



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**  
**PETITION NO. 25 OF 2019**

**IAN LUTTA.....PETITIONER**

**VERSUS**

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

**JUDGMENT**

1. The Petitioner, Ian Lutta, holds a Bachelor of Laws (LLB) degree obtained on 21<sup>st</sup> December, 2018 from the University of Nairobi. He also holds a diploma in Criminology and Social Order awarded by the same University on 5<sup>th</sup> December, 2014.
2. When the Petitioner applied in 2018 to join the Advocates Training Programme (ATP) offered by the Respondent, Kenya School of Law, he received a letter dated 6<sup>th</sup> December, 2018 informing him that his application was not successful because he did not attach his secondary school qualifications clearance from the Kenya National Qualifications Authority.
3. The Petitioner went ahead and obtained an equation of his International General Certificate of Secondary Education and General Certificate Qualification awarded by Cambridge International Examinations from the Kenya National Qualifications Authority. Armed with the equation of qualifications document dated 10<sup>th</sup> January, 2019, the Petitioner appealed to the Respondent.
4. The Petitioner's appeal received a reply from the Respondent through a letter dated 18<sup>th</sup> January, 2019 as follows:-

**“Dear Mr. Lutta**

**RE: APPEAL AGAINST NON-ADMISSION INTO THE ADVOCATES TRAINING PROGRAMME (ATP)**

**Reference is made to your letter dated 11<sup>th</sup> January, 2019 on the above subject matter.**

**We note that the equation from the Kenya National Qualifications Authority gives your mean grade as C (plain) which is below the stipulated grade of C (plus). In addition, the admission requirements envisage that a relevant diploma should be a “Diploma in Law”.**

**In light of the above, it is regretted that your appeal was not successful.**

**Yours sincerely**

**Dr. Henry K. Mutai**

**DIRECTOR/CHIEF EXECUTIVE OFFICER”**

5. Through his petition dated 23<sup>rd</sup> January, 2019 the Petitioner asserts that the Respondent's decision violated a number of his constitutional rights. He therefore prays for orders as follows:

**“A. A declaration that the action of the Respondent is in violation of articles 27, 43 and 47 of the Constitution of Kenya 2010.**

**B. An order of judicial review by way of *Certiorari* be and is hereby issued to bring into this Court and quash the entire decision made by the Respondent vide letter dated 18<sup>th</sup> January, 2019 declining and/or rejecting to admit the Petitioner to the Advocates Training Programme for the academic year 2019/2020.**

**C. An order of judicial review by way of *Mandamus* be and is hereby issued compelling the Respondent to admit the Petitioner into the Advocates Training Programme for the academic year 2019/2010.**

**D. Costs of the Petition be borne by the Respondent.**

**E. Or that such other Order(s) as this Honourable Court shall deem fit.”**

6. The Petitioner’s case as gleaned from his pleadings is that he sat for his International General Certificate of Secondary Education (IGCSE) at St Christopher’s School in 2012. His case is that he applied to the University of Nairobi for enrolment for an undergraduate degree programme in law and he was advised to first undertake a diploma course which he did in 2013 graduating on 5<sup>th</sup> December, 2014.

7. It is the Petitioner’s case that at the time he applied for and commenced his diploma studies 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 degree programme. He avers that he was admitted to pursue the LLB degree course on 5<sup>th</sup> September, 2014 and he graduated on 21<sup>st</sup> December, 2018.

8. The Petitioner’s case is that the rejection of his application for the ATP by the Respondent was irregular as the relevant proviso under which he ought to gain entry into the ATP is Paragraph 5(c) of the First Schedule of Legal Notice No. 169 of 2009 or Paragraph 5 (d).

9. The Respondent opposed the petition through the replying affidavit sworn by its Academic Service Manager, Fredrick Muhia on 3<sup>rd</sup> April, 2019. His averment is that the Petitioner’s application to join the ATP was rejected on the ground that the Second Schedule to the Kenya School of Law Act, 2012, which came into force on 15<sup>th</sup> January, 2013 requires a minimum of a mean grade of C+ in the Kenya Certificate of Secondary Education or its equivalent for admission into the ATP. Further, that the GCE “O” level certificate is not a university entry qualification as has been clearly stated by the Kenya National Qualifications Authority and the Council of Legal Education.

10. Mr Muhia avers that it was incumbent upon the Petitioner to ensure adherence to the qualifications for the ATP set out under the law before commencing his LLB studies in 2014. He additionally deposes that the Respondent is enjoined by the law to reject an application for admission into the ATP by an unqualified person.

11. Through the submissions dated 25<sup>th</sup> May, 2019, counsel for the Petitioner submits that the University of Nairobi was and still is an accredited institution for the purposes of offering legal education both under the repealed Council of Legal Education Act, 2009 and the Legal Education Act, 2012.

12. Counsel submits that in 2012 the Petitioner applied to enroll for the LLB degree at the University of Nairobi and he was advised to first undertake a diploma course. He subsequently undertook a Diploma in Criminology and Social Order between 2013 and 2014. After completing the diploma course with a credit pass, he was admitted to the degree programme.

13. It is counsel’s submission that at the time of undertaking the diploma studies, the Petitioner knew that his “O” level qualifications, as well as his diploma, would qualify him for admission to the law degree programme. Counsel submits that while undertaking the degree course, the Petitioner was confident and well aware that he would qualify for admission to the Kenya School of Law having fulfilled the requirements of the Council of Legal Education (Accreditation of Legal Education Institutions) Regulations, 2009 (“the 2009 Regulations”). He specifically points to Paragraph 2(d) of the Second Schedule as providing one of the requirements for admission into an undergraduate degree programme as “*a diploma of an institution recognized by the Commission for Higher Education and the applicant shall have obtained at least credit pass.*”

14. It is the counsel’s submission that the Petitioner’s expectation was dashed by the Respondent’s refusal to admit him. According to counsel, the Petitioner had a legitimate and reasonable expectation that the criteria for admission into the ATP would not change, or if it changed, it would not apply retrospectively. It is the submission of counsel that the Respondent’s actions violated the Petitioner’s right to education under Article 3(1)(f) of the Constitution.

15. The decision in the case of **Laura Makungu Lumbasio v Kenya School of Law [2018] eKLR** is cited for the holding that:-

**“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.”**

16. The decisions in **Republic v Attorney General & another Ex-parte Waswa & 2 others [2005] 1KLR 280**, and **Keroche Industries Limited v Kenya Revenue Authority & 5 others [2007] eKLR** are cited as outlining the principle of legitimate expectation. Also cited is the book of **De Smith, Woolf and Jowell** titled **Judicial Review of Administrative Action, 6<sup>th</sup> Edition, Sweet & Maxwell** where the authors state at page 609 that:-

**“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”**

17. The second ground upon which the Petitioner bases his case is that the Kenya School of Law Act, 2012 was wrongly applied to his situation. It is his case that by the time the Act came into force he had already been admitted to the University of Nairobi to undertake a diploma and thereafter a degree in law. In support of his case that the Act was not supposed to apply retrospectively, the Petitioner's counsel points to guidelines published by the Respondent and the Council of Legal Education giving a transition period for the provisions of the Act for three years from January 2013.

18. Counsel for the Petitioner cites the decision of the Supreme Court in the case of **Samuel Kamau Macharia & another v Kenya Commercial Bank & 2 others [2012] eKLR** for the holding 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 effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”**

19. Relying on Article 47 of the Constitution, counsel submits that the retrospective application of the Kenya School of Law Act, 2012 to the Petitioner is unlawful, unreasonable and unprocedural. Further, that the Respondent has for several years admitted students who were in university before the 2013 amendments but continues to deny him admission hence violating Article 27 of the Constitution which provides for the right to equality before the law and freedom from discrimination.

20. It is the position of counsel that the Petitioner had met the qualifications for admission to the ATP provided by the 2009 Regulations which were the provisions applicable to him. Counsel concedes that the Petitioner was indeed not qualified under the Kenya School of Law Act, 2012 but urges that the said law is not applicable to the Petitioner. He therefore asserts that the Respondent's refusal to admit the Petitioner to its institution on the basis that he had not attained a mean grade of C+ in the Kenya Certificate of Secondary Education or its equivalent is unlawful and unfounded in law.

21. Counsel for the Petitioner also rejects the Respondent's statement that a relevant diploma should be a diploma in law stating that the law only requires a relevant diploma. Counsel supports this submissions by citing the decision in **Sydney Douglas Webuye v Kenya School of Law [2018] eKLR** 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.”**

22. The Respondent's counsel through brief submissions dated 20<sup>th</sup> June, 2019 submits that although legitimate expectation is a recognized principle of law, the facts of this case demonstrate that the Petitioner cannot benefit from that principle for the simple reason that there was absolutely no basis for a legitimate expectation in his favour.

23. The Respondent's counsel states that at the time the Petitioner completed his “O” level studies, the Kenya School of Law Act, 2012 had already come into force on 15<sup>th</sup> January, 2013. He asserts that consequently the provisions of the Council of Legal Education (Kenya School of Law) Regulations, 2009 (Legal Notice 169/2009) cannot apply to the Petitioner. Reliance is placed on the decision in **JR No. 377 of 2015 Kevin Mwiti v Kenya School of Law & another** for the proposition that all applications for admission to the ATP must be evaluated on the basis of the law in place at the time an applicant commenced law studies.

24. Counsel for the Respondent agrees that had the Petitioner commenced his diploma course before the commencement of the Kenya School of Law Act, 2012, then Legal Notice No. 169 of 2009 would have been applicable to him but this is not the case. Further, that the Kenya School of Law Act, 2012 is clear on the minimum secondary school qualifications necessary for admission into the ATP and the Petitioner has indeed admitted that he did not have those qualifications.

25. Additionally, counsel for the Respondent submits that the Council of Legal Education has directed that the “O” level qualification in IGCSE is not a university entry qualification and the Respondent is bound to obey the directive by the Council of Legal Education. The Petitioner, he states, would in any case be ineligible for the bar examination which is administered by the Council of Legal Education.

26. Counsel for the Respondent urges this Court to dismiss the petition stating that had the Petitioner checked the applicable law before commencing his studies he would have established that he was ineligible for admission to the ATP.

27. The pleadings and submissions reveal that only question for the determination of this Court is whether the Petitioner had commenced his diploma studies at the time the Kenya School of Law Act, 2012 came into force on 15<sup>th</sup> January, 2013. This is a matter of fact which once determined will resolve this petition in its entirety.

28. I have carefully read the Petitioner's pleadings. At Paragraph 4(III) of the affidavit sworn on 23<sup>rd</sup> January, 2019 he avers that:-

**“In 2013 I enrolled at the University of Nairobi and pursued a Diploma in Criminology and Social Order whereupon I graduated on 5<sup>th</sup> December, 2014.”**

29. It is interesting to note that the Petitioner does not indicate the date that he was admitted for the diploma course. This is in contrast to the fact that he has exhibited the letter dated 5<sup>th</sup> September, 2014 which admitted him for the degree studies.

30. It is the Petitioner who alleges that he had joined the University of Nairobi for his diploma course before the Kenya School of Law Act, 2012 came into force on 15<sup>th</sup> January, 2013. The onus was on him to prove this fact but he has failed to do so. The Respondent has all along insisted that the Kenya School of Law Act, 2012 was already applicable when the Petitioner commenced his diploma studies. The Petitioner has failed to dislodge this averment. On the evidence before the Court, I find that the Petitioner started his diploma studies after the Kenya School of Law Act, 2012 had become operational.

31. The Second Schedule of the Kenya School of Law Act, 2012 provides the criteria for admission to the ATP 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, or of 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 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.”**

32. The Kenya National Qualifications Authority equated the Petitioner’s IGCSE certificate to a KCSE C (Plain). The Petitioner did not therefore meet the requirement for admission to the ATP programme. I will at this point state in passing that the fact that the Kenya National Qualifications Authority equated the Petitioner’s qualifications to a KCSE C (Plain) defeats the Respondent’s submission that the “O” level qualification in IGCSE is not a university entry qualification. If the examination is equivalent to a KCSE grade then it is a qualification for entry to the university so long as it meets the grade for admission to a particular field of study.

33. The Petitioner also relies on the doctrine of legitimate expectation. The principles underlying this doctrine were expressed by the Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014 eKLR]** as follows:-

**“[269] The emerging principles may be succinctly set out as follows:**

**a. there must be an express, clear and unambiguous promise given by a public authority;**

**b. the expectation itself must be reasonable;**

**c. the representation must be one which it was competent and lawful for the decision-maker to make; and**

**(d) there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”**

34. In **Republic v Kenya Revenue Authority Ex-parte Shaka Distributors Ltd [2012] eKLR** it was held that :-

**“It follows therefore that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a certain manner. For the promise to hold, the same must be made within the confines of the law. A public body cannot make a promise which goes against the express letter of the law.”**

35. In the case before me, it is clear that the Petitioner rests his claim of legitimate expectation on an Act of Parliament that was already repealed by the time he embarked on his diploma studies. This Court cannot in the guise of enforcing the Petitioner’s legitimate expectation command the Respondent to act in contravention of the law. Legitimate expectation is only useful where the acts done were done within the law.

36. It is therefore clear that the Petitioner’s case is without merit. The Respondent correctly applied the Kenya School of Law Act, 2012 to the Petitioner and it is clear that he does not meet the conditions for admission to the ATP.

37. The other ground upon which the Petitioner’s application was rejected by the Respondent is that his diploma was not a diploma in law. A determination on this issue will not be of any use to the Petitioner. However, if it may be of any comfort to him, I would agree with the determination in regard to that issue by W. A. Okwany, J in **Sydney Douglas Webuye** (supra).

38. Otherwise I find the instant petition bereft of merit. The same is dismissed with no order as to costs.

**Dated, signed and delivered through video conferencing/email at Nairobi this 14<sup>th</sup> day of May, 2020.**

**W. Korir,**

**Judge of the High Court**