



**Mohamed v Kenya School of Law & another (Petition E204 of 2022)
[2023] KEHC 2203 (KLR) (Constitutional and Human Rights) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2203 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E204 OF 2022

M THANDE, J

MARCH 24, 2023

BETWEEN

FAIZA ABDULKADIR MOHAMED PETITIONER

AND

KENYA SCHOOL OF LAW 1ST RESPONDENT

KENYA NATIONAL QUALIFICATIONS AUTHORITY 2ND RESPONDENT

JUDGMENT

1. The Petitioner has moved to this Court by a Petition dated May 9, 2022. Her claim is that she undertook her secondary school education ordinary level at Light Academy Girls School where she passed with 9 credits. She was issued with an International General Certificate of Secondary Education by the University of Cambridge International Examinations and Edexcel Pearson, UK. She proceeded to undertake law studies at the Riara University and was on March 15, 2019, conferred a Bachelor of Laws Degree, Second Class Upper Division.
2. The Petitioner averred that the 1st Respondent (KSL), by an advertisement on its website, called for applications for enrolment for the Advocates Training Programme (ATP) for the year 2022/2023 in its website. Included in the eligibility criteria was a new requirement for applicants whose certificates were not issued by the Kenya National Examinations Council to seek equation from the 2nd Respondent (KNQA). On application for equation, in 2019, KNQA in a letter dated August 28, 2019 informed the Petitioner that her qualification was not recognized within the Kenya national qualification framework. She was advised to take advanced level examinations so as to be equated to the Kenya Certificate of Secondary Education (Level 2). She found this requirement absurd as she was required to go back to secondary school yet she had completed university education.



3. When the Petitioner applied online for admission at the Kenya School of Law, she was informed vide a letter dated February 16, 2022 by the KSL, that her application could not be processed for want of a high school certificate. She supplied the same but her application was rejected by a letter dated March 8, 2022 on grounds that she had not attached a letter of equation from the KNQA. She appealed the decision and attached the letter from KNQA. Her appeal was however rejected by KSL, claiming that she could not be admitted for want of an advanced level high school qualification.
4. The Petitioner claims that at the time of commencing her studies at the University, the only requirement for admission to the Kenya School of Law was a Bachelor of Laws degree or eligibility for conferment of a Bachelor of Laws degree, as per Regulation 5(b) of the Council for Legal Education (Kenya School of Law) Regulations, 2009 and paragraph 1(a) and (b) of the Second Schedule of the [Kenya School of Law Act](#). As such, the decision by KSL was arbitrary and devoid of legal backing. By requiring a letter of equation from KNQA yet this was not a legal requirement at the time the Petitioner commenced university studies, KSL imposed an unreasonable, unlawful and unfair requirement.
5. The Petitioner thus claims that by arbitrarily denying her admission, KSL violated her right to equality and freedom from discrimination under Article 27 of the [Constitution](#) has been violated as other persons have and continue to benefit from the previous legal regime. Also violated is her right to human dignity under Article 28. Further, by its decision, KSL violated the Petitioner's right to education guaranteed under Article 43(1)(b) and to fair administrative action under Article 47. The Petitioner further claims that KNQA also violated her right under Article 47 by failing to apply the applicable guidelines in the equation of the Petitioner's certificate in accordance with the Commission for Higher Education Standards and Guidelines for Academic Degree Programmes 2011.
6. The Petitioner thus seeks the following reliefs:
 - a) A Declaration that the law applicable to the Petitioner's admission to the 1st respondent's Advocates Training Program is the legal regime prevailing at the time she was admitted to Riara University being Regulation 5(b) of the [Council for Legal Education \(Kenya School of Law\) Regulations, 2009](#) and paragraph 1(a) and (b) of the Second Schedule of the [Kenya School of Law Act, 2012](#).
 - b) A Declaration that the guidelines applicable to the equation of the Petitioner's International General Certificate of Secondary Education are the Commission for Higher Education Standards and Guidelines for Academic Degree Programmes 2011.
 - c) A Declaration that the Petitioner's right of access to education has been violated by the 1st Respondent.
 - d) A Declaration that the Petitioner's right to expeditious, efficient, lawful and reasonable administrative action has been breached by the 1st and 2nd Respondents.
 - e) An order of mandamus directing the 1st Respondent to admit the Petitioner to the Advocates Training Program with immediate effect.
 - f) An order of Certiorari to remove to this Honourable Court and quash the decision contained in the letters dated January 13, 2020 refusing to process the Petitioner's application.



- g) An order of Certiorari quashing the 2nd Respondent's decision contained in the letter dated March 8, 2022 refusing to equate the Petitioner's International General Certificate of Secondary Education certificate.
 - h) An order of Prohibition restraining the 1st Respondent from interfering with the Petitioner's participation and completion of the Advocates Training Program at the Kenya School of Law.
 - i) Punitive and general damages against the 1st and 2nd Respondent jointly and severally for deliberately violating the Petitioner's fundamental rights and freedoms.
 - j) Costs of the Petition.
7. The Petition is opposed by the Respondents. KSL, through a replying affidavit sworn by Frederick Muhia, the Principal Officer, Academic Services, on June 23, 2022 stated that in its advertisement inviting applicants for the ATP, KSL set out the eligibility criteria for admission as provided in the Second Schedule of the [Kenya School of Law Act](#), by which KSL is strictly bound. The Petitioner did not meet the eligibility criteria under Section 16 as read together with paragraph 1 of the Second Schedule of the Act; she did not have a mean grade of C+ in KCSE with B plain in English and Kiswahili languages. The Petitioner is thus not qualified for admission to the ATP and KSL was right in declining to admit her. KSL denied that it infringed on the Petitioner's rights and freedoms, by applying the set criteria.
 8. KSL further stated that the interpretation of the word "or" in the statute as being disjunctive results in an absurdity. The rule in construction of a statute requires adherence to the ordinary meaning of words used and grammatical construction unless that is at variance with the intention of the legislature, or leads to a manifest absurdity or repugnance. In such a case, the language may be varied or modified to avoid inconvenience but no further. The rule may also be used to avoid a result that is obnoxious to the principles of public policy even where words may prima facie carry only one meaning. This calls for a purposive approach to interpretation of statute. The High Court has in decisions supported the Respondent's interpretation and application of the law regarding the admission criteria. The Petitioner cannot therefore claim that the 1st respondent has disregarded the law and acted in bad faith.
 9. In a replying affidavit sworn on September 14, 2022, by Dr Juma Mukhwana, HSC, its Director General, KNQA stated that the Petition is an abuse of the Court process based on misstatement of fact and law. KNQA is established under Section 6(1) of the [Kenya National Qualifications Framework Act](#), 2014 and is empowered under Section 4(d) and 8(1(j)) of the [Act](#), to align and validate foreign qualifications into the Kenya National Qualifications Framework, for purposes of enabling an applicant to pursue further education or seek employment in Kenya. With regard to the Petitioner's case, KNQA's mandate was limited to aligning the Respondent's foreign qualifications in accordance with Kenyan standards and with global benchmarks. KNQA thus only determines if an applicant's qualifications align with national qualifications standards and gives direction. To this end, the 2nd Respondent only determined that the Petitioner's qualifications did not align with the national standards and advised the Petitioner to undertake advanced level examinations in order to attain the equivalent of the Kenya Certificate of Secondary Education (Level 2), which is a mandatory requirement for the ATP provided by the KSL. The Petitioner however disregarded its advice and proceeded to seek admission for the ATP.
 10. KNQA stated that the Cambridge International General Certificate of Secondary Education (Advanced IGSE) is equivalent to the Kenya Certificate of Secondary Education (Level 2). Further that the requirement for an advanced level IGSE certificate before joining university is also an internationally accepted requirement even within the Cambridge IGSE curriculum which the



Petitioner allegedly undertook. Thus failure by the Petitioner to undertake advanced level IGSE curriculum amounted to failure to meet the basic requirement for admission to university even in the United Kingdom where the certificate is offered. KNQA further asserted that it acted lawfully in accordance with its mandate and denied that the KNQFA was implemented retrospectively. It created sanity within the qualifications framework which was riddled with blatant disregard to the existing framework by industry players due to lack of an enforcement policy. KNQA thus stated that it was not factually correct that the directive of KSL to all applicants seeking to enroll in the ATP to seek alignment of their foreign qualifications from KNQA was non-existent but that it is anchored in Section 8(1)(j) of the KNQFA. KNQA urged that the Petition be dismissed.

11. There is on record an application dated July 29, 2022 seeking inter alia, leave to amended the Petition. Directions were to be given on November 10, 2022. The Petitioner was however not present. On the next mention date on January 30, 2023, the Petitioner's counsel stated that he had filed submissions and asked for a date for judgment. There was no mention of the application to amend the Petition. Accordingly, this Judgment is on the Petition dated May 9, 2022.
12. The Petitioner contends that her rights and fundamental freedoms have been violated by the by the Respondents. Among the rights she claims to have been violated is the right to fair administrative action under Article 47 of the Constitution which provides:
 - (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 - (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration.
13. To give effect to the provisions of Article 47(3) of the Act, Parliament enacted the Fair Administrative Action Act (FAAA) which is of universal application. Section 3 of the FAAA provides:
 1. This Act applies to all state and non-state agencies, including any person—
 - (a) exercising administrative authority;
 - (b) performing a judicial or quasi-judicial function under the Constitution or any written law; or
 - (c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.
14. Section 4 of the FAAA sets out the rights to fair administrative action. Relevant to this Petition are subsections (1) and (2) which provide as follows:
 - (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.



- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
15. At the core of the Petition is the decision by KSL to reject the Petitioner’s application for admission into the ATP. She claims that the said decision was arbitrary, as a result of which her rights and fundamental freedoms were violated.
16. Section 2 of the FAAA defines administrative action is defined to include:
- i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
 - ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates. (emphasis added)
17. Flowing from the above, it is quite evident that the decision of KSL to reject the Petitioner’s application for admission into the ATP falls within the definition of administrative action.
18. The Petitioner stated that KSL placed an advertisement in its website by KSL inviting applications for the ATP for the 2022/2023 academic year. The advertisement indicated that the ATP would commence on March 21, 2022. The Petitioner put in her application for admission which was unsuccessful. She appealed twice with the same result. The Petitioner exhibited the following letters from KSL:
- i) Letter from KSL dated February 16, 2022 informing her that her application for admission was not successful. The reason given for the rejection is “High School certificate not attached”.
 - ii) Letter from KSL dated March 8, 2022 informing her that her application for admission was not successful. The reason given for the rejection is “No KNQA equation letter for secondary school qualifications.”
 - iii) Letter from KSL dated March 14, 2022 informing her that her application for admission was not successful. The reason given for the rejection is “As per KNQA letter, the student does not have an advanced level high school qualifications.”
19. Although the Petitioner has not indicated the dates on which she made the application for admission and the 2 appeals, it would appear that responses were sent to her without delay. The response to her application is dated February 16, 2022. The response to her first appeal is dated March 8, 2022 while that to the second appeal is dated March 14, 2022. Accordingly, I find that administrative action was expeditious, efficient, lawful, reasonable and procedurally fair as required by Article 47(1) of the Constitution and Section 4(1) of the FAAA. In each of the 3 responses, KSL gave written reasons for the rejection of the application, thereby complying with Section 4(2) of the FAAA.
20. The Legal Education Act at Section 4 established the Council for Legal Education. The functions of the Council are set out in Section 8 of the Act as follows:
- (1) The functions of the Council shall be to—
 - (a) regulate legal education and training in Kenya offered by legal education providers;
 - (b) licence legal education providers;



- (c) supervise legal education providers; and
 - (d) advise the Government on matters relating to legal education and training.
 - (e) recognise and approve qualifications obtained outside Kenya for purposes of admission to the Roll.
 - (f) administer such professional examinations as may be prescribed under section 13 of the *Advocates Act*
- (2) Without prejudice to the generality of subsection (1), the Council shall, with respect to legal education providers, be responsible for setting and enforcing standards relating to the—
- (a) accreditation of legal education providers for the purposes of licensing;
 - (b) curricula and mode of instruction;
 - (c) mode and quality of examinations;
 - (d) harmonization of legal education programmes; and
 - (e) monitoring and evaluation of legal education providers and programmes.
- (3) In carrying out its functions under subsection (2), the Council shall—
- (a) make Regulations in respect of requirements for the admission of persons seeking to enroll in legal education programmes;
 - (b) establish criteria for the recognition and equation of academic qualifications in legal education;
 - (c) formulate a system for recognizing prior learning and experience in law to facilitate progression in legal education from lower levels of learning to higher levels;
 - (d) establish a system of equivalencies of legal educational qualifications and credit transfers;
 - (e) advise and make recommendations to the Government and any other relevant authority on matters relating to legal education and training that require the consideration of the Government;
 - (f) collect, analyse and publish information relating to legal education and training;
 - (g) advise the Government on the standardization, recognition and equation of legal education qualifications awarded by foreign institutions;
 - (h) carry out regular visits and inspections of legal education providers; and



- (i) perform and exercise any other functions conferred on it by this Act.
 - (4) Where any conflict arises between the provisions of this section and the provisions of any other written law for the time being in force, the provisions of this section shall prevail.
21. KSL is a legal education provider within the meaning of Section 2 of the *Legal Education Act*. As such, the Council is mandated under Section 8 to regulate the legal education and training offered by KSL, among other legal education providers. This includes to inter alia make regulations in respect of requirements for the admission of persons seeking to enroll in legal education programmes and establish criteria for the recognition and equation of academic qualifications in legal education.
22. Where a party is aggrieved by any decision concerning legal education, the *Legal Education Act* has provided a remedy by way of appeal to the Legal Education Appeals Tribunal established under Section 29 of the *Legal Education Act*. The jurisdiction of the Tribunal is stipulated in Section 31 of that Act as follows:
- (1) The Tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the Council or by any committee or officer of the Council, on any matter relating to this Act, inquire into the matter and make a finding thereupon, and notify the parties concerned.
 - (2) For the purposes of hearing an appeal, the Tribunal shall have all the powers of the High Court to summon witnesses, to take evidence on oath or affirmation and to call for the production of books and other documents.
 - (3) Where the Tribunal considers it desirable for the purposes of avoiding expenses, delay or for any other special reasons, it may receive evidence by affidavit and administer interrogatories within the time specified by the Tribunal.
 - (4) When determining any matter before it, the Tribunal may take into consideration any evidence, which it considers relevant to the subject of an appeal before it, notwithstanding that such evidence, would not otherwise be admissible under the law relating to evidence.
23. The Tribunal is established to inter alia determine any appeal made to it in writing by any party or any reference made to it by the Council or by any committee or officer of the Council, on any matter relating to the Act. The Petitioner's complaint relates to the requirements for admission to the ATP offered by KSL. In the premises, her grievance falls within the jurisdiction of the Tribunal.
24. Where any party is dissatisfied with the decision of the Tribunal, such party may file an appeal to this Court under Section 38 of the *Act* which provides as follows:
- (1) Any party to proceedings before the Tribunal who is dissatisfied by a decision or order of the Tribunal on a point of law may, within thirty days of the decision or order, appeal against such decision or order to the High Court.
 - (2) The Tribunal may of its own motion or on the application of an interested person, if it considers it appropriate in the circumstances, grant a stay of



execution of its award until the time for lodging an appeal has expired or where an appeal has been commenced until the appeal has been determined.

25. The Petitioner has moved to this Court seeking judicial review orders against the decision of the 1st Respondent. Section 9 of the [FAAA](#) sets out the procedure for judicial review of an administrative decision as follows:

- (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the [Constitution](#).
- (2) The High Court or a subordinate court under sub-section (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
- (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
- (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
- (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

26. Section 9(2) of the [FAAA](#) is explicit that courts shall not review an administrative action or decision unless all the mechanisms for appeal or review and all remedies available under any other written law are first exhausted. This is the doctrine of exhaustion, which encourages the use of alternative dispute resolution mechanisms and accords with Article 159(2)(c).

27. In the case of [Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others \[2015\] eKLR](#), the Court of Appeal provided the constitutional rationale and basis for the doctrine of exhaustion as follows:

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the [Constitution](#) which commands Courts to encourage alternative means of dispute resolution.

28. And in [Mutanga Tea & Coffee Company Ltd v Shikara Limited & another \[2015\] eKLR](#), the Court of Appeal stated:

We are therefore satisfied that the learned judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court



in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this appeal, be to defeat the constitutional objective behind Article 159(2)(c) and the very *raison d'être* of the mechanisms provided under the two Acts.

29. The Court may exercise its discretion to exempt a party from the obligation to exhaust all available remedies before applying to the Court for judicial review of any administrative action. Section 9(4) of the *FAAA* provides:

Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

30. For the Court to exercise its discretion in favour of a party, it must first be demonstrated that exceptional circumstances exist to warrant such exemption and that such exemption is in the interest of justice. Second, such exemption may only be made on application by the party desiring the same.

31. In the case of *Republic v Kenya School of Law & 2 others Ex parte Kgaborone Tsholofelo Wekesa [2019] eKLR*, Mativo, J (as he then was) considered the exceptions to the doctrine of exhaustion and stated:

My reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section 9(4) of the *Fair Administrative Action Act*. [38] The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given. [39] Section 9(4) of the *Fair Administrative Action Act* [40] postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. No such application for exemption was made to this court prior to filing the application.

32. The contested decision by which the Petitioner is aggrieved, is an administrative decision by the 1st Respondent. This being the case, the first port of call by dint of Section 9 of the *FAAA* was the Tribunal established under the *Legal Education Act*. The Petitioner could only approach this Court by way of an appeal from the decision of the Tribunal. In the end I find that the Petitioner ought to have had recourse to, and exhausted the remedies available under the law, before seeking the intervention of this Court.

33. It is noted that the doctrine of exhaustion of available remedies was not raised by any of the parties herein. However, this goes to the jurisdiction of the Court and cannot be wished away. The Petitioner has invoked the original jurisdiction of this Court in circumstances where the alternative dispute resolution mechanisms are provided by statute, thereby stripping this Court of jurisdiction. It is a truism that jurisdiction is everything and without it, a court must down its tools as directed in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1*, where Nyarangi, JA, famously stated:

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to



exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.

34. In view of the foregoing the inevitable conclusion arrived at by the Court is that the Petitioner ought to have exhausted the available mechanism before approaching this Court. Accordingly, by dint of Section 9(2) of the [FAAA](#), I find and hold that this Court lacks the jurisdiction to entertain the Petition herein. Without jurisdiction, the Court has no basis to grant any of the orders sought. The Petition therefore fails and is hereby struck out. Each party shall bear own costs.

DATED AND DELIVERED IN NAIROBI THIS 24TH DAY OF MARCH 2023

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M THANDE

JUDGE

In the presence of: -

.....**for the Petitioner**

.....**for the 1st Respondent**

.....**for the 2nd Respondent**

.....**Court Assistant**

