Kithuka v Kenya School of Law & another (Civil Appeal E344 of 2024)
[2025] KEHC 637 (KLR) (Civ) (30 January 2025) (Judgment)

Neutral citation: [2025] KEHC 637 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E344 OF 2024

LP KASSAN, J

JANUARY 30, 2025

BETWEEN

MUMBI CAROLINE KITHUKA ..... APPELLANT

AND

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

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

(Being an appeal against the judgment and decree delivered on 7th February, 2023 by the Legal Education Appeals Tribunal in LEAT Appeal No. E031 of 2023)

JUDGMENT

1. This appeal is in respect of the judgment delivered on 7th February, 2023 in LEAT Appeal No. E031 of 2023 (the Tribunal Appeal).

2. At the onset, Mumbi Caroline Kithuka (hereafter the Appellant) being dissatisfied with the decision rendered by Kenya School of Law (hereafter the 1st Respondent) and communicated by its Director/ Executive Officer-Dr. Henry K. Mutai on 7th December, 2023, lodged the Tribunal Appeal against the 1st Respondent and before the Legal Education Appeals Tribunal (the Tribunal) by way of a memorandum of appeal dated 14th December, 2023. Therein, the Council of Legal Education (hereafter the 2nd Respondent) was enjoined in the Tribunal proceedings as an interested party. In summary, the seven (7) grounds of appeal featuring in the Tribunal Appeal were essentially challenging the decision by the 1st Respondent denying the Appellant entry into the Advocates Training Programme (ATP) despite the fact that she had obtained a Bachelor of Laws degree (LLB) from a recognized university, and therefore qualified for admission into the ATP. The Appellant further faulted the 1st Respondent for failing to recognize her additional relevant academic qualifications

and academic progression which entitled her to admission therein, terming the decision by the 1st Respondent as being ultra vires, unlawful and based on consideration of irrelevant factors.

3. The reliefs sought in the Tribunal Appeal were an order setting aside the impugned decision and substituting it with a declaratory order that the Appellant qualifies for admission into the ATP and a consequent order compelling the 1st Respondent to admit her accordingly.

4. The Tribunal memorandum of appeal was supported by the affidavit sworn by the Appellant, stating inter alia, that she initially received an email containing a letter from the 1st Respondent and dated 28th November, 2023 informing her that the said Respondent had rejected her application for enrollment into the ATP for the academic year 2024/2025. The Appellant stated that she proceeded to challenge the decision by way of an appeal submitted on 1st December, 2023 to which the 1st Respondent replied with a letter dated 7th December, 2023 in which it further declined to admit her into the ATP.

5. The Appellant stated that as per her knowledge, she meets the minimum qualifications for admission into the ATP pursuant to the *Legal Education Act*, 2012 as read with the *Kenya School of Law Act*, 2012.

6. The Appellant specifically stated that while she attained a mean grade of x (plain) in her Kenya Certificate of Secondary Education (KCSE) with the respective grades of x (plus) being attained in both English and Kiswahili, she proceeded to enroll for a Diploma in Law (Paralegal Studies) at the 1st Respondent institution, successfully completing the same with a Credit score in December, 2018.

7. It was the Appellant's averment that prior to enrolling for the Paralegal Studies course, she applied to and was granted employment in the Judiciary, where she served as a Licensed Court Process Server from the year 2013 to date.

8. The Appellant further stated that she thereafter successfully enrolled into Mt. Kenya University in pursuit of an LLB degree in June, 2019 which she completed and graduated with, attaining a Second Class Honours Division in August, 2023.

9. It was equally the Appellant's averment that upon applying for enrolment into the ATP however, her application was deemed unsuccessful for the reason that she did not meet the minimum qualification requirements for admission thereto; which was not the case as seen hereinabove.

10. The Appellant further deposed that upon visiting the 1st Respondent's institution while pursuing the Paralegal Studies course, she was informed that upon successful completion of both the said course and an LLB programme, she would be eligible for admission into the ATP. That it is on the basis of this information that she proceeded to pursue an LLB degree. On that basis, the Appellant urged the Tribunal to review the 1st Respondent's decision accordingly.

11. The 1st Respondent relied on the replying affidavit sworn by its Principal Officer-Academic Services, Fredrick Muhia on 3rd January, 2024 to challenge the Tribunal Appeal. Therein, the deponent averred that matters pertaining to admission of persons into the ATP are strictly governed by the *Kenya School of Law Act* No. 26 of 2012 and hence the Tribunal's jurisdiction was limited to matters relating to the *Legal Education Act*, 2012.

12. The deponent further averred that upon considering the Appellant's application, the 1st Respondent found her to be ineligible for admission into the ATP under Section 16 as read with Paragraph 1 of the Second Schedule to the *Kenya School of Law Act*.

13. He also averred that unfortunately, the aforesaid Act does not make provision for academic progression, which is what the Appellant was riding on. That to allow an applicant admission into the ATP on the sole basis that he or she has attained a Diploma in Law prior to pursuing an LLB

degree would be akin to circumventing the provisions of the said Act. That in any event, the question of admission into the ATP has since been settled by the Court of Appeal. That in the circumstances, the 1st respondent acted correctly by declining to admit the Appellant herein into the ATP.

14. The Appellant rejoined with a supplementary affidavit sworn on 11th January, 2024 where she stated that contrary to the averments being made in the replying affidavit, the Tribunal has unlimited jurisdiction on matters touching on legal education, by dint of Section 31 of the *Legal Education Act*, 2012.

15. She further stated that the 2nd Respondent herein; being a regulator of legal education in Kenya; is permitted under Section 8(3)(c) of the *Legal Education Act*, 2012 to formulate a system for recognition of prior learning and experience in law, in order to facilitate progression in legal education.

16. She equally stated that by declining her an opportunity to enroll for the ATP, the 1st Respondent was essentially limiting her constitutional right to education. The Appellant therefore urged the Tribunal to find in her favour, as prayed in the Tribunal Appeal.

17. It is apparent from the record that the 2nd Respondent on its part did not file any documents in respect of the appeal, though it participated therein through its advocate on record. Going by the record, the Tribunal Appeal was dispensed with through written submissions.

18. Upon close thereof, the Tribunal by way of its judgment delivered on 7th February, 2024 dismissed the Appeal.

19. Being aggrieved by the aforesaid judgment, the Appellant preferred the present appeal to challenge the same, vide the memorandum of appeal dated 8th March, 2024 containing the following grounds:

> " 1. The Tribunal erred in law by failing to appreciate the legal position that legitimate expectation binds public and/or statutory bodies in respect of representations made to other parties by such bodies such as the 1st Respondent herein.
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> 2. The Tribunal erred in law by failing to appreciate that the decisions in Kenya School of Law v Otene Richard Akomo & 41 others [2021] KECA 608 (KLR) and Javan Kiche Otieno & Another v Council of Legal Education, (2021) eKLR were arrived at after the Appellant had enrolled for the Bachelor of Laws degree Programme and therefore were operative after her admission to the said programme had crystallized thus not applicable to her based on the doctrine of legitimate expectation.
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> 3. The Tribunal erred in law and misdirected itself in finding that the Appellant did not qualify for admission to the Advocates Training Programme despite the fact that the 2nd Respondent herein, the Regulator of Legal Education in Kenya, indicated that it was not opposed to the Appeal in the Tribunal.
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> 4. The Tribunal erred in law and misdirected itself in holding that the 1st Respondent is entitled to scrutinize how the Appellant gained admission into a recognized university in Kenya to pursue an Undergraduate Programme in law despite the lack of any statutory backing from its establishing legal regime.
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> 5. The Tribunal erred in law in holding that the 1st Respondent was right in subjecting the Appellant to the qualification requirements in section 1(b)

while she ought to be considered in section 1(a) of the Second Schedule to the *Kenya School of Law Act*, 2012.

6. The Tribunal misdirected itself by holding that the Appellant was not qualified for admission to the Advocates Training Programme despite the Appellant demonstrating her qualifications and competence in pursuing the said Programme.

7. The Tribunal erred in law in entering judgment in favour of the 1st Respondent against the Appellant despite the Appellant having demonstrated her case on a balance of probability especially on the issue of admission criteria to the Advocates Training Programme.

8. The Tribunal erred in law by failing to appreciate that the Appellant was entitled to be given prior notice and to be heard before the adverse decision rejecting her application to the Advocates Training Programme was made on 7th December 2023." (sic)

20. The appeal was canvassed by way of written submissions. The 2nd Respondent notably did not participate in the present appeal.

21. The court has considered the memorandum of appeal; the record of appeal; and the submissions filed in the appeal. This is notably a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle v Associated Motor Boat Co. [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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> An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.
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> In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

22. From the foregoing, it follows that an appellate court will not ordinarily interfere with a finding of fact made by a trial court (or Tribunal) unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1988] IKAR 278.

23. Upon review of the memorandum of appeal and submissions by both the Appellant and the 1st Respondent on appeal, it is the court's view the appeal turns on the sole issue whether the Tribunal was correct in both its reasoning and ultimate finding that the Appellant did not meet the minimum qualifications for admission into the ATP and hence the 1st Respondent had every right to reject her application for admission. The court will therefore address the eight (8) grounds of appeal under the following two (2) limbs.

24. The first limb of the appeal touches on whether the Tribunal either appreciated or ought to have appreciated the legal position on legitimate expectation.

25. In summary, the Appellant's arguments on the above are that the Tribunal ought to have appreciated the legal position on legitimate expectation. More specifically, the Appellant argued that the administrator at the 1st Respondent's office represented to her that she could be eligible for admission into the ATP upon successfully completing the Diploma in Law (Paralegal Studies) followed by the LLB programme. That this representation informed her decision to pursue the aforementioned courses, with a hope to being admitted into the ATP. That in the circumstances, a legitimate expectation arose.

26. Upon re-examination of the record, it is apparent that the above legal principle was not necessarily touched on by the Tribunal. Nevertheless, the gist of the legal principle was described in Smith & Maxwell 6th Edition where Desmith, Woolf and Jowell in "Judicial Review of Administrative Action" state as follows:

> " 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 that legitimate expectation is at the core of the constitutional principle of the rule of law which requires predictability and certainty in government's dealing with the public."

27. The above description was advanced in the case of Kevin Kimiti and others v Kenya School of Law and 2 others [2015] eKLR in which the court reasoned that:

> " In my view there is a legitimate expectation that public authority should comply with *the constitution* and the law. In our law, it is expected that public authority will adhere to the constitutional values and principles including those enumerated in Article 10.....Where legitimate expectation is found to apply, if a public authority is to depart from it, it must be demonstrated that there exists good reason for that departure."

28. Returning to the present circumstances, the question remains whether the Appellant has demonstrated that the principle of legitimate expectation became applicable. Upon perusal of the material which was tendered before the Tribunal, the court observed that while the Appellant alleged that she sought the advice of an administrator working for the 1st Respondent regarding the issue of eligibility and admission into the ATP and that upon relying on the information conveyed to her by the said administrator, she enrolled into both the Diploma in Law course and the LLB programme, it is apparent that the Appellant did not tender any credible material or correspondence to support the above assertions. The details relating to the purported communication between herself and the so-called administrator were not elaborated either before the Tribunal or before this court on appeal.

29. In the circumstances, the court finds on that issue, that the Appellant did not demonstrate the manner in which the principle of legitimate expectation would become applicable in the present circumstances and further did not demonstrate the manner in which the purported legitimate expectation was contravened by the 1st Respondent upon its rejection of her application for admission into the ATP.

30. The second and more central limb of the appeal concerns itself with whether the Tribunal correctly found that the Appellant did not meet the minimum qualifications for admission into the ATP and therefore, the 1st Respondent was entitled to decline her application for admission thereto.

31. The Appellant on her part, argued that the Tribunal ought to have determined the Appeal in her favour, since it had been demonstrated that she possessed the minimum qualifications for admission into the ATP, particularly the qualification requiring an applicant to hold an LLB degree pursuant to Section 16 as read with the Second Schedule to the *Kenya School of Law Act*, 2012. The Appellant further argued that the Tribunal ought to have applied Paragraph 1(a) of the Second Schedule to aforesaid Act as opposed to Paragraph *1*(b). She equally faulted the Tribunal for relying on the decision arrived at by the Court of Appeal in Civil Appeal No. E472 of 2021 – Kenya School of Law v Otene Richard Akomo & others and yet the said decision was rendered after the Appellant had already been admitted into the LLB programme at Mt. Kenya University. That had the Tribunal correctly applied the existing laws and provisions, it would have found in her favour in the Tribunal Appeal and would have reviewed the decision by the 1st Respondent, accordingly.

32. In retort, the 1st Respondent whilst supporting the finding arrived at by the Tribunal, took the position that the question of minimum qualifications and criteria for admission into the ATP was conclusively determined by the Court of Appeal in Civil Appeal No. E472 of 2021 – Kenya School of Law v Otene Richard Akomo & others and hence the Tribunal acted correctly by declining to overturn or otherwise review its decision declining to grant the Appellant admission into the ATP.

33. In its analysis, the Tribunal referenced the above-cited provisions of the *Kenya School of Law Act* as well as the above-cited decision by the Court of Appeal which addressed and conclusively determined the issue of admission of persons into the ATP, by reasoning that Paragraph *1*(a) and (b) ought to be read holistically and not distinctively. The Tribunal further stated that the mere rejection of an applicant's application into the Programme for failure to meet the minimum academic qualifications and requirements in no way contravenes the applicant's constitutional right to an education under Article 43(1)(f) of *the Constitution*, 2010. On those grounds, the Tribunal declined to reverse the decision rendered by the 1st Respondent.

34. Upon re-examination of the material on record, it is not in dispute that the Appellant herein attained a mean grade of x (plain) in her Kenya Certificate of Secondary Education (KCSE) upon attaining inter alia, the respective grades of x+ (plus) in both English and Kiswahili. It is not in dispute that she subsequently enrolled for the Diploma in Law (Paralegal Studies) at the 1st Respondent institution in the year 2016, successfully completing the same with a Credit score in December, 2018.

35. It is similarly not in dispute that the Appellant thereafter pursued an LLB degree in June, 2019 at Mt. Kenya University, and upon completion, graduated with a Second Class Honours-Lower Division in August, 2023.

36. The record shows that however, the Appellant's subsequent application for enrolment into the ATP was deemed unsuccessful by the 1st Respondent, for the reason that she did not meet the minimum academic requirements for admission specifically the KCSE minimum grade requirements coupled with the minimum grade requirements for languages, as seen in the correspondences issued to her by the 1st Respondent and dated 28th November, 2023. That being dissatisfied with the decision by the 1st Respondent, the Appellant filed an appeal against the same, but which appeal equally fell through, as seen in the correspondence dated 7th December, 2023 thereby triggering the Tribunal Appeal.

37. The relevant provisions regarding the minimum requirements for admission into the ATP are set out under Section 16 as read with the Second Schedule to the *Kenya School of Law Act* Cap. 16C Laws of Kenya. Section 16 on the one part provides that:

> 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.

38. The Second Schedule on the other part, expresses that:

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 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 x (plain) in English Language or Kiswahili and a mean grade of x (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.

39. Turning to the Court of Appeal's rendition in the above-cited Kenya School of Law v Otene Richard Akomo & others [2022] KECA 1132 (KLR), the Court stated as follows on the above provisions:

> " The contention between the two parties is the interpretation of the above provisions as to whether given the two scenarios of joining KSL, whether the first one 1(a) does not require one to have the KCSE mandatory requirements of a mean grade x+ (plus) and a grade x (plain) in English or Kiswahili. That the said KCSE requirements only applies to those making applications under 1(b) of the said section. To us, the interpretation we discern from the above section is that the section should be read as a whole. The text is that paragraph 1(a) and (b) is separated by a semicolon, then there are the key elements mentioned after the colon on 1(b) which means that both 1(a)(b) must meet the conditions precedent in roman i and ii. In essence, whether you obtained a degree in a Kenyan or out of a Kenyan University, the basic requirement is the score in one's KCSE results which should correspond to those cited in the Act...
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> "It is our view that there is also the need to give a Statute a holistic reading and interpretation in order to ascertain the true legislative intent ... It would not make any sense to interpret the section as meaning that two students who score the same mean grade at KCSE and one decides to study at a university outside Kenya and another at a university in Kenya would be treated differently in considering their entry requirements to the ATP, just because one was in the local university thus does not need to prove whether he attained the requires

score in KCSE or not but subject to the foreign earned degree to KCSE confirmation. This ideally would be negative discrimination and against the principles of natural justice and goes beyond the spirit of the CLE Act informing the qualification."

40. From a careful reading and understanding of the foregoing binding authority, it is apparent that the same essentially holds that Paragraph *1*(a) and (b) ought to be read together and not distinctly, which is the finding that the Tribunal arrived at. It is also noteworthy that the above-referenced provisions leading up to the decision by the Court of Appeal, have been the subject of debate over the last few years now.

41. Applying the reasoning by the Court of Appeal to the present circumstances, the court is of the view that while it may be apparent that the Appellant pursued a Diploma in Law (Paralegal Studies) followed by an LLB Degree from an accredited University, pursuant to Paragraph *1*(a) (supra), she did not attain the minimum KCSE and language grade requirements under Paragraph *1*(b) (supra) in order to make her eligible to join the ATP.

42. Further to the foregoing and in answer to the issue arising both before the Tribunal and in the present appeal on retrospectivity of the law, the standing legal position is that the principle of retrospectivity extends to judicial decisions, especially where the decisions rendered set a legal precedent. This position was echoed by the High Court in the case of Kenya School of Law v Barno; Council of Legal Education (Interested Party) [2024] KEHC 5444 (KLR) when it rendered itself thus:

> "The principle of the retroactive or retrospective application of the law also applies to case law. However, the courts have pronounced that, according to the common law, the retrospective effect of a judicial decision is excluded from cases that have already been determined. See Mary Wambui Munene vs. Peter Gichuki King'ara & 2 others [2014] eKLR (Mutunga CJ, Rawaj DCJ, Tunoi, Ibrahim, Ojwang, Wanjala & Njoki, SCJJ), Pauline Anna Benadette Onyango vs. Kenya School of Law [2017] eKLR (Mwita, J) and Richard Otene Akomo & 41 others [2022] KECA 1132 (KLR)(Makhandia, Mohammed & Kantai, JJA)..."

43. Likewise, the High Court in the case of Kenya School of Law v Gachoki & 2 others; Council of Legal Education (Interested Party) [2024] KEHC 528 (KLR) reaffirmed the above reasoning, in the manner hereunder:

> Turning to the issue whether the Court of Appeal decision and court decisions of precedential note have retrospective effect, the Supreme Court in Mary Wambui Munene v Peter Gichuki King'ara & 2 others [2014] eKLR cited with approval the case of A v The Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88 where it was held that:
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> Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position.
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> It should not be lost that the Supreme Court in Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR and Law Society of Kenya v

Attorney General & another [2019] eKLR, held that retrospective application of statutes is not per se illegal or in contravention of *the Constitution* unless, "it: (i) is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden". The same principles can be stated of superior court decisions as stated earlier hence retrospective application of the Court of Appeal's decision in this case would not be illegal as the decision is not in the nature of a bill of attainder, does not impair any obligation under any contract and is not constitutionally forbidden. The decision does not divest the Respondents of their rights as the Court of Appeal in the said decision stated that, "the rejection of the respondents who did not meet the above requirement was not a violation of their constitutional rights or infringement of any of their rights to education provided for under article 43(1)(f); that the decision by the appellant declining each and every individual respondent for admission.....was made within the law and is upheld."

44. It therefore follows that the principles set out by the Court of Appeal in Kenya School of Law v Otene Richard Akomo & others (supra) on the admission criteria and requirements to join the ATP would extend to the Appellant herein.

45. In any event, it is apparent from the record that at the time of the Appellant's application for enrolment into the ATP in late 2023, the afore-cited decision by the Court of Appeal was already in place. Consequently, the Appellant was required to fulfil the minimum requirements set out collectively under Paragraph 1(a) and (b) of the Second Schedule to the *Kenya School of Law Act* in order for her to be declared eligible for admission into the ATP. By virtue of the fact that she fell short of the minimum requirements stipulated under Paragraph *1*(b), she was unfortunately disqualified from admission thereto.

46. It is important to mention at this point that while the court takes cognizance of the efforts so far taken by the Appellant in attaining the relevant legal qualifications and therefore sympathizes with the unfortunate situation in which the Appellant finds herself, the court is bound by the legal position established by the superior courts on the issue of admission and interpretation of Paragraph *1*(a) and (b) (supra).

47. In view of all the foregoing circumstances, the court finds that the Tribunal correctly applied the standing legal principles on matters admission into the ATP to the circumstances before it and it cannot therefore be faulted in its reasoning and/or its finding. The court sees no reason to disturb the impugned judgment.

48. Consequently, the appeal cannot be sustained and the same is hereby dismissed for want of merit, with costs to the Respondent. Consequently, the judgment delivered on 7th February, 2023 by the Legal Education Appeals Tribunal in LEAT Appeal No. E031 of 2023 is hereby upheld.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF JANUARY 2025.

HON. L. KASSAN

JUDGE

In the presence of:

Leakey holding brief Keyawa the Appellant.

No appearance for Respondent

Guyo - Court Assistant