



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 102 OF 2018

SYDNEY DOUGLAS WEBUYE.....PETITIONER

VERSUS

KENYA SCHOOL OF LAW.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The petitioner herein, who describes himself as a law graduate of the University of Nairobi brings this petition against the respondent, a public legal education provider established under Kenya School of Law Act No. 26 of 2012.

2. The petitioner case is that he is a holder of the degree of Bachelor of Laws (LLB) from the University of Nairobi having graduated on 2nd December 2017. He sat for Kenya Certificate of Secondary Education (KCSE) examinations in 2011 and obtained a mean grade of C plain). He was then enrolled at the University of Nairobi (UON) to pursue Diploma in Armed Conflict Studies in Eastern Africa and graduated on 6th December 2013 after which he was admitted to the same university (UON) where as I have already stated, he graduated with Bachelor of Laws. Upon his graduation, he applied to join the Advocate's Training Programme at the Kenya School Law but his application was rejected thereby precipitating the instant petition.

PETITION

3. In the petition dated 19th March 2018 supported by the petitioners affidavit of even date, the petitioner challenges the respondents decision to decline his application for admission to the Advocate's Training Programme. He contends the in declining to admit him, the respondent had violated his constitutional right under Articles 19(3), 20(2), 21(1), 24(1), 27 and 47 of the Constitution.

4. The petitioner states that at the time he applied for the Diploma in Armed Conflict Studies in Eastern Africa from the University of Nairobi, the Council of Legal Education Act 2009 as well as the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009 (Second Schedule) permitted the University of Nairobi to admit him into the LLB Programme. He contends that the Council of Legal Education recognizes admission requirements of University of Nairobi and further recognizes the Diploma that the petitioner pursued as being sufficient for admission into the LLB programme.

5. The petitioner case is that at the point of admission to the University of Nairobi in May 2013, the applicable criteria to the petitioner for admission to the Bachelor of Law Degree was prescribed by paragraph 11 of the Second Schedule to the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009 which provided for the criterion for admission as follows;

Be a holder of a relevant diploma with a credit pass from an institution recognized by Senate and mean grade of C(plain)and a B(plain) in English at Kenya Certificate of Secondary Education.

6. The petitioner claims that sometime in September 2012, Parliament enacted the Kenya School of Law Act, which came into force on 15th January 2013 at which time the petitioner had already been admitted to the University of Nairobi to pursue his legal studies and that the newly enacted law provided a new criterion for admission to the school as follows:

i. 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 degree(LL.B) 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(LL.B) in the grant of that University, university college or other institution; (i) attained a minimum entry requirements for admission to a university in Kenya; and (ii) obtained a minimum grade B(plain) in English Language or Kiswahili and a mean grade C(plus) in the Kenya Certificate of Secondary Education or its equivalent; or

ii. Has sat and passed the Pre- Bar examination set by the school.

7. He adds that sometime in 2014, Parliament amended the Kenya School of Law Act by deleting the word OR used in the Second Schedule thereby replacing it with the word AND thereby making a pre- bar examination a pre- requisite for admission to the Kenya School of Law for the Advocate's Training Programme.

8. The petitioner's complaint is that the respondent intends to subject him to pre-bar examination which was not a requirement at the time he enrolled for his law degree. According to the petitioner, the Kenya School of Law Act 2012 cannot operate retrospectively to affect students who had already enrolled for the law degree. He contends that the Regulation 6 of the Act requiring students to sit for pre-bar examination was invalidated for contradicting the Kenya School of Law Act.

9. He maintains that in considering his admission, the respondent should only apply the 2009 Regulations which qualify him for direct admission. He argues that having created a legitimate expectation that the 2nd Schedule will not be applicable to students admitted before the coming into force of the Act, and considering that it is discriminatory to afford different treatment to students whose circumstances are materially the same, the respondent acted unfairly and in violation of Articles 27 and 47 of the Constitution.

10. He further contends that by requiring him to sit for the pre-bar examination over subjects he has already been taught and examined, the respondent has acted unreasonably and contrary to Article 47 of the Constitution. He therefore prays for orders that:

a) That a declaration that the action of the respondent is in violation of Articles 27, and 47 of the Constitution.

b) That an order of certiorari to call up into the High Court and a quash the proceedings and decision of the respondent vide letters dated 23/10/2017 and 30/1/2018 declining to directly admit the petitioner to the Advocates Training programme for the year 2018/2019.

c) That a judicial review order of Mandamus compelling the respondent institution to admit the petitioner based on the criterion in statute before coming into force of the Kenya School of Law Act, 2012.

d) That an order of prohibition be and hereby issued directed at the respondent prohibiting it from excluding the applicant from directly joining the Advocates Training Programme for the year 2018/2019.

e) Any further order, directions or writ as the Honourable court deems fit, just and appropriate to grant.

f) Costs of this petition.

The respondents case

11. The respondent opposed the petition through the replying affidavit of its Academic Manager Fredrick Muhia who avers that on 4th July 2017, the respondent placed an advertisement requesting for persons to join its Advocate's Training programme 2018/19 programme after which the respondent got numerous enquiries and complaints about the applicability of the Second Schedule of the Act in view of an order issued by Odunga J in the case of **Kevin K. Mwiti & Others vs Kenya School of Law & 2 Others [2015] eKLR** (herein after "the Kevin Mwiti case") wherein it was observed that:

" A declaration that the petitioners who were already in the LLB Class prior to the enactment of the Kenya School of Law are to be treated in the manner contemplated by the guidelines issued by the school prior to the enactment of the Amendment Act. For avoidance of doubt those who had not been admitted in the LLB Class prior to the enactment of the Kenya School of Law Act are to comply with the said provisions of the said Act."

12. He stated that following the said decision by Justice Odunga the respondent sought a clarification of the said ruling and that a clarification was done as shown in annexure marked "FM3" to the effect that all students who had been admitted to the LLB Degree programme prior to the enactment of the Amendment Act should benefit from the Transition Criteria *ad infinitum*.

13. He states that upon receiving the clarification, the respondent decided to extend the transition criteria to all applicants who were admitted to the LL.B degree programme prior to 8th December 2014, and a category of students, under which the petitioner fell. He attached a letter dated 30th January 2018 informing the petitioner of the transition criteria that is applicable to him as annexure "FM4".

14. The respondent's deponent referred to Clause 5 of the 1st Schedule to L.N. 169 of 2009 as the applicable provision for the admission criteria and stated that the petitioner was still eligible for admission under Clause 5(d) of the said legal notice and not under Clause 5(c) because he did not have the relevant diploma that could have entitled him to direct entry to the Advocate's Training Programme.

15. The respondent's case was that it fulfilled its obligation to afford the petitioner an opportunity to actualize his right to education under Clause 5(d) of the LN 169 of 2009.

16. According to the respondent, the petitioner does not qualify to benefit under the 2nd Schedule of the Act as he does not meet the minimum criteria of academic credentials.

17. Parties filed written submissions to the petition which I have carefully perused. At the hearing of petition, parties opted not to highlight the submissions and Mr Nakhone, learned counsel for the petitioner observed that the main issue for determination the interpretation of Clause 5(c) of the LN 169 of 2009, and specifically, the meaning of the words, “relevant Diploma.”.

Analysis and determination

18. I have anxiously considered the pleadings filed by the parties herein, their respective written submissions and the authorities that they cited. I discern the main issues for determination to be:

a) Whether the petitioner is entitled/qualified to direct admission to the Advocate’s Training programme at Kenya School of Law under clause 5(c) of the impugned legal notice.

b) Whether the petitioner is entitled to the orders sought in the petition.

19. The petitioner’s case is that he is under paragraph 5 (c) of Part 11 of the 1st Schedule to the Regulations 2009 qualified to be admitted to the Advocate’s Training Programme without going through the requirement of a pre-bar examination while the respondent maintained that the petitioner did not possess the relevant Diploma that would have enabled him to such direct entry. According to the respondent the applicable Clause of the Regulations was Clause 5(d) that would guarantee the petitioner entry to the Advocate’s Training Programme upon passing the pre-bar examination.

20. The main issue in contest, having been narrowed down to the interpretation of what amounts to a relevant Diploma, I will move straight into determining whether the petitioner obtained the relevant diploma that would have entitled him to direct entry into the Advocates Training Programme. It was not disputed that the petitioner attained a Diploma in Armed Conflict Studies in Eastern Africa from the University of Nairobi before being admitted to the same University (UON) for an LL.B Degree. It was also not disputed that the Council of Legal Education recognizes admission requirements of University of Nairobi and by extension recognizes the Diploma that the petitioner pursued as being sufficient for admission into the LLB programme.

21. While the respondent maintained that the term ‘relevant diploma’ means diploma in law, the petitioner argued that nowhere in the Council of Legal Education Act and Regulations is the term relevant Diploma defined to mean a diploma in Law .

22. As I have already stated in this judgment, the issue in contention is whether or not the petitioner’s Diploma certificate meets the criteria of relevant diploma within the meaning of paragraph 5(c) of the First Schedule of the Legal Notice No. 169 of 2009 or if he falls under paragraph 5(d). The said paragraphs stipulates as follows:

A person shall not be eligible for admission for the Post Graduate Diploma (Advocates 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.

b) A Bachelor of Laws Degree (LLB) from a recognized University and attained a minimum grade of C+ in English and a minimum aggregate grade of C(pain) in the Kenya Certificate of Secondary Examination, holds a higher qualification e.g. “A” “IB”, relevant “Diploma”, other “Undergraduate degree” or has attained degree in a law after the undergraduate studies in the Bachelor of Laws Programme; or

c) A Bachelor of Law Degree (LLB) from recognized university and attained a minimum of C- in English a minimum of an aggregate grade of C- in the Kenya Certificate of Secondary Examination sits and passes the pre-bar set by the council of Legal Education as a pre-condition for admission.

23. The respondent’s argument was that the petitioner’s diploma did not qualify as a relevant diploma since it was not a diploma in law and that for that reason, the applicable provision under which the petitioner could gain admission to the Advocates Training Programme was under paragraph 5(d) of the 1st Schedule of the impugned legal notice No. 169 of 2009.

Black’s Law Dictionary defines relevant as follows:

“Logically connected and tending to prove or disprove a matter in issue, having applicable probable value that is, rationally tending to persuade people of the probability or possibility of some alleged fact.”

24. Having regard to the above definition and the facts of this case coupled with the fact that the petitioner was admitted to the University of Nairobi for a degree course in Law on the basis of the Diploma he had obtained from the same university, 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.

25. I find that having been admitted to the University of Nairobi to study law on the basis of the diploma in his possession and Kenya

Certificate of Secondary Education certificate, the said diploma certificate qualifies as a 'relevant diploma' within the meaning of paragraph 5 (c) of the impugned regulations, and is therefore eligible for direct entry to the Advocates Training Programme.

26. For the above reasons, I am satisfied that the petitioner has proved his case against the respondent to the required threshold and the order that commends itself to me is the order to allow the petition and make the following final orders:-

a) That a judicial review order of mandamus is hereby issued compelling the respondent institution to admit the petitioner based on the criterion on statute before coming into force of the Kenya School of Law Act, 2012.

b) That an order of prohibition be is hereby issued directed at the respondent prohibiting it from excluding the applicant from directly joining the Advocates Training Programme for the year 2018/2019.

c) I make no order as to costs.

Dated, signed and delivered in open court at Nairobi this 28th day of November 2018.

W. A. OKWANY

JUDGE

In the presence of:

Mr Onindo for the petitioner

Mr Kiberenge for the respondent

Court Assistant –Kombo