Kenya School of Law v Barno; Council of Legal Education (Interested Party) (Civil Appeal E417 of 2023) [2024] KEHC 5444 (KLR) (Civ) (20 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5444 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E417 OF 2023

WM MUSYOKA, J

MAY 20, 2024

BETWEEN

KENYA SCHOOL OF LAW .... APPELLANT

AND

BOAZ KIPNG'ETICH BARNO .... RESPONDENT

AND

COUNCIL OF LEGAL EDUCATION .... INTERESTED PARTY

(An appeal arising from the judgement of the Legal Education Appeal Tribunal, delivered on 10th June 2022, in LEAT No. E009 of 2022)

JUDGMENT

1. The cause before the Legal Education Appeals Tribunal, hereafter the Tribunal, was initiated by the respondent, against the appellant, to challenge a decision by the Director of the appellant, of 14th February 2022, declining to admit the respondent to the Advocates Training Programme, hereafter the Programme, and a subsequent appeal to the said Director, which was also dismissed. The case by the respondent, before the Tribunal, was that the appellant had exceeded its mandate; the decision was unfair unreasonable and discriminative; the decision thwarted his legitimate expectation and violated his right to education; the decision was based on a misrepresentation of the law; and it was illegal and unlawful. He sought that that decision be set aside, a declaration be made that he qualified for admission, and an order to compel his admission to the Programme. It is not clear, from the record, whether the appellant filed a reply to the appeal before the Tribunal.

2. The matter was canvassed by way of written submissions, filed by both sides. The Tribunal rendered a verdict, dated 10th June 2022, wherein it declared that the respondent was qualified for admission to the

Programme, by dint of section 1(a) of the Second Schedule to the *Kenya School of Law Act*, Cap 16C, Laws of Kenya, and the decision to decline his admission was set aside. An order was issued compelling his admission to the Programme forthwith.

3. The appellant was aggrieved, hence the instant appeal. The grounds, in the memorandum of appeal, dated 6th March 2023, revolve around lack of jurisdiction of the Tribunal to hear and determine the dispute; the Tribunal exceeding its mandate; and failing to properly apply the law on eligibility for admission to the Programme. The appellant sought the dismissal or striking out of the appeal in LEAT No. E009 of 2022.

4. Directions were given on 20th February 2024, for disposal of the appeal by way of written submissions. There has been compliance, by both sides.

5. The appellant has submitted on only 1 ground, the admission criteria. It was submitted that the Tribunal ought to have decided on whether secondary school qualifications matter for admission to the Programme, and should have found that they do matter, based on Kenya School of Law vs. Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA), where it was determined that the secondary school academic qualifications of all the applicants, must be taken into account, regardless of the university from which they obtained their law degree qualification. It is submitted that the interpretation of the Second Schedule of the *Kenya School of Law Act*, particularly of "or," as used between paragraphs (a) and (b) should not result in an absurdity. It is submitted that the Tribunal failed to consider the absurdity that would result, if 2 separate criteria were allowed for candidates based on where they studied. *Kenya School of Law vs. Charity Wamuyu HCCA No. E062 of 2021* and Kenya School of Law vs. James Muchiri Gachiki and Duncan Kyalo Muusya and 1 other HCCA No. E166 of 2022 are also cited.

6. On his part, the respondent has identified 3 issues for determination: whether the Tribunal had jurisdiction over the matter, whether he qualified for admission to the Programme, and whether the Court of Appeal judgement applied retrospectively. On jurisdiction, section 31 of the *Legal Education Act*, Cap 16B, Laws of Kenya, and Republic vs. Kenya School of Law & 2 others Exparte Kgaborone Tsholofelo Wekesa [2019] eKLR (Mativo, J) are cited, for the point that the Tribunal has power to determine any matter relating to the *Legal Education Act*. On whether he qualified for admission, sections b and c of the second schedule to the Kenya School of Act and part (iii) of the *Legal Education Act*, are cited for the submission that the law allows admission to a paralegal education programme, which allows progression to admission to university for a degree programme in law. Republic vs. Kenya School of Law & another Ex parte Otene Richard Akomo & 41 others [2019] eKLR (Mativo, J) and Republic vs. Kenya School of Law & another ex-parte Kithinji Maseka Semo & another [2019] eKLR (Mativo, J), where admission criteria based on section 1(a) of the Second Schedule to the *Kenya School of Law Act* was addressed. Robert Uri Dabaly Jimma vs. Kenya School of Law & Kenya National Qualifications Authority [2021] eKLR (Mrima, J), for the proposition that the "or" between 1(a) and 1(b) of the Second Schedule to the *Kenya School of Law Act* was disjunctive, as it was meant to target different categories of people. Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR) (Makhandia, Mohammed & Kantai, JJA) is also cited, with respect to the use of "or" as a disjunctive. On the retrospective effect of a decision of the Court of Appeal, Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA) and Mary Wambui Munene vs. Peter Gichuki King'ara & 2 others [2014] eKLR (Mutunga CJ, Rawaj DCJ, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ) are cited, for the submission that the retrospective effect of a precedent-setting judicial decision is excluded from decisions that have already been made. It is argued that the Court of Appeal, in Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA), did not order that its decision was to apply retrospectively.

7. Although the memorandum of appeal herein raises 2 issues, jurisdiction and admission criteria, the appellant has submitted on only 1 of them, the admission criteria, which then means that it has abandoned the grounds of appeal on jurisdiction. I shall restrict this judgement to the ground on admission criteria.

8. The dispute that was before the Tribunal was on the admission of the respondent to the Programme. Admission to the Programme is governed by section 16 of the *Kenya School of Law Act*, which provides, in general terms, for admission to the various study programmes offered by the institution. It is more about admission to the institution, in general, rather than to any particular programme. The said provision is not exhaustive, as it merely refers to other provisions in the Schedules to the Act. Section 16 states:

> " 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."

9. The course that the respondent sought to be admitted to is the Advocates Training Programme. The admission criteria to that Programme is set out in the Second Schedule, at (a)(1)(a)(b), which states as follows:

> " (a) Admission Requirements in the Advocate Training Programme
>
> (1) A person shall be admitted to the School if –
>
> a. having passed the relevant examination of any recognised university in Kenya, or of any university, university college or other institution prescribed by the Council, holds or becomes eligible for 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.

(2) ...”

10. The starting point should be with acknowledging that that portion of the Second Schedule to the Act is very poorly drafted or structured. It appears to create 2 categories of qualifications for admission, one under paragraph *1*(a) and the other under paragraph *1*(b), which provide for differential and unequal routes to admission to the Programme .

11. Under paragraph *1*(a), there are 2 classes of qualifications. The first is for those who hold a law degree from any recognised university in Kenya; while the second is for those who hold a law degree from any university, university college or other institution prescribed by the Council of Legal Education. The second level in paragraph *1*(a) is that admissions on the basis that one either holds the law degree already, or is eligible to conferment of that law degree by the university, university college or institution prescribed by the Council. Under 1(a), there is no mention of minimum entry qualifications to a university in Kenya based on KCSE grades, nor the language qualifications in English or Kiswahili, nor passage of pre-Bar examinations set by the appellant herein.

12. Under paragraph *1*(b), there is only 1 classification, one must hold a law degree, or is eligible to conferment of such a law degree, from any university, prescribed by the Council, and, in addition, they must meet the secondary school qualifications, the language qualifications and pass a pre-Bar examination.

13. It is not clear who is targeted by either of the 2 qualification streams, for they appear to suggest 2 separate approaches to admission to the Programme. The first approach does not require consideration of the secondary school qualifications. It would not matter, therefore, whatever grades one attained at the secondary school level of education, so long as they gained admission to a university, university college or other institution offering a law degree course, whether in Kenya or abroad, so long as the same is prescribed by the Council. The second approach would require that the applicant had attained KCSE grades that would have entitled him to admission to a university in Kenya, and that that applicant attained a B (plain) in either English or Kiswahili, and had passed a pre-Bar examination. The effect of it is that there would be a category of individuals who would qualify under both paragraphs, and another category that would qualify only under paragraph *1*(a).

14. The respondent did not attain grades in his secondary school education, to qualify for admission to a university in Kenya, to study law. He subsequently undertook a diploma course, with the appellant, which enabled him to qualify for admission to a university in Kenya to study law, and was eventually conferred with a law degree. By dint of that conferment, he stood qualified to be admitted to the Programme under paragraph *1*(a). However, as he did not meet the secondary school qualifications under paragraph *1*(b), he could not gain admission under that other route.

15. It would appear that the appellant based its decision to deny the respondent admission under paragraph *1*(b), and he challenged that decision before the Tribunal, on the basis that, although he did not fit the bill under paragraph *1*(b), he was still qualified under paragraph *1*(a), an argument that the Tribunal agreed with.

16. The appellant argues that the interpretation given by the Tribunal creates an absurdity, by having 2 pathways to admission, where one demands more onerous qualifications than the other. Of course, there is an absurdity. The absurdity, alluded to by the appellant, was not created by the interpretation given to the provision by the Tribunal, it exists in the provision itself. It is on account of the plain ordinary obvious literal meaning of that provision. The provision does create 2 sets of qualifications for admission to the Programme, and that was what the Tribunal followed. There can be no other plain or obvious or straightforward interpretation of that provision, hence the decisions that preceded

Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA), such as Republic vs. Kenya School of Law & another ex-parte Kithinji Maseka Semo & another [2019] eKLR (Mativo, J), Robert Uri Dabaly Jimma vs. Kenya School of Law & another [2020] eKLR (Mrima, J), Sabrina Jelani Badawi vs. Kenya School of Law [2021] KEHC 306 (Mativo, J), Stephen Kipkemei Rutto vs. Kenya School of Law & another [2022] eKLR (A. Makau, J), among others.

17. In view of the absurdity that I have referred to above, to use the appellant's own language in assessment of the provision, the circumstance of having 2 sets of entry qualifications, where one calls for a rather stricter qualification, while the other allows room for the possibility of a lower qualification, there has been quite heavy litigation over the provision, as indicated in the preceding paragraph. The latest decision from the Court of Appeal, in Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA), has sought to give the said provision a much broader and holistic interpretation, beyond the plain ordinary and obvious meaning, which, in the opinion of the appellant, created the absurdity that the appellant is talking about, with a view to make the provision sound sensible, meaningful or palatable. The objective of Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA) is, no doubt, to clear that alleged absurdity, if at all.

18. Instead of paraphrasing the said decision, let me quote verbatim from the said judgement of the Court of Appeal. This is what the Court of Appeal said in its own words:

> " The contention between the two parties is the interpretation of the above provisions as to whether given the two scenarios of joining KSL, whether the first one 1(a) does not require one to have the KCSE mandatory requirements of a mean grade C+ (plus) and a grade B (plain) in English or Kiswahili. That the said KCSE requirements only applies to those making applications under 1(b) of the said section. To us, the interpretation we discern from the above section is that the section should be read as a whole. The text is that paragraph 1(a) and (b) is separated by a semicolon, then there are the key elements mentioned after the colon on 1(b) which means that both 1(a)(b) must meet the conditions precedent in roman i and ii. In essence, whether you obtained a degree in a Kenyan or out of a Kenyan University, the basic requirement is the score in one's KCSE results which should correspond to those cited in the Act."

19. The Court of Appeal went on to state:

> " It is our view that there is also the need to give a Statute a holistic reading and interpretation in order to ascertain the true legislative intent ... It would not make any sense to interpret the section as meaning that two students who score the same mean grade at KCSE and one decides to study at a university outside Kenya and another at a university in Kenya would be treated differently in considering their entry requirements to the ATP, just because one was in the local university thus does not need to prove whether he attained the requires score in KCSE or not but subject to the foreign earned degree to KCSE confirmation. This ideally would be negative discrimination and against the principles of natural justice and goes beyond the spirit of the CLE Act informing the qualification."

20. It must be underscored that the decision, in Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA), turned, largely, on differential and unequal treatment of students who had obtained law degrees from universities domiciled outside of Kenya and those who obtained theirs locally. I do not agree that that provision creates parallel and unequal approaches to admission to the Programme, as between students holding law degree qualifications

from foreign universities and those from Kenyan universities. Maybe that was the intention, to have parallel admission routes for law graduates from local and foreign universities. However, that intention, if it all it was, was not achieved. A plain and literal reading of that provision, as worded, does not, in my understanding, with respect, create any distinctions of that kind. The provision does not even carry the word "foreign" within it. It does not expressly talk of law degree qualifications from other jurisdictions. There is nothing in paragraph *1*(b) that suggests that that provision was designed to govern admission of candidates, to the Programme, who hold law degrees from foreign universities. There is also nothing in paragraph *1*(a) which states that that provision is exclusive to law degrees conferred by universities domiciled in Kenya.

21. In the instant case, the respondent did not obtain a degree from a foreign university, but from Mt. Kenya University, a university in Kenya, accredited by the Council. That would qualify him for admission to the Programme under paragraph *1*(a), by dint of holding a law degree qualification from an accredited university in Kenya, which is, that is paragraph *1*(a), free of the KCSE and language requirements in paragraph *1*(b). However, he would not meet the KCSE and language criteria in paragraph *1*(b), and, therefore, he would not qualify under paragraph *1*(b). Given that paragraph *1*(a) and paragraph *1*(b) are separated by a disjunctive, when the provision is read disjunctively, as it should be, the respondent would still qualify for admission under paragraph *1*(a), despite not meeting the requirements as to KCSE and the language under paragraph *1*(b).

22. Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA) partially lays the matter of the admission criteria to rest, so that all law graduates seeking admission to the Programme must hold a law degree from institutions accredited or prescribed or approved by the Council, and, in addition, they must meet the KCSE and language criteria set out in that provision. In short, Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA) merges the 2 qualifications, that is in paragraphs *1*(a)(b), so that all law graduates, seeking admission to the Programme, are now required to meet the qualifications in paragraph *1*(b), which effectively renders paragraph *1*(a) ineffectual. I say that Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA) only partially lays the matter to rest because the untidiness in that provision remains in the Statute book, and the absurdity can only be finally and completely cured through legislative amendment, which aligns it to the interpretation in Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA). As the respondent does not meet the KCSE and language criteria in paragraph *1*(b), going by Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA), he does not qualify for admission to the Programme.

23. In the face of the reliance, by the appellant, on the interpretation given by Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA), to the said provision, which would effectively lock the respondent out of the programme, he has submitted that that decision is not of retrospective effect, to the extent that it was pronounced after the Tribunal had rendered its verdict. Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA) was decided on 21st October 2022, while the judgement of the Tribunal was delivered on 10th June 2022. The case, by the respondent, is that Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA), should not be used to close the door on him, given that the judicial interpretation on the provision prevailing as at 10th June 2022 was contrary to it, and it was that jurisprudence that the Tribunal had relied on. The appellant did not address the court, in this appeal, on the retrospectivity of Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR) (Makhandia, Mohammed & Kantai, JJA) to the impugned decision of the Tribunal.

24. The principle of the retroactive or retrospective application of the law also applies to case law. However, the courts have pronounced that, according to the common law, the retrospective effect of a judicial decision is excluded from cases that have already been determined. See Mary Wambui Munene vs. Peter Gichuki King'ara & 2 others [2014] eKLR (Mutunga CJ, Rawaj DCJ, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ), Pauline Anna Benadette Onyango vs. Kenya School of Law [2017] eKLR (Mwita, J) and Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA). That then would mean that Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA) would have no effect on the judgement that the Tribunal delivered on 10th June 2022.

25. In view of what I have stated, in the penultimate paragraph of this judgement, it is my finding and holding that the appeal herein has no merit, and I hereby dismiss the same. Each party shall bear their own costs.

DELIVERED BY EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 20TH DAY OF MAY 2024

W MUSYOKA

JUDGE

Ms. Veronica, Court Assistant, Milimani, Nairobi.

Mr. Arthur Etyang, Court Assistant, Busia.

Mr. Boaz Kipng'etich Barno, the respondent, in person.

Advocates

Mr. Mbuthu, instructed by Dr. Henry K Mutai, Advocate for the appellant.