Kibegwa & 8 others v Kenya School of Law; Council of Legal Education (Interested Party) (Appeal 8, 9, 10, 11, 12, 13, 14, 15 & 16 of 2021 (Consolidated)) [2021] KELEAT 187 (KLR) (Civ) (15 October 2021) (Judgment)

John Kibegwa & 8 others v Kenya School of Law; Council of Legal Education (Interested Party) [2021] eKLR

Neutral citation: [2021] KELEAT 187 (KLR)

REPUBLIC OF KENYA

IN THE LEGAL EDUCATION APPEALS TRIBUNAL

CIVIL

APPEAL 8, 9, 10, 11, 12, 13, 14, 15 & 16 OF 2021 (CONSOLIDATED)

R.N MBANYA, CHAIR, EO ARWA, R.W KIGAMWA & SM GITONGA, MEMBERS

OCTOBER 15, 2021

BETWEEN

JOHN KIBEGWA ..... 1ST APPELLANT

NELLY GATIE JARA ..... 2ND APPELLANT

KIBORE WANGUI LUCIA ..... 3RD APPELLANT

MURABULA EMILLY AKWANYI ..... 4TH APPELLANT

JACOB ODANGA ODHIAMBO ..... 5TH APPELLANT

MBOTE NELLY MWIKALI ..... 6TH APPELLANT

GELATIUS MWANGANGI MWENDWA ..... 7TH APPELLANT

OBOTE MICHAEL SAVAI ..... 8TH APPELLANT

KIRIMI BRENDA GAKII ..... 9TH APPELLANT

AND

KENYA SCHOOL OF LAW ..... RESPONDENT

AND

COUNCIL OF LEGAL EDUCATION ..... INTERESTED PARTY

(Being appeals against the decision of the Director/Chief Executive Officer of the Kenya School of Law denying admission into the Advocates Training Program – 2021/2022 academic year)

JUDGMENT

1.Introduction.

1. The appellants lodged separate appeals with the Tribunal against the Kenya School Of Law as a respondent and the Council Of Legal Education as the interested party. The appeals as instituted seek for relief as follows:-

    a) The appeals be certified as urgent and be fixed for inter parties hearing on priority basis;

    b) The Tribunal declares that the appellants qualify for admission to ATP by dint of Section 1 (a) of Schedule 2 of the *Kenya School of Law Act*, 2012;

    c) The Tribunal issues an order compelling the respondent to admit the appellants to the Advocates Training Program (ATP)

    d) The making of any necessary orders.

2. The appeal is predicated on the grounds:-

    a) The appellants have been denied admission to the Advocates Training Programme based on their Kenya Certificate of Secondary Education (KCSE) results, despite being qualified under Section 1 (a) of Schedule 2 of the *Kenya School of Law Act*, 2012.

    b) The respondent's actions in denying the appellants admission to the Advocates Training Programme is a violation of the right to fair administrative action as the same is unreasonable and thwarts their legitimate expectations based on the representations of the respondent.

    c) The respondent's action in denying the appellants' admission to the Advocates Training Programme is based on a misrepresentation of the law.

3. To buttress their respective appeals the appellants have deponed to the facts in support and annexed their respective documents. The appellants hinge their respective appeals on the provisions of article 47 of the *Constitution* of Kenya, 2010 and section 29 of the *Legal Education Act*, 2012, and all other relevant legal provisions.

4. The appeals as instituted were served upon the respondent and the interested party. The respondent entered appearance through Dr. H. K. Mutai – Advocate its Director/Chief Executive Officer and filed a replying affidavit to the appeals through Mr. Fredrick Muhia its Academic Services Manager. The interested party entered appearance through Mr. Moses Muchiri and filed their responses to the individual appeals.

5. The Tribunal set down the appeals for pretrial directions and conference on various dates. During the pre-trial formalities the appeals were consolidated by consent of the parties, who also consented to their disposal by way of written submissions. The 9th appellant was enjoined into the matter by consent of the parties and she lodged her documents accordingly.

6. The appellants and the respondents lodged their submissions with the Tribunal as directed. The matter was set down for highlighting of submissions on the 10th September 2021, when the appellants were represented by Mr. Charles Ouma and the respondent by Ms. Pauline Mbuthu. The interested party did not file submissions and did not participate in the highlighting of submissions despite being duly served with notice. A date was then set for the delivery of judgment.

2.The Background To The Appeal.

7. The facts of the respective appeals are summarized as follows:-

a) Appeal Number 8 of 2021- John Kibegwa.

8. He sat for his Kenya Certificate of Secondary Education in the year 2000 and attained a mean grade of x (plain) with a x (plus) grade in English and a x (plain) grade in Kiswahili. In 2006, he graduated with a degree of Bachelor of Arts from the University of Nairobi. Later, he graduated with a Master of Science in Finance and Investment from the Methodist University in 2018. Subsequently, he attained an LLB degree from the University of Nairobi in 2020. He then applied to the Respondent for admission to the Advocates Training Programme which application was rejected by a letter dated 27th. April, 2021 from the respondent's Director/Chief Executive Officer. The basis for rejecting the application as communicated was that his Kenya Certificate of Secondary Education grades in English and Kiswahili languages were below the stipulated grade of B (plain). Aggrieved by the decision, the 1st appellant filed an appeal.

b) Appeal Number 9 of 2021- Nelly Gatie Jara.

9. She sat for her Kenya Certificate of Secondary Education in the year 2003 and attained a mean grade of x (plain) with a x (plain) grade in English and a x (plus) grade in Kiswahili. She graduated from the Kenya School of Professional Studies (KSPS) with a Diploma in Law in 2006. She later attained an LLB degree from the Catholic University of Eastern Africa (CUEA) in 2020. She then applied to the respondent for admission to the Advocates Training Programme. Her application was rejected by a letter dated the 26th. April, 2021 from the respondent's Director/Chief Executive Officer. In rejecting her application the respondent indicated that her Kenya Certificate of Secondary Education mean grade of x (plain) as per the Kenya National Qualifications Authority equation was below the stipulated grade of C + (plus). Aggrieved by this decision, the 2nd appellant filed an appeal.

c) Appeal Number 10 of 2021- Kibore Lucia Wangui.

10. She sat for her Kenya Certificate of Secondary Education in 2011 and attained a mean grade of x (plain) with a x (minus) grade in English and a x (plain) grade in Kiswahili. She graduated from the Inoorero University with a Diploma in Law in 2014. She later attained an LLB degree from the Catholic University for Eastern Africa (CUEA) in 2020. She then applied to the respondent for admission to the Advocates Training Programme which application was rejected by a letter dated the 26th. April, 2021 from the respondent's Director/Chief Executive Officer. In rejecting her application it was indicated that her Kenya Certificate of Secondary Education mean grade of x (plain) was below the stipulated grade of C + (plus). Aggrieved by this decision, the 3rd appellant filed an appeal.

d) Appeal Number 11 of 2021- Murabula Emilly Akwanyi.

11. She sat for her Kenya Certificate of Secondary Education in 2012 and attained a mean grade of x (plain) with a x (plain) grade in English and a x (plain) grade in Kiswahili. She graduated from the Mount Kenya University with a Diploma in Law in 2016. She later attained an LLB degree from the Catholic University of Eastern Africa (CUEA) in 2020. She then applied to the respondent for admission to the Advocates Training Programme which application was rejected by a letter dated 26th. April, 2021 from the respondent's Director/Chief Executive Officer. In rejecting her application it was indicated that her Kenya Certificate of Secondary Education mean grade of x (plain) was below the stipulated grade of C + (plus). Aggrieved by the decision, the 4th appellant filed an appeal.

e)Appeal Number 12 of 2021- Jacob Odanga Odhiambo.

12. He sat for his Kenya Certificate of Secondary Education (KCSE) in 2008 and attained a mean grade of x (plain) with a x (minus) grade in English and a x (minus) grade in Kiswahili. He graduated from the Kenya School of Law the respondent herein with a Diploma in Law in 2015. He later attained an LLB degree from the Catholic University for Eastern Africa (CUEA) in 2020. He then applied to the respondent for admission to the Advocates Training Programme which application was rejected by a letter dated 22nd. April, 2021 from the respondent's Director/Chief Executive Officer. In rejecting the application it was indicated that the appellant had grades x (minus) in English and Kiswahili languages with a mean grade of x (plain) in the Kenya Certificate of Secondary Education (KCSE) which were below the stipulated grades of B (plain) and C + (plus). Therefore, he did not qualify for a direct admission to the School.

    Aggrieved by this decision, the 5th appellant filed an appeal.

f)Appeal Number 13 of 2021- Mbote Nelly Mwikali.

13. She sat for her Kenya Certificate of Secondary Education (KCSE) in 2013 and attained a mean grade of x (plus) with a x (minus) grade in English and a x (plus) grade in Kiswahili. She graduated from the Kenya School of Law the respondent herein with a Diploma in Law in 2017. She later attained an LLB degree from the Catholic University of Eastern Africa (CUEA) in 2020. She then applied to the respondent for admission to the Advocates Training Programme which application was rejected by a letter dated 22nd April, 2021 from the respondent's Director/Chief Executive Officer. In rejecting the application it was indicated that she was not eligible to direct admission to the School on the basis that her x (minus) and x (plus) grades in English and Kiswahili languages respectively were below the stipulated grade of B (plain). Aggrieved by this decision, the 6th appellant filed an appeal.

g) Appeal Number 14 of 2021- Mwangangi Gelatius Mwendwa.

14. He sat for his Kenya Certificate of Secondary Education (KCSE) in 2013 and attained a mean grade of x (minus) with a x (minus) grade in English and x (minus) grade in Kiswahili. He graduated from the Kenya School of Law the respondent herein with a Diploma in Law in 2016. He later attained an LLB degree from the Catholic University for Eastern Africa (CUEA) in 2020. He then applied to the respondent for admission to the Advocates Training Programme which application was rejected by a letter dated 22nd April, 2021 from the respondent's Director/Chief Executive Officer. In rejecting the application it was indicated that he was not eligible for direct admission to the School as he had grade x (minus) in English and Kiswahili languages at the Kenya Certificate of Secondary Education (KCSE) which were below the stipulated grade of a B (plain). Aggrieved by the decision, the 7th appellant filed an appeal.

h) Appeal Number 15 of 2021- Obote Michael Savai.

15. He sat for his Kenya Certificate of Secondary Education (KCSE) in 2012 and attained a mean grade of x (plain) with a x (minus) grade in English and a x (minus) grade in Kiswahili. He graduated from the Kenya School of Law the respondent herein with a Diploma in Law in 2017. He later attained an LLB degree from the Catholic University for Eastern Africa (CUEA) in 2020. He then applied to the respondent for admission to the Advocates Training Programme which application was rejected by a letter dated 26th. April, 2021 from the respondent's Director/Chief Executive Officer. In rejecting the application it was indicated that his grades of x (minus) in English, x (minus) in Kiswahili and the mean grade of C (plain) all arising from the Kenya Certificate of Secondary Education (KCSE) were

below the stipulated grades of B (plain) in both English and Kiswahili and C + (plus). Aggrieved by this decision, the 8th appellant filed an appeal.

i)Appeal Number 16 of 2021 - Kirimi Brenda Gakii.

16. She sat for her Kenya Certificate of Secondary Education in 2012 and attained a mean grade of x (plus) with a x (minus) grade in English and a x (plus) grade in Kiswahili. She graduated from Mount Kenya University with a Diploma in Law in 2015. She later attained an LLB degree from the Catholic University for Eastern Africa (CUEA) in 2020. She then applied to the respondent for admission to the Advocates Training Programme which application was rejected by a letter dated 26th. April, 2021 from the respondent's Director/Chief Executive Officer. In rejecting her application it was indicated that she had grades x (minus) and x (plus) in English and Kiswahili languages respectively which are below the stipulated grade of B (plain). Aggrieved by this decision, the 9th appellant filed an appeal.

17. The Appellants contend that they are eligible for admission to the Advocates Training Programme as their admission ought to be governed by section 1 (a) of the second schedule to the *Kenya School of Law Act*, 2012 and that the decision by the respondent to deny them admission on the basis of their Kenya Certificate of Secondary Education academic qualifications was erroneous. The appellants' contended that various decisions by the High Court and the Tribunal in similar situations like theirs had held that applicants to the Advocates Training Programme from local Universities did qualify for admission under section 1 (a) of the second schedule to the *Kenya School of Law Act*, 2012 and that therefore, the respondent did not need to revert into an enquiry of the grades attained at the Kenya Certificate of Secondary Education examinations, by applicants from local universities. They contended that the decision of the respondent to deny them admission into the Advocates Training Programme was not well founded in law, the decision was not a fair administrative action, it was manifestly unreasonable and thwarted the legitimate expectation of the appellants.

3.The Responses To The Appeal.

18. The respondent in opposition to the appeal contended that matters of admission to the Advocates Training Programme offered by it were exclusively provided for under section 16 of the *Kenya School of Law Act*, no. 26 of 2012. It challenged the jurisdiction of the Tribunal contending that it was limited to matters that relate to the *Legal Education Act*, 2012. The respondent stated that it publishes an advertisement in the local newspapers inviting applications for admission to the Advocates Training Programme and that the said advertisement sets out the eligibility criteria for admission. It contended that the Appellants did not meet the eligibility criteria as provided for under Section 16, read together with section 1 of the second schedule to the *Kenya School of Law Act*, 2012. They further contended that the appellants were relying on their Diploma in Law qualifications to be admitted to the Advocates Training Programme, yet the *Kenya School of Law Act*, 2012 does not have a provision for academic progression. The respondent was bound by the provisions of the *Kenya School of Law Act*, 2012. The respondent contended that they had not infringed on the appellants rights and freedoms in any way by applying the eligibility criteria for the Advocates Training Programme as per section 16 of the *Kenya School of Law Act*, 2012, as read with section 1 of the second schedule. They relied heavily in the judgment of Hon. Justice Weldon Korir in Constitutional and Human Rights Division Petition No. 20 of 2019 - *Victor Juma v Kenya School of Law and Council of Legal Education*, in asserting that their interpretation of the law was the correct one.

19. The interested party in it's responses to the appeals conceded the same that the appellants were eligible to admission to the Advocates Training Programme. They all had LLB degree qualifications from recognized and licenced Universities by it in Kenya.

4.The Appellants' Submissions On The Appeals.

20. It was submitted that the appellants were law graduates of locally recognized Universities accredited by the interested party to offer law programmes. The respondent was a public legal education provider by dint of section 4 (2) (a) of the *Kenya School of Law Act*, 2012 with the primary object of training persons to be Advocates under the *Advocates Act*, Cap. 16. The interested party under section 8 (1) (f) of the *Legal Education Act*, 2012 had amongst its functions to administer such professional examinations as may be prescribed under section 12 of the *Advocates Act*, Cap. 16 while its responsibilities under section 8 (3) of the *Legal Education Act*, 2012 included inter-alia to make Regulations in respect of the requirements for admission of persons seeking to enroll in legal education programmes and to formulate a system for recognizing prior learning and experience in law in order to facilitate progression in the legal profession from lower levels of learning to higher levels.

21. As regards the jurisdiction to entertain the appeals; the appellants invoked the provisions of section 31 of the *Legal Education Act*, 2012 and sought a finding from the Tribunal on a determination as regards the respondent's interpretation of the second schedule to the *Kenya School of Law Act*, 2012 and whether the respondent was bound by the interpretation of the interested party. The appellants submitted that the issue of jurisdiction was resolved by the Tribunal in LEAT Appeal no. 1 of 2020 – *Bethsheba Achieng' Nyamiwa v Kenya School of Law and Council of Legal Education* together with LEAT Appeal no. 1 – 5 (as consolidated) - *Kibore Wangui Lucia & 4 Others v Kenya School of Law and Council of Legal Education*. The Bar Examination was partly administered by the respondent involving the project course work at 20% and the oral examination at 20% while the interested party administered the written examination at 60%. This rendered the Tribunal to have jurisdiction on the appeal on admissibility to the Programme.

22. The appellants were of the view that they qualified to join the Advocates Training Programme run by the respondent by dint of section 1 (a) of the second schedule to the *Kenya School of Law Act*, 2012 as amended in 2014. The appellants relied on the authority of *Republic v Kenya School of Law & Another ex-parte Kithinji Maseka Semo & Another*, (2019) eKLR in which Justice Mativo had confirmed the admissibility of the ex-parte applicants to the programme based on the said provision of the law.

23. The appellants submitted that they were two routes to admission to the Programme. Their route was in section 1 (a) of the second schedule to the *Kenya School of Law Act*, 2012. Under the same, an applicant was only required to pass the relevant examination of any recognized University in Kenya, or of any University, University College or any other institution prescribed by the Council, hold or be eligible for conferment of the Bachelor of laws (LLB) degree of the University, University College or Institution. The appellants, relied on *Adrian Kamotho Njenga v Kenya School of Law* (2017) eKLR by Justice Chacha Mwita, *Republic v Kenya School of Law*, (2019) eKLR by Justice Mativo, Kithinji Maseka Semo & Another, (*supra*) by Justice Mativo, *Kihara Mercy Wairimu & 7 Others v Kenya School of Law & 4 Others*, (2019) eKLR by Justice Makau and *Robert Uri Dabaly Jimma v Kenya School of Law & Kenya National Qualifications Authority*, (2021) eKLR by Justice Mrima. As per Justice Makau in Kihara Mercy Wairimu (*supra*), the 2016 regulations could not override section 1 (a) of the *Kenya School of Law Act*, 2012. The appellants placed reliance on the authority in Robert Uri Dabaly Jimma (*supra*) in which Justice Mrima held that the use of the word 'or' by the drafters of the provision of section 1 (a) of the second schedule to the *Kenya School of Law Act*, 2012 was deliberate.

24. The respondent was imposing on the appellants the qualifications under section 1 (b) of the second schedule to the *Kenya School of Law Act*, 2012 which was improper. The appellants finally implored the Tribunal to invoke the doctrine of legitimate expectation as there existed confusion on the state of legislation and find in favour in the appeals.

5.The Respondent's Submissions On The Appeals.

25. The respondent filed submissions where it objected to the jurisdiction of the Tribunal as the first point in its written submissions dated 2nd September 2021. The respondent stated that the prayer asking the Tribunal for an order declaring that the appellants were qualified for admission to the ATP would fall outside the ambit of the jurisdiction of the Tribunal. The respondent then laid out extensive facts in support of the objection to jurisdiction concluding that the *Legal Education Act*, 2012 has only a regulatory role and not a role of admitting students to the Advocates Training Programme.

26. The respondent further submitted that where the dispute arises from a matter of consideration of an application for admission to the School for whatever reason, the respondent's authority emanates from the *Kenya School of Law Act*, 2012. The respondent stated that it would follow that the matter fell outside the jurisdiction of the Tribunal.

27. The respondent further submitted that the process of admission to the Advocates Training Programme was not a joint venture between the respondent and the interested party. Counsel for the respondent submitted that the latter is a regulator and the former is a legal education provider. She stated that the Kenya School of Law does not offer university training as it offers post graduate studies. Further, that there was no rational explanation why similarly placed persons were to be treated in substantially different ways. The denial of admission for failure to meet the minimum threshold set in the Act was lawful, reasonable, fair and non- discriminatory.

28. The respondent then contended that a claim for the breach of fair administrative action was not applicable as it normally seeks to sc scrutinize the process and legality of the decision made by an entity as contemplated by section 3 of the *Fair Administrative Act*, 2015. It was contended that the appellants had purported to claim benefits under clause 1 (a) of the second schedule to the *Act* in order to be granted direct entry into the Programme, however, if the Tribunal was to find that they could derive benefit from clause 1 (a) of the second schedule to the *Act*, they would still be ineligible as they did not meet the minimum Kenya Certificate of Secondary Education grade requirements. The said position was consistent with the finding in *Peter Githanga Munyeki v Kenya School of Law*, (2017) eKLR in which Justice Mwita held that a holistic interpretation had to be accorded to the schedule of the Act. He held;

> " The respondent is obliged to follow the law as enacted by parliament unless such law is found to contravene the constitution. In enacting the eligibility criteria under Kenya School of Law Act, parliament must have intended to promote high standards in the training and practice of the law."

Finally, the respondent relied on the decision in *Victor Juma v Kenya School of Law, Council of Legal Education (Interested Party)*, (2020) eKLR; in which while upholding the decision taken by the respondent it was observed;

> " The right to education can only be enjoyed in the context of the laws of the country. One can only pursue a course of his choice if he qualifies for that course. Being denied the opportunity to pursue a course that one does not qualify for cannot be said to be a violation of the rights to education."

6.Analysis And Determination.

a)Jurisdiction of the Tribunal.

29. Tribunals in Kenya are established under article 169 (1) of the *Constitution* of Kenya, 2010 which provides;

> " The Subordinate Courts are –
>
> a) the magistrates courts;
>
> b) the kadhi's courts;
>
> c) the courts martial; and
>
> d) any other Court or local tribunal as may be established by an Act of Parliament, other than the courts established as required by Article 162(2)."

30. Parliament has established and enacted legislation conferring the jurisdiction, functions and powers of the Legal Education Appeals Tribunal through the *Legal Education Act*, no. 27 of 2012 which in the preamble it is indicated;

> " 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."

31. The jurisdiction of the Tribunal is provided for in section 31 of the *Act* as follows;

> "(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 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."

32. The authority in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* (1989) eKLR by Justices Nyarangi, Masime and Kwach JJ.A as they then were forms a sound guideline for addressing the jurisdiction of the Tribunal. In the said decision Nyarangi JA. as he then was pronounced himself as follows;

> " I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

33. The material available for the Tribunal to address the issue of jurisdiction is the newspaper advertisement published by the respondent inviting applications for the Advocates Training Programme (ATP) for the academic year 2021/2022. The advertisement in Part A 1 provides for minimum qualifications for Kenyan University graduates admitted into the LLB degree course after 8th December, 2014 by requiring that;

> "a) Have 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; or
>
> b) Have attained a minimum of two (2) principals and one (1)subsidiary totaling to an aggregate of ten (10) points in the Kenya Advanced Certificate of Education or its equivalent; and
>
> c) Have passed in the mandatory 16 core subjects as stipulated in the Second Schedule of the *Legal Education Act*, 2012; and
>
> d) Hold or are eligible for conferment of an LL.B degree from a recognized Kenyan university."

34. The respondent in the advertisement imported the application of the *Legal Education Act*, 2012 which is the establishing law of the Tribunal. Accordingly, jurisdiction to entertain the appeals by the appellants' exists. Further, the body mandated to administer examinations for persons who intend to be admitted to the Bar is the interested party and the respondent remains a delegate for the purposes of the conduct of the examinations. In fact, the Bar examination structure confirms that the interested party is a central player as the school deals with 40% of the total examination mark through the project course work and oral examinations while the interested party deals with the written examination marked out of 60%. Thus, the Tribunal has the mandate to inquire into the admission process that will eventually lead to the Bar examinations. The said issue was addressed by the High Court in *Nabulime Miriam & Others v Council of Legal Education & 5 Others*, (2016) eKLR in which Justice Odunga held;

> "That the body with the legal mandate to determine the qualification for Admission, registration of Applicants to the Kenya School of Law is the Council but the actual admission of students to the School is to be undertaken by the School.
>
> That the body with the legal mandate as between Kenya School of Law, and the Council for Legal Education, to set, supervise or mark Advocate Training Programme examinations is the Council though in this instance, that mandate was delegated to the School by the Council."

35. The respondent also took up the issue of progression in the legal progression its position being that academic progression is not provided for in the law governing its operations which is the *Kenya School of Law Act*, 2012. The said progression is a matter falling under the mandate of the interested party which is established under the *Legal Education Act*, 2012 and in which law the Tribunal is also established. Therefore, it is clear that Tribunal is empowered to deal with the appeal as by dint of section 31 (1) of the *Legal Education Act*, 2012 it is entitled to deal with any matter under the Act. Tdhe Tribunal derives guidance from the authority in *Republic v Kenya School of Law & 2 others Exparte Kgaborone Tsholofelo Wekesa* (2019) eKLR in which Justice Mativo held at paragraph 33 therein;

> "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."

36. Finally, the respondent cannot purport to operate in sole isolation of the *Kenya School of Law Act*, 2012 as the power to make regulations for persons wishing to enroll in legal education programmes and progression in the legal education sphere are a sole preserve of the interested party. The relevant provisions are in sections 8 (1) (a), 8 (2), 8 (3) (a) and (b) of the *Legal Education Act*, no. 27 of 2012 which provides;

> " (1) The functions of the council shall be to-
>
> (a) Regulate legal education and training in Kenya offered by legal education providers;
>
> (2) Without prejudice to the generality of subsection (1), the council shall, with respect to legal education providers, be responsible for setting and enforcing standards relating to the .....
>
> (3) In carrying out its functions under subsection (2), the council shall:-
>
> a) Make regulations in respect of requirements for the admissions of persons seeking to enroll in legal education programmes;
>
> b) ...;
>
> (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."

b)The Appeal And Admission Requirements to the Advocates Training Programme.

37. The qualifications for eligibility to the Advocates Training Programme are provided for in section 1 of the second schedule of the *Kenya School of Law Act*, 2012 as amended by *Statute Law (Miscellaneous Amendments) Act*, 2014 which provides for admission requirements to the School as follows;

> " A person shall be admitted to the School if—
>
> (a) having passed the relevant examination of any recognized university in Kenya, or of any university, university college or 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; 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; and

(iii) has sat and passed the pre-Bar examination set by the school."

38. The contention of the appellants that they fall into section 1 (a) of the second schedule to the said *Act* is proper. The 1st appellant holds an LLB degree from the University of Nairobi while the 2nd – 7th appellants hold LLB degrees from the Catholic University of Eastern Africa which are recognized Universities in Kenya and which fact is well confirmed by the interested party in its response to the appeal filed herein. The respondent has sought to extend the application of section 1 (b) of the second schedule to the appellants, it is the finding of the Tribunal that the same would be improper. The conjunction 'or' between (a) and (b) means that only one is applicable to an applicant. If the applicant is from a recognized university in Kenya the category applicable is (a) without resort and reference to (b). The authority in *Republic v Kenya School of Law & Another Ex Parte Kithinji Maseka Semo & Another*, (2019) eKLR clearly settles the matter. Mativo J observed;

> 49. From the dictionary and judicial precedents discussed above, it is clear that the word "or" is ordinarily used to introduce another possibility or alternative, that is either or. Depending on context, it can also be used interchangeably with the word "and." It follows that in construing statutory provisions, the context is important so as to get the real intention of the legislature.
>
> 50. Guided by the authorities cited above and the ordinary meaning of the word "or" in the context of the provision under consideration, it is my view that the use of the word "or" immediately after the semi-colon at the end of the sentence in section 1 (a) of the second schedule introduces another possibility, the first possibility being the category referred to in paragraph (a), that is:-
>
> > "having passed the relevant examination of any recognized university in Kenya, or of 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."
>
> 51. The ex parte applicants hold Bachelor of Laws degrees from a recognized University in Kenya. By dint of the above provision, they qualified for admission to the ATP. To suggest otherwise, is in my view an insult to the above provision, which is framed in a simple and clear language. A contrary interpretation is misguided and unfaithful to the provision. It follows that any decision emanating from such a misguided interpretation cannot be read in a manner that is consistent with the enabling provision."

39. The Tribunal also derives guidance from the decision by Justice Chacha Mwita in *Robert Uri Dabaly Jimma v Kenya School of Law & Kenya National Qualifications Authority*, (2021) eKLR at paragraph 110 as follows;

> " Given the diverse nature of the persons targeted under categories (a) and (b) of the Second Schedule of the *KSL Act*, it is obvious that their qualifications cannot be similar. It is for

those reasons that I echo the position that category (a) and (b) are different hence the visible use of the word 'or'."

40. In the said decision the Learned Judge considered the various pronouncements made by the courts on the legal provisions relating to admissibility to the Advocates Training Programme as follows;

> " 106. There are two schools of thought on the interpretation of the above provision. One school fronts the position that requirements in paragraph 1 (a) and 1 (b) must be similar otherwise there shall be discrimination of the students falling within category paragraph 1 (a) and those in 1 (b). The other school of thought is of the position that the two categories are different and ought to be treated as such.
>
> 107. Some of the decisions which posit that the qualifications must be similar include Nairobi High Court Petition No. 20 of 2019 *Victor Juma v Kenya School of Law*, *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, among many others. 108. The Courts in Judicial Review Application Nos. 7, 8, 13, 20, 21 and 26 of 2020 *Republic v Kenya School of Law & Others* (2020) eKLR and in *Kevin K. Mwiti & Others v Kenya School of Law & 2 Others* (2015) eKLR were categorical that the qualifications for persons intending to join the ATP under 1(a) and 1(b) are different.
>
> 109. I have carefully read the said decisions among others on the interpretation of paragraph 1(a) and 1(b) above. I associate myself with the school of thought that the two categories are different and ought to be treated as such.
>
> 110. I must acknowledge the great detail in which the Court in Judicial Review Application Nos. 7, 8, 13, 20, 21 and 26 of 2020 *Republic v Kenya School of Law & Others* (2020) eKLR went in demonstrating the difference between the words 'or' and 'and'. The discussion is highly persuasive and is a reasonable and candid exposition of the law.
>
> 111. If I may add my voice to the discussion, I find the use of the word 'or' by the drafters was very deliberate. To me, category 1(a) dealt with those persons who joined a recognized university in Kenya and obtained or became eligible for the conferment of the Bachelor of Laws (LLB) degree of that university. Mostly, such persons would be those who studied under the 7-4-3-3 or 8-4-4 systems in Kenya and qualified to join the universities and were eligible for and were admitted to pursue studies towards the conferment of the Bachelor of Laws (LLB) degrees."

41. The Parliamentary intention that sections 1 (a) and (b) targeted different categories of applicants to the Advocates Training Programme becomes manifest upon examining the initial Bill that was submitted to Parliament for deliberation leading to the enactment of the *Kenya School of Law Act*, 2012 the same had the conjunction 'or'. The same remained even in the 2014 amendments to the Act which left it unaltered. This is a clear confirmation that the Legislature never intended that the respondent subjects graduates of locally recognized universities into an inquiry of having met the mimimum entry requirements to the LLB degree programme when applying for the Advocates Training Programme. The respondent well confirms this by submitting that it is offering the Advocates Training Programme

as a Post Graduate Course. An examination of the law as initially drafted and progressively amended confirms that the 'or' conjunction has been consistently maintained. The Tribunal for ease of reference sets out the Kenya School of Law Bill, 2011 at clause 16 which provided;

> " A person shall not qualify for admission to a course of study at the School, unless that person has met the admission requirements, set out in the Second Schedule for that course."

While in the second schedule it was provided;

> " The Admission requirements will be as follows:
>
> (a) Admission Requirements into the Advocates Training Programme
>
> (1) A person shall be admitted to the School if:
>
> (a) having passed the relevant examination of any recognized university in Kenya holds, or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) of that university; or
>
> (b) having passed the relevant examinations of a university, university college or other institutions prescribed by the Council of Legal Education, holds or has become eligible for the conferment of the Bachelor of Laws Degree (LL.B) in the grant of that university, university college or other institution:
>
> (i) attained a minimum entry requirements for admission to a university in Kenya; and..."

42. The enacted law in the year 2012 assumed the same format as presented in the afore - stated Bill until it was amended in the year 2014 by the Statute Law Miscellaneous (Amendments) Bill, 2014 as follows;

> " Second Schedule Item (a)
>
> Delete paragraph (1) (a) and substitute therefor the following -
>
> (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..."

43. The 2014 amendment only added into section 1 (a) University Colleges and other institutions prescribed by the Council. The initial requirements for graduates of Kenyan Universities were never changed. We do in interpreting the law herein echo the findings of Finlay, CJ in *McGrath v McDermott*, (1988) IR 258 at page 275 cited in *O'Neill & Another v Governor of Castlerea Prison & Others*, (2003) IEHC 83 (27 March 2003), which dealt with the role of the court in interpreting statutes in the following terms;

> " The function of the Courts in interpreting a statute...is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt

or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even other statutes expressed to be construed with it."

44. The respondent has contended that allowing the appellants not to be subjected to the scrutiny of the minimum secondary school qualifications grades by virtue of having attained their respective LLB degrees from recognized universities while those who have obtained LLB degrees from foreign countries amounts to discrimination. A reading of the two provisions would lead to an inclination of an instance where the legislature has simply differentiated the two categories of the applicants to the Advocates Training Programme. An act of differentiation can never amount to discrimination. The Tribunal derives guidance from the authority in *Federation of Women Lawyers Fida Kenya & 5 Others v Attorney General & Another*, (2011) eKLR in which it was stated as follows;

> "In our view, mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases".

45. The Tribunal further derives guidance from the authority in *Mohammed Abduba Dida v Debate Media Limited & Another*, (2018) eKLR in which Justices Waki, Makhandia and Murgor JJ.A observed;

> "With regard to differential or unequal treatment it was observed in the case of *Kedar Nath v State of W.B.* (1953) SCR 835 (843) that;
>
> > 'Mere differentia or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary; that it does not rest on any rational basis having regard to the object which the legislation has in view."

46. The differentiation set in the two routes is well premised on the existence of quality assurance and monitoring on Kenyan institutions by a number of players such as the interested party for the Schools of Law offering undergraduate LLB degree qualifications together with the Commission for University Education. Indeed the point of checking for minimum LLB degree entry qualifications is at the time of an applicant seeking admission to the course at the undergraduate entry point as opposed to waiting for the applicant to present the degree for purposes of admission to the respondent for the Post Graduate Diploma in Law. However, for applicants who have undergone LLB studies in foreign countries, the only time the scrutiny may be undertaken would be at the point when the applicants tender their applications to the school. The established local higher education supervision mechanism of the interested party and the Commission for University Education have no control at the time of admission to foreign universities. The afore– said position was discussed at length by Justice Chacha Mwita in *Robert Uri Dabaly Jimma v Kenya School of Law & Kenya National Qualifications Authority*, (2021) eKLR.

47. The Tribunal also finds that the respondent breached the provisions on fair administrative action in taking the decisions. For instance inrespect of the 2nd appellant it concluded that her Kenya Certificate of Secondary Education mean grade of C (plain) as per the Kenya National Qualifications Authority equation was below the stipulated grade of C + (plus). The respondent upon being prompted by the Tribunal to address the issue it conceded that it fell in error and sought an opportunity that the matter be remitted to it for reconsideration. It is our finding that remission of the matter is inconsequential as the said appellant was already eligible to admission to the Programme based on section 1 (a) of the second schedule to the *Kenya School of Law Act*, 2012. This clearly connotes that the respondent was not entitled to conclude as it did and also it has not pointed out the empowering law. The Tribunal stands guided by section 7 (2) of the *Fair Administrative Action Act*, 2015 which provides;

> " A court or tribunal under subsection (1) may review an administrative action or decision, if—
>
> (a) the person who made the decision—
>
> (i) was not authorized to do so by the empowering provision;.."

48. We also note that taking the said cause of remission will subject the said appellant to undue delay as the respondent in the proceedings made it clear during the highlighting session that it would take a decision declining admission by way of purporting to correct the alleged error and also the appellant will be denied the due guarantees as duly fortified in article 47 of the *Constitution* of Kenya, 2010 a practice frowned upon by the existing jurisprudence. We are guided by the decision in *Nabulima Miriam & Others v Council of Legal Education & 5 Others*, (2016) eKLR in which it was observed;

> " It is however important to point out that this position does not mean that the Council is the sole and ultimate judge when it comes to the determination of proper exercise of such discretion since this Court is under a constitutional obligation to ensure that the safeguards provided under Article 47 of the *Constitution* are not destroyed by being whittled away in purported exercise of discretion. Accordingly the Courts are empowered to and are under a duty to investigate allegations of abuse of power and improper exercise of discretion. I therefore associate myself with the holding in *Keroche Industries Limited v Kenya Revenue Authority & 5 Others* Nairobi HCMA No. 743 of 2006 [2007] KLR 240, that:
>
> > 'When litigants come to the courts it is the core business of the courts and the courts' role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance'."

49. The Tribunal also notes that the respondent in arriving at its decisions in respect of the 4th, 5th and 6th appellants of whom it had awarded Diplomas in Law before they proceeded to enroll and undertake LLB degree courses indicated that they were not entitled to direct admission which was different from the decisions taken in respect of the other appellants. The respondent has not pointed

out the empowering law entitling it to deny direct admission to the said appellants. Section 2 of the *Fair Administrative Action Act*, 2015 gives the meaning to the same as follows;

> " empowering provision means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action is taken or purportedly taken;..."

Also no explanation was given as to the variation in the decision making.

50. In conclusion the Tribunal once again reiterates the position as postulated by the authority in *Resley v The City Council of Nairobi*, (2006) 2 EA 311 where it was held that;

> " In this case there is an apparent disregard of statutory provisions by the respondent, which are of a fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid...the purpose of the court is to ensure that the decision making process is done fairly and justly to all parties and blatant breaches of statutory provisions cannot be termed as mere technicalities by the respondent. That the law must be followed is not a choice and the courts must ensure that it is so followed and the respondent's statements that the Court's role is only supervisory will not be accepted and neither will the view that the Court will usurp the functions of the valuation court in determining the matter. The court is one of the inherent and unlimited jurisdiction and it is its duty to ensure that the law is followed...if a local authority does not fulfil the requirements of law, the court will see that it does fulfil them and it will not listen readily to suggestions of "chaos" and even if the chaos should result, still the law must be obeyed. It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statutes in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law: and it is essential that bureaucracy should be kept in its place."

7.Disposition.

51. The Tribunal now decrees:-

a) A declaration is issued that the appellants qualify for admission to the Advocates Training Programme as provided by Section 1 (a) of the second schedule to the *Kenya School of Law Act*, 2012 as and as amended by the *Statute Law Miscellaneous (Amendments) Act*, 2014.

b) An order is issued compelling the Kenya School of Law to admit all the appellants herein to Advocates Training Programme forthwith.

c) Each party to bear own costs of the appeal.

d) Any party so aggrieved is at liberty to lodge an appeal with the High Court on a point of law in-accordance with section 38 (1) of the *Legal Education Act*, 2012.

It is so ordered by the Legal Education Appeals Tribunal.

DATED AT NAIROBI THIS 15TH. DAY OF OCTOBER, 2021.

ROSE NJOROGE – MBANYA -(MRS.) - CHAIR PERSON

EUNICE ARWA - (MRS.) - MEMBER

RAPHAEL WAMBUA KIGAMWA (MR.) - MEMBER

STEPHEN GITONGA MUREITHI (MR.) MEMBER

I Certify this is a true copy of the original judgment of the Tribunal.

Gilbert Onyango - Registrar