



REPUBLIC OF KENYA

IN THE LEGAL EDUCATION APPEALS TRIBUNAL AT NAIROBI

APPEAL NO. 7 OF 2021

CORAM: Rose Njoroge – Mbanya (Mrs.) – Chairperson; Members - Eunice Arwa (Mrs.), Raphael Wambua

Kigamwa (Mr.) and Stephen Gitonga Mureithi (Mr.)

IAN WACHIRA NDEGWA..... APPELLANT

VERSUS

COUNCIL OF LEGAL EDUCATIONRESPONDENT

KENYA SCHOOL OF LAWINTERESTED PARTY

(Being an appeal against the decision of the Council of Legal Education as communicated on the 24th March, 2021 declining

to submit for gazette, refusal to issue a final transcript and a certificate of compliance a finalist of the Advocates

Training Programme)

JUDGMENT OF THE TRIBUNAL.

1. Introduction.

By a Memorandum of Appeal dated 19th April 2021, the Appellant herein filed an appeal against the decision of the Respondent as embodied in the letter of 24th March 2021 in which the Respondent communicated its decision not to issue him with a certificate of compliance and gazette his name for admission to the Bar. The Appeal which was filed under a Certificate of Urgency also dated 19th April 2021 was accompanied by a Supporting Affidavit sworn by the Appellant on the same date.

Neither the Respondent nor the Interested Party appeared before the Tribunal during its sittings in this matter or file any pleadings in response despite being served with the pleadings and the notices for mention for directions on several occasions. The Appeal therefore proceeded *ex-parte*. The Appellant agreed to dispose of the Appeal by way of written submissions.

2. The Appellant's Case.

The appellant, a student who was undertaking the Advocates Training Programme (ATP) during the 2019 academic year by the Memorandum of Appeal, seeks the grant of the following substantive prayers:-

- a) Spent;
- b) The Honourable Tribunal does set aside the Respondent's decision contained in the letter dated 23rd March 2021 refusing gazette and issuance of the Final Transcript together with the Certificate of Compliance;
- c) An order compelling the Respondent to gazette the Appellant and do issue him with the Final Transcript together with the Certificate of Compliance;
- d) The costs of the Appeal;
- e) General damages for the psychological trauma caused by the Respondent;
- f) Interest on (c) and (d).

The facts of the Appeal are briefly that the Appellant was a student of the Respondent in 2019 undertaking the Advocates Training Program, ATP. During his studies, he received results for his project work for all the units offered by the Interested Party save for the results for Trial Advocacy (ATP 104) based on the grounds that he had not appended his signature to the project work.

The Appellant wrote to the Director of the Interested Party requesting for the inclusion of his project marks in the Trial Advocacy results. The Appellant thereafter undertook the Advocates Training Program exams in November 2019 and the Respondent published the results thereto in February 2020. The Appellant confirmed from the published results that he had passed 8 out of the 9 units save for Conveyancing (ATP 107) to which he successfully applied for a remark.

Having now passed all the units, the Interested Party provided the Appellant with an updated Provisional Bar Examination Transcript dated 23rd March 2020 indicating that he had passed all the examinations. The Appellant then completed his pupillage and cleared with the Interested Party who then issued a notice indicated as General Notice No. 3 of 2021 requesting the Appellant among others to confirm their listed particulars before their names are published in the Kenya Gazette which request the Appellant responded to by an email of 10th February 2021 confirming his particulars.

Upon receiving a reminder of the gazette, the Respondent informed the Appellant through an email dated 15th March 2021 that he was yet to complete one component of the examination.

The email read;

“Gazette and Issuance of Certificate of Compliance

Good afternoon Ian,

The above issue refers.

On scrutiny of the records at the Council you are yet to complete one component of the ATP examination; that is the Project marks for ATP 104, Trial Advocacy where you were in firm B17. So your particulars were inadvertently included on the list of those to confirm their details for gazette. Since that component of the ATP examination is administered by the Kenya School of Law, you may want to clear with the School.”

The Appellant protested this turn of events to which the Respondent wrote him a letter dated 24th March 2021 conveying its decision as quoted verbatim below;

“Dear Mr. Wachira,

GAZETTEMENT AND ISSUANCE OF CERTIFICATE OF COMPLIANCE: IAN WACHIRA ADM NO. 20199955 Reference is made to the above-mentioned subject and to your email of 19th March 2021.

The Council of Legal Education acknowledges that it cleared you for gazette on the basis of an oversight and apologizes for the misrepresentation. Subsequent to your clearance, document verification has revealed that you have not fulfilled

ALL requirements of the Advocates Training Program examination for purposes of admission to the Roll of Advocates.

Specifically, records show that you do not have a grade/mark for the project in ATP 104, Trial Advocacy as per the attached matrix.

As you are aware, the ATP examination has three mandatory components. The final score for any unit in the ATP examination is an aggregation of the Project 20%, oral examination 20% and the written examination 60%.

The Council of Legal Education is guided by the records provided by the Kenya School of Law which administers and grades the projects and the oral examination on behalf of the Council of Legal Education. In a nutshell, the project in ATP 104 is missing.

Significantly, the transcript furnished by the Council at this stage is provisional and thus amenable to change in case of a defect or mistake.

Hereto attached please find the updated provisional transcript.

In light of the foregoing, Council urges you to liaise with the Kenya School of Law on how to complete the Project in ATP104 Trial Advocacy for purposes of clearance for gazette. Yours Sincerely,

Secretary/ Chief Executive Officer

Council of Legal Education”

It is this decision that is the subject of this Appeal. As stated earlier, neither the Respondent nor the Interested Party appeared before the Tribunal or filed any document in response. So these facts from the Appellant are not controverted.

3. The Appellant's Submissions.

In his written submissions the Appellant submits that he has satisfied the examination requirements to be cleared by the Council of Legal Education and therefore the decision by the Respondent to deny him gazettement and his final transcript together with a Certificate of Compliance is unfairly discriminatory and a violation of his right to legitimate expectation. He also argues that he has suffered loss from the Respondent's actions. While relying on the decision in **Douglas Moturi Nyairo v University of Nairobi**, (2018) eKLR, the Appellant contends that the Court held in this case that the Respondent was the custodian on past and present student records and that an 11th hour change of position upon discovery of an anomaly is a serious indictment on the capacity of an institution that is reputable and would amount to infringement of the petitioner's right to legitimate expectations.

The Appellant further submitted that under Article 27 of the Constitution, he had a right to equal treatment and relied on the case of **James Nyasora Nyarangi & 3 Others v Attorney General**, (2008) eKLR. He further relied on **Wollace Maina Gatundu v Council of Legal Education**, (2020) eKLR where the Court held that differential treatment of persons where there is no difference constitutes unfair discrimination.

The Appellant also submits that his right to fair administrative action guaranteed by Article 47 of the **Constitution of Kenya**, 2010 as read together with section 4 (1) of the **Fair Administrative Actions Act**, No. 4 of 2015 has been breached since he was not provided with adequate notice and an opportunity to be heard before the decision was made. On this contention, he relied on the case of **Republic v Kenyatta University Ex parte Martha Waihuinin Ndungu**, (2019) eKLR. The Appellant contended that after sitting his Bar examination results and attaining passes in all of them, he had a legitimate expectation. The Appellant relied on the case of **Republic v Kenya Revenue Authority Ex parte Shake Distributors Limited**, Nairobi Civil Appeal No. 359 of 2012 and **Harry Woolf, Jeffrey Jowell and Andrew Le Sueur** at Page 609 of the 6th Edition of **De Smiths Judicial Review** for a definition of legitimate expectation.

The Appellant further submitted that in the case of **Jane Kiongo & 15 Others v Laikipia University and 6 Others** (2019) eKLR, and several other authorities on this doctrine of legitimate expectation. Finally, the Appellant submitted that he had suffered loss as a result of the Respondent's actions and deserved to be paid general damages. He relied on the case of **Iganga Alfred Arunga v University of Nairobi**, (2017) eKLR.

4. Analysis of the Appeal and Determination.

The decision the subject of the appeal originates from the reversal by the Respondent of the results it had issued in the ATP 104 Trial Advocacy unit whereby having earlier confirmed that the Appellant had passed the same, it later informed the Appellant that it was done in error and that the Appellant had not satisfied the requirement for project work in the said unit. The main issues for determination are as follows:-

- (a) Whether the Appellant has satisfied the Respondent's examination requirement;
- (b) Whether the orders sought ought to be granted.
- (c) Who bears the costs of this Appeal?

The Appellant presented evidence from the Respondent and the Interested Party in which both the Respondent and the Interested Party confirmed that the Appellant had passed all his units required for gazettement.

The decision by the Respondent not to gazette the Appellant, not to provide him with a final transcript or issue him with a Compliance Certificate has been challenged in this Tribunal. Both the Respondent and the Interested Party did not appear before the Tribunal or file any response before the Tribunal to explain the basis of the impugned decision.

The Tribunal notes that Section 28 (2) (a) of the **Kenya School of Law Act**, 2012 obligates that the manner of administration of examinations is to be provided for in the Regulations. The same provides;

"28. Regulations.

(1) The Board may, with the approval of the Cabinet Secretary, make regulations generally for the administration and management of the School.

(2) Regulations made under subsection (1) may provide for—

(a) the categories of examinations and the manner in which such examinations shall be administered;..."

The Tribunal once again notes as it did in the case of **Diana Kemunto Ogega v Kenya School Of Law & Council of Legal Education, LEAT Appeal No. 2 of 2020** that the Regulations of the Interested Party do not provide for the assessment mode for the Advocates Training Programme unlike the Para – Legal and the Continuing Legal Education Programmes which are provided for in Regulations 16 and 21 of the **Kenya School of Law (Training Programmes) Regulations**, 2015 which provide;

"16. Assessment and issuance of certificate in the Paralegal Studies Programme

- (1) *The School shall assess each course unit using coursework and a final written examination.*
- (2) *The Board of Directors shall determine the percentage to be allocated for each mode of assessment...*

21. *Assessment under the Continuing Professional Development programme*

The School shall determine the mode of assessment for each course offered under the Continuing Professional Development Programme.

The Regulations have a lacuna on the mode of assessment for the Advocates Training Programme which should be cured through the making of the requisite Regulation. The statutory duty to administer Bar Entry Examination is reposed upon the Respondent by dint of section 8 (1) (f) of the **Legal Education Act**, 2012. The same provides;

“8. Functions of the Council

- (1) *The functions of the Council shall be to—*
 - (a) *regulate legal education and training in Kenya offered by legal education providers;*
 - (b) *licence legal education providers;*
 - (c) *supervise legal education providers; and*
 - (d) *advise the Government on matters relating to legal education and training.*
 - (e) *recognise and approve qualifications obtained outside Kenya for purposes of admission to the Roll.*
 - (f) **administer such professional examinations as may be prescribed under section 13 of the Advocates Act.**

The Respondent has however, delegated the said function to the Interested Party. Under section 8 (1) (f) of the **Legal Education Act, 2012**. Therefore, the Trial Advocacy exam the subject of this appeal was being administered on behalf of the Respondent by the Interested Party pursuant to this delegated authority. The Tribunal takes cognizance of the fact that Section 19 (2) of the **Kenya School of Law Act**, 2012 provides;

“19. Course attendance

- (2) ***The Director shall cause records of attendance to be kept in respect of each course and the record shall be conclusive evidence of attendance by students at the School.***

The Tribunal was not presented with evidence by either the Respondent or the Interested Party rebutting the claim to passing ATP 104 Trial Advocacy as presented by the Appellant. In absence of evidence to the contrary, the Tribunal therefore makes a finding that the Appellant satisfied the examination requirements to be cleared by the Council of Legal Education.

On the issue of fair administrative action, the Tribunal has considered the submissions of the Appellant. The Tribunal finds that the Respondent acted in breach of the Appellant’s right to fair administrative action when it made the decision to recall the Appellant’s published results in ATP 104 Trial Advocacy examination. The basic requirements as to a hearing were clearly breached.

On legitimate expectation, the Appellant has submitted that he had a legitimate expectation. The Respondent and the interested party made written confirmations of the fact of having been a successful Bar examinations student who was awaiting admission to the Bar. The appellant indeed had a legitimate expectation that for the said position or representation to be reversed, he would be subjected to fair administrative action. This indeed forms the basic premise underlying the protection of legitimate expectations being the promotion of legal certainty. Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law. Forsyth in the **Provenance and Protection of Legitimate Expectations**, 47 CAMB. L. J. 238, 242-244 (1988) describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows;

“Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public’s fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices.”

The Tribunal thus makes a finding that the respondent did breach the same as the appellant had already obtained a confirmation that he had satisfied all the requirements of the Advocates Training Programme examinations components.

On the claim for general damages, the Tribunal does not see any justification based on the facts and evidence placed before us to grant the same. The Appellant ought to have established a basis for grant of the same which has not been done. We therefore do not find for the Appellant on this prayer.

5. Disposition

From the findings above The Tribunal finds that the Appellant deserves the grant of the following orders:-

- a) The Tribunal finds merit in the appeal and the same is partially allowed.
- b) The decision contained in the letter of the Respondent of 23rd March 2021 is hereby set aside.
- c) The Tribunal hereby makes an order compelling the Respondent to gazette the Appellant and issue him with a final transcript and Certificate of Compliance within 14 days of service of this judgment.
- d) Each party to bear their own costs in this appeal.
- e) Any party aggrieved has the liberty to appeal to the High Court under section 38 (1) of the **Legal Education Act**, 2012 on a point of law.

IT IS SO ORDERED BY THE LEGAL EDUCATION APPEALS TRIBUNAL.

DATED AT NAIROBI THIS 2ND DAY OF JULY, 2021.