Lucia & 4 others v Kenya School of Law; Council of Legal Education (Interested Party) (Appeal 1, 2, 3, 4 & 5 of 2021 (Consolidated)) [2021] KELEAT 627 (KLR) (23 April 2021) (Judgment)

Kibore Wangui Lucia & 4 others v Kenya School of Law; Council of Legal Education (Interested Party) [2021] eKLR

Neutral citation: [2021] KELEAT 627 (KLR)

REPUBLIC OF KENYA

IN THE LEGAL EDUCATION APPEALS TRIBUNAL

APPEAL 1, 2, 3, 4 & 5 OF 2021 (CONSOLIDATED)

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

APRIL 23, 2021

BETWEEN

KIBORE WANGUI LUCIA .... 1ST APPELLANT

MBOTE NELLY MWIKALI .... 2ND APPELLANT

JACOB ODHIAMBO ODANGA .... 3RD APPELLANT

MURABULA EMILY AKWANYI .... 4TH APPELLANT

NELLY GATIE JARA .... 5TH APPELLANT

AND

KENYA SCHOOL OF LAW .... RESPONDENT

AND

COUNCIL OF LEGAL EDUCATION .... INTERESTED PARTY

(Being an appeal against the decision of Director/Chief Executive Officer of the Kenya School of Law on the qualifications of admissibility to admission for the Advocates Training Programme (ATP) for the year, 2021/2022 academic year)

JUDGMENT

Introduction.

1. The appellants Kibore Wangui Lucia, Mbote Nelly Mwikali, Jacob Odhiambo Odanga, Murabula Emily Akwanyi and Nelly Gatie Jara lodged appeals with the Tribunal through Charles B. G. Ouma & Company Advocates against the Kenya School Of Law as the respondent and the Council Of Legal

Education as an interested party. By the motions originating the respective appeals the common prayers sought are:-

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

b) The Tribunal do declare that the appellants qualify for admission to ATP by dint of section 1 (a) schedule 2 of the *Kenya School of Law Act*, 2012.

c) The Tribunal to issue an order compelling the Kenya School of Law to admit the appellants to the Advocates Training Programme (ATP).

d) The Tribunal to make any necessary orders.

2. The grounds of appeal as can be discerned from the respective motions by the appellants are:-

a) That the appellants are apprehensive and worried that the respondent will decline to admit them into the Advocates Training Programme (ATP) based on the Kenya Certificate of Secondary Education (K. C. S. E) results, despite being qualified under section 1 (a) of the schedule to the *Kenya School of Law Act*, 2012.

b) That the respondent's actions of denying admission to the Advocates Training Programme (ATP) to the category of students comprising the appellants was a violation of the appellants rights to fair administrative action as the same was unreasonable and thwarts their legitimate expectations based on the representations of the respondent.

c) That the denial of the appellants' admission is based on a misinterpretation of the law.

d) That it is in the interest of justice that the appeal be allowed and the orders sought granted.

3. The appellants to buttress their respective appeals have deponed to the facts in support and annexed their respective documents. The appellants' hinge their respective appeals on the provisions of articles 47 and 159 of the *Constitution of Kenya*, 2010, section 29 of the *Legal Education Act*, 2012, the *Kenya School of Law Act*, 2012, *Council of Legal Education Act*, 2009 (repealed) and all other relevant legal provisions. The appeals as intituled were served upon the respondent and the interested party. The respondent did enter appearance through Dr. H. K. Mutai – Advocate and its Director/Chief Executive Officer. The interested party appeared through Dr. Jacob Gakeri – Secretary/Chief Executive Officer of the Council of Legal Education. The Tribunal set down the appeals for pretrial directions and conference on various dates. During the pre - trial formalities the appeals were consolidated with the file for Appeal No. 1 of 2021 being the dominant file, responses filed by the respondent through Fredrick Muhia (Mr.) – Academic Services Manager while the interested party through its Secretary informed the Tribunal that it will participate in its sessions but will not be filing any documentation. The parties consented to consolidation of the appeals and the Tribunal gave directions on the disposal of the appeals by way of written submissions. The appellants and the respondent lodged their submissions with the Tribunal as directed.

4. The matter was set down for highlighting of submissions on the 7th April, 2021 when the appellants were represented by Charles Ouma (Mr.), the respondent by Pauline Mbuthu (Ms.) and the interested party by Dr. Jacob Gakeri. Upon the highlighting and conclusion of the hearing of the appeal a date was set for the delivery of judgment.

The background to the appeal.

5. The appellants who are graduates from the Catholic University of Eastern Africa (CUEA) made applications for admission to the Advocates Training Programme offered by the respondent during the 2021/2022 Academic Year. The appellants had prior to enrolling for the respective Bachelor of Laws degree obtained Diploma in Law qualifications from the Inoorero University or the Kenya School of Law which were institutions licensed by the Council of Legal Education to offer the said programmes. The appellants at the Kenya Certificate of Secondary Education Examination had attained the following grades:-

   a) 1st. appellant: - mean grade C (plain) with B – (minus) and B (plain) in English and Kiswahili respectively.

   b) 2nd. appellant:- mean grade C+ (plus) with B – (minus) and C+ (plus) in English and Kiswahili respectively;

   c) 3rd. appellant: mean grade C (plain) with B – (minus) and B – (minus) in English and Kiswahili respectively;

   d) 4th. appellant; mean grade C (plain) with B (plain) and B+ (plus) in English and Kiswahili respectively.

   e) 5th. appellant; mean grade C (plain) with B (plain) and B – (minus) in English and Kiswahili respectively.

6. The appellants' contended that the advertised admission criteria by the respondent for admission to the Advocates Training Programme (ATP) which required that applicants from local universities ought to have attained a mean grade of C+ (plus) and grades B (plain) in English or Kiswahili at the Kenya Certificate of Secondary Education examinations rendered them in admissible to the programme. They further contended that though they had submitted applications to the respondent for admission they were apprehensive that the same would not be successful. They premised the said apprehension on the respondent's conduct and of which they invited the Tribunal to take judicial notice of denying admissibility to applicants who had not attained the published minimum Kenya Certificate of Secondary Education grades.

7. 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 admissions under section 1 (a) of the second schedule to the *Kenya School of Law Act*, 2012. The respondent did not need to revert into an enquiry of the minimum grades attained by applicants from local universities at the Kenya Certificate of Secondary Education examinations. They contended that the decision of the respondent to deny admissibility to the Advocates Training Programme to persons similarly situated like the appellants 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.

The response to the appeal.

8. 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 was required by its establishing law to consider an application for admission to the Advocates Training Programme and once satisfied

that the applicant qualified it would grant admission to the school. To entertain the appeals before the Tribunal it would amount to arrogating the statutory duties of the respondent as the Tribunal would end up granting admissions to the School. The purpose of fair administrative action was to seek to scrutinize the process and legality of a decision made by an entity and the appellants could not challenge a decision that had not been made. The respondent contended that on more than one occassion, the High Court had supported the interpretation of the law taken by it in similar situations hence the appellant could not claim that it was misguided or disregarded the law. It was deposed without particulars being tendered by the respondent that there was an appeal before the Court of Appeal on a matter with similar facts and the decision would apply to this matter. The respondent finally called upon the Tribunal to decline the appeals as they were premature and sought to defeat a process set by statute.

The appellants' submissions on the appeals.

9. It was submitted that the appellants were law graduates of the Catholic University of Eastern Africa (CUEA) an institution accredited by the interested party to offer law progammes. The respondent was 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 amongst others to make Regulations in respect of

10. 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 inorder to facilitate progression in the legal profession from lower levels of learning to higher levels.

11. 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 respondents 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 qualifications for the taking of a Bar Exam which was jointly administered by the respondent and the interested party were matters relating to the establishing law of the Tribunal and fell squarely within its jurisdiction. The appellants had variously joined the Diploma in Law programmes offered by Inoorero University and the Kenya School of Law and upon successful completion enrolled for the degree programmes offered by Catholic University of Eastern Africa. They had successfully completed the Bachelor of Laws degree and had applied for admission to the Advocates Training Programme offered by the respondent.

12. The appellants were of the view that they did qualify 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.

13. 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. 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.

14. For applicants who joined University in the year 2016 after the coming into force of the *Legal Education (Accreditation and Quality Assurance) Regulations*, 2016 made pursuant to the Third Schedule to the *Legal Education Act*, 2012 the admission to the University was covered by Regulation 5 therein. The appellants had joined University prior thereto and the applicable law was to be found in section 18 of *Council of Legal Education Act*, Cap. 16 A (repealed) which had made the *Council of legal Education (Accreditation of Legal Education Institutions) Regulations*, 2009. The appellants in support of their submissions relied on the authorities in *Andrian 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. To him it dealt with persons who became eligible for the conferment of Bachelor of Laws (LLB) degree of recognized Universities in Kenya. 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 their favour on the appeals.

The respondent's submissions on the appeals.

15. It was contended that the appellants had lodged appeals to the Tribunal to admit them to the Advocates Training Programme. The Tribunal had no jurisdiction to entertain the appeals. Reliance was placed on the *Black's Law Dictionary 6th. Edition* and *Halsbury's Laws of England, 4th.edition*, volume 10, paragraph 314 on the meaning of jurisdiction which was the authority by which a court has to decide matters that are litigated before it or to take cognizance of matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.

16. The respondent relied on the authorities of the *Law Society of Kenya v Centre for Human Rights and Democracy & 13 others*, (2013) eKLR and *Bakeries Limited v Rent Restriction Tribunal & Kiriti Raval*; Nairobi HC. Misc. Appli. No. 246 of 1981. In the latter decision it was held;

> " Testing whether a statute has conferred jurisdiction on an inferior court or tribunal ... the wording must be strictly construed: it must infact be an express conferment and not a matter of implication and that a tribunal is a creature of statute and has only such jurisdiction as has been specifically conferred upon it by the statute."

17. The Tribunal being a creature of the *Legal Education Act*, 2012 had no jurisdiction to address a dispute in the nature of the appeals before it which arose under the *Kenya School of Law*, 2012.

18. The process of admission to the Advocates Training programme was exclusively provided for in section 16 of the *Kenya School of Law Act*, 2012 which required an applicant to meet the requirements set in the second schedule of the *Act* for that course. The respondent could only admit an applicant based on section 17 of the *Act* if it was satisfied that the applicant was qualified. The appellants had by their own admissions complied with section 17 (1) of the *Act* by making applications for admission to the school but had then moved the Tribunal to effectively arrogate the duties and powers conferred upon

the respondent under section 17 (2) of its *Act*. The appeals were meant to ask the Tribunal to grant them admission to the school and thus arrogate the statutory duties of the school.

19. Reliance was placed on the decision in *Kenya Pipeline Company Limited v Hyosung Ebora Company Limited & 2 Others*, (2012) eKLR in seeking to caution the Tribunal from usurping the respondent's powers under the guise of preventing abuse of power.

20. The respondent then advanced an argument on discrimination based on the provisions of sections 1(a) and (b) of the *Kenya School of Law Act*, 2012 and by extension double standards in that to adopt the appellants construction it will mean that only applicants with degrees from foreign Universities will be subjected to the scrutiny of the minimum entry points to the University.

21. Applicants from local or recognized Universities would not be so subjected leading to unfair treatment of applicants to the Advocates Training Programme. The respondent relied on the decision of *Sollo Nzuki v Salaries and Remuneration Commission & 2 Others*, (2019) eKLR in which Justice Odunga held;

> "In *Peter K. Waweru v Republic*, (2006) eKLR discrimination was defined as affording different treatment to different persons attributable wholly or mainly to their descriptions whereby persons of one such description are subjected to ... restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description."

22. There was no reasonable distinction between the two categories of applicants from Kenyan Universities and Foreign Universities that would justify the existence of the two sets of standards. 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.

23. The respondent then contended that a claim for the breach of fair administrative action was not applicable as it normally seeks to scrutinize the process and legality of the decision made by an entity as contemplated by section 3 of the *Fair Administrative Act*, 2015.

24. The appellants were seeking to challenge a decision which had not been made before the Tribunal. The appeal was premature and had sought to defeat a process set by the law. The appellants had not particularized in what manner their right to fair administrative action had been violated. The respondent in executing its mandate inaccordance with article 27 of the *Constitution of Kenya*, 2010 had accorded the appellants equal benefit of the law. The respondent had in all its communications to the appellants clearly indicated the reasons for its decision.

25. On the issue of failure to particularize the allegations of breach of rights, the respondent relied on the decisions in *Benard Murage v Fineserve Africa Limited & 3 Others*, (2015) eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others*, (2013) eKLR in which the common thread was that the importance of precise claims assist in the due dispensation of justice and the exercise of jurisdiction.

26. The respondent submitted that it proposed to act within its mandate, its actions would be guided by the law and it was therefore improper to interfere with its actions and discretion. It relied in the decision

in *Ntele James Kipambi v Council of Legal Education & Kenya School of Law*, (2017) eKLR in which Justice Nyakundi held;

> "It is not the function of the courts to substitute their decision in place of those made by the targeted or challenged body."

27. 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 K.C.S.E mean grade requirements.

28. 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."

29. 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."

The highlighting of the submissions.

30. The parties were invited to highlight the submissions at a hearing session of the appeal and the Tribunal. For the appellants, it was reiterated that the Tribunal had jurisdiction to determine the matter by section 31 of the *Legal Education Act*, 2012. It was contended that the provisions was worded in fairly board terms and it could address any matter relating to the *Act*. If a matter was connected with the *Act* the Tribunal had the jurisdiction. The Tribunal had earlier resolved its jurisdiction in LEAT Appeal no. 1 of 2020 – *Nyamiwa Achieng Bethsheba v Kenya School of Law & Another*, and in the High Court had confirmed the Tribunal's jurisdiction. The appellants reiterated that they were two routes of admission to the Advocates Training Programme. They relied on the decision in *Robert Dabali* (*supra*) .The decision had considered most of the earlier precedents including the one relied on by the respondent in its submissions of *Victor Juma*, (*supra*).

31. The said decision was even consistent with the Tribunal finding in its decision in *Nyamiwa Achieng Bethsheba* (*supra*). The fact that the said approach would create discrimination as argued by the respondent was inconsequential as the same was permissible. The reason for the 2 routes was based on quality assurance as the interested party had control over the supervision of local University institutions offering legal education while it had no control on foreign institutions offering the said qualification and course. Thus, Parliament gave a different criteria to those who attended local Universities and those who attended foreign Universities. The admission criteria by the respondent thus violated the law.

32. The Tribunal prompted the appellants Advocate to address the issues of progression in the profession, the mandate of the Council and the Board of the respondent the latter being a delegate of the former in offering legal education, the decision being challenged whether it had been made or was yet to be made and thus they relied on section 11 (2) of the *Fair Administrative Action Act*, 2015. The appellants Advocate clarified that a decision had been taken by the newspaper advertisement which set the entry qualifications for the Advocates Training Programme that clearly excluded the appellants' entry to the school. The Tribunal wasentitled to make a finding that the criteria adopted by the school was inconsistent with section 1 (a) of the second schedule to the *Kenya School of Law Act*, 2012.

33. The Tribunal could direct that in considering the applications by the appellants it follows the directions of the Tribunal. The appellants also confirmed that section 11 (2) of the *Fair Administrative Action Act*, 2015 applied to the scenario in their respective appeals. The appellants did not address the issue of career progression in the legal profession.

34. For the respondent it was reiterated that jurisdiction to entertain the appeals was lacking. The establishing statute of the Tribunal only limited its jurisdiction to matters within the statute. The Tribunal could not step out of the *Act*. The issue of admission and the process thereto was provided in the *Kenya School of Law Act*, 2012. The appellants had by their own admission complied with the *Kenya School of Law*, 2012 by making applications to the school then moved the Tribunal for a decision on the applications. On the purposes of regulation, it was reiterated that the interested party as a regulator did not manage the day to day activities of a service provider such as the respondent. The Tribunal by allowing the appeal it would be usurping the mandate of the respondent. In construing a statute the under the literal rule if the meaning was clear there was no resort to the other cannons of statutory interpretation. Section 1 (a) of the second schedule of the *Kenya School of Law Act*, 2012 required that minimum secondary school qualifications for entry to the under graduate law schools be considered by the respondent at the time of taking decisions made on applications to the school by both local and foreign law degree graduates. It would be discriminatory for applicants who have lower qualifications at the Kenya Certificate of Secondary Education to be allowed entry to the school by the mere fact that they attended local Universities. There was no breach of the fair administrative action law as a decision was yet to be taken on the appellants applications by the school.

35. The appeal was premature and the appellants had failed to give particulars of the breach of the fair administrative action requirements alleged. The respondent had proposed to act within the law and it had never breached or violated any process of law. If the Tribunal was to find that they could benefit from section 1 (a) of the second schedule to the *Act* they would still not be eligible as they did not meet the minimum Kenya Certificate of Secondary Education grades. It relied on *Peter Githaiga Munyeki*, (*supra*) for the proposition that a holistic reading had to be adopted to the second schedule. The school had acted within the law. In *Victor Juma* (*supra*) it was concluded that Parliament had not intended enacting a law which would be discriminatory by requiring one set of students to meet certain qualifications and then seek to exempt others from meeting the criteria. The decision in *Robert Dabali* (*supra*) was a dispute on equivalence of qualifications. The Judge found against the school but it was not a dispute on admission to the school but equation. The respondent was prompted by the Tribunal to clarify on when the applications were lodged with the school and why it had taken a while for decisions to be taken on the applications, the issue as to whether the school could introduce its own additional qualifications to those set by Parliament, as to whether it had read the Handsard embodying the debate leading to the enactment of the amendment to the second schedule in 2014, what mischief was sought to be cured and also whether the delay in advising the applicants' on the outcome of the applications entitled the appellants' to move the Tribunal under section 11 (2) of the *Fair Administrative Action Act*, 2015 and finally, the meaning of the conjunction 'or' which appeared

in the second schedule to the *Act* at sections 1 (a) and (b). On delay, the respondent contended that the application process was disrupted by the COVID - 19 pandemic in the country and also most law schools took long to release graduation lists to the school. If it was to create any qualifications outside the *Act* it would be beyond its mandate. On the issue of the double criteria the respondent believed that it arose in 2012 when the school was created as a separate entity under its own *Act*. The respondent had tried to study the Handsard but was still unable to comprehend where the disconnect came from and efforts were being made to effect an amendment to the said law. On the interpretation of the word 'or', the plain dictionary meaning of the word would suggest an alternative. The word 'or' was added as an amendment in 2014 as previously it did not exist. Since it was an amendment it seeks to give a more open understanding of 1 (a) and 1 (b). 1 (a) would be applicable to students from Kenyan Universities but must have the minimum Kenya Certificate of Secondary Education qualifications. For 1 (b), it adds additional requirements for students who have qualifications from foreign Universities. The said construction would be one that can be meant to understand the intention of the legislator but not to legislate on behalf of the legislator.

36. In a brief rejoinder, the appellants reiterated that the provisions of the *Fair Administrative Action Act*, 2015 applied to the appeals. They were entitled to seek a declaration that they were entitled to admission to the school. It was perfect for the appellants to move the Tribunal even before the rejection of the admissions. On discrimination, the appellants reiterated that it could not arise as for instance the respondent had complied with the decision in *Adrian Kamotho* (*supra*), which declared that Pre - Bar examinations were not applicable to students from local Universities. No complaint of discrimination had been taken up on the said position as it has been applied to foreign students only.

Analysis and determination.

a)Jurisdiction of the Tribunal.

37. The respondent contends that the Tribunal is devoid of jurisdiction to entertain the matter accordingly this will be the first issue to be resolved. The *Halsbury's Laws of England, 4th edition* vol. 9 at page 350 defines the term 'jurisdiction' as;

> " The authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision".

38. John Beecroft Sanders in his treatise, *Words and Phrases Legally* Defined, vol. 3 at page 113 proffers a similar definition of the term 'jurisdiction' as follows;

> " By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited.

39 A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.....where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given".

40. The foundation upon which the Tribunals in Kenya are established is article 169 (1) of the *Constitution of Kenya*, 2010. It 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)."

41. Parliament is required to enact legislation conferring jurisdiction, functions and powers on the courts established under article 169 (1) aforegoing. Parliament has pursuant thereto enacted the *Legal Education Act*, no. 27 of 2012 which recognizes in its preamble that part of the purpose of the *Act* is to establish the Legal Education Appeals Tribunal. 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."

42. Section 2 of the *Act* provides for the term 'Tribunal' to mean the Legal Education Appeals Tribunal as established by section 29 of the *Act*. 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."

43. 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 they ought to;

(i) 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

(ii) 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

(iii) Have passed in the mandatory 16 core subjects as stipulated in the Second Schedule of the Legal Education Act, 2012; and

(iv) Hold or are eligible for conferment of an LL.B degree from a recognized Kenyan university.

44. The advertisement clearly imports the application of the *Legal Education Act*, 2012 and which is the establishing law of the Tribunal. Accordingly, it is the Tribunal's finding that it has jurisdiction to entertain the appeals filed by the appellants. Also in dealing with the issue of admissibility to the Advocates Training Programme, a sole reference to the *Kenya School of Law Act*, 2012 is not possible as

at the time of enactment of the law, there was the subsidiary legislation in place made by the interested party under the repealed *Council of Legal Education Act*, Cap. 16A. The said legislation continues to be inforce as a repeal of an Act does not lead to a revocation of the subsidiary legislation thereto. On this account the *Council of Legal Education (Kenya School of Law) Regulations*, 2009 are in place. The provisions of section 24 of the *Interpretation and General Provisions Act*, Cap. 2 so provide.

45. This position is also well confirmed by the High Court in *Republic v Kenya School of Law & Another Ex Parte: Ibrahim Maalim Abdullahi*, [2014] eKLR in which Justice Odunga held,

> " In the final analysis I agree that the provisions of the Second Schedule to Kenya School of Law do not repeal the *Council of Legal Education (Kenya School of Law Regulations)* 2009, but supplement them, and that the two instruments are to be read together since Section 29 (3) (a) of the *Kenya School of Law Act*, 2012 saved Regulation 5 of the *Council of Legal Education (Kenya School of Law Regulations)* 2009."

46. Also 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 admission to the programme and the conduct of the examinations. Infact, 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.

47. 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."

48. Finally on jurisdiction the High Court which has final appellate jurisdiction on the decisions made by the Tribunal has well pronounced itself on the same in similar circumstances in the decision in Nairobi HC. Judicial Review no. 47 of 2019 - *Republic v Kenya School of Law & 2 Others Ex-parte Khaborone Tsholofelo Wekesa* in which Justice John Mativo held;

> " 53. The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application? The jurisdiction of the tribunal is expressly provided under the Act. No argument was advanced to challenge the jurisdiction of the Tribunal to entertain the dispute.
>
> 54. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the ex-parte applicant ought to have exhausted the available mechanism before approaching this court. I find that this case offends section 9 (2) of the *Fair Administrative Action Act*. Second, the ex-parte applicant has not satisfied the exceptional circumstances requirement under section 9 (4) of the *Fair Administrative Action Act*.

> 55. In conclusion, I find and hold that the applicant's application offends the doctrine of exhaustion of statutory available remedies. It must fail. Consequently, I dismiss the application dated 20th February, 2019 with no orders as to costs and direct that the ex-parte applicant must first exhaust the statutory dispute resolution mechanism before approaching this court."

b)Whether the Appellants are entitled to the orders sought.

49. The appellants seek a declaration of eligibility into the Advocates Training Programme and consequent admission by the Tribunal to the Kenya School of Law. The Tribunal finds that the appeal is premature as no adverse decision has been taken by the respondent or the interested party on the pending applications submitted by the appellants for admission into the Advocates Training Programme for the academic year 2021/2022. An appeal cannot be lodged against a non – existent decision. The Tribunal accordingly refrains from exercising its well espoused jurisdiction in this matter without delving into the merits of the dispute before it to avoid prejudicing the respondent and the interested party from addressing the pending applications based on the statutory mandate accorded to them. The dispute is not ripe for consideration by the Tribunal. The Tribunal is well guided by the authority in *Wanjiru Gikonyo & 2 Others v National Assembly of Kenya & 4 Others*, (2016) eKLR where it was held inter alia that;

> " Effectively, the justifiability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination."

50. The appellants have not established facts that merit intervention of the Tribunal on a threat to breach of the right to fair administrative action to the required standard at this stage. They have fallen short of the standard set in law by the Court of Appeal in *Alfred N. Mutua v Ethics & Anti-Corruption Commission (EACC) & 4 Others*, (2016) eKLR where it was stated;

> " 34. We find that the applicant is entitled in law to institute proceedings whenever there is threat of violation of his fundamental rights and freedoms or threat of violation of the Constitution. Whether there is a threat of violation is a question of fact and evidence must be adduced to support the alleged threat."

51. The Tribunal also concludes that the appeals herein are distinguishable from its decision rendered in *Nyamiwa Achieng Bethsheba v Kenya School of Law & Council of Legal Education*, (2020) eKLR. In the said matter a decision had been taken up revoking an admission to the Advocates Training Programme after the respondent had granted an admission letter, admission number and even received school fees from the appellant in the said case.

52. The Tribunal is further guided by the fact that it is not bound by its previous decisions as it retains its powers to address a dispute on a case to case basis. The said position is well reinforced by the decision of the Supreme Court in *SGS Kenya Limited v Energy Regulatory Commission & 2 Others*, (2020) eKLR in which Justices Ibrahim, Ojwang, Wanjala ,Njoki Ndungu & Lenaola, SC. JJ; held,

> " (41) So we turn to the single issue before us: are the Tribunals bound by the doctrine of stare decisis? The petitioner has contended that the Review Board failed to follow its own decision in *Avante*, without any explanation. According to the

petitioners, *stare decisis* applies to quasi - judicial tribunals, to the intent that there be uniformity/consistency, predictability, and certainty in law, in general terms. The 1st respondent, quite to the contrary, has argued that tribunals are not bound by their previous decisions such being only persuasive; and that each tribunal's task is to be determined on the basis of the facts before it.

(42) From the two contending propositions, it emerges, in our view, that tribunals, in their primary category, are specialized bodies charged with programming and regulatory tasks of the socio-economic, administrative and operational domains. Membership in such tribunals generally reflects the essential skills required for the specific tasks in view. The Public Procurement Administrative Review Board falls within this category. It is endowed with requisite experience from its membership, and has access to relevant information and expertise, to enable it to dispose of matters related to procurement. The question is: whether it is bound by its previous decision, as it takes decisions on different matters lately coming up.

(43) Such a variegated range of implementation scenarios, it is apparent to us, calls for flexibility in the regulatory scheme. In principle, matters on the agenda of an administrative tribunal will merit determination on the basis of the claims of each case, and will depend on the special factual dynamics. The relevant factors of materiality, and of urgency, will require individualised response in many cases: and in these circumstances, a strict application of standard rules of procedure or evidence may negate the fundamental policy-object. On this account, the specialized tribunal should have the capacity to identify relevant factors of merit; be able to apply pertinent skills; and have the liberty to prescribe solutions, depending on the facts of each case. Such a tribunal should fully take into account any factors of change, in relation to different cases occurring at different times: without being bound by some particular determination of the past.

(44) We would agree with the 1st respondent, that administrative decision-makers should have significant flexibility, in responding to changes that affect the subject-matter before them. Matters before an administrative tribunal should be determined on a case-to-case basis, depending on the facts in place."

53. Indeed that account courts are deemed to be different from tribunals. The said standpoint is well reinforced by the Canadian case of *Weber v Ontario Hydro*, (1995) 2 SCR 929, in the dissenting opinion of Lacabucci, J. at paragraph 14 it was held;

> " The first significant difference between courts and tribunals relates to the difference in the manner in which decisions are rendered by each type of adjudicating body. Courts must decide cases according to the law and are bound by *stare decisis*. By contrast, tribunals are not so constrained. When acting within their jurisdiction, they may solve the conflict before them in the way judged to be most appropriate."

54. In conclusion, the parties will be at liberty to move the Tribunal at the opportune time should need arise when a decision is taken on the individual appellants applications as presented to the respondent.

Disposition.

55. The Tribunal now decrees:-

    (a) The appeals are dismissed on account of being premature.

    (b) Each party to bear own costs of the appeal.

    (c) 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 23RD DAY OF APRIL, 2021.

ROSE NJOROGE – MBANYA - (MRS.)

CHAIRPERSON

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