining the ATP, the law guarantees him the right of admission into the program without being subjected to pre-bar examinations and the Respondent in denying the Petitioner a chance to join the program flagrantly defied the law. He therefore urged that the petition be allowed as prayed.

7. Mr. Mutai appearing for the Respondent filed written submission on 17th February, 2020. Counsel submitted that it is not in dispute that the ATP is regulated under the KSL Act and the mandate of the Respondent in admitting students to the ATP can be discerned from this Act. It was further submitted that Section 16 of the KSL Act as read together with the Second Schedule of the Act provides the criteria and requirements for admission to the ATP and in counsel's view, the Petitioner had not met the said requirements since he was admitted to the Mount Kenya University in the year 2014 and graduated on 7th July, 2017.

8. Counsel went on to submit that the relevant statute governing admission requirements is the KSL Act which is clear and unequivocal that qualifications for admission to ATP are those contained in Section 16 as read together with Paragraph 1 of the Second Schedule. Counsel submitted that the Petitioner had not met the prescribed requirements since he had a mean grade of C plain in KCSE with C Plain in Kiswahili and D+ in English which were below the prescribed requirements. Accordingly, he cited the case of **Peter Githaiga Munyeki v Kenya School of Law [2017] eKLR** where the Court held that allowing a person to join the ATP on the basis of having obtained their law degree from a local university would be to circumvent clear provisions of statute and would amount to discrimination and application of double standards. This Court was therefore urged to dismiss the petition with costs to the Respondent.

9. Having carefully considered the pleadings and submissions of the parties, I find that the issue for the determination of this Court is whether the refusal by the Respondent to admit the Petitioner to the ATP was unlawful and breached the Petitioner's constitutional rights.

10. Section 16 of the KSL Act refers to the Second Schedule of the Act on the requirements for admission to the KSL. According to the Second Schedule, the admission requirements to the ATP are as follows:

> **"(a) Admission Requirements into the Advocates Training Programme**
>
> **(1) A person shall be admitted to the School if—**
>
> **(a) having passed the relevant examination of any recognized university in Kenya holds, or has become eligible for the conferment of the Bachelor of Laws (LLB) degree of that university; 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; or**
>
> **2. has sat and passed the Pre-Bar examination set by the School."**

11. The Second Schedule of the KSL Act has been interpreted differently by various judges. In **Republic v Kenya School of Law & another Ex-parte Kithinji Maseka Semo & another [2019] eKLR** Mativo, J opined that:

> **"51. The *ex parte* applicants hold Bachelor of Laws degrees from a recognized University in Kenya. By dint of the above provision, they qualified for admission to the ATP. To suggest otherwise, is in my view an insult to the above provision, which is framed in a simple and clear language. A contrary interpretation is misguided and unfaithful to the provision. It follows that any decision emanating from such a misguided interpretation cannot be read in a manner that is consistent with the enabling provision.**
>
> **52. The second possibility is the category provided in section 1 (b) which provides:-**
>
> **"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—**
>
> **iv. attained a minimum entry requirement for admission to a university in Kenya; and**

v. 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

vi. has sat and passed the pre-Bar examination set by the school."

53. Parliament in its wisdom provided for the second category. A reading of the second category shows clearly that it applies to those who meet the three conditions stipulated therein. These are having attained a minimum entry requirement for admission to a university in Kenya; and obtained a minimum grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent; and has sat and passed the pre-Bar examination set by the school.

54. It is unfortunate that the Respondents have on countless occasions misconstrued and or confused the above two categories to the detriment of innocent applicants."

12. In the case of **Adrian Kamotho Njenga v Kenya School of Law [2017] eKLR**, Mwita, J took a position similar to that of Mativo, J and held that:

"41. This is so because paragraph 1(a) does not prescribe any university entry requirements for the simple reason that entry requirements for LLB programmes in local universities are known and no one can be admitted to undertake this degree without meeting the basic KCSE grades required for this course. Furthermore, paragraph 1(a) contains the disjunctive word "or" at the end of the paragraph just before the beginning of paragraph 1(b). That means qualifications under paragraph 1(a) are distinct from those under paragraph 1(b). That can only mean one thing- that the two sub-paragraphs apply to two different and distinct categories of applicants."

13. However, Mwita, J gave a different interpretation to the Second Schedule of the KSL Act in **Peter Githaiga Munyeki v Kenya School of Law [2017] eKLR** when he held that:

"25. According to the Schedule, there are two categories of persons who can be admitted to the ATP. First are those who attended local universities who fall under paragraph 1(a). The other is persons who attended universities outside Kenya who fall under paragraph 1(b) of the Schedule. Paragraph 1(a) of the Schedule does not specifically state the KCSE grades one should have. but a reading of paragraph 1(b) shows that persons who obtained LLB degrees from outside Kenya should have KCSE grades that would have enabled them join LLB programmes in universities in Kenya, and goes ahead to state those grades as a mean grade of C+ (plus), in KCSE, with B(plain) in either English or Kiswahili languages.

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

14. In my view, the decision by Mwita, J in **Peter Githaiga Munyeki v Kenya School of Law [2017] eKLR,** which he made after **Adrian Kamotho Njenga v Kenya School of Law [2017] eKLR,** provides the correct interpretation of the Second Schedule. I do not think that the Second Schedule provides one set of qualifications for admission into a law degree course in a foreign university and another set of qualifications for admission into a law degree programme in a local university. It cannot be that Kenyan universities offering studies leading to the award of a degree in law are allowed to set their individual admission qualifications but the qualifications for admission to foreign universities are set by the law. In my view, the requirements of Paragraph 1(b)(i) & (ii) as to the qualifications for admission for law studies in foreign institutions are equally applicable to admission to local universities.

15. Indeed, in **R v Kenya School of Law, Ex-parte Daniel Mwaura Marai [2017] eKLR** it was held that:

"66. As regards the interest parties' case, it is contended that they were in the LLB Programme in 2014. There is no indication when they joined the programme. As I have held hereinabove if they joined after the commencement of the amendments to the Second Schedule of the *Kenya School of Law Act* then they were bound by the same in which event they could only qualify for admission to the School if they had *"obtained a minimum grade B (plain) in English language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education or its equivalent"* and not just the minimum qualifications prescribed in the Third Schedule of the *Legal Education (Accreditation and Quality Assurance) Regulations, 2016."*

16. Mwita, J agreed with this position in the already cited case of **Peter Githaiga Munyeki v Kenya School of Law [2017] eKLR** when he held that:

"37. Any university admitting students to pursue LLB degree, on the basis that that they have a degree from another university must be aware that such student will only be admitted to ATP on completion of their LLB degree if they will meet the requirements set out in section 16 of the KSL Act as read with paragraph 1 of the Second Schedule. The regulations under CLE Act are clearly in conflict with section 16 of the KSL Act as read with paragraph 1 of the Second Schedule in so far as they make reference to admission requirements for ATP at KSL….

39. I agree with *Odunga J's* observation in Republic v Kenya School of law & Council of Legal Education Ex parte Daniel Mwaura Marai (supra) that *the applicant having not 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 would be locked out from admission to the ATP. **I also agree with the learned judge when he stated that** ***if the provisions of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 are in conflict with the provisions of section 16 of the Kenya School of Law Act as read with the Second Schedule to the said Act, the former cannot override the latter.***

40. Allowing people to join ATP at KSL on the basis that they had a degree prior to joining LLB degree programme would be to circumvent clear provisions of a statute and would result into discrimination and application of double standards. The upshot is that the petitioner was not qualified for admission to ATP hence the respondent was right in declining to admit him."

17. The evidence placed before this Court by the parties is that the Petitioner had a mean grade of C (plain) with C (plain) in Kiswahili and D (plus) in English in his Kenya Certificate of Secondary of Education. He was thus not qualified for admission to the ATP and neither did he meet the qualifications laid down by the Second Schedule of the KSL Act for registration to sit pre-bar examinations.

18. The Respondent cannot be said to have violated the Petitioner's constitutional rights in circumstances where the provisions of the KSL Act were properly applied. The Petitioner was accorded a hearing as evidenced by the letters exhibited by the parties. The fact that his application was rejected and the subsequent appeal failed cannot be equated to breach of Article 47 of the Constitution. No evidence was adduced by the Petitioner in support of his claim that he was treated differently hence the Petitioner's right to equality and freedom from discrimination protected under Article 27 of the Constitution was not violated.

19. In short, the Petitioner has failed to establish a case for the issuance of the orders sought. The petition therefore fails and the consequence is that same is dismissed. There will, however, be no order as to costs.

Dated, signed and delivered through video conferencing/email at Nairobi this 24th day of September, 2020.

W. KORIR

JUDGE