REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 4 OF 2018

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION BY THE EXPARTE APPLICANT

FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI, MANDAMUS

AND PROHIBITION AGAINST KENYA SCHOOL LAW AND ORDER OF

PROHIBITION AGAINST COUNCILMOF LEGAL EDUCATION

IN THE MATTER OF: ARTICLES Article 3(1), 10(2) (a)(b)(c),

Article 23(1) (3), 27(1)(2)(4)(5), 47(1) and 43(1) (f) OF

THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF: SECTION 7(2) AND 11 OF THE FAIR

ADMINISTRATIVE ACTIONS ACT (NO. 4 OF 2015)

BETWEEN

REPUBLIC.....APPLICANT

AND

KENYA SCHOOL OF LAW.....1ST RESPONDENT

COUNCIL OF LEGAL EDUCATION.....2ND RESPONDENT

AND

KYALO KENNEDY MAWEU.....EX PARTE APPLICANT

JUDGEMENT

Introduction

1. The ex parte Applicant herein, **Kyalo Kennedy Maweu,** vide an application dated 15th January, 2018 seeks the following orders:

> **1. An order of certiorari be hereby issued to remove into this court and quash the decision of the 1st Respondent contained in the letters of 23rd October, 2017 and 15th December, 2017 rejecting the Ex-parte Applicant's application for admission to the 1st Respondent and the subsequent appeal respectively.**

2. That an order of Mandamus do issue directed at the 1st Respondent to compel the 1st Respondent to admit the Ex-parte Applicant to the Kenya School of Law.

3. An order of prohibition be hereby issued prohibiting the 1st Respondent and the 2nd Respondent through itself, agents, servants and employees from interfering with the studies of the Ex-parte Applicant at Kenya School of Law on upon his admission to the 1st Respondent on the ground of his eligibility for admission to Kenya School of Law.

Applicant's Case

2. According to the ex parte applicant, he has always dreamt of being an advocate of the High Court of Kenya which dream is being arbitrarily shattered by the 1st Respondent. The applicant averred that he sat for the Kenya Certificate of Secondary Education and attained a mean grade of B (Plain) and a B-(Minus) in English, which grades are way above the minimum university entry grades. Later in 2011, he applied to pursue a degree in law at the Catholic University of Eastern Africa and was admitted for the bachelors of law degree (LLB).

3. According to the applicant, he undertook his studies diligently and in compliance with all the requirements of the University regulations and graduated with Bachelors of Law Degree (first class honours). Thereafter he applied to join the Kenya School of Law for the Advocate Training Programme (ATP) but vide a heart breaking letter dated 23rd October 2017 the 1st Respondent rejected his application on the basis that he had a grade B- in English and C+ in Kiswahili which is way below B grade required under ***Kenya School of Law Act 2012***. Aggrieved by the said decision, the ex parte applicant on the 22nd of November 2017, appealed against the said decision to the 1st Respondent but vide a letter dated 15th of December, 2017, the 1st Respondent rejected his appeal on the ground that he had obtained B-(minus) in English in the Kenya Certificate of Secondary Education (KCSE) which it found was below the minimum requirement for admission to the Kenya School of Law under the ***Kenya School of Law Act, 2012*** which came into force on 15th January 2013.

4. Based on legal advice, the applicant believed that the matters touching on qualification for admission to Kenya School of Law was determined in the case of **Kevin Mwiti & Others v Kenya School of Law Constitutional Petitions 377, 395 & JR 295 of 2015 (Consolidated),** where this Court declared that the Petitioners who were already in the LLB Class prior to the enactment of the ***Kenya School of Law Act*** were to be treated in the manner contemplated by the guidelines issued by the School prior to the enactment of the Amendment Act and that those who had joined the LLB Course prior to the effective date of Amendment Act were to be subjected to the admission criteria prevailing before that date.

5. According to the applicant, the applicable law in his case (admitted prior to coming into force of the 2013 Act) is clause 5(a) of the 1st Schedule of the ***Council of Legal Education(Kenya school of Law) Admission Rules of 2009*** which provides that a person who has passed relevant examination and is eligible for conferment of degree from a recognised University in Kenya is eligible for admission to Kenya School of Law.

6. It was therefore contended by the applicant that the 1st Respondent in its decision as depicted in the letters rejecting his application and the subsequent appeal it applied the criteria of the ***Kenya School of Law Act 2012*** which came into force in15th January 2013, and yet the applicant was admitted for the Bachelors of Law on 9th of August 2011, which is 2 years and 5 months after his admission.

7. It was therefore the applicant's case that the 1st Respondent in a show of total impunity acted in disregard of the orders of this Court, yet the 1st Respondent has no powers to apply any other criteria other than the one set out in the 1st Schedule of the **Council of Legal Education (Kenya School of Law) Admission Rules of 2009**. In addition, the 1st Respondent lacks jurisdiction to derogate from the said express statutory provision.

8. It was the applicant's case that the 1st Respondent took into account irrelevant factors in rejecting his application by applying the criteria other than the one provided by the law and hence the 1st Respondent's decision was tainted with illegality since it was made in disobedience of a court order and it was contrary to Article 47 of the Constitution which guarantees the right to fair administrative action. In addition, the decision of the 1st Respondent was unreasonable as it sought to enforce inapplicable law and was therefore made in bad faith. Indeed, the only plausible explanation for the disregard of the court order and subsequent clarification is bad faith and disregard of the rule of law by those who are expected to respect it the most.

9. While acknowledging that the 1st Respondent is endowed with discretion in discharging its mandate, the Applicant insisted that such discretion should not be abused by disregarding a Court order and the ***Council of Legal Education (Kenya school of Law) Admission Rules of 2009***. To the applicant, the arbitrary rejection of his admission to Kenya School of Law by the 1st Respondent will greatly impair his right to education which right is well guaranteed by Article 43 (1)(f) of the Constitution of Kenya since for the legal profession, Advocates Training Programme is basic education for qualification to practice law as an advocate of the High Court of Kenya and in essence his degree will amount to nothing if he does not join the Kenya School of Law.

10. The applicant averred that what was even more tormenting to him was the fact that the 1st Respondent has no sound legal justification for rejecting his admission to Kenya School of Law. In fact, what is clear is that its decision cannot be supported both in law and logic since it is in direct disobedience of the Court order.

11. Based on legal advice, the applicant's view was that this Court's aforesaid decision rendered in **Kevin Mwiti & Others v Kenya School of Law Constitutional Petitions 377, 395 & JR 295 of 2015 (Consolidated)** was a judgment in rem, meaning it was just stating a state of affairs and not limited to the enjoyment of parties only.

12. The applicant's position was that since the 1st Respondent applied the requirements of admission in the 1st Schedule of the Council of

Legal Education (Kenya school of Law) Admission Rules of 2009 for the admissions for the year 2016 and 2017, it was unfair and discriminatory to change the rules in his admission. To him, he was in the same circumstances with the applicants previously subjected to the admission requirements under 1st Schedule of the ***Council of Legal Education(Kenya school of Law) Admission Rules of 2009*** having being admitted for Bachelors of Law degree prior to the 2012 Act and they should therefore be accorded same treatment. Further, he had a legitimate expectation that Kenya School of Law would subject him to the criteria prevailing prior to the commencement of the ***Kenya School of Law Act of 2012*** since he was admitted to Bachelor of Laws prior to the commencement of the said Act. In addition, he had a legitimate expectation that 1st Respondent would not deviate from the criteria provided by the law and the court order and that the 1st Respondent would not deviate from the promise they had made to prospective applicants stating that the Act would not apply to students who were admitted for Bachelors of Law Degree prior to the commencement of ***Kenya School of Law Act of 2012***.

1st Respondent's Case

13. In response to the application, the 1st Respondent herein, the Kenya School of Law (hereinafter referred to as "the School"), averred that it is correct that the High Court has ruled that all persons who had enrolled for the LL.B programme prior to the coming into force of the ***Kenya School of Law Act, 2012***, should be evaluated using the law then in place for purposes of admission to the Advocates Training Programme (ATP).

14. According to the School, as the ex parte applicant commenced his LL.B studies in 2011, the rules applicable to him are contained in the ***Council of Legal Education (Kenya School of Law) Regulations, 2009*** (Legal Notice No. 169 of 2009) and in terms of paragraph 5(b) (ii) of Part II of the First Schedule to the said regulations, an applicant qualifies for direct admission to the ATP if the applicant has scored a mean grade of C+ (plus) and a minimum grade B plain in the English language at the Kenya Certificate of Secondary Education. In this case it was averred that the ex parte applicant does not meet the criteria stated under paragraph 5 above nor does he qualify under paragraph 5(c) of the Part II of the aforesaid schedule.

15. To the School, the ex parte applicant falls under paragraph 5 (d) of that schedule. It was disclosed that in compliance with past court orders, the 1st respondent had invited persons eligible under the aforesaid paragraph 5(d) to sit the pre-bar examination stipulated therein between 31st January 2018 and 2nd February 2018 and that the 1st respondent invite the ex parte applicant to take advantage of the window referred to in paragraph 8 above.

2nd Respondent's Case

16. The 2nd Respondent, the Council of Legal Education (hereinafter referred to as "the Council") on its part relied on the following grounds of opposition in opposing the application:

1. **The Honourable court cannot take away the statutory function of the 2nd Respondent**

The 2nd Respondent has the function under section 8(1) of the *Legal Education Act* of *inter alia* regulation of legal education and training in Kenya. The functions are excerpted hereunder as follows:

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.

Therefore, in allowing (iii) of the Notice of Motion Application, the court will be taking away the function of the 2nd Respondent against the well laid out provisions of the law.

This position was affirmed by this court in Anne Wangui Ngugi & 2,222 Other v Edward Odundo, C.E.O Retirement Benefits Authority [2015] eKLR wherein it stated-:

"….This Court cannot therefore oust the jurisdiction of the dispute resolution mechanism under the RBA Act by taking away their powers, functions and duties and purporting to direct, as the petitioners demand, that the petitioners' complaints should be heard by the Employment and Labour Relations Court….."

Determinations

17. I have considered the issues raised both in support of and in opposition to the petition.

18. Section 16 of the ***Kenya School of Law Act*** provides:

> ***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.***

19. Before the amendment the Second Schedule to the Act at section 1 and 2 thereof provided:

> ***(1) 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 of C (plus) in the Kenya Certificate of Secondary Education or its equivalent; or***
>
> ***(2) has sat and passed the Pre-Bar examination set by the School.***

20. It is clear that before the amendment, subsection 2 was an alternative to what was required under subsection 1. With the advent of the Amendment Act, this provision was varied to read:

> ***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.***

21. The import and impact of the amendment was that the pre-bar examination is nolonger an option but an added requirement.

22. In this case, it is clear that the applicant was subject to the legal provisions prevailing before the amendments. That was the position in **Kevin K. Mwiti & Others vs. Kenya School of Law & 2 Others [2015] eKLR,** where this Court held that those students who had been admitted to the LLB Degree Course ought to be treated in accordance with the law that was in existence at that time. Accordingly, the Petitioner herein was entitled to be admitted to the ATP if she could prove that she has sat and passed the Pre-Bar examination set by the School since he did not qualify for direct admission to the Advocates Training Programme. I do not understand the applicant to contest the requirement that he should be subjected to pre-Bar examination.

23. However, in rejecting the applicant's application the Respondents did not allude to the fact that the applicant could be admitted to the Programme upon passing pre-bar examinations. To the contrary, a reading of the letters transmitting the decisions reveals that the Respondents were of the view that the applicant was absolutely barred from being admitted to the Programme. It is clear that in framing the decision in the manner they did, the Respondents clearly transmitted an erroneous decision.

24. In my view the applicant's admission to the School is conditional upon his passing the pre-bar examinations.

25. Section 11 of the ***Fair Administrative Action Act, 2015*** provides as follows:

> ***(1) In proceedings for judicial review undersection 8 (1), the court may grant any order that is just and equitable, including an order***
>
> ***(a)declaring the rights of the parties in respect of any matter to which the administrative action relates;***

(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;

(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;

(d) prohibiting the administrator from acting in a particular manner;

(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;

(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

(g) prohibiting the administrator from acting in a particular manner;

(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;

(i) granting a temporary interdict or other temporary relief; or

(j) for the award of costs or other pecuniary compensation in appropriate cases.

26. As stated in ***Halsbury's Laws of England*** 4th Edn. Vol. 1(1) para 12 page 270:

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. *The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant*."** [Emphasis added].

27. This Court is therefore empowered to fashion appropriate remedies. It must however be noted that in so doing the Court ought not to interfere with the merits of the Respondent's decision.

Order

28. In the premises I issue the following orders:

(1) An order of certiorari removing into this court and quashing the decision of the 1st Respondent contained in the letters of 23rd October, 2017 and 15th December, 2017 rejecting the Ex-parte Applicant's application for admission to the 1st Respondent and the subsequent appeal respectively.

(2) That an order of Mandamus directed at the 1st Respondent to facilitate the applicant to sit the pre-bar examinations for the purposes of admitting the applicant to the Advocates Training Programme in accordance with the law and the decision of this Court for the next admission.

(3) In light of the relationship between the applicant and the 1st Respondent, there will be no order as to costs.

29. Orders accordingly.

G V ODUNGA

JUDGE

Delivered at Nairobi this 9th day of April, 2018

P NYAMWEYA

JUDGE

In the presence of: