Otinga v Cabinet Secretary, Ministry of Education & 3 others (Civil Appeal E625 of 2023) [2025] KECA 460 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 460 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E625 OF 2023

PO KIAGE, LA ACHODE & WK KORIR, JJ

MARCH 7, 2025

BETWEEN

STEPHEN NIKITA OTINGA ..... APPELLANT

AND

THE CABINET SECRETARY, MINISTRY OF EDUCATION .. 1ST RESPONDENT

THE HON ATTORNEY GENERAL ..... 2ND RESPONDENT

THE COUNCIL OF LEGAL EDUCATION ..... 3RD RESPONDENT

THE KENYA SCHOOL OF LAW ..... 4TH RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (L.N. Mugambi, J), dated 30th June, 2023 in Petition No. E010 of 2023)

JUDGMENT

1. This appeal challenges the judgment of the High Court (L. N. Mugambi, J.), dated 30th June 2023, by which the learned Judge found the appellant's petition not merited and accordingly dismissed it.

2. In the petition dated 11th January 2023, and supported by an affidavit sworn by the appellant on even date, it was averred that the legal training sector has been bedevilled by serious challenges especially in the Advocates Training Programme (ATP) at the Kenya School of Law (KSL). A critical challenge that risks being entrenched as a norm is the mass failure of students at the KSL in the ATP. Upon failing the ATP, the affected students may opt to retake the examinations they have failed or have the same remarked. It was deposed that both the retakes and remarks have significant economic implications to the students as they are an additional expense to the already high cost of the ATP while to the Council of Legal Education (CLE), the body mandated to administer the examination, it is an additional source of revenue. Further, the poor performance of students in the ATP raise questions on the professional

competence of Kenya's legal profession and on the ability of graduates of the Kenyan legal training system to provide quality legal services.

3. In an acknowledgment of the dire situation in the legal training sector, the former Attorney General (Professor Githu Muigai, SC) vide Gazette Notice No. 8116 of 2016 of 7th October 2016, established the Taskforce on Legal Sector Reforms to evaluate, review and make recommendations and reform proposals on, among other matters; the suitability and quality of legal education and professional legal training, curriculum, standards, entry qualification criteria, and delivery systems; and, the legal and institutional frameworks for regulating and licensing legal education providers. The Taskforce found, notably that, as currently administered, the ATP is experiencing a decline in standards occasioned by a large number of students in the programme. The apparent strain in resources and facilities at the KSL is also a major contributing factor to this status and a further dilution of the ATP. It was further stated that there are proposals towards diversification of the training institutions in the ATP as a long-term measure, to alleviate the strain on the KSL and also to provide alternatives for prospective candidates. In its recommendation regarding the ATP, the Report of the Taskforce stated;

> "Given the need to liberalize, decongest and decentralise the provision of the ATP, CLE should execute its mandate to develop the regulatory framework and standards and licence other Legal Education Providers to provide training in the ATP (in addition to KSL) with urgency in light of the current resource constraints faced by KSL owing to the large student number."

4. The appellant contended that despite the dire situation in the legal training sector and, in the face of the clear recommendations in the Taskforce report, the CLE had failed, neglected and refused to develop the regulatory framework and standards to license other legal education providers pursuant to its statutory mandate in section 8(1) (b) of the *Legal Education Act*, 2012.

5. The petition was founded on the following constitutional provisions; Articles 2(4), 10, 19(1) and (3), 20(1) to 20(4), 21(1),22,23(1),27(1),46, 165(3)(d) and 258. It was premised on grounds that; the CLE had breached its obligations under sections 8(1)(b) and 8(2) of the *Legal Education Act*, 2012, by which it was required to license other legal education providers to offer legal education programmes including the ATP and to set and enforce standards relating to the accreditation of legal education providers that intend to offer the ATP. It was posited that the failure by any statutory body such as the CLE to perform its statutory mandate constitutes a violation of the national values and principles of good governance including, transparency, accountability and rule of law as prescribed in Article 10(2)(a) and 10(2)(c) of *the Constitution*. Section 8(3)(a) enjoins the CLE to make regulations prescribing requirements for admission of persons seeking to enrol in legal education programmes in Kenya. The appellant pleaded that whereas the CLE has made regulations on the licensing of legal education providers at various levels, it has failed, neglected and/or refused to make similar regulations for purposes of legal education providers intending to provide the ATP. Further, while the CLE has made and continues to make regulations prescribing the requirements for admission of persons seeking to enrol in legal education programmes, the KSL with the acquiescence of the CLE, continues to illegally apply section 16 of the KSL Act and the second schedule thereto, as the basis for admission to the ATP. It was contended that this position was unjustified given that section 8(4) of the *Legal Education Act*, 2012 states that,

> '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.' The appellant argued that all legal education providers in Kenya, including the KSL, should be subject to section 8(3)(a) of the *Legal Education Act*, 2012.

6. The petition was further premised on the ground that the misapplication and non-application of the law by the CLE and the KSL undermines the principle of certainty, a critical plank of the rule of law. It was asserted that pursuant to section 8(3)(c) of the *Legal Education Act*, 2012, the CLE has a mandate to establish criteria for recognising prior learning and experience in law to facilitate progression in legal education from lower levels of learning to higher levels. On the other hand, Section 16 and the second schedule to the KSL Act, 2012 prescribes requirements for admission into the ATP that oust the place of prior learning and experience in law as a basis for progression in legal education. It was posited that section 16 and the second schedule to the KSL Act are inconsistent with section 8(3)(c) of the *Legal Education Act* and therefore null and void given that the latter takes precedence over any other written law when it comes to the functions of the CLE of regulating, licensing, training and supervision of legal education in Kenya.

7. The appellant contended that in failing to take appropriate remedial action in line with its statutory mandate and as recommended by the Taskforce, the CLE has violated consumer rights under Article 46 of *the Constitution* in that, the Law students' right to receive services and training of a reasonable quality has and continues to be violated because of the endemic challenges that the KSL had faced and continues to face because of the failure to license other legal education providers to offer the ATP. Further, consumers of legal services are entitled to services of a reasonable quality under Article 46(1)(a) of *the Constitution*. However, there is evidence that the ATP, as currently administered, and due to failure to licence other legal education providers, is experiencing a decline in standards. This has and shall deprive consumers of legal services of reasonable quality in violation of *the Constitution*.

8. In conclusion, the appellant sought the following orders;

    a. A declaration that pursuant to section 8(3)(a) of the *Legal Education Act*, No. 27 of 2012, it is the exclusive mandate of the Council of Legal Education to make Regulations in respect of requirements for the admission of persons seeking to enrol in all legal education programmes including the Advocates Training Programme (Post Graduate Diploma in Law).

    b. A declaration that section 16 of the *Kenya School of Law Act*, No. 26 of 2012, and the second schedule thereto are inconsistent with the provisions of section 8(3)(a) of the *Legal Education Act*, No. 27 of 2012 in so far as they purport to prescribe requirements for admission of persons seeking to enrol in legal education programmes such as the Advocates Training Programme (Post Graduate Diploma in Law).

    c. A declaration that section 16 of the *Kenya School of Law Act*, No. 26 of 2012 and the second schedule thereto are null and void to the extent that they purport to contradict section 8(3) of the *Legal Education Act*, No. 27 of 2012 which is a specific legislation to licensing, regulation and supervision of legal education providers such as the Kenya School of Law.

    d. A declaration that section 16 of the *Kenya School of Law Act*, No. 26 of 2012, and the second schedule thereto violate Article 27 of *the Constitution* and are discriminatory to other legal education providers to the extent that they single out one legal education provider in the Republic of Kenya namely the Kenya School of Law and purport to prescribe requirements for persons seeking to enrol in its legal education programmes and therefore unconstitutional, null and void.

    e. A declaration that section 16 of the Kenya of Law *Act, No. 26 of 2012*, and the second schedule thereto are inconsistent, null and void for violating the mandate of the Council of Legal Education under section 8(3)(c) of the *Legal Education Act*, 2012 to formulate a system for

recognising prior learning and experience in law to facilitate progression in legal education from lower levels of learning to higher levels.

f. A declaration that pursuant to section 8(1)(b), 8(3)(a), 8(4), 18 and 19 of the *Legal Education Act*, No. 27 of 2012, the Council of Legal Education has a mandate/duty to develop the regulatory framework, standards and license other Legal Education Providers that meet the established criteria to provide training in the Advocates Training Programme (in addition to the Kenya School of Law).

g. An order for judicial review by way of mandamus do issue compelling the Council of Legal Education to develop and publish on its website and at least one local daily newspaper with national circulation the regulatory framework and standards for application for accreditation by Legal Education Providers (other than the Kenya School of Law) for licensing to offer the Advocates Training Programme (Post Graduate Diploma in Law within 45 days of the judgment herein.

h. Any further relief that the court deems fit to make in the interest of justice.

i. The costs of this petition be awarded to the petitioner.

9. In reply to the petition, Beatrice Inyangala, the Principal Secretary of the State Department for University Education and Research swore an affidavit on 2nd February 2023 on behalf of the 1st respondent. She acknowledged that a Taskforce on Legal Sector Reforms was appointed on 26th September 2016 by the then Attorney General and in its recommendations regarding the ATP, the report advised on the need to liberalise, decongest and decentralise the provision of ATP. The 1st respondent averred that pursuant to Executive *Order No. 1 of 2023* which outlines the functions of government departments and legal policy management, the CLE and the KSL are placed under the State Law Office as headed by the Hon. Attorney General. Consequently, it was not in the purview of the 1st respondent to develop a regulatory framework for the legal sector that facilitates professional legal practice, as doing so would be in breach of Executive *Order No. 1 of 2023*. Accordingly, the 1st respondent sought to be expunged from the proceedings.

10. The 3rd respondent opposed the petition through a replying affidavit sworn on an unknown date in March 2023 by Mary M. Mutugi (Ms. Mutugi). Citing sections 18(1) and (2) of the *Legal Education Act*, 2012, Ms. Mutugi contended that it is incumbent upon the Legal Education Providers to submit an application for any type of license specified under the Act, in the prescribed form, to the 3rd respondent. Moreover, nothing prevents any institution from applying to be licensed to offer the ATP and so far no institution had submitted an application for licensing to be an ATP Legal Education Provider. It was thus argued that the 3rd respondent cannot be faulted. Ms. Mutugi explained that there exists a regulatory framework for licensing Legal Education Providers to offer the ATP. The *Legal Education Act*, 2012 and its attendant Regulations being the Legal Education (Accreditation & Quality Standards) Regulations, 2016, provide for the process of licensing and the standards to be met by Legal Education Providers seeking to offer legal education programmes, including the ATP.

11. Paragraph 6 of the Third Schedule to the Legal Education (Accreditation & Quality Standards) Regulations, 2016, prescribes the minimum requirements for admission to the ATP. It was conceded that while the CLE is mandated to develop standards in legal education and training, including prescribing the minimum admission criteria for various legal education programmes, there is currently incongruence in the admission criteria to the ATP as stipulated by Paragraph 6 of the Third Schedule as compared with section 16 and the second schedule of the KSL Act. The CLE Regulations could, however, not override the provisions of an Act of Parliament, that is, the KSL Act. Ms. Mutugi

continued that, the respondent through the Office of the Attorney General has developed proposals with a view to solely anchoring the admission criteria for the ATP in the *Legal Education Act*. The process was underway. The 3rd respondent was also in the process of developing the ATP Regulations although institutions could still be licensed to offer the ATP despite the absence of specific regulations. Legal Education Providers only needed to demonstrate different learning outcomes and methodologies of delivery of the ATP, and the resources that specifically catered for the ATP.

12. The 4th respondent opposed the petition through a preliminary objection seeking to strike out the petition on grounds that the High Court lacked jurisdiction to hear and determine the matter on account of section 31(1) of the *Legal Education Act* as read with section 8(1) and (2) of the Act. Further, the appellant had not exhausted alternative statutory avenues for ventilating his grievance. In a replying affidavit sworn on 9th March 2023 by Fredrick Muhia (Mr. Muhia), the Principal Officer, Academic Services, it was averred that matters of admission to the ATP are exclusively provided for under section 16 of the KSL Act and this has been affirmed by the Court of Appeal. Mr. Muhia denied the claim that the 4th respondent's facilities are strained by student numbers. He deposed that since the year 2018 when the Task Force Report was released, the 4th respondent has continued to improve and grow its capacity by continuous recruitment of both full time and adjunct lecturers in addition to improving physical facilities, purchase of text books, procurement of online library resources and introduction of online classes. It was averred that the appellant relied on an outdated report and failed to address himself to the current situation of the 4th respondent and thus made unfounded, inaccurate and outright fictitious claims about it. Mr. Muhia deposed that the 4th respondent has created a revolving fund to provide financial aid for needy students in the ATP, which debunks claims that the institution is unable to cater for its students. Moreover, the appellant had not offered any evidence to show that the current pass rate of the Bar examination is below acceptable standards.

13. In response to the averments by the 3rd and 4th respondents, the appellant swore a further affidavit on 5th April 2023. He reiterated that failure to set standards for accreditation is prejudicial to prospective institutions that intend to offer the ATP as they do not know the criteria and standards that would be applicable to them. It was asserted that the contention by the KSL that this matter ought to have been filed before the Legal Education Appeals Tribunal under sections 31 and 32 of the *Legal Education Act* is legally and factually incorrect, as the Tribunal does not have jurisdiction to direct the CLE to set standards and promulgate Regulations for accreditation and licensing. Nor is it vested with powers to determine the constitutionality of section 16 and the second schedule to the KSL Act, 2012. The assertion by the 4th respondent that the Report of the Taskforce on Legal Sector Reforms is not conclusive was also rejected for the reason that the KSL was represented in the Taskforce by its Director and is therefore, part and parcel of both the findings and recommendations therein, which have not been challenged or implemented to date.

14. The matter proceeded by way of written submissions whereupon the learned Judge (Mugambi, J.) found that the preliminary objection citing lack of jurisdiction, on the basis of the exhaustion principle, lacked merit. The learned Judge also found the petition to be unmerited and dismissed it in its entirety.

15. The appellant was dissatisfied with that judgment and preferred an appeal to this Court. The memorandum of appeal comprises twelve (12) prolix grounds of appeal, contrary to Rule 88(1) of the Rules of this Court which requires grounds of appeal to be set out concisely without argument or narrative. Despite that infirmity, we discern that, summary, the appellant complains that the learned Judge erred in law and in fact by;

a. Holding that there is no conflict between section 8(3)(c) of the *Legal Education Act* and section 16 as read with the second schedule to the KSL Act, that would violate the constitutional principle of rule of law and predictability of the law under Article 10 of *the Constitution*.

b. Failing to find that under section 8(1)(b), 8(2)(a) and 8(3)(a) of the *Legal Education Act* and Part III of the 2nd Schedule thereof, the CLE has a legal duty to licence other legal education providers to offer the ATP, in addition to the KSL.

c. Violating the doctrine of implied repeal by deciding that the provisions of an earlier statute namely the KSL Act prevail over the provisions of a latter statute namely the *Legal Education Act*.

d. Holding that the KSL is the only institution that is mandated to train advocates.

e. Failing to find that by refusing to license other legal education providers to offer the ATP, the CLE has entrenched a monopoly status of the KSL contrary to Article 27 of *the Constitution*.

f. Holding that the appellant did not tender evidence to show that failure by the CLE to license other legal education providers to offer the ATP (in addition to the KSL) is a violation of consumer rights under Article 46 of *the Constitution*.

g. Failing to take into account Recommendation number 11 of the Taskforce Report on Legal Sector Reforms, 2018 which required the CLE to develop the regulatory framework and standards, and license other legal education providers to provide training in the ATP.

h. Disregarding the evidence and submissions by the CLE that it has the legal mandate to license and regulate other legal education providers.

i. Failing to consider the relevant law, decided cases and issues as pleaded and canvassed by the appellant.

16. In the end, the appellant implored us to allow the appeal and set aside the impugned judgment. He also urged that we allow the petition as prayed and award him costs.

17. During the hearing of the appeal, Mr. Rapando and Mr. Keaton appeared for the appellant while Mr. Weche, State Counsel, appeared for the 1st to 3rd respondents. There was no appearance for the 4th respondent despite service having been effected, and neither had they filed written submissions. Counsel present proceeded to highlight written submissions which they had filed prior.

18. For the appellant, it was submitted that three (3) issues fall for determination in this appeal, the first one being whether the learned judge erred in failing to find that the CLE has a legal duty, to license other legal education providers, in addition to the Kenya School of Law to offer training in the ATP. Counsel contended that despite pleading on that issue and making extensive submissions on it, the learned Judge failed to make a determination on it. He urged that on this footing alone this appeal should succeed. Further, counsel entreated us to look at the provisions of section 8(1)(b) of the *Legal Education Act* which enjoins the CLE to license legal education providers to offer different programmes. Our attention was also drawn to the provisions of section 18(1) and (2) by which an institution that intends to offer the ATP is required to apply to the CLE for licensing, and Part III of the second schedule to the *Legal Education Act* that prescribes the 10 core units that should be offered in the ATP. Asserting that the mandate to license institutions to offer the ATP lay with the CLE, Mr. Rapando referred us to paragraphs 6, 7 and 8 of Ms. Mutugi's affidavit where she conceded to the existence of that mandate except that she pointed out that no institution had ever applied to be licensed. Counsel further drew our attention to recommendation 11 of the Taskforce on Legal Sector

Reforms Report which proposed that the 'Given the need to liberalise, decongest and decentralize the provision of the ATP, CLE should execute its mandate to develop the regulatory framework, standards and license other Legal Education Providers to provide training in the ATP (in addition to KSL) with urgency in light of the current resource constraints faces by KSL owing to the large student numbers.'

19. It was submitted that the second issue was whether the CLE reneged on its mandate. In this respect counsel referred us to paragraph 14 of the affidavit by Ms. Mutugi for CLE where it was admitted that the CLE was still in the process of developing the ATP Regulations.

20. Mr. Rapando submitted that the third issue for determination was whether section 16 of the KSL Act as read with the second schedule thereof violates the constitutional principle of rule of law, legal certainty and predictability under Article 10(2) of *the Constitution*. While section 8(3)(c) of the *Legal Education Act* mandates the CLE to formulate a system of recognising prior learning and experience in law to facilitate progression in legal education from lower levels of learning to higher levels of learning, section 16 and the second schedule of the KSL Act do not. It was urged that this Court should find that in failing to find that section 16 of the KSL Act contradicts section 8(3)(c) of the *Legal Education Act* which institutionalises academic progression, the trial court fell into error. In support of this position, counsel cited authorities which assert that provisions of the law which create uncertainty and inconsistencies, violate the test of the rule of law. These included, Kenya Medical Laboratory Technicians And Technologists Board & 4 Others Vs. Attorney General; Council Of Legal Education (Petitioner); Kenya Law Reform Commission & 4 Others (Interested Parties) [2020] KEHC 9875 (KLR); and Aids Law Project Vs. Attorney General & Another; Vihda Association (Interested Party); Center For Reproductive Rights (Amicus Curiae) [2015] KEHC 6972 (KLR)

21. Mr. Rapando submitted that provisions of the KSL Act that do not recognise progression should give way to those of the *Legal Education Act* on the basis of the doctrine of implied repeal. To buttress this submission, counsel cited the Ugandan decision of David Sajjaka Nalima Vs. Rebbecca Musoke Civil Appeal No. 12 of 1985 as cited with approval in EMMH Vs. RH [2016] eKLR and the High Court decision of Martin Wanderi & 19 Others Vs. Engineers Registration Board Of Kenya And 5 Others [2014] KEHC 1519 (KLR). In those authorities, the courts determined that according to principles of construction, if provisions of a latter Act are so inconsistent with or repugnant to those of an earlier Act, such that the two cannot stand together, then the earlier Act stands impliedly repealed by the latter Act. Counsel argued that should the doctrine of implied repeal be inapplicable, then reference should be made to the purpose of the two legislations as set out in their preamble. The *Legal Education Act* in particular makes provision for the regulation and licensing of legal education providers while the KSL Act is limited to establishing the KSL. Mr. Rapando cited the High Court decision of Law Society Of Kenya Vs. Kenya Revenue Authority & Another [2017] eKLR and this Court's decision in Kenya Revenue Authority Vs. Waweru & 3 Others; Institute Of Certified Public Accountants & 2 Others (Interested parties) [2022] KECA 1306 (KLR) for the argument that where words in a statute are plain, precise and unambiguous, the intention of the legislature is to be gathered from the language of the statute itself and no external aids are admissible to construe such words. It was further submitted that the KSL conceded the validity of the concept of academic progression in Kenya School Of Law Vs. Otene Richard Akomo & 41 Others [2022] eKLR.

21. While noting the concession by the CLE that it had not issued relevant regulations that would facilitate provision of ATP by institutions, it was urged that this Court should find that the enactment of regulations is a critical component in operationalising a given legal framework. For this submission, counsel cited the High Court decision of Nubian Rights Forum & 2 Others Vs. Attorney General & 6 Others; Child Welfare Society & 9 Others (Interested Parties) [2020] KEHC 8772 (KLR). This Court's decision in Kenya National Examinations Council Vs. Republic & 2 Others [2019] KECA

493 (KLR) was cited for the assertion that an order of mandamus will issue to compel the performance of a duty which is imposed on a person by a statute where such a person has failed to perform the duty to the detriment of a party who had a legal right to expect the duty to be performed. Counsel further cited the Supreme Court decision in Communications Commission Of Kenya & 5 Others Vs. Royal Media Services Limited & 5 Others [2014] KESC 53 (KLR) where the Court upheld the powers of a court to grant a judicial review order in a constitutional petition. He urged that premised on this decision and Articles 23(3)(f) and 165(3)(d) of *the Constitution*, this Court should make a finding that the High Court erred in failing to issue a judicial review order of mandamus compelling the CLE to perform its obligations under section 8(2)(a) of the *Legal Education Act*. It was submitted that it was discriminatory and a violation of Article 27(1) of *the Constitution* for section 16 of the KSL Act and the second schedule thereto to single out one legal education provider namely the KSL and purport to prescribe requirements for admission to its programmes when it is evident that requirements for admission into legal education programmes offered by other legal education providers are as prescribed by the CLE under section 8(3)(a) of the *Legal Education Act*. In the end, Mr. Rapando urged that we set aside the impugned judgment and allow the appeal by granting the reliefs sought in the petition dated 11th January 2023

22. We sought counsel's opinion on the learned Judge's reasoning on the doctrine of implied repeal where he was of the view that the doctrine should be embarked on with a measure of circumspection. Further, where we have a general statute vis-a-vis a particular statute, then the particular statute should take effect over the general statute. Accordingly, the CLE statute being a general statute and the KSL Act a particular one, the KSL Act should take effect over the *Legal Education Act*. Mr. Rapando cited this Court's decision in National Social Security Fund Board Of Trustees Vs. Kenya Tea Growers Association & 14 Others [2023] KECA 80 (KLR) where it held that the title and preamble of a statute were fundamental to establishing its purpose. According to the preamble of the *Legal Education Act*, the purpose of the Act is to make provision for regulation and licensing of legal education providers unlike the KSL Act whose purpose is to establish the KSL and provide for its powers and functions. Counsel thus urged that what is specific to the training of Advocates is the *Legal Education Act*.

23. We further probed whether the appellant had shown that there was an applicant who had applied to offer the ATP and they were denied license. Counsel drew our attention to the affidavit sworn by Ms. Mutugi on behalf of the CLE where it was indicated that the ATP regulations have not yet been promulgated. Mr. Rapando contended that when there are no such regulations to be enforced, then there is an impediment to applying for licensing.

24. For the 1st to 3rd respondents, Mr. Weche outlined two (2) issues for determination, that is, whether there is a refusal by the CLE to issue licenses that are necessary for offering the ATP and whether section 16 of the KSL Act is inconsistent with section 8(3) of the *Legal Education Act*. On the first issue, counsel maintained that since there were no applications that were made to the CLE by any legal education provider, pursuant to section 18 of the *Legal Education Act*, for purposes of offering the ATP, the CLE could not be faulted for not issuing licenses in that regard. He urged that where the law has set out a certain procedure to be followed, then that procedure ought to be adhered to. Mr. Weche conceded that the learned Judge failed to address this issue and thus his judgment should be disturbed to that extent. He, however, urged us to find in favour of the CLE since no legal education provider had applied for a license to offer the ATP. While acknowledging the recommendations made by the Taskforce on Legal Sector Reforms, particularly recommendation number 11, which required the CLE, to develop the regulatory framework, standards and license other legal education providers to provide training in the ATP (in addition to KSL), counsel insisted that in order to implement that recommendation, any legal education provider that was interested in offering the ATP ought to have lodged the relevant application with the CLE in order to be conferred with the requisite license.

25. On the second issue, Mr. Weche submitted that section 8(3)(c) of the *Legal Education Act* was not inconsistent with section 16 of the KSL Act as read with the second schedule thereof since the application of the provisions has to be construed in reference to different parameters. To counsel, section 16 and the second schedule of the KSL Act only regulate the admission criteria for candidates who seek to join the KSL in order to undertake the ATP while section 8(3)(c) of the *Legal Education Act* reaffirms, protects and preserves the right to education and attainment of progressive education as guaranteed under Article 43(1)(f) of *the Constitution*. Mr. Weche cited this Court's decision in Attorney General Vs. Law Society Of Kenya & Another [2017]eKLR where the Court opined that in construing a statute or a provision of a statute, one should interrogate the intention expressed in the statute itself by the drafters. The intention must be determined by reference to the precise words used in the statute, their factual context and their aim and purpose. Counsel also cited the Canadian Supreme Court decision of R Vs. Big M Drug Mart Ltd, [1985] 1 S.C.R. 295, where the court was of the view that both purpose and effect are relevant in determining constitutionality of legislation.

26. It was submitted that if another legal education provider were to be accredited by the CLE to offer the ATP, then nothing ought to bar the accredited legal education provider from setting its own admission criteria, provided the criteria is consistent with the basic minimum requirements that are set by the CLE. Counsel urged that the two challenged provisions are constitutional and do not contradict each other. Mr. Weche agreed that it had been conceded through the replying affidavits sworn on behalf of the 1st and 3rd respondents that the duty of accreditation belongs to the CLE. He contended, however, that no legal education provider had ever applied to be licensed to offer the ATP and the application was denied. Concerning the argument that the said regulations for the ATP that had not been promulgated, counsel submitted that what was remaining was for them to advise the relevant bodies to promulgate them.

27. We inquired from Mr. Weche whether in view of the recommendations of the Taskforce Report concerning the ATP, the CLE had put out a notice inviting institutions that were interested to apply to offer the ATP. In answer, counsel admitted that the CLE had not issued such notice. Asked whether Regulations for the ATP were critical for the mounting of the programme by legal education providers, counsel answered in the affirmative.

28. In a brief reply, Mr. Rapando while responding to the delayed promulgation of the Regulations for the ATP, cited Article 259(8) of *the Constitution* which provides that when time for performing an act is not specified, the act must be done without unreasonable delay. He urged us to make a finding that the delay in developing and promulgating the ATP regulations was not only unreasonable but tantamount to refusal to perform a statutory function.

29. We have carefully read and considered the rival submissions in light of the entire record, in obedience to our duty as a first appellate court to proceed as a re-hearing of the case with a view to making our own inferences of fact and arriving at independent conclusions after a fresh and exhaustive re-appraisal and analysis of the entire evidence. See Selle Vs. Associated Motor Boat Company Ltd [1968] EA 123.

30. We think, the issues that are germane to determination of this matter are;

    1. Whether pursuant to section 8(3)(a) of the *Legal Education Act*, the CLE has failed, neglected and/or refused to make regulations for licensing legal education providers who intend to offer the ATP.

    2. Whether there is a conflict between section 8(3)(c) of the *Legal Education Act* and section 16 as read with the second schedule to the KSL Act, that violates the constitutional principle of rule of law, legal certainty and predictability of the law under Article 10 of *the Constitution*.

31. Counsel for the appellant contended that despite pleading on the first issue and making extensive submissions on it, the learned Judge failed to make a determination on it. He urged that on this issue alone this appeal should succeed. On the part of 1st to 3rd respondents, it was conceded that the learned Judge failed to address the issue on whether the CLE failed, neglected and/or refused to make regulations for licensing legal education providers who intend to offer the ATP. Counsel agreed, as they had to, that the impugned judgment should be disturbed to that extent. And it shall be.

Section 8(3)(a) of the *Legal Education Act* provides that;

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;"

Section 8(2) provides that;

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."

32. Indeed, Ms. Mutugi admitted at paragraph 11 of the replying affidavit sworn on behalf of the 3rd respondent that the mandate to develop standards in legal education and training lies with the CLE. At paragraph *14* she indicated that the CLE was in the process of developing the ATP Regulations. Our attention was drawn to recommendation 11 of the Taskforce on Legal Sector Reforms Report which proposed that the 'Given the need to liberalise, decongest and decentralize the provision of the ATP, CLE should execute its mandate to develop the regulatory framework, standards and license other Legal Education Providers to provide training in the ATP (in addition to KSL) with urgency in light of the current resource constraints faces by KSL owing to the large student numbers.'

33. Although the CLE argues that no application has ever been made by any institution for licensing to offer the ATP, and thus it cannot be faulted for not implementing the recommendation by the Taskforce on Legal Sector Reforms, it is obvious, and Mr. Weche agreed with us when we probed him during the hearing, that Regulations are critical for the mounting of any programmes by legal education providers. On reliance of the Court of Appeal decision in Kenya National Examinations Council (supra) we were urged to find that the learned Judge erred in failing to issue a judicial review order of mandamus compelling the CLE to perform its obligations under section 8(3)(a). In that decision this Court observed;

37. In the same case, the Court expounded on the scope and efficacy of an order of mandamus. It enunciated that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

34. In Communications Commission Of Kenya & 5 Others, (supra) the Supreme Court stated;

358. The words in Article 10(1)(b) "applies or interprets any law" in our view includes the application and interpretation of rules of common law and indeed, any statute. There is always the danger that unthinking deference to cannons of interpreting rules of common law, statutes, and foreign cases, can subvert the theory of interpreting *the Constitution*. An example of this follows.

358. The famous United States Supreme Court case of Marbury v. Madison, 5 U.S. 137 (1803) established the principle of the possibility of judicial review of legislation, and at the same time the key place of the courts in the upholding of the U.S. Constitution. This principle is enshrined in our Constitution (Articles 23(3)(d)and 165(3)(d)). A close examination of these provisions shows that our Constitution requires us to go even further than the U.S. Supreme Court did in Marbury v. Madison(Marbury). In Marbury, the U.S. Supreme Court declared its power to review the constitutionality of laws passed by Congress. By contrast, the power of judicial review in Kenya is found in *the Constitution*. Article 23(3) grants the High Court powers to grant appropriate relief 'including' meaning that this is not an exhaustive list:A declaration of rights;An injunction;A conservatory order;A declaration of invalidity of any law that denies violates, infringes, or threatens aright or fundamental freedom in the Bill of Rights;An order for compensation;An order for judicial review.

358. Article 165(3)(d) makes it clear that that power extends well beyond the Bill of Rights when it provides that the High Court has jurisdiction to hear any matter relating to any question with respect to interpretation of *the Constitution* "including the determination of (i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention, of this Constitution; (iii) any matter relating . . . to the constitutional relationship between the levels of government." These provisions make clear that Kenyan courts have a far-reaching constitutional mandate to ensure the rule of law in the governance of the country."

35. On whether there is a conflict between section 8(3)(c) of the *Legal Education Act* and section 16 as read with the second schedule to the KSL Act, that violates the constitutional principle of rule of law, legal certainty and predictability of the law under Article 10 of *the Constitution*, it was submitted that while section 8(3)(c) of the *Legal Education Act* mandates the CLE to formulate a system of recognising prior learning and experience in law to facilitate progression in legal education from lower levels of learning to higher levels of learning, section 16 and the second schedule of the KSL Act do not. It was urged that this Court should find that in failing to find that section 16 of the KSL Act that contradicts section 8(3)(c) of the *Legal Education Act* which institutionalises academic progression, the trial court fell into error.

36. The respondents however contended that there was no inconsistency between the two provisions since the two have to be construed in reference to different parameters. To counsel, section 16 and the second schedule of the KSL Act only regulate the admission criteria for candidates who seek to join the KSL in order to undertake the ATP while section 8(3)(c) of the *Legal Education Act* reaffirms, protects and preserves the right to education and attainment of progressive education as guaranteed under Article 43(1)(f) of *the Constitution*.

> Section 8(3)(c) of the *Legal Education Act* provides that;
>
> In carrying out its functions under subsection (2), the Council shall—

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;"

Section 16 of the KSL Act 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."

37. The second schedule in relevant part provides;

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 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.

38. In Kenya Medical Laboratory Technicians And Technologists Board & 4 Others (supra), the High Court was emphatic that provisions of the law which create uncertainty and inconsistencies violate the test of the rule of law. The court rendered itself as follows;

40. I find from the aforesaid that Section 5A contradicts the other provisions of the Act and it does not meet the test of the Rule of Law prescribed under Article 10 of *the Constitution* which militates against contradiction and inconsistency. I further find that Section 5A though the object of the amendment was introduced to create certainty, it has created a vague and confusing situation as it has not clearly contradicted any provisions. In the case of Law Society of Kenya v. Kenya Revenue Authority & Another (2017)eKLR the court upheld its jurisdiction to declare as unconstitutional a legislation that is vague and contradictory and infringing or threatening to infringe Constitutional rights."

39. Further, in Aids Law Project (supra), the court cited with approval the sentiments of Sir Francis Bacon in A Treatise On Universal Justice quoted in Coquiellette pp 244 and 248, from Aphorism 8 and Aphorism 39 as follows;

For if the trumpet give an uncertain sound, who shall prepare himself for the battle? So if the law give an uncertain sound, who shall prepare to obey it? It ought therefore to warn before it strikes...Let there be no authority to shed blood; nor let sentence be pronounced in any court upon cases, except according to a known law and certain law...Nor should a man be deprived of his life, who did not first know that he was risking it."

40. The appellant argued that reference should be made to the purpose of the two legislations as set out in their preamble. The *Legal Education Act* in particular makes provision for the regulation and licensing of legal education providers while the KSL Act is limited to establishing the KSL. In National Social Security Fund Board Of Trustees, (supra), the court held that the title and preamble of a statute were fundamental to establishing its purpose. It observed as follows;

> 10. It was to the preamble that the court was to look for the reason or spirit of every statute; rehearsing that, as it ordinarily did, the evils sought to be remedied, or the doubts purported to be removed by the statute, and so evidencing, in the best and most satisfactory manner, the object or intention of the Legislature in making and passing the statute itself. However, two propositions were quite clear a preamble could afford useful light as to what a statute intended to reach and if an enactment was itself clear and unambiguous, no preamble could qualify or cut down the enactment."

41. The preamble of the *Legal Education Act*, 2012 provides as follows;

> An Act of Parliament to provide for the establishment of the Council of Legal Education; the establishment of the Legal Education Appeals Tribunal; the regulation and licensing of legal education providers and for connected purposes."

42. On the other hand the preamble for the *Kenya School of Law Act*, 2012 provides;

> "An Act of Parliament to provide for the establishment, powers and functions of the Kenya School of Law and for connected purposes."

43. It is evident that the *Legal Education Act* is the framework of legal education and training in Kenya, including training in ATP.

44. Consequently, the provisions therein are the ones applicable to all legal training in Kenya including the ATP.

45. Having arrived at those conclusions, it is obvious that the appeal is for allowing. We accordingly set aside the judgment and decree of the High Court and substitute therefor an order that the petition be and is hereby granted as prayed. On costs, our order is that each party shall bear own costs of this appeal.

So ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH, 2025.

P. O. KIAGE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar