Kenya School of Law v Akomo & 41 others (Civil Appeal E472 of 2021)
[2022] KECA 1132 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KECA 1132 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E472 OF 2021

MSA MAKHANDIA, J MOHAMMED & S OLE KANTAI, JJA

OCTOBER 21, 2022

BETWEEN

KENYA SCHOOL OF LAW ..... APPELLANT

AND

OTENE RICHARD AKOMO & 41 OTHERS ..... RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Mativo, J.) dated 28th August, 2020 in Judicial Review Petition No. 20 of 2020 Consolidated with Judicial Review Petitions No's. 7, 8, 20, 21 & 26 of 2020)

Applicable admission criteria to the Advocates training programme at the Kenya School of Law

The instant case relates to the eligibility and admission criteria of persons both from local and foreign universities to the Advocates Training Programme. The court held that it was discriminative against those who did not study from within Kenya who then according to the respondents were the only persons who were required to have their KCSE results considered. Such stance and finding was unrealistic, unreasonable and was not the intention of the Legislature when drafting the impugned section.

Reported by Flora Weru

Advocates *– legal education – training of advocates – advocates training programme (ATP) – admission to the ATP – what was the applicable admission criteria to the ATP at the Kenya School of Law for applicants who studied in both Kenyan and foreign universities – whether the basic requirements for KCSE under section16 and the Second Schedule to the Kenya School of Law Act applied to applicants who studied in or out of Kenyan universities – Kenya School of Law Act, 2012, section 16 and Second Schedule paragraph 1(a) and 1(b)*

Constitutional Law *– fundamental rights and freedoms – economic and social rights - right to education – Advocates Training Programme (ATP) – admission requirements – claim that admission requirements were discriminatory – a breach of the right to education for only considering the KCSE results of students who studied in Kenyan universities to the exclusion of the KCSE results of those that studied in foreign universities – whether an interpretation that section16 and the second schedule to the Kenya School of Law Act estopped persons who studied*

in foreign universities from having their KCSE results from being considered was discriminatory and a breach to the right to education – Constitution of Kenya, 2010, articles 24 and 43(f)

Advocates *– legal education – regulation of legal education – regulatory bodies/institutions governing legal education – Council of Legal Education – regulation on how universities admit students to pursue various cadres of legal education – what was the scope of duties of the Council of Legal Education on how universities admitted students to pursue multiple cadres of legal education*

Statutes *– interpretation of statutes – factors to consider when interpreting statutory provisions – what were the factors to consider when interpreting statutory provisions*

Advocates *– legal education – progression in legal education – system for the progression in legal education – factors to consider – what ought to be considered in formulating a system for the progression in legal education*

Brief facts

The respondents applied for admission to the advocates training programme (ATP) at the Kenya School of Law (KSL), the appellant, in which some were considered and offered admission letters. However, they were later informed by the Director of the KSL in writing that their respective applications were unsuccessful because their Kenya Certificate of Secondary Education (KSCE) grades were below the grades stipulated in the Kenya School of Law Act (KSL Act).

According to the respondents, the appellant misapplied section 16 of the KSL Act and paragraph 1(a) of the Second Schedule to the Act and arrived at decisions that were unreasonable, and *ultra vires* its statutory mandate and a breach of the right to education. Judgment and decree was entered for the respondents in the trial court. Aggrieved by the judgment and decree, the appellants filed the instant appeal.

Issues

i. Whether the basic requirements for KCSE under section 16 and the second schedule to the KSL Act were applicable to applicants who studied in or out of Kenyan universities.
ii. Whether an interpretation that section 16 and the second schedule to the KSL Act estopped persons who studied in foreign universities from having their KCSE results being considered was discriminatory and violated their right to education.
iii. What was the scope of the duties of the Council of Legal Education in regulating how the universities admitted students to pursue various cadres of legal education?
iv. What were the factors to consider when interpreting statutes?
v. What type of degree could be considered as a progression towards studying law?
vi. What ought to be considered in formulating a system for the progression in legal education?

Held

1. The process of becoming an advocate started from a lower level of schooling to the time of admission and every such level of education was governed by a set of laws and regulations. The right to education would make no sense if a person's academic qualifications were not recognized by the State on unreasonable grounds.
2. The Legal Education Act established the Council of Legal Education (the Council); the Legal Education Appeals Tribunal; the Act also dealt with the regulation and licensing of legal education providers and for connected purposes. The Council regulated legal education and training in Kenya offered by legal education providers, licence legal education providers and to supervise legal education providers.
3. The Council had a duty to regulate how the universities admitted students to pursue various cadres of legal education; that was at the certificate, diploma and degree levels. That duty had to be discharged at the point of entry of the student at the institution offering such courses. A legal education provider, had to, at the direction and supervision of the Council, be able to determine whether a student was qualified to pursue studies in law at the time the student applied to join the institution, be it a college or a university.

4. Whereas the Council had powers to make regulations in respect of requirements for the admission of persons seeking to enroll in legal education programmes, it also had the duty to ensure compliance of such regulations at the very point of admission of such persons, at whatever level. It was upon the Council to ensure that all those enrolled to pursue legal education programmes were duly qualified in law to undertake such studies.
5. The KSL trained persons to be advocates under the Advocates Act. KSL had the power to admit persons for the necessary training. Section 16 and the second schedule to the KSL Act provided for the criteria for admission of students to the KSL.
6. The interpretation discerned from sections 1(a) and (b) of the second schedule to the KSL Act was that the section should be read as a whole. The text was that section 1(a) and (b) was separated by a semicolon, then there were the key elements mentioned after the colon on 1(b) which meant that both sections 1(a) and (b) had to meet the conditions precedent in section 1(b)(i) and (ii). In essence, whether one obtained a degree in a Kenyan or out of a Kenyan university, the basic requirement was the score in one's KCSE results which had to correspond to those cited in the Act.
7. In interpreting statutes courts looked at both the text and context in order to ascertain the true legislative intent. Courts were to give a statute a holistic reading and interpretation in order to ascertain the true legislative intent.
8. It would not make any sense to interpret the section as meaning that two students who scored the same mean grade at KCSE and one decided to study at a university outside Kenya and another at a university in Kenya would be treated differently when considering their entry requirements to the ATP, just because one was in the local university thus did not need to prove whether she/he attained the required score in KCSE or not but subject to the foreign earned degree to KCSE confirmation. That ideally would be negative discrimination and against the principles of natural justice and went beyond the spirit of the Legal Education Act informing the qualifications.
9. A closer look at the provisions of section 16 and the second schedule to the KSL Act showed that there were two parts which all were dependent on the qualifications after clause 1(b) of the second schedule. Even in the provision for those who were categorized under paragraph 2 to the extent that they would be eligible for admission after they had passed the pre-bar examination, the Legislature intended that they had 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 of the second schedule, it was a condition precedent to all applicants but after the amendment, it became optional and depended on the conditions set by the appellant.
10. 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 was erroneous. The key entry point to any career course in the Kenyan education system was the KCSE examination results and thus it could not be that just because one graduated from any Kenyan university, the grades obtained at KCSE did not matter or that the certificate itself was of no value at all.
11. It was discriminative of those who did not study from within Kenya who then according to the respondents were the only persons who were required to have their KCSE results considered. Such stance and finding was unrealistic, unreasonable and was not the intention of the Legislature when drafting the impugned section.
12. The parties relied on the Council of Legal Education (Accreditation and Quality Assurance) Regulations 2012 as they were then in force before the Court of Appeal declared the same to be invalid for want of compliance with the Statutory Instruments Act, 2013 in December 21, 2021. Such invalidation could not apply retrospectively.
13. Progression ideally was the process of developing or moving gradually towards a more advanced state. The wording in section 8(3)(c) of the Legal Education Act was clear that prior learning and experience

in law was what ought to be considered when formulating a system that would see the progression in legal education.

14. A degree in aeronautics or a diploma in interior design for instance, could not be termed as progression towards studying law. Indeed, the only closer aspect contemplated was experience and learning in law culminating in a diploma in law or related course in law. Such a degree and diploma were not to be categorized as a progression in law of whatsoever kind and even if they were, the appellant had to consider the primary requirements in the Act first before reverting to the Regulations and which was the requirement of grades in KCSE.
15. Having obtained a mean grade D Plain, one could not proceed and pursue law and only wave the diploma in other disciplines as a condition for admission to the ATP.
16. 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 qualification. With the use of semi-colon between section 1(a) and (b) of the Act then the conditions followed which meant that one was eligible, firstly, based on their LLB degree either from a Kenyan university or as in section 1(b) from a foreign university but in all situations, the conditions were same and were enlisted therein which were mandatory to all irrespective of whether you had a degree from within or without Kenya.
17. The appellant should be shown to have acted beyond what the law required of it to do as it was the body bestowed with the mandate of ensuring that the legal profession was conducted in a manner that uplifted and upheld the law and standards. There was nothing wrong, illegal, unreasonable, discriminatory or unconstitutional in the conduct of the appellant in the whole process. The respondents were well aware that after completing KCSE, there were cluster points for one pursuing a degree in law and the mandatory subjects. The decision by the appellant was in line with the law and could not be faulted.
18. The interpretation being advanced by the respondents' points to discrimination between the two lots of students under section 16 of the Act which was not the intent of the section at all. The purpose of the Act and in particular, section 16 was to make it clear, that the requirements for admission to KSL for both local and foreign obtained degrees and the common denominator was the grades attained at KCSE. Any interpretation other than that would only mean negative discrimination. The interpretation given by the trial court if allowed would lead to total absurdity and discrimination.
19. The rejection of the respondents who did not meet the 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)of the Constitution; the decision by the appellant declining each and every individual respondent for admission into the ATP for 2020/2021 academic year was made within the law and was upheld.
20. The basic requirements for KCSE under section 16 and the second schedule to the KSL Act were 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 were precedent had to be met before admission to KSL. Failure to meet the basic requirements of the qualifications in KCSE as envisaged in the section rendered one's application incompetent and hence ripe for rejection by the appellant. The Council of Legal Education (Accreditation and Quality Assurance) Regulations 2012 could not override the provisions of an Act of Parliament.

Appeal allowed.

Orders

Judgment and decree of the trial court set aside; each party to bear their own costs.

Citations

Cases

Kenya

1. *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petitions 14, 14A, 14B & 14C of 2014; [2014] eKLR (Consolidated) - (Mentioned)
2. *Engineers Board of Kenya v Jesse Waweru Wahome & others & 5 others* Civil Appeal No 240 of 2013; [2015] eKLR - (Explained)
3. *Githaiga, Munyeki v Kenya School of Law* Petition 566 of 2017; [2017] eKLR - (Explained)
4. *Gitobu, Imanyara & 2 others v Attorney General* Civil Appeal 98 of 2014; [2016] eKLR - (Mentioned)
5. *Kenya Medical Laboratory Technicians & Technologists & 7 others v Attorney General; Commission of University Education & another (Interested Parties)* Civil Application 190 of 2020; [2020] eKLR - (Explained)
6. *Kenya Revenue Authority v Menginya Salim Murgani* Civil Appeal No 108 of 2009; [2010] eKLR - (Explained)
7. *Khelef, Khalifa & 2 others v Independent Electoral and Boundaries Commission & another* Constitutional Petition 168 of 2017; [2017] eKLR - (Mentioned)
8. *Maema, Eunice Cecilia Mwikali v Council of Legal Education & 2 others* Civil Appeal 121 of 2013; [2013] eKLR - (Explained)
9. *Munya, Gatirau Peter v Dickson Mwenda Kithinji & 2 others* Petition 2B of 2014; [2014] eKLR - (Explained)
10. *Nyarangi & 3 others v Attorney General* [2008] KLR 688 - (Explained)
11. *Odinga, Raila Amolo & another v Independent Electoral and Boundaries Commission & 6 others* Petition No 1 of 2017; [2017] eKLR - (Explained)
12. *Otieno, Javan Kiche v Chief Justice and President of the Supreme Court of Kenya; Law Society of Kenya & another (Interested Parties)* Civil Appeal 38 of 2018; [2021] eKLR - (Mentioned)
13. *Republic v Council of Legal Education ex parte James Njuguna & 14 others* Civil Case No 137 of 2004; [2007] eKLR - (Explained)
14. *Republic v Kenya School of Law & another ex parte Daniel Mwaura Marai* Judicial Review Application 529 of 2017; [2017] eKLR - (Mentioned)
15. *Webuye, Sydney Douglas v Kenya School of Law* Petition 102 of 2018; [2018] eKLR - (Explained)

South Africa

Bato Staff Fishing (PTY) Ltd v Minister of Environmental Affairs and Tourism & others [2004] ZACC 15; 2004(4) SA 490(CC): 2004(7) BCLR 687(CC) - (Explained)

United Kingdom

Griggs v Duke Power Company 401 US 424 (1971) - (Followed)

India

Reserve Bank of India v Peerless General Finance and Investment Co Ltd 1987 AIR 1023; 1987 SCR (2) 1 - (Explained)

Statutes

Kenya

1. Advocates Act (cap 16) In general - (Cited)
2. Constitution of Kenya, 2010 articles 10, 19(3); 20(2); 21(1); 22(1); 24(1); 27; 28; 29(d); 43(1)(f); 47; 55 - (Interpreted)
3. Council of Legal Education (Accreditation and Quality Assurance) Regulations, 2016 (Act No 27 of 2012 Sub Leg) paragraphs 4, 5, 6; Schedule 3 - (Interpreted)
4. Fair Administrative Action Act, 2015 (Act No 4 of 2015) In general - (Cited)
5. Kenya School of Law Act, 2012 (Act No 26 of 2012) sections 8(3)(a)(c)(4); 15; 16; 17; Schedule Paragraph 1(a); 1(b) - (Interpreted)
6. Legal Education Act, 2012 (Act No 27 of 2012) section 8(4) - (Interpreted)
7. Statute Law (Miscellaneous Amendment) Act, 2014 (Act No 18 of 2014) In general - (Cited)

8. Statutory Instruments Act, 2013 (Act No 23 of 2013) In general - (Cited)
9. Universities (Amendment) Act, 2016 (Act No 48 of 2016) In general - (Cited)
10. Universities Act, 2012 (Act No 42 of 2012) In general - (Cited)

Texts

1. De Waal, J., et al (Eds) (2004), *The Bill of Rights Handbook* Cape Town: Juta 4th Edn
2. Garner, BA., (Ed) (2014), *Black's Law Dictionary* St Paul Minnesota: Thomson Reuters 10th Edn

Advocates

None mentioned

JUDGMENT

1. This appeal arises from the judgment and decree of Mativo, J (as he then was) in consolidated Judicial Review Petition Numbers 7, 8, 20, 21 and 26 all of 2020. In their respective Judicial Review Petitions, the respondents challenged the legal and constitutional validity of the decision by the appellant declining to admit them into the Advocates Training Program "ATP".

2. The brief facts of the case were that the respondents came across an advertisement in the local dailies by the appellant on September 4, 2019, inviting applications for admission to the ATP for the year 2020 - 2021. The said advert prescribed the eligibility criteria as follows:

A. Eligibility Criteria

3. The following categories of persons will be admissible to the ATP:

    1. Applicants admitted into the LLB after December 8, 2014 must satisfy the following requirements: -

        Graduates of Kenyan Universities: i) Attained a minimum of grade B(plain) in English Language or Kiswahili and a mean grade of C(plus) in the Kenya Certificate of Secondary Examination or its equivalent; ii) Attained a minimum of two (2) principals and one (1) subsidiary totalling to an aggregate of ten

        (10) points in the Kenya Advanced Certificate of Education or its equivalent: iii) Passed the mandatory 16 core subjects as stipulated in the Second Schedule to the *Legal Education Act, 2012*; and iv) Hold or are eligible for conferment of an LLB degree from a recognized Kenyan university. NB: Applicants holding secondary school qualifications other than those offered by the Kenya National Examinations Council (KNEC) must seek equation from the Kenya National Qualifications Authority (KNQA).

        Graduates of Foreign Universities i) Attained a minimum of grade B (plain) in English Language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Examination or its equivalent; ii) Attained a minimum of two (2) principals and one (1) subsidiary totalling to an aggregate of ten

        (10) points in the Kenya Advanced Certificate of Education or its equivalent: and iii) Passed the mandatory 16 core subjects as stipulated in the Second Schedule to the *Legal Education Act, 2012*; iv) Hold or are eligible for conferment of a recognized LLB degree from a foreign university; v) Obtain clearance from the Council of Legal Education vi) Sit and pass the Pre-Bar Examination provided for under part 1(b) (iii) of the Second Schedule to the *Kenya School of Law Act, 2012*. NB: Applicants holding secondary school qualifications other than those

offered by the Kenya National Examinations Council (KNEC) must seek equation from the Kenya National Qualifications Authority (KNQA).

2. Applicants admitted into the LLB Before December 8, 2014must satisfy the following requirements: - 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 (LLB) of that university; b) Having passed the relevant examinations of a university, university college or other institution 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, and prior to enrolling at that university, university college or other institution – (i) attained the minimum entry requirements for admission to a university in Kenya; and

    ii) obtained a minimum grade B (plain) in English Language and a mean grade of C (plus) in the Kenya Certificate of Secondary Examination or its equivalent; c) Holds a Bachelor of Laws Degree (LLB) from a recognized university and attained a minimum grade of C (plus) in English and a minimum aggregate grade of C (plain) in the Kenya Certificate of Secondary Examination and holds a higher qualification eg "A" level, "IB", relevant "Diploma", other "undergraduate degree" or has attained a higher degree in Law after the undergraduate studies in the Bachelor of Laws programme; or d) Holds Bachelor of Laws Degree (LLB) from a recognized university and attained a minimum grade of C (minus) in English and a minimum of an aggregate grade of C (minus) in the Kenya Certificate of Secondary Examination and sits and passes the Pre-Bar Examination set by the School as a pre-condition for admission. NB: Applicants holding secondary school qualifications other than those offered by the Kenya National Examinations Council (KNEC) must seek equation from the Kenya National Qualifications Authority (KNQA).

B. Application Documents. Applicants seeking admission to the programme are required to forward their complete application forms together with: - a) Copy of the applicant's LL.B. degree certificate or proof of eligibility for conferment; b) Copies of academic transcripts for the four (4) academic years; NB (Provisional transcripts shall only be accepted if they show proof of completion of the LLB programme) c) Copy of secondary school certificate(s); d) Copy of national identity card or valid passport; e) Two passport size colour photographs; f) Copy of payment receipt issued by the School; g) Copy of CLE clearance letter for persons with LLB Degrees from foreign universities; h) Letter of equation from KNQA for secondary school qualifications not offered by KNEC; I) Copy of admission letter of the LLB.

4. The respondents were of the view that they met the threshold, applied for admission in which some were considered and offered admission letters. However, they were later informed by the Director of the appellant "KSL" in writing that their respective applications were unsuccessful as their Kenya Certificate of Secondary Education (KSCE) grades were below the grades stipulated in the *Kenya School of Law Act* (KSL Act). They deposed that they held Bachelor of Laws Degree (LLB) from local Universities which was the only requirement for admission to the ATP under section 16 of the KSL Act as read with paragraph 1(a) of the Second Schedule to the Act. They further deposed that the applications were rejected on grounds either that their KCSE grades were below the grades stipulated in the KSL Act or that as per the KSL Act, the Diploma in Law Certificates or degree certificates they held could not be considered for admission to the ATP, hence, their provisional admission letters to KSL dated 4th December, 2019 were revoked on grounds that they were issued in error.

5. That article 43(1)(f) of the *Constitution* guaranteed them the right to education which the KSL was illegally denying them being the sole institution within Kenya offering the ATP, hence, the refusal, though discretionary, had to recognize this monopoly and their huge investment both in time and money. In the premises, the decision was unlawful, unreasonable, procedurally unfair and materially influenced by an error of law.

6. According to them, the appellant misapplied section 16 of the *KSL Act* and paragraph 1(a) of the Second Schedule and arrived at decisions that were unconscionable, irrational, unreasonable, unjust and *ultra vires* its statutory mandate. It was their case that section 16 of the KSL Act as read together with paragraph 1(a) of the Second Schedule of the Act are not mutually exclusive to section 8(3)(a) & (c) and (4) read together with paragraphs 4, 5 and 6 of the *Council of Legal Education (Accreditation and Quality Assurance) Regulations 2012* (Rev 2016) on the criteria for admissions to the diploma, LLB degree and ATP program. To them, their applications fell under section 16 of the *KSL Act* as read together with paragraph 1(a) of the Schedule to the *KSL Act* which provisions are qualified by the conclusive requirements set out in sections 8(3)(a) and (c) of the *Legal Education Act* read together with paragraphs 4(1)(a), 5(1)(d) and 6(1)(a) of Part II of the Third Schedule of the *Council of Legal Education (Accreditation and Quality Assurance) Regulations 2012*. As a consequence, the rejection was unreasonable, irrational and *ultra vires* KSL statutory powers and a breach of articles 43(f) & 47 of the *Constitution* and the *Fair Administrative Action Act* and the right to legitimate expectation.

7. The respondents in the penultimate prayed for orders of *certiorari* to quash the impugned decision of KSL, an order of prohibition stopping the KSL from enforcing, implementing, or in any manner whatsoever, effecting its decision of barring them from joining the ATP, and an order of *mandamus* compelling KSL to immediately admit them into ATP. Further, the respondents prayed for a declaration that KSL had breached their constitutional rights among others the right to dignity contrary to article 28 of the *Constitution*, freedom from psychological torture under article 29(d), right to information under article 35(3), right to education under article 43(f), right to fair administrative action under article 47 and rights of the Youth under article 55.

8. The appellant in response relied on two replying affidavits dated 6th and February 25, 2020 respectively, all sworn by one, Fredrick Muhia the Principal Officer, Academic Services, KSL. In a nutshell, the appellant's case was that they had placed an advertisement in the local dailies for applications for admission into the ATP for the year 2020/2021 which was based on the legal requirements stipulated under the law. It thereafter evaluated all the applications received against the legal criteria and rejected the respondents' applications for failing to meet the prescribed KSCE requirements. That some of the respondents relied on their Diploma in Law Certificates to gain admission, yet the applicable law had no provision for academic progression particularly based on Diploma in Law Certificates. That some of the appellants lodged appeals which were considered and dismissed on the grounds that the applicable law did not have a provision for academic progression. Further, that some of the respondents did not satisfy the criteria under LN No 169 of 2009 against which the applications were evaluated though they had initially been issued with provisional admission letters which were subsequently recalled. That some of them qualified under clause 5(c) of the First Schedule of LN No 169 of 2009, which provision provides for a Bachelor's Degree from a recognized university, a minimum grade C+ in English and a minimum aggregate C plain in the KCSE, held a higher qualification for instance "A" levels, IB, relevant diploma, other undergraduate degree or has attained a higher degree in law after undergraduate studies in the LLB. That any diploma, in law, was not a relevant diploma for the purposes of the ATP Programme. It was the appellant's stand that if some of the respondents' applications were allowed on that score, anybody with a diploma in any field would be eligible to join the ATP Programme, and that

was not the intention of the drafters of the Act to have a holder with a diploma not related to law to be eligible for admission into the ATP Programme.

9. The petitions proceeded by way of written submissions with limited oral highlights. The trial court after consideration of the matter determined that:

> "In view of my analysis and conclusion herein above, it is my finding that the applicants in these consolidated judicial review applications have established grounds for the court to grant the orders sought. Accordingly, I issue the following orders: -
>
> a. That KSL's decision to reject the applicants' applications into the ATP is illegal and *ultra vires* its statutory mandate.
>
> b. That KSL's decisions declining each applicant's admission into the ATP is a gross violation of the applicants' constitutionally guaranteed rights to education provided under article 43(1)(f) of the *Constitution*.
>
> c. An order of *certiorari* be and is hereby issued quashing the decision by the Kenya School of Law declining each and every individual applicant's application for admission into the Advocates Training Programme (ATP) for the 2020/2021 academic year and or for any other academic period.
>
> d. An order of *mandamus* be and is hereby issued compelling the Kenya School of Law to admit all the applicants in these consolidated judicial review applications into the Advocates Training Programme (ATP) at the Kenya School of Law.
>
> e. That each party shall bear his/her costs of his/her application."

10. Aggrieved by the judgment and decree, the appellants approached this court on appeal that the trial court erred in law and fact: by failing to refer to and analyze the appellant's extensive case law cited and submissions, and holding that the *Legal Education Act* prescribed admission requirements to the ATP when it did not; by failing to recognize the statutory obligations of the appellant under section 17(2) of *KSL Act* and finding that the subsidiary legislation overrides substantive law; by legislating in its judgment and interpreting the law in a manner that perpetuates unfair discrimination between foreign graduates and local graduates; and lastly, disregarding or ignoring the evidence of the appellant and considering extrinsic matters and drawing conclusions that the appellant admitted students with qualifications similar to the respondents without any evidence to that effect being placed before it.

11. The appeal was canvassed by way of written submissions with limited oral highlights. The appellant submitted that given the contents of the judgment, it will be forced to admit unqualified persons to the ATP. That the trial court ought to have found that the key issue for consideration under the *KSL Act* was that secondary school qualifications counts a lot for an applicant to join the ATP contrary to the submissions by the respondents. That the trial court's interpretation of the provisions of the Second Schedule of the *KSL Act 2012* and particularly the word "OR" as used between paragraphs 1(a) and (b) resulted in absurdity. That even though there were two schools of thought on the interpretation of the meaning of the word "OR" as used in the statute, the appellant submitted that the trial court ought to have used an interpretation that would not only make the statutory provision on admission operative and workable but also equally make them operative in a just and reasonable manner. That, at a glance of paragraph 1(a) and 1(b) of the Act, their respective plain meaning is identical in that recognition of universities is by the Commission of University Education while legal education service providers are subjects of further prescription by the Council of Legal Education. That under paragraph 1(a)

of the Act, candidates being admitted to pursue a law degree at a university level must have attained qualifications in b(i) & (ii) but that paragraph does not have the qualification that appears in paragraph 1(b), and, if a wrong interpretation is used would result in discrimination against students who study outside the country and those who study within the country. The appellant while relying on the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR urged that a purposive interpretation should have been invoked by the trial court so as to reveal the real intention of the Statute.

12. The appellant further submitted that if section 1(a) of the Act was to be interpreted plainly and assumed to apply to universities domiciled in Kenya and the word (OR) interpreted disjunctively would mean that all students who join any Kenyan university irrespective of the grades they hold should be allowed to join the ATP and the secondary school qualification would not matter which would be different from those graduates in 1(b) from foreign universities who would be required apart from their LL.B degrees, also to prove that their secondary school results are in line with the requirement of the grade B plain in English or Kiswahili and a mean grade of C+ and then be further subjected to a pre-bar examination. This kind of interpretation would bring absurdity and discrimination to the detriment of those who study abroad and which the trial court failed to appreciate.

13. The appellant submitted that there is 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 standards otherwise it is tantamount to arbitrary discrimination.

14. The appellant went on to point out that some of the respondents failed to avail copies of their KCSE certificates which was a prerequisite. This was a blatant refusal to comply with the requirements which meant that their applications were not competent and hence the rejection. Further, some of the respondents had a score of D in English, D+ in Kiswahili and a mean grade C-. The appellant cited the persuasive decision of the High Court of *Githaiga Munyeki v Kenya School of Law* [2017] eKLR where Mwita, J while dealing with a similar issue stated that the minimum qualification in both cases should be the mandatory requirements as stated under 1(b) whether the applicant undertakes the degree outside or within the Country. Both must have obtained a mean grade of C+ in KCSE and a B (plain) in either English or Kiswahili.

15. The appellant submitted that by holding that Parliament created two different categories of admission to KSL, the trial court legislated against and defeated section 17(2) KSL Act hence rendering the KSL admission functions perfunctory and ceremonial to the extent that once one obtains an LL. B degree it becomes automatic to join the ATP. The trial court further erred when it relied on regulations to find that they gave the Council power to set the admission criteria yet the said function had been set by the Parliament under section 17(2) of the KSL Act. It was submitted that ideally, subsidiary legislation cannot override a substantive Act of Parliament.

16. That the relevant provisions of the regulations had been found to be inconsistent with the KSL Act in the case of *R v Kenya School of Law, & Council of Legal Education Ex parte Daniel Mwaura Marai* [2017] eKLR. The appellant could not thus look beyond the provisions of the enabling Act in admitting students to the ATP. The appellant thus prayed that the appeal be allowed.

17. The respondents in turn submitted that the main issue for determination was the applicable admission criteria to the ATP at the KSL and that the advertisement published on 4th of September, 2019 in the local dailies by the appellant purporting to set out requirements to join the ATP added extra requirements that were manifestly illegal. The appellant accordingly acted *ultra vires*. That a plain reading of sections 15 and 16 of the *KSL Act* together with the Second Schedule rule 1(a) the only qualifications an applicant to the ATP needs to satisfy are that he/she possesses a genuine LLB degree

earned from a Kenyan University, recognized by the Commission for University Education, and offering an LLB programme also recognized by the Council for Legal Education. With regard to the Second Schedule 1(b), it was submitted that the text is captured as per the *Universities Act*, and the Commission of University Education requirements for equation and recognition of foreign obtained degrees. When an applicant, therefore applies to the KSL with a law degree obtained from a university not in the Commission for University Education's purview, it is at that point that the KSL, under the direction and supervision of the Commission and the Council, determine the eligibility of a person intending to pursue a course in the legal sector and the practice of the KSL is to subject them to a pre-bar examination to gauge their aptitude.

18. It was further submitted that once a person is admitted into a university to pursue a certain course, there is a rebuttable presumption in law that such a person is qualified and eligible to study such a course. That the Second Schedule of the KSL Act provisions 1(a) and (b) refer to locally trained as contrasted with foreign-trained lawyers. This distinction is not made by the KSL Act, but rather is made by the Commission for University Education. Provision 1(b) that refers to KCSE qualifications is to ensure that those who seek training abroad are qualified to be trained in Kenyan Universities but choose to study abroad. Further, that the respondents did have post-secondary qualifications which demonstrated progression in their studies. The respondents relied on the case of *Khelef Khalifa & 2 others v IEBC* [2017] eKLR to buttress the argument that, the KSL Act was amended by *Statute Miscellaneous (Amendment) Act* No 18 of 2014, and since that time to date, the criterion has been that, once a person is admitted into a university to pursue a certain course, there is a rebuttable presumption in law that such a person is qualified and eligible to undertake such a course. The Second Schedule of the *KSL Act* provisions 1(a) and (b) refer to locally trained as contrasted with foreign trained lawyers, and that, to use long repealed regulations to deny the respondents entry into the ATP, was as absurd as well as manifestly illegal. The respondents further relied on the case of *Kenya Medical Laboratory Technicians and Technologists Board & 4 others v Attorney General; and Kenya Law Reform Commission & 4 others (Interested Parties* [2020] eKLR for the proposition that once a law is repealed, it completely ceases to have the force of law, just as a newly passed law cannot be applied retrospectively. That the court rightly held that the *Universities (Amendment) Act* 2016, granted the Commission of University Education the sole mandate of regulating and accrediting Universities. The appellant could not therefore make the rules as it goes along.

19. The respondents submitted that the appellant's actions were manifestly discriminatory as article 27 of the *Constitution* guarantees every Kenyan freedom from discrimination and the appellant had turned to a gatekeeper, discriminating against Kenyans whom they deem to be too slow to be trained solely due to KCSE examination results despite article 43 of the *Constitution* guaranteeing all Kenyans a right to education. That the actions by the appellant were in contravention of article 55(a) of the *Constitution* which is to the effect that the State should ensure that the youth are able to access relevant education and training; and in sub-article (c) access employment. The appellant's actions were in the circumstances driven by the fact of its monopolistic nature as the only institution mandated to offer ATP training. That the respondents were Kenyan- trained lawyers, who had satisfied a University Senate that they are worthy of an LLB degree that had been awarded and there was therefore a legitimate expectation that they would be enrolled for the ATP program. They submitted that the appellant was discriminatory in its operations as whilst this appeal was pending it had admitted the 5th respondent to the program under unclear circumstances.

20. It was submitted that the appellant interpreted the law selectively to the detriment of the respondents. That the admission criteria by the appellants ought to be based on the applicable law at the time which was before December 8, 2014 when the amendments to the Second Schedule of the *Kenya School of Law* No. 26 of 2012 came into force. Reliance was placed on the case of *Sydney Douglas Webuye v*

Kenya School of Law [2018] eKLR for the proposition that if the intention of the LN No 169/2009 was for the diploma envisaged therein to be one in law, it would have been clearly stated or expressed therein but which was not the case here. That it is only under Clause 5 and 6 of the Third Schedule to the *Legal Education Act (accreditation and quality assurance) Regulations* that require applicants for admission to have a diploma in law if the said applicant did not attain the minimum required qualifications in his/her KCSE results.

21. It was their submission that the regulations under the Council of *Legal Education Act* (CLE Act) must be read together and that LN No 169/2009 and 170/2009 should be read together as a subsidiary legislation under CLE Act and not in distinction to one another. Reliance was placed on the High Court decision of Lenaola, J (as he then was) in *Eunice Cecilia Mwikali Maema v Council of Legal Education & 2 others* [2013] eKLR in which he stated that the two regulations under the CLE Act must be read together and not in distinction to one another which holding was affirmed by the Court of Appeal. That under the LN No 169/2009, the appellant admitted in the trial court that it allowed for academic progression but at the same time claimed that if allowed would compromise the profession.

22. On discrimination, it was submitted that their rights under the *Constitution* and particularly articles 10, 19(3), 20(2), 21(1), 22(1), 24(1), 27, 28, 43(1)(f) and 47 were violated. That the decision by the appellant was unlawful, unreasonable, procedurally unfair and materially influenced. Further, that their legitimate expectation as pronounced in the case of *Communication Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR had been curtailed.

23. That the issue of admission criteria to the ATP has been litigated times without number and that the inconsistency in the numerous decisions rendered by the High Court on the interpretation of section 16 of the *KSL Act* read together with Paragraphs 1(a) and 1(b) of the Second Schedule to the Act has not made it any easier for law students seeking admission to the ATP, Universities and Institutions of legal education and in particular the CLE and the appellant who still has the monopoly of teaching the ATP. That the trial court did not err in holding that the appellant misinterpreted and misconstrued sections 16 and 17 of the *KSL Act* and the Second Schedule to the Act thereby breaching the respondents' legitimate expectations to be admitted to the ATP and their constitutional rights to non-discrimination and equal treatment before the law, the right to information, right to education and right to fair administrative action among others.

24. The respondents submitted that the Supreme Court's interpretation of the word 'or' when used in a Statute as being disjunctive in *Raila Amolo Odinga & another v Independent Electoral & Boundaries Commission & 4 others & Attorney General & another*, Petition No 1 of 2017 is binding on this court and therefore this court should follow the said interpretation and find that the trial court did not err in its interpretation of the word 'or' as disjunctive and that the respondents therefore fell under paragraph 1(a) of the Second Schedule to the Act. They submitted that it defies all logic as to why the appellant elected to read paragraph (b) selectively so that in its view, paragraph b(ii) applies to all the respondents but paragraph (b)(iii) does not. If paragraph b(iii) were to apply to all respondents, then none of the respondents from Kenyan Universities admitted to the Kenya School of Law in the year 2019/2020 qualified because they were not required to sit the pre-bar exams. That the argument by the appellant on creation of two categories of entry to ATP will discriminate against those who study outside Kenya is litigation on behalf of unknown parties and should not be entertained by this court.

25. The respondents further submitted that there was no provision in any Statute that gives the appellant the mandate, function and/or power to determine the criteria for admission to the ATP or to any other legal program for that matter. That vide section 8 of the *Legal Education Act* No 27 of 2012, it is only the Council of Legal Education which has the mandate to set the criteria for admission to all and any legal education program including the ATP. The appellant can only measure the qualifications of the

respondents against those set by the CLE. They submitted that the CLE's mandate to set criteria for admission to legal programs is found in section 8(4) of the *Legal Education Act* which provides that in case of any conflict of laws, section 8 of the *Legal Education Act* prevails and that regulations by CLE made pursuant to its powers in section 8 of the *Legal Education Act* cannot be said to be inconsistent with section 16, 17 of the *KSL Act* and Paragraph 1(a) of the Second Schedule to the Act. This is so because none of the latter provisions are explicit on the admission criteria to the LLB and or the ATP.

26. That whilst the CLE regulations made pursuant to its powers under section 8 of the *Legal Education Act* require no construction, the *Council of Legal Education (Accreditation and Quality Assurance) Regulations* 2012 provide that those who obtain a minimum of B in English and an aggregate of C+ in KCSE get direct admission to LLB programs and afterwards the ATP. Significantly, the Regulations, sets out the criteria for admission to progressive legal education starting with Certificate in Law, Diploma in Law, Bachelor of Laws (LLB) and ATP in Paragraphs 4, 5 and 6, Part II of the Third Schedule to the regulations.

27. As a result, and contrary to the appellant's submission that a reading of paragraph 1(a) of the Second Schedule to the Act to the exclusion of paragraph 1 would compel it to admit any or all applicants who present LLB degrees from Kenyan Universities with no regard as to how they obtained such degrees is misleading as the criteria for obtaining an LLB degree by direct admission after KCSE and also through progression in legal education exists in law. They therefore submitted that the eligibility is through progressive legal training as provided for under paragraph 4(1)(a) of the Regulations. In the end, they prayed that the appeal be dismissed.

28. We have considered the record, submissions by respective counsel, the authorities relied on and the law. This being a first appeal, parties are entitled to and expect a re-evaluation and re-consideration of the evidence tendered in the trial court afresh and to this court's own determination of the issues in contestation. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testify and therefore give due allowance for that. See *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.

29. Having have gone through the record, the submissions and all information provided to us by both parties, we deem that the only issue for determination in this appeal is the applicable admission criteria to the ATP at KSL.

30. In dealing with this issue, we shall first consider various legislations and entities that have a bearing for one to be admitted to KSL as it is our considered view that for one to become a lawyer, it is a process that starts from a lower level of schooling to the time of admission and every such level of education is governed by a set of laws and regulations. The *Constitution* is the supreme law of the land and under article 43, it provides for the right to education. It provides that every person has the right to education. The right to education would make no sense if a person's academic qualifications are not recognized by the State on unreasonable grounds.

31. There are several statutes that deal with matters of education. However, those that concern us are the *Legal Education Act*, No 27 of 2012 and the *Kenya School of Law Act*. The *Legal Education Act* in its preamble provides for the establishment of the Council of Legal Education (the Council); the Legal Education Appeals Tribunal; the regulation and licensing of legal education providers and for connected purposes. Section 4 establishes the Council of Legal Education whose functions amongst others is to regulate legal education and training in Kenya offered by legal education providers, licence legal education providers and to supervise legal education providers.

32. Further, Section 8(3) of the Act allows the Council to:

a. make regulations in respect of requirements for the admission of persons seeking to enrol in legal education programmes;

b. establish criteria for the recognition and equation of academic qualifications in legal education;

c. 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;

d. establish a system of equivalencies of legal educational qualifications and credit transfers;

e. advise and make recommendations to the Government and any other relevant authority on matters relating to legal education and training that require the consideration of the Government;

f. collect, analyse and publish information relating to legal education and training;

g. advise the Government on the standardization, recognition and equation of legal education qualifications awarded by foreign institutions;

h. carry out regular visits and inspections of legal education providers; and

i. perform and exercise any other functions conferred on it by this Act.

33. The Council has a duty to regulate how the universities admit students to pursue various cadres of legal education; that is at the certificate, diploma and degree levels. That duty must be discharged at the point of entry of the student at the institution offering such courses. A legal education provider, must, at the direction and supervision of the Council, be able to determine whether a student is qualified to pursue studies in law at the time the student applies to join the institution, be it a college or a university.

34. It should be noted however that whereas the Council has powers to make regulations in respect of requirements for the admission of persons seeking to enrol in legal education programmes, it also has the duty to ensure compliance of such regulations at the very point of admission of such persons, at whatever level. Hence, it is upon the Council to ensure that all those enrolled to pursue legal education programmes are duly qualified in law to undertake such studies.

35. The *KSL Act* in its preamble states that it is an Act of Parliament to provide for the establishment, powers and functions of the Kenya School of Law (KSL) and for connected purposes. Among its various functions is to train persons to be advocates under the *Advocates Act*. KSL, therefore, has the power to admit persons for the necessary training. Section 16 and the Second Schedule of the *KSL Act* provide for the criteria for admission of students to the KSL. For purposes of this judgment, the text of the qualifications in the Second Schedule to the Act provides as follows: -

1. "A person shall be admitted to the school if –

    a. having passed the relevant examination of any recognized university in Kenya or any university, university College or any other institution prescribed by the council, holds or becomes eligible for the conferment of the bachelor of Laws (LLB) degree of that university, University college or Institution, or

    b. having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of laws – Degree (LLB) in the grant of that university, University college or other institution

        i. Attained a minimum entry requirement for admission to a university in Kenya;

ii. Obtained a minimum grades B(plain) in English language or Kiswahili and a mean grade 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."

36. This is the text after an amendment was introduced in 2014. Prior to this amendment, paragraph 1 of the Second Schedule provided as follows: -

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 (LLB) 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 (LLB) in the grant of that university, university college or other institution:

i. attained a minimum entry requirement for admission to a university in Kenya; and

ii. obtained a minimum grade B(plain) in English Language or Kiswahili and a mean grade of C(plus) in the Kenya Certificate of Secondary Education or its equivalent; or

2. Has sat and passed the Pre-Bar examination set by the school.

37 The parties in this appeal have repeatedly made reference to Legal Notice No 169 of 2009 as applicable to some of them and particularly Regulation 5 which provides as follows:

"A person shall not be eligible for admission for the Post Graduate Diploma (Advocate Training Programme) unless that person has;

a. passed the relevant examination of any recognized university in Kenya, he holds or has become eligible for the conferment of the Bachelor of Laws Degree (LLB) of that university;

b. passed the relevant examinations of a university, university college or other institutions prescribed by the Council, he 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, had prior to enrolling that university, university college or other institution-

i. attained a minimum entry requirement for admission to a university in Kenya; and

ii. a minimum grade B (plain) in English Language and a mean grade of C+ (plus) in the Kenya Certificate of Secondary Examination or its equivalent;

c. A Bachelor of Laws Degree (LLB) from a recognized university and attained a minimum aggregate grade of C (plain) in the Kenya Certificate of Secondary Examination, holds a higher qualification eg "A" level, "IB", relevant "Diploma", other

"undergraduate degree" or has attained a higher degree in Law after the undergraduate studies in the Bachelor of Laws Programme; or

d. A Bachelor of Laws Degree (LLB) from a recognized university and attained a minimum grade of C- (C minus) in English and a minimum of an aggregate grade of C- (C minus) in the Kenya Certificate of Secondary Examination sits and passes the Pre-Bar Examination set by the Council of Legal Education as a per- condition for admission."

38 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.

39 In interpreting Statutes, it is also a requirement that the court looks at both the text and context in order to ascertain the true legislative intent. In *Reserve Bank of India v Peerless General Finance and Investment Co Ltd*, 1987 SCR (2) 1 the Supreme Court of India stated thus:

> " Interpretation must depend on the text and the context. They are the basis of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important... A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

40 On the same principle, Ngcobo, J of the Constitutional Court of South Africa stated in *Bato Staff Fishing (PTY) Ltd v Minister of Environmental Affairs and Tourism and others* [2004] ZACC 15; 2004(4) SA 490(CC): 2004(7) BCLR 687(CC) that:

> " The technique of paying attention to context in statutory construction is now required by the *Constitution* section 39(2). As pointed above, that provision introduces a mandatory requirement to construe every piece of legislation in a manner that promotes the spirit, purport and objects of the Bill of rights."

41 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. This was stated by this court in the case of The *Engineers Board of Kenya v Jesse Waweru Wahome & Others* Civil Appeal No 240 of 2013 thus:

> "One of the canons of statutory interpretation is a holistic approach... no provision of any legislation should be treated as 'stand -alone' An Act of parliament should be read as a whole, the essence being that a proposition in one part of the Act is by implication modified by another proposition elsewhere in the Act."

42 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 required 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 qualifications.

43 The respondents' main contention is that since they had obtained degrees from local Universities, they were not required to prove their entry grades at KCSE. A closer look at the provisions clearly shows that there are two parts which all are dependent on the qualifications after clause 1(b) of the Act.

44 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.

45 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.

46. We are alive to the fact that the parties relied on the said regulations as they were then in force before the Court of Appeal declared the same to be invalid for want of compliance with the *Statutory Instruments Act, 2013* on December 21, 2021 in the case of *Javan Kiche Otieno & another v Council of Legal Education* [2021] eKLR. But we hasten to add that such invalidation could not apply retrospectively.

47. On the issue of progressive academic qualifications, it is the appellant's stand that the person who hinges on this aspect of qualification must have obtained a diploma in law and not just any other course. Progression ideally is the process of developing or moving gradually towards a more advanced state. The respondents urge that they have been progressing towards studying law and should be seen as having qualified through this medium of qualification. The appellant's statutory mandate under section 8(3)

(a) of the *Legal Education Act*, 2012 is to make regulations in respect of persons wishing to enrol in Legal Education Programmes. The same provides as follows:

> " Functions of the Council: 1) .....
>
> 2) .....
>
> 3. 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 enrol in legal education programmes;
>
> ....
>
> c) 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."

48 The wording in Part C above is clear as it is, that prior learning and experience in law is what ought to be considered in formulating a system that would see the progression in legal education. We do not think a degree in aeronautics or a diploma in interior design for instance, can be termed as progression towards studying law. Indeed, the only closer aspect contemplated is experience and learning in law culminating in a diploma in law or related course in law. We therefore hold that such degree and diploma are not to be categorized as a progression in law of whatsoever kind and even if they were, the appellant had to consider the primary requirements in the Act first before reverting to the regulations and which is the requirement of grades in KCSE. We refuse to be swayed by the respondents' argument that even having obtained a mean grade D Plain, one can still proceed and pursue law and only wave the diploma in other disciplines as a condition for admission to the ATP.

49 It is our considered view that the 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.

50 It was submitted that section 1(a) of the Second Schedule to the Act, is clear that upon being eligible for an award of a Bachelor of Laws degree from a Kenyan University an applicant would be eligible for admission to the ATP. Further, sections 1(a) and (b) of the Second Schedule to the *KSL Act*, distinguishes applicants who hold a Bachelor of Laws degree from a Kenyan University and those from a foreign University. We are of the view that with the use of semi-colon between 1(a) and (b) of the Act then the conditions follow which to us means that you are eligible, firstly, based on your LLB degree either from a Kenyan University or as in (b) from a foreign university but in all situations, the conditions are same and are enlisted therein which are mandatory to all irrespective of whether you have a degree from within or without Kenya.

51. On whether the decision declining to admit the respondents was illegal and unreasonable, the respondents all recite the provisions of article 47(1) of the *Constitution*. We are aware of the fact that the appellant should be shown to have acted beyond what the law required of it to do as it is the body bestowed with the mandate of ensuring that the legal profession is conducted in a manner that uplifts and upholds the law and standards. We see nothing wrong, illegal, unreasonable, discriminatory or unconstitutional in the conduct of the appellant in the whole process. The respondents were well aware that after completing KCSE, there were cluster points for one pursuing a degree in law and the

mandatory subjects. We agree with the proposition in *Kenya Revenue Authority v Menginya Salim Murgani* Civil Appeal No. 108 of 2009, that:

> " There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."

52. We, therefore, find that the decision by the appellant was in line with the law and cannot, therefore, be faulted.

53. On the question of discrimination of the respondents by the appellant, we wish to render ourselves as follows. In the case of *Nyarangi & 3 others v Attorney General* [2008] KLR 688, it was held:

The *Black's Law Dictionary*, 10th Edition defines discrimination as follows:

> " The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured."

Wikipedia, the free encyclopaedia defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. *The Bill of Rights Handbook*, Fourth Edition 2001, defines discrimination as follows:-

> " A particular form of differentiation on illegitimate ground."...

The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of *Griggs v Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications was found "to disqualify Negroes at a substantially higher rate than white applicants."

54 Further in the persuasive High Court case of *Republic v The Council of Legal Education ex parte James Njuguna & 14 others* Miscellaneous Civil Case No 137 of 2004 (Unreported): Mumbi, J (as she then was) whilst dealing with a similar situation stated:

> "...it is clear that, rather than the respondents having acted in a manner that was discriminatory against the petitioner, it was the petitioner who was seeking what can only be viewed as preferential treatment from the respondents. The Admission Regulations applicable to all those seeking admission to the Kenya School of Law in 2006 when the petitioner made her application were the Council of Legal Education (Kenya School of Law) Regulations, 1997. There is nothing before this court to show that all other applicants were not required to meet these qualifications. What the petitioner was asking was for the 1st respondent to waive these requirements with regard to her; and what she is asking this court to do is to find that even if she was not qualified under those regulations, they were against

the requirements of the *Advocates Act* anyway, and she should not have been required to meet them."

55 To us, the interpretation being advanced by the respondents' points to discrimination between the two lots of students under section 16 of the Act which was not the intent of the section at all. It is our view that, the purpose of the Act and in particular the section cited was to make it clear, that the requirements for admission to KSL for both local and foreign obtained degrees and the common denominator was the grades attained at KCSE. Any interpretation other than this would only mean negative discrimination. We, therefore, agree with the appellant that the interpretation given by the trial court if allowed would lead to total absurdity and discrimination.

56 Thus, 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 into the ATP for 2020/2021 academic year was made within the law and is upheld.

57 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.

58. In the end, we are satisfied that the appellant has made out a case deserving our wave of hand in its favour. Consequently, the appeal is allowed, the judgment and decree of the trial court are set aside. Based on the type of litigation, each party will bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

Deputy Registrar