



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO. 584 OF 2017**

**LAURA MAKUNGU LUMBASIO.....PETITIONER**

**VERSUS**

**THE KENYA SCHOOL OF LAW.....RESPONDENT**

**JUDGMENT**

1. The petitioner is a citizen of Kenya. She undertook her Secondary and University Education in the Republic of Botswana. She completed her secondary education in November 2009 and proceeded to the University of Botswana joining on 12<sup>th</sup> May 2010 to pursue the degree of Bachelor of Laws (LLB) finally graduating on 8<sup>th</sup> October 2016.

2. In January 2017, the petitioner submitted her documents to the National Examination council for equation. Her Secondary Education Certificate from Botswana was equated to KCSE and overall mean grade was equated to B (Plain). Her English language score was equated to B- (Minus). This was communicated to the petitioner by the Council of legal education in a letter dated 20<sup>th</sup> January 2017. In that letter the council purported to state that the petitioner did not qualify to join University to pursue a degree in law. The council did not however state that the petitioner's law degree was not recognizable.

3. Subsequently, the petitioner applied to the Kenya School of Law, the respondent, which is mandated to train persons intending to qualify as advocates of the High Court in this Country, to sit Pre-Bar examination before joining ATP at the respondent. The application was declined by the respondent through letter dated 17<sup>th</sup> October 2017. The reason given for declining to allow the applicant sit the pre Bar examination was that was that the petitioner had scored an equivalent B-(Minus) in English language in her Secondary School Education which was below the required grade B (Plain) for one to join ATP at the respondent School. The petitioner was aggrieved and filed the present petition to challenge the respondent's decision.

4. The petitioner averred that the respondent's action was unlawful and illegal; that the law applicable to her was that prior to 2010 when she joined the law degree programme; that having joined University in 2010, she could not be subjected to the new law that came into operation way after she had joined university and that the decision was unreasonable and against her legitimate expectation. She stated that her constitutional rights had been violated and sought the following reliefs:-

***i. An order of Certiorari to remove into this Honourable court and quash the decision and letter dated 30<sup>th</sup> October 2017.***

***ii. An order of Mandamus be issued, compelling the respondent to admit the petitioner to the Advocate Training Programme, Pre-Bar Examination for the Academic Year 2018/2019 forthwith or such other examination as the curriculum of the respond may provide.***

***iii. A declaration that the petitioner's rights under Articles 27, 43, 47 of the constitution have been infringed and threatened with violation by the respondent.***

***iv. Costs of this petition.***

***v. Any further reliefs that this Honourable court deems fit in the interests of justice to grant.***

***Response***

5. The respondent though served and had been given time to file its response, did not respond to the petition and did not attend during the hearing through the hearing date had been also been taken in court by consent. The petition therefore proceeded undefeated.

6. During the hearing, the petitioner testified that she attended the University of Botswana joining on the 12<sup>th</sup> May 2010 to pursue a degree in law (LLB). She produced the letter of admission as PEX 1. She told the court that before joining the university, she had taken her “O” studies at St Joseph College State still in Botswana and attained grade shown in her O level certificate which she produced as PEX 2. The petitioner testified that she graduated with the bachelor of Laws Degree on 8<sup>th</sup> October 2016 after 6 years of study and produced her degree certificate as PEX3.

7. She testified that on returning to Kenya, her degree certificate was recognized by the council of legal education and her ‘O’ level certificate was equated by KNEC on 24<sup>th</sup> January 2017 to KCSE mean grade of B with English language score of B-(Minus). She produce the letter from the council of legal education is dated 26<sup>th</sup> January 2017.( PEX 4)

8. The petitioner further testified that she applied to the respondent to sit Pre Bar examination in readiness to join the ATP but her application was declined and produced the letter dated 30<sup>th</sup> October 2017 as Pex5. According to the petitioner, the respondent declined to admit her because she had score and equivalent of B - (Minus) in English instead of B (plain) as required by the Kenya School of Law Act, hence she was not qualified to join KSL.

### **Submission**

The petitioner filed written submission dated 20<sup>th</sup> March 2018 and filed on 21<sup>st</sup> march 2018 which **Mr. Anyoka** relied on. **Mr. Anyoka** however emphasized that at the time the petitioner joined the University to pursue a degree in law the applicable law was different from the one the respondent is applying on the petitioner. He contended that the petitioner had the qualifications that were at the time the petitioner joined university in 2010, while the new law came into operation in 2013.

10. The petitioner’s main contention is that the respondent made a substantial error in declining her application on grounds that she did not have grade B (plain) in English as required by the Kenya School of Law Act. According to the petitioner’s council, the law in force when the petitioner joined the university to pursue a degree in law, required was C+ (plus). It was contended that by that time the new law came into operation, the petitioner had completed her secondary education and had the equivalent of mean grade of B with B- (Minus) in English which was sufficient to enable her produce a degree in law even locally.

### **Determination**

11. I have considered this petition, the petitioner’s evidence and submissions filed herein. I have also considered the authorities relied on. There is only one issue for determination, that is; whether the respondent’s decision to decline the petitioner’s application to sit for pre Bar examination was justified in law. The petitioner contends that she attained the minimum grade for joining the University to pursue a degree in law when she joined the in 2010, and therefore, the respondent acted improperly in declining her application to sit for the Pre Bar examination as a prelude to joining ATP.

12. The facts in this petition are not in dispute. This is so given that the respondent, though aware of both the petition and the hearing date and was in fact given more time to file a response none was filed. The petitioner has O level certificate from Botswana which is equivalent to KCSE mean grade B (plain) with B- (minus) in English. The grades were obtained in November 2009. She joined the LLB degree Programme in 2010 graduating in 2016. At the time she joined the law class, University she says entry requirement to pursue law was grade c+ with C- in English or Kiswahili languages. That means by the time the petitioner joined the LLB. Programme, she had qualifications to pursue the same programme locally.

13. The respondent is established under section 3 of the KSL Act as a body corporate and the institution responsible to among other things **train persons to be advocates under the Advocates Act.** To that extent it is KSL as an institution that is responsible for professional legal training in the country and no other and determines whether applicants seeking to join ATP have met the qualifications under the Kenya School of Law Act.

14. Section 16 of the Act provides that **a person shall not qualify for admission to a course of study at the School, unless that person has met the admission requirements set out in the Second Schedule for that course.** The second Schedule to the Act which is central to admission to ATP and to the dispute herein provides;

**(1) “A person shall be admitted to the school if –**

**a) having passed the relevant examination of any recognized university in Kenya or 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 grades B (plain) in English language or Kiswahili and a mean grade 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”**

15. The law requires an applicant to have LL.B. Degree from a recognized university, and a mean grade of C+ (Plus) with B (Plain) in English or Kiswahili Languages in KCSE or its equivalent. For those who attended university education outside Kenya, they must also sit and pass pre Bar examination set by the School. This law came into operation in 2013.

16. Prior to this, the applicable law was the **Council of Legal Education Act (Cap 16 A)**, and the **Kenya School of Law Regulations, 2009**. Under that Act, regulations 4 and 5 which have a bearing in this petition provided as follows:

**4. "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 First Schedule to these Regulations for that course.**

**5. (1) Any person who wishes to be admitted to any course of study at the School, shall make an application to the School in Form KSL No. 1 set out in the Third Schedule and pay the fees set out in the Fourth Schedule to these Regulations.**

2. The application under paragraph (1) shall be accompanied by–

a) *academic transcripts for the relevant qualifying examinations;*

b) *academic certificate or any other academic award*

c) *a copy of the National identification Card*

d) *two passport photographs; of the applicant and any other document the School may from time to time require.*

**3. The School shall consider an application submitted under paragraph (2) and if it is satisfied that the applicant meets the admission requirements, admit the applicant to the School.**

17. Part II of the First Schedule to the Regulations with regard to admission for ATP requirements stated;

**1) "A person shall not be eligible for admission for the Post Graduate Diploma (Advocate Training Programme) unless that person has–**

a) *passed the relevant examination of any recognized university in Kenya, he holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) of that university;*

b) *passed the relevant examinations of a university, university college or other institutions prescribed by the Council, he holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) in the grant of that university, university college or other institution, had prior to enrolling at that university, university college or other institution–*

i) *attained a minimum entry requirements for admission to a university in Kenya; and*

ii) *a minimum grade B (plain) in English Language and a mean grade of C (plus) in the Kenya Certificate of Secondary Examination or its equivalent;*

c) *Bachelor of Laws Degree (LL.B) from a recognized university and attained a minimum grade of C+ (C plus) in English and a minimum aggregate grade of C (plain) in the Kenya Certificate of Secondary Examination, holds a higher qualification e.g. "A" levels, "IB", relevant "Diploma", other "undergraduate degree" or has attained a higher degree in Law after the undergraduate studies in the Bachelor of Laws Programme; or*

**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 pre-condition for admission.(emphasis)**

18. The question then is; was the respondent right in declining to allow the petitioner sit for pre-Bar examination on grounds that she had a B-(minus) in English language instead of B (Plain)? The answer to this question is in paragraph 1 (d) of Part II of *the First Schedule to the 2009 Regulations* which were in force when the petitioner joined the law degree programme. The petitioner had obtained an equivalent of B (Plain) with B- (Minus) in English Language. Qualification for one to join KSL then was a Bachelor of Laws Degree (LL.B) from recognized university a minimum grade of C- (C minus) in English and a minimum of an aggregate grade of C- (C minus) in the KCSE and sits and passes the **Pre-Bar Examination** set by the Council of Legal Education (KSL) as a pre-condition for admission.

19. The petitioner obtained the equivalent of B(plain) with B-minus in English in 2009 and joined LLB degree in 2010 when the above criteria was being used to determine those who were to join ATP. The law the respondent applied in the case of this petitioner was enacted in 2012 and came into force in 2013. It is obvious that the respondent applied the law retrospectively which was not the intention of the legislature. The Kenya School of Law Act does not either expressly or by necessary implication state that it will have a retrospective application.

20. It is a principle of law that laws apply prospectively and not retrospectively. In that regard, the Authors of **Maxwell on the Interpretation of Statutes**, 12<sup>th</sup> Edition (Sweet & Maxwell 1969) opine;

**“...no rule of construction is more firmly established than thus - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. The rule has, in fact, two aspects, for it, "involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary.”**

21. The Supreme Court of India stated in Mithilesh Kumari and another, vs. Prem Behari Khare, AIR 1989 SC 1247, that;

**“The presumption against retrospective operation is strong in cases in which the statute, if operated retrospectively, would prejudicially affect vested rights or the illegality of past transaction, or impair contracts, or impose new duty or attach new disability in respect of past transactions or considerations already passed,...” Every law that impairs or takes away rights vested agreeably to existing laws is retrospective, and is generally unjust and may be oppressive.”**

22. And the Supreme Court observed in Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others, SCK Application No. 2 of 2011 [2012] eKLR that,

**“As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”**

23. When the petitioner joined the LLB programme, she knew that her secondary school qualifications would enable her join ATP upon graduating. She therefore had that legitimate expectation when she applied to join ATP. I must also point out that so much litigation has gone into this issue that it cannot keep on engaging the courts every so often. I need not mention all the cases that have consumed judicial time over the same issue, suffice to mention the case of Kevin K Mwiti & Others v Kenya School of law & others [2015] eKLR, where the court stated that there was no express intention by Parliament to effect the amendment retrospectively, and adopted an interpretation that most favour enforcement of rights and fundamental freedoms, equality and freedom from discrimination.

24. On finding that the applicants in that case, students who joined had LLB degree programme before the new Act, but had challenges similar to what the petitioner before this Court faces, the court stated;

**“[188] in my view there is a legitimate expectation that public authorities will comply with the Constitution and the law. In our context it is expected that public authorities will adhere to the constitutional values and principles including those enumerated in Article 10. The Petitioners can therefore be said to have expected the Respondents to interpret the Amendment Act in a manner that upholds their rights and fundamental freedoms as long as the interpretation did not contradict the express language of the Act. In my view an interpretation that upholds the freedom of equality and non-discrimination cannot be said to be inimical to the Amendment Act just like it was not inimical to the prior enactment.**

**[189] It is therefore my view that the contention by the Respondents that by adhering to their earlier position they would be acting contrary to the law is incorrect.”**

25. The respondent neither filed a response to their petition nor attended during the hearing though aware of the hearing date which had been given in the presence of its representative. The court has no explanation why the respondent declined the petitioner’s application to sit to Pre Bar examination except what is contained in its letter dated 30<sup>th</sup> October 2017 stating that the petitioner had B-(Minus) in English Language instead of B (Plain). This is despite the fact that the petitioner sat for ‘O’ level and joined LLB. programme much earlier before the enactment of the Act that introduced the requirements of B (plain) in English language for one to join ATP.

26. It must be taken that the respondent had no reasonable or plausible answer to the petitioner’s case and could not explain why it declined her application. The petitioner having obtained grades that were required to pursue a degree in law and there being no legitimate reason why she could not sit for Pre Bar Examination, the respondent acted unreasonably and violated the petitioner legitimate expectation to sit for pre Bar examination for purpose determining her suitability to be admitted to ATP. Despite the courts having stated so often that the Kenya School of Law Act was not expected to operate retrospectively, the respondent continues to make decision to that effect leading to unnecessary litigation which it then fails to defend.

27. Consequently and for the above reasons, I am satisfied that the petitioner has a legitimate complaint which must succeed. The petition dated 1<sup>st</sup> December 2017 is allowed and I make the following Orders:-

**i. An order of Certiorari is hereby issued quashing the respondent’s decision contained and communicated in the letter dated 30<sup>th</sup> October 2017.**

**ii. An order of Mandamus is hereby issued, compelling the respondent to allow the petitioner to sit the Pre-Bar Examination for the Academic Year 2018/2019 or such other examination as the respondent’s curriculum may provide.**

**iii. Costs to the petitioner.**

**Dated, Signed and Delivered at Nairobi this 3<sup>rd</sup> Day of August 2018**

**E C MWITA**

**JUDGE**