Kenya School of Law v Gachoki & 2 others; Council of Legal Education (Interested Party) (Civil Appeal E062 of 2022) [2024] KEHC 528 (KLR) (Civ) (31 January 2024) (Judgment)

Neutral citation: [2024] KEHC 528 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E062 OF 2022

DAS MAJANJA, J

JANUARY 31, 2024

BETWEEN

KENYA SCHOOL OF LAW ..... APPELLANT

AND

JAMES MUCHIRI GACHOKI ..... 1ST RESPONDENT

DUNCAN KYALO MUUSYA ..... 2ND RESPONDENT

KENNEDY LEMPATE ELIMLIM ..... 3RD RESPONDENT

AND

COUNCIL OF LEGAL EDUCATION ..... INTERESTED PARTY

(Being an appeal against the Judgment of the Legal Education Appeals Tribunal at Nairobi dated 11th March 2022 in LEAA Appeal No E001 of 2022 consolidated with LEAA E002 of 2022 and LEAA E003 of 2022)

JUDGMENT

Introduction and Background

1. The Appellant ("KSL") is a State Corporation established under section 3 of the *Kenya School of Law Act*, 2012 and its mandate includes, inter alia, training persons for purposes of the *Advocates Act* (Chapter 16 of the Laws of Kenya). In that regard it runs the Advocates Training Programme ("ATP"). It is also required under the *Kenya School of Law Act* to consider applications for admission to the ATP and once an applicant is qualified, he or she is admitted.

2. The Respondents applied to KSL for admission into the ATP for the academic year 2022/2023 in January 2022. KSL, through its Director/Chief Executive Officer issued various responses in February

2022 rejecting the applications and declining their admission on the ground that they did not meet the Kenya Certificate of Secondary Education ("KSCE") grade requirements. Aggrieved, the Respondents lodged an appeal with the Legal Education Appeals Tribunal ("the Tribunal"). They argued that having obtained Bachelor of Law (LLB) degrees from various universities, they were duly qualified to be enrolled into the ATP in line with section 1(a) of the Second Schedule of the *Kenya School of Law Act* and as such, KSL had no basis to disqualify them.

3. The Respondents contended that KSL had infringed their right to education by its decision to reject their applications for admission into the ATP. That the said decision was ultra-vires, unlawful and illegal as in doing so the Director of KSL ignored that the Respondents did their KCSE in Kenya and that they had Diplomas in Law from Universities accredited by the Interested Party (CLE). As such, the Respondents prayed to be admitted into the ATP for the academic year 2022/2023 whose registration exercise was scheduled to commence on 07.03.2022 and that the decisions of KSL be quashed. The Respondents also averred that the Director of KSL lacked any legal basis to monitor legal education in Kenya as this is the sole mandate of the CLE.

4. In response, KSL asserted that the Respondents did not meet the eligibility criteria as provided for under section 16, read together with Paragraph 1 of the Second Schedule of the *Kenya School of Law Act* which provides that the requirement for admission to the ATP is a mean grade of C+ (plus) in KCSE with B (plain) in English or Kiswahili languages which the Respondents did not have. That the Respondents were relying on Diploma in Law qualifications to be admitted for the ATP, yet the *Kenya School of Law Act* does not have a provision for academic progression. KSL averred that it is bound by the provisions of the *Kenya School of Law Act* in determining the eligibility of the ATP and thus it cannot admit a student based on any other criteria other than that provided for in the Second Schedule of the *Kenya School of Law Act*. It stated that allowing people to join the ATP at KSL on the basis that they had a Diploma in Law prior to joining LLB degree programme amount would circumvent clear statutory provisions and would result in discrimination and application of double standards.

5. KSL rejected the Respondents' contention that it had misinterpreted or disregarded the law as it had followed several court decisions in reaching its determination. It thus insisted that the Respondents are not qualified for admission to the ATP.

6. In its judgment, the Tribunal dealt with the issue of its jurisdiction and academic progression. On jurisdiction, the Tribunal found that since the matter of progression formed the core issue for determination in the appeals before, it had jurisdiction to address the consolidated appeals. The Tribunal stated that it as guided by the provisions of its jurisdiction as spelt out in section 31 of the *Legal Education Act* which entitles it to inquire into any matter brought before it in respect of the Act. The Tribunal also relied on the decision in *Republic v Kenya School of Law & 2 others Exparte Kgaborone Tsholofelo Wekesa* [2019] eKLR.

7. The Tribunal explained that whereas the issue of academic progression is not provided for in the *Kenya School of Law Act*, the establishing law of the Tribunal, that is the *Legal Education Act*, while addressing the functions of CLE provides for academic progression at section 8(3)(c). That a system for recognizing prior learning and experience in law in order to facilitate progression was formulated by CLE through the *Legal Education (Accreditation and Quality Assurance) Regulations*, Legal Notice no. 15 of 2016 but these Regulations were nullified by this court and this decision upheld by the Court of Appeal. That with this nullification, the applicable legal regime reverted to the *Council of Legal Education (Accreditation of Legal Education Institutions) Regulations*, 2009. The Tribunal stated that the 1st and 2nd Respondents, based on the fact that they held Diploma in Law qualifications prior to admission to the LLB degree qualifications were thus qualified for admission to the said programme. That for the 3rd Respondent, he held a degree from a recognized University in Kenya and was therefore

was eligible for admission to the LLB degree. The Tribunal held that the conclusion of KSL as reached in the communication to the 2nd Appellant that the Regulatory regime had changed when he joined the University was faulted and reversed by the Tribunal as the *Council of Legal Education (Accreditation of Legal Education Institutions) Regulations*, 2009 remained being in force. The Tribunal also took note of the fact that the 1st Respondent had been given an assurance by CLE that he qualified for the degree programme and that the 1st Respondent's entitlement to admission to the LLB programme based on the Diploma in Law qualification had already crystallized prior to the nullification of the 2016 Regulations.

8. It was the Tribunal's further position that the inquiry by KSL at the stage of the application to the ATP will be solely based on the eligibility of an applicant from a recognized University in Kenya for conferment to an LLB degree or holding the same. That the 1st and 2nd Respondents hold LLB degrees from the Mount Kenya University while the 3rd Respondent holds a degree from the University of Nairobi and that the argument by KSL that it is entitled to scrutinize how one gained admission into a recognized University in Kenya lacks any statutory backing from its establishing legal regime which is the *Kenya School of Law Act*. The Tribunal stated that KSL cannot arrogate the functions of other regulatory bodies such as CLE and the Commission of University Education in dealing with undergraduate legal education regulation in Kenya and that this will at the very best be described as acting in an ultra-vires manner.

9. For these reasons, the Tribunal held that the Respondents thus qualify for admission to the ATP and the decisions of KSL as taken which concluded that unspecified KCSE High School grades were not met in the communications by KSL were not sustained by the Tribunal and were all reversed. The Tribunal relied on the court's decision in *Robert Uri Dabaly Jimma v Kenya School of Law & Kenya National Qualifications Authority* [2020]eKLR to state that the use of the conjunction 'or' in sections 1(a) and (b) of the Second Schedule of the *Kenya School of Law Act* meant that it was improper for KSL to subject the Respondents to the qualification requirements in section 1 (b) while they ought to be considered in section 1 (a) of the applicable law. That Parliament in its wisdom while enacting the Second Schedule to the *Kenya School of Law Act* did not intend that section 1 (b) requirements be applied to category 1(a) applicants to the ATP and the Tribunal stated that it had no reason to doubt and inquire as to the wisdom behind the enactment as made. As regards the communication of the decisions as taken by KSL declining the Respondents' applications to the ATP, the Tribunal held that the Director was bound to comply with section 4 of the Fair Administrative Act, 2015.

10. The Tribunal ultimately set aside the decisions of KSL declining to admit the Respondents to the ATP, made a declaration that the Respondents qualify for admission to the ATP by dint of section 1 (a) of the Second Schedule of the *Kenya School of Law Act* and issued an order compelling KSL to admit them to the ATP forthwith.

11. KSL is aggrieved by the Tribunal's judgment and has now filed an appeal grounded on the Memorandum of Appeal dated 17.03.2022. The appeal has been canvassed by way of written submissions and since the submissions regurgitate the parties' positions I have already summarised above, I do not find it necessary to highlight the same but I will only make relevant references in my analysis and determination below.

Analysis and Determination

12. The court derives its appellate jurisdiction from section 38(1) of the *Legal Education Act* which provides as follows:

    38. Appeals to the High Court

(1) Any party to proceedings before the Tribunal who is dissatisfied by a decision or order of the Tribunal on a point of law may, within thirty days of the decision or order, appeal against such decision or order to the High Court.

13. An appeal limited to matters and points of law does not permit the appellate court to substitute the Tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts. The court can only intervene where the decision on facts is not supported by the evidence or it otherwise perverse (see *John Munuve Mati v Returning Officer Mwingi North Constituency & 2 others* [2018] eKLR and *Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others* [2013] eKLR).

14. The matters in this appeal are essentially matters of law involving interpretation of statutory provisions. The thrust of the appeal, which raises 6 grounds, can be condensed to two grounds; whether the Tribunal has jurisdiction to determine the appeals and whether the Respondents qualified to be admitted to the ATP.

15. On jurisdiction, KSL submits that despite the *Legal Education Act* being explicit in section 31, in setting the limits of the Tribunal's jurisdiction as being limited to matters relating to the *Legal Education Act* only, the Tribunal erred in law by exceeding its jurisdiction by hearing and determining a dispute arising from the interpretation and application of the admission criteria to the ATP which is exclusively provided for in section 16 of the *Kenya School of Law Act*. As stated, in concluding that it had jurisdiction, the Tribunal relied on section 31 of the *Legal Education Act* which provides as follows:

31. Jurisdiction of Tribunal

(1) The Tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the Council or by any committee or officer of the Council, on any matter relating to this Act, inquire into the matter and make a finding thereupon, and notify the parties concerned.

(2) For the purposes of hearing an appeal, the Tribunal shall have all the powers of the High Court to summon witnesses, to take evidence on oath or affirmation and to call for the production of books and other documents.

(3) Where the Tribunal considers it desirable for the purposes of avoiding expenses, delay or for any other special reasons, it may receive evidence by affidavit and administer interrogatories within the time specified by the Tribunal.

(4) When determining any matter before it, the Tribunal may take into consideration any evidence, which it considers relevant to the subject of an appeal before it, notwithstanding that such evidence, would not otherwise be admissible under the law relating to evidence.

16. The Tribunal further relied on the court's decision in *Republic v Kenya School of Law & 2 others Exparte Kgaborone Tsholofelo Wekesa* (*Supra*) where Mativo J., (as he was then) held as follows:

33. The preamble to the *Legal Education Act* provides that it is 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. Section 31 of the act provides for the jurisdiction of the Tribunal. A reading of the section leaves me with no doubt that the Tribunal's jurisdiction is to determine an appeal made to it in writing by any party or a reference made to it by the Council or by any committee or officer of the Council, on any matter relating to the Act. The ex parte applicant's dispute distilled above in my view squarely falls within the Tribunal's jurisdiction.

17. The dispute that the learned Judge was referring to above was one where the ex parte applicant was denied admission into KSL's ATP 'due to lack of an equation of..... secondary school qualifications.' This dispute was similar to the present one where the Respondents were denied admission to KSL's ATP for reasons that they had not met the requisite secondary school requirements. The Tribunal, being subordinate to the High Court, was bound by the aforementioned decision and thus rightly held that it had jurisdiction to determine the appeals before it.

18. On my part, I do not see any reason to depart from the settled position on jurisdiction. Section 31(1) of *Legal Education Act* grants the Tribunal jurisdiction to inquire into, "... any matter relating to this Act," which is an all-encompassing clause that that affirms the Tribunal's jurisdiction to deal with matters concerning legal education arising not only within the Act itself but also from the *Kenya School of Law Act* under which the KSL is guided by and applies the provisions of the *Legal Education Act*. This ground of appeal by KSL therefore fails.

19. Turning to the conclusion by the Tribunal that the Respondents are eligible to be admitted to KSL for the ATP, KSL submits that the admission mission criteria to the ATP has been conclusively determined by the Court of Appeal in *Kenya School of Law v Akomo & 41 others* (Civil Appeal E472 of 2021) [2022] KECA 1132 (KLR) which determined that the interpretation of the academic qualifications must be taken into account regardless of the university. That the Tribunal's interpretation that secondary school qualifications, especially KCSE, are not necessary for applicants seeking to join the ATP has been decisively rejected by the Court of Appeal. KSL submits that the question of the interpretation of the provisions of the Second Schedule of the *Kenya School of Law Act* specifically the word 'OR' as used between paragraphs 1(a) and (b) ought not to result in an absurdity and that the Tribunal failed to consider the absurdity that two applicants to the ATP who have the exact same qualifications would be subjected to two different standards and measures depending on whether they obtained their LLB degree in Kenya or a foreign university. That an applicant with a LLB degree from a foreign university with higher qualifications would not be granted admission to the ATP and that there is absolutely no justification in law or explanation for the differential treatment of the two classes of individuals and that they must be held to the same standard. KSL thus submits that to hold otherwise would amount to discrimination against applicants who attend foreign universities.

20. Paragraphs 1(a) and (b) of the Second Schedule of the *Kenya School of Law Act* provides as follows:

> 1. A person shall be admitted to the School if—
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> 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
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> 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—
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> i. attained a minimum entry requirement for admission to a university in Kenya; and
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> 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 parties agree that interpretation of the aforementioned provision is not novel and has been the subject of various decisions of the court including *Victor Juma v Kenya School of Law; Council of Legal Education (Interested Party)* [2020] eKLR, *Bishar Adan Mohamed v Kenya School of Law* (2020) eKLR, *Peter Githaiga Munyeki v Kenya School of Law* (2017) eKLR, *R. v Kenya School of Law exparte Daniel Mwaura Marai* (2017) eKLR where it was held that the qualifications under the provisions of para. 1(a) and (b) above are similar and *Robert Uri Dabaly Jimma v Kenya School of Law* (*supra*), *Republic v Kenya School of Law & Others* (2020) eKLR and in *Kevin K. Mwiti & Others v Kenya School of Law & 2 Others* (2015) eKLR where it was stated that the qualifications are different.

22. KSL has stated that this interpretation has since been settled by the Court of Appeal in *Kenya School of Law v Akomo & 41 others* (*Supra*) where it was held as follows:

> 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 C + (plus) and a grade B (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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> .....
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> We have adverted to several authorities that the High Court has grappled with in the interpretation of the said section. We have no difficulty in interpreting the same as the context is very clear and the wording is that there are conditions which affect both qualifications and this is the KCSE grades which are captured at the end of the paragraph.
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> Even in the provision for those who are categorized under paragraph 2 to the extent that they will be eligible for admission after they have passed the pre-bar examination, it follows that the intent of the legislator was that you have to meet the requirements of the law on admission and equally then after application and consideration, sit for the pre-bar exam. Before the amendment, it was a condition precedent to all applicants but after the amendment, it became optional and depending on the conditions set by the appellant. In the end, with respect, we find that the trial court's interpretation that the respondents were eligible for admission on the mere fact that they had completed LLB studies without having regard to their KCSE grades to be erroneous. The key entry point to any career course in the Kenyan education system is the KCSE examination results and thus it cannot be that just because one graduated from any Kenyan University, the grades obtained at KCSE do not matter or that the certificate itself is of no value at all. It would be discriminative of those who do not study from within the Country who then according to the respondents are the only persons who are required to have their KCSE results considered. We are satisfied that such stance and finding is unrealistic, unreasonable and was not the intention of the Legislature when drafting the said section.
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> .....

> It is our considered view that the conjunction 'or' in sections 1(a) and 1 to the Second Schedule of the *KSL Act*, should be read disjunctively as requiring both applicants from recognized Universities in Kenya and those from foreign Universities to hold similar qualifications.
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> .....
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> For the avoidance of doubt, the basic requirements for KCSE under section 16 and the Second Schedule of the *KSL Act* are for both applicants who studied in or out of Kenyan universities. The section should be read as a whole and not in bits and pieces and the three conditions which are precedent must be met before admission to KSL. Failure to meet the basic requirements of the qualifications in KCSE as envisaged in the above section renders one's application incompetent and hence ripe for rejection by the appellant. The regulations cannot override the provisions of an Act of Parliament.

23. Whereas the Respondents submit and admit that the aforementioned decision by the Court of Appeal settled the interpretation of Paragraphs 1(a) and (b) above, they contend that the Tribunal's decision was made on 11.03.2022 and that the Court of Appeal made its decision on 21.10.2022. Thus, the Respondents urge that this decision should not apply retrogressively. While it is true that at the time, the Tribunal rightly relied on and was bound by this court's decisions in finding the Respondents eligible to be admitted to KSL, the position has now changed in light of the aforementioned Court of Appeal decision. The Tribunal's judgment cannot obviously stand as this court and the Tribunal are obligated and bound to follow the Court of Appeal's decision.

24. 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:

> 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.

25. 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 forbidde". 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."

26. In any event, I note that the Respondents' provisional admission by KSL dated 17.03.2022 was revoked in May 2022 and that the court in its ruling of 27.04.2023 noted that the said revocation had not been set aside. However, the Respondents have submitted that by the time the court delivered the ruling, they were long done with their ATP studies and bar exams. This was never brought to the court's attention and the court wonders how the Respondents managed to complete the ATP studies and bar exams when the revocation letter was still in force. Whichever way, the court cannot just "wash its hands" as it has a constitutional duty to advance and assert the binding decision of the Court of Appeal which is that the Respondents do not meet the the basic minimum requirements of the qualifications in KCSE for them to be admitted in KSL's ATP and KSL was right to reject their applications for admission. The Respondents' ATP studies and subsequent bar examinations are of no consequence and are a nullity.

Disposition

27. For the reasons outlined above, the Appellant's appeal succeeds and the decision of the Tribunal is set aside. The letters that were issued by the Appellant to the Respondents in February 2022 and May 2022 rejecting their applications for admission and revoking the Respondents' initial provisional admission for the ATP respectively remain in force.

28. Given the nature of the appeal and the manner in which it has been allowed, each party shall bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2024.

D. S. MAJANJA

JUDGE

Mbuthu, Advocate instructed by Dr Henry K. Mutai for the Appellant.

instructed by Keaton and Keaton Advocates for the Respondents.