



**Simon v Kenya School of Law; Council of Legal Education (Interested Party)
(Appeal E024 of 2023) [2023] KELEAT 381 (KLR) (Civ) (21 July 2023) (Judgment)**

Neutral citation: [2023] KELEAT 381 (KLR)

**REPUBLIC OF KENYA
IN THE LEGAL EDUCATION APPEALS TRIBUNAL
CIVIL
APPEAL E024 OF 2023**

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

JULY 21, 2023

BETWEEN

SAMUEL KIVUVA SIMON APPELLANT

AND

KENYA SCHOOL OF LAW RESPONDENT

AND

COUNCIL OF LEGAL EDUCATION INTERESTED PARTY

(Being an appeal against the decision of Dr. H. K. Mutai – Director/Chief Executive Officer of the Kenya School of Law dated 12th January 2023 rejecting admission into the Advocates Training Programme during the 2023/2024 academic year)

JUDGMENT

A. Background

1. This is an Appeal against the decision of the Respondent dated 12th January 2023 in which the Respondent declined the Appellant admission into the Advocates Training Programme (“ATP”) for not having attained the statutorily prescribed grades in his Kenya Certificate of Secondary Education (KCSE) grades. The Appellant who was aggrieved by this decision filed his Memorandum of Appeal dated 24th April 2023 before this Tribunal. His Appeal was accompanied by a Supporting Affidavit sworn on 24th April 2023 as well as supporting documents.
2. In his Appeal, the Appellant states that he scored a mean grade of C(plain) in KCSE, a B(minus) in English and a C(plus) in Kiswahili and holds a Bachelor of Laws degree, 2nd Class Honours (Upper Division) from Mount Kenya University, which degree was attained on 9th December 2022. Prior to



studying for his Bachelor of Laws degree, he had obtained a Diploma in Law from Nairobi Institute of Business Studies.

3. The Appellant states that the Respondent has declined his application for admission into the ATP on the basis that he does not qualify based on his Kenya Certificate of Secondary Education (“KCSE”) results. The Appellant rebuts this contention and states that he qualifies by virtue of Section 1(a) of the Second Schedule to the *Kenya School of Law Act, 2012*.
4. Although both the Appellant and the Respondent have referred to a Replying Affidavit filed by the Respondent in their submissions, the said Replying Affidavit was not availed to the Tribunal. It appears from the record of the Tribunal’s proceedings (when the matter came up for mention on 23rd June 2023), that the Appellant’s counsel informed the Tribunal that she was served with a “replying affidavit” on 7th June 2019. This replying affidavit doesn’t seem to have been filed in the e-filing portal of the Tribunal and is therefore not on record. The Tribunal thus relied on the Appeal, the Supporting Affidavit and Submissions of the Appellant and the submissions filed by the Respondent in delivering this judgment.
5. The Interested Party did not file any response or submissions in these proceedings but indicated to the Tribunal that it would be relying on the submissions of the Respondent.

B. The Appeal by the Appellant

6. The Appellant relied on the grounds on the face of the Memorandum of Appeal, which were inter alia:
 - i. That having scored a mean grade of C(plain) in KCSE and having been conferred a Bachelor of Laws Degree from Mount Kenya University, he was duly qualified to be enrolled to the ATP at the Respondent in line with section 1(a)schedule 2 of the *Kenya School of Law Act 2012*;
 - ii. That the decision of the Respondent declining him admission to the ATP was unfair, an infringement of his right to education and a misinterpretation of the law. He asserts further that:
 - a. He did his KCSE in Kenya
 - b. He has a diploma in law from an accredited institution
 - c. He has completed his Bachelor of Laws degree from an accredited University
 - iii. The Appellant states that the director of the Respondent has no legal basis to monitor legal education in Kenya which is the mandate of the Interested Party.
 - iv. He seeks the following reliefs:
 - a. The decision of the director/chief executive officer of the Respondent dated 12th January 2023 be quashed
 - b. The Appellant be forthwith admitted to the ATP for the forthcoming academic year
 - c. The Tribunal exercises its jurisdiction to make other orders as it deems fit.
7. The impugned decision is contained in a letter dated 12th January 2023 addressed to the Appellant from the director/chief executive officer of the Respondent and reads as follows in part:

“Dear Mr. Kivuva

Admission To The Kenya School Of Law-academic Year



Reference is made to your application for admission to the Advocates Training Programme (ATP) at the Kenya School of Law.

It is regretted that your application was not successful for admission due to the following reason(s):

You scored a KCSE mean grade C(plain) and grade B(minus) in English and C(plus) in Kiswahili. Having been admitted in the University in 2018, this falls short of the minimum grades provided under the [Kenya School of Law Act, 2012](#)

Thank you.....”

8. On 28th April 2023, upon the consent of the parties, the Tribunal gave directions that the matter be disposed to by way of written submissions.

C. The Appellants’ Submissions

9. The Appellant sets out the following issues for determination:
 - i. Whether the Tribunal has jurisdiction to hear and determine the Appeal
 - ii. Whether the Appellant qualifies for admission into the ATP
 - iii. Whether the doctrine of academic progression is applicable in this case
 - iv. Whether the Appellant is entitled to the orders sought
 - v. Who bears the costs of the Appeal
10. On jurisdiction, the Appellant refers the Tribunal to section 31(1) of the [Legal Education Act, 2012](#) that defines the jurisdiction of the Tribunal. He has stated that given that both the Appellant and the Respondent had addressed the issue of academic progression which is provided for under Section 8(3) of the [Legal Education Act, 2012](#), the Tribunal has jurisdiction to hear the Appeal. The Appellant sought to rely on the case of Leon Kamau V Kenya School of Law and Another, 2021 eKLR
11. On the issue of whether the Appellant qualifies for admission into the ATP, the Appellant submits that he qualifies under 2nd Schedule, Section (1) (a) of the [Kenya School of Law Act, 2012](#) . He relies on the case of Republic V Kenya School of Law & Ano Ex-Parte Kithinji Maseka Semo & Another, (2019) eKLR where the court held that the 2 sets of qualifications under paragraphs 1(a) and (b) of the Second Schedule to the [Kenya School of Law Act, 2012](#) are alternatives. He goes on to quote several other cases in this regard.
12. Concerning academic progression, the Appellant asserts that he holds a diploma in law and places reliance on Kihara Mercy Wairimu & 7 Others V Kenya School of Law and 4 Others (2019) eKLR among other cases. He further submits that academic progression is provided for under Section 8(3) of the [Legal Education Act, 2012](#) and that the Second Schedule of the said Act provides for courses to be taught at diploma as well as degree level.

D. The Respondent’s Submissions

13. The Respondent set out the following as the issues for determination:
 - i. Does the Tribunal have jurisdiction over the matter?
 - ii. Is the Double standards in admission qualification discriminatory or justifiable?



- iii. Whether the Respondent's decision to refuse admission to the Respondent's Advocates Training Programme was a breach of legitimate expectations.
 - iv. Is Academic progression applicable?
14. The Respondent submits that the Tribunal does not have jurisdiction over the matter, it states that LEAT was created by the [Legal Education Act, 2012](#) under Part VI and its jurisdiction under that Part, is to hear appeals matters arising out of the [Legal Education Act, 2012](#). The matter before the Tribunal relates to an appeal from a provision of the [Kenya School of Law Act, 2012](#).
 15. The Respondent also submits that this Honourable Tribunal's jurisdiction is limited to matters that relate to the [Legal Education Act 2012](#) which states in section 31(1) that:
 - “ 31. Jurisdiction of Tribunal
 - (1) The Tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the Council or by any committee or officer of the Council, on any matter relating to this Act, inquire into the matter and make a finding thereupon, and notify the parties concerned.
 16. The Respondent submits that the Tribunal is a creature of the [Legal Education Act, 2012](#) which was enacted to establish it. Thus, the [Legal Education Act, 2012](#) is an Act 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.
 17. The Respondent goes ahead to submit that Section 30 flows from section 29 which established LEAT, spells out its purpose and specifies the membership and crucially, section 31 grants the Tribunal jurisdiction on any matter relating to this Act, it submits that it is clear that these sections do not expressly confer upon Tribunal power to adjudicate matters that are outside the scope of the [Legal Education Act 2012](#).
 18. As to whether there is a double standard in admission qualifications and whether it is discriminatory or justifiable the Respondent submits inter alia that in constructing a statutory provision, the first and foremost rule is that of literal construction. If the interpretation is unambiguous and the legislative intent is clear then the meaning is applied without resort to other rules of statutory interpretation.
 19. The Respondent relies on the case of the Law Society of Kenya V Centre for Human Rights and Democracy & 13 other (2013) eKLR and Bakeries Limited V Rent Restriction Tribunal and Kiriti Raval Nairobi HCMCC No. 246 of 1981 among others.
 20. The Respondent further submits that the process of admission into the ATP is exclusively provided for in the [Kenya School of Law Act, 2012](#), a process which the Appellant submitted to.
 21. As to whether there is a double standard in admission qualifications, and whether it is discriminatory or justifiable, the Respondent urges the Tribunal to avoid a literal interpretation of the admission criteria that would lead to an absurdity or discrimination. It quotes the Court of Appeal decision in Nairobi Civil Appeal No. E472 of 2021.
 22. The Respondent further urges the Tribunal to adopt an interpretation that will not only make the statutory provisions on admission operative and workable, but also to make them operative in a just and reasonable manner.



23. Concerning the issue of whether the Respondent’s decision to refuse admission into its institution was a breach of legitimate expectation, the Respondent quotes the above Court of Appeal decision and submits that the Appellant did not meet the admission criteria.
24. On whether the procedure to refuse admission was illegal and unreasonable the Respondent submits that the procedure adopted by the Respondent in arriving at the impugned decision was fair and reasonable.
25. On the issue of academic progression the Respondent submits that the Appellant does not qualify to be admitted to the ATP by reason of academic progression because the applicable law, which is the [Kenya School of Law Act](#) 2012, as amended by Statute Law Miscellaneous Amendments Act (No. 18 of 2014) does not provide for academic progression.
26. The Respondent further states that the Appellant cannot rely on the CLE Quality Assurance Regulations as the Tribunal has stated in various decisions that the cut-off date was 30th January 2018 for one to rely on the doctrine of crystallized actions.

E. Analysis and determination.

27. In this matter the following main issues arose for our determination:
 - I. Does the Tribunal have jurisdiction to hear and determine the Appeal?
 - II. Does the Appellant qualify for admission into the ATP under section 1 (a) of the Second Schedule to the [Kenya School of Law Act](#), 2012?
 - III. Does the Appellant qualify for admission into the ATP under the doctrine of academic progression?
28. We will proceed and deal with each of these issues individually

I. Whether This Tribunal Has Jurisdiction

29. In its submissions, the Respondent states that the Tribunal has no jurisdiction to hear and determine this Appeal. This is not the first time the issue has been brought up by the Respondent in a similar matter before this Tribunal but non-the- less, we shall proceed to determine it as herein-below.
30. We would not hesitate to re-emphasize the importance of jurisdiction as was stated in the celebrated case of Owners Of The Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd [1989] eKLR where Nyarangi, Masime & Kwach: JJ A as they then were held 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.”
31. On the contention that the Tribunal has no jurisdiction to entertain this Appeal, we note that the primary relief sought by the Appellant is hinged on two main points:
 - i. His entitlement thereof to admission to the ATP based on section 1 (a) of the Second schedule of the [Kenya School of Law Act](#), 2012.



- ii. His entitlement to admission to the ATP by dint of statutory interpretation and academic progression and in particular, his entitlement to admission to the ATP under the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 which were formulated by the interested party pursuant to the [Legal Education Act, 2012](#).
32. The Tribunal notes that Section 8 (3) (a) of the [Legal Education Act, 2012](#) provides that one of the functions of the Interested Party is to make Regulations for persons wishing to enroll in legal education programmes. This provision reads as follows:
- “In carrying out its functions under subsection (2), the Council shall—
- a) make Regulations in respect of requirements for the admission of persons seeking to enroll in legal education programmes;...”
33. This function has been confirmed in Nairobi Court of Appeal Civil Appeal No. E472 OF 2021 - Kenya School of Law v Otene Richard Akomo & 41 Others, by Justices Asike - Makhandia, J. Mohamed and Kantai JJ.A at page 21 as follows;
- “The Council has a duty to regulate how the universities admit students to pursue various cadres of legal education; that is at the certificate, diploma and degree levels. That duty must be discharged at the point of entry of the student at the institution offering such courses. A legal education provider, must, at the direction and supervision of the Council, be able to determine whether a student is qualified to pursue studies in law at the time the student applies to join the institution, be it a college or a university.
- It should be noted that whereas the Council has powers to make regulations in respect of requirements for admission of persons seeking to enrol in legal education programmes, it also has the duty to ensure compliance of such regulations at the very point of admission of such persons, at whatever level. Hence, it is upon the Council to ensure that all those enrolled to pursue legal education programmes are duly qualified in law to undertake such studies.”
34. The Interested Party and the Tribunal are established under the same statute. It follows that the Tribunal has the requisite jurisdiction to inquire into the appeals before it by dint of section 31 (1) of the [Legal Education Act, 2012](#).
35. The Tribunal also notes that Section 8 (3)(c) of the [Legal Education Act, 2012](#) provides for academic progression by requiring the interested party to 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. The Legal Education (Accreditation and Quality Assurance) Regulations, 2016 were formulated by the interested party pursuant to the [Legal Education Act, 2012](#).
36. It is the finding of this Tribunal therefore that in inquiring into the matter of applicability of academic progression, the Tribunal will be discharging its mandate under section 31 of the [Legal Education Act, 2012](#).
37. In view of the above, the Tribunal is confident and so finds that it has the requisite jurisdiction to inquire into the appeals before it by dint of section 31 (1) of the Act which provides;
- “The Tribunal shall, upon an appeal made to it in writing by any party or a reference made to it by the Council or by any committee or officer of the Council, on any matter relating



to this Act, inquire into the matter and make a finding thereupon, and notify the parties concerned.”

II. Whether The Appellant Qualifies For Admission Into The ATP Under Section 1 (a) Of The Second Schedule To The *Kenya School Of Law Act*, 2012?

38. The Appellant contends that he is entitled to admission to the ATP based on the fact that he holds a Bachelor of Laws degree from the Mount Kenya University, a recognized university in Kenya. Thus, he was only to be subjected to the scrutiny in section 1 (a) as opposed to 1 (b) of the Second Schedule to the *Kenya School of Law Act*, 2012.

39. The section provides 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, or of any university, university college or other institution prescribed by the Council, holds or becomes eligible for the conferment of the Bachelor of Laws (LLB) degree of that university, university college or institution; or

(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.”

40. To buttress his argument, the Appellant has cited several past authorities mainly from the High Court of Kenya, where the Court had held that the conjunction ‘or’ between the two sections is an elective, and that a disjunctive interpretation was to be adopted so that the applicants to the ATP were to only be subjected to a singular as opposed to a conjunct criteria in consideration of their applications to the Programme depending on the jurisdiction in which they undertook their undergraduate degree programme. Thus applicants who undertook their undergraduate degree programme from a recognized university in Kenya were to be subjected to the criteria in paragraph (a) while those who



undertook their undergraduate degree programme from a recognized university outside Kenya were to be subjected to the criteria in paragraph (b).

41. The Tribunal notes that being respectful of the hierarchy of courts, this position shifted, following the pronouncement of the Court of Appeal in Nairobi Civil Appeal no. E472 of 2021 - Kenya School of Law v Otene Richard Akomo & 41 Others in which Justices Asike - Makhandia, J. Mohammed and Kantai JJ.A observed;

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

42. The Appellant scored a mean grade of C(plain) in KCSE, a B(minus) in English and a C(plus) in Kiswahili. Based therefore on a conjunctive interpretation, as propounded by the Court of Appeal, the Respondent’s decision declining the Appellant’s admission to the ATP is a correct one, since the Appellant failed to meet the minimum required English or Kiswahili languages grades in his KCSE examinations as embodied above.
43. It is therefore the finding of this Tribunal that the Appellant is not qualified for admission under section 1 (a) of the Second Schedule to the Kenya School of Law Act, 2012.

III. Whether The Appellant Qualifies For Admission Into The Atp Under The Doctrine Of Academic Progression

44. The Appellant has explored his entitlement to benefit from the doctrine of academic progression. He states in paragraph 7 of his Supporting Affidavit that he applied for admission to the Bachelor of Laws degree in September 2018. He produced a letter of admission from the Mt. Kenya University dated 8th June 2018. This letter confirms his admission into the bachelor of laws degree programme and hence the effective date of admission is 8th June 2018. He subsequently graduated therefrom with a second class Honours (upper Division).
45. He notes that his admission was based on his successful undertaking of a Diploma in Law from Nairobi Institute of Business Studies.
46. The Interested Party had formulated a criteria for admission to the Bachelor of Laws degree and the Advocates Training Programme based on its mandate under section 8 (3) (a) of the Legal Education Act, 2012. For the Bachelor of Laws degree, the same was provided for vide regulation 5 of the 3rd Schedule to the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 which provided;

“ 5. Undergraduate Degree Programme

- (1) The minimum admission requirements for an undergraduate degree programme in law shall be —



- (a) a mean grade of C+ (Plus) in the Kenya Certificate of Secondary Education examination or its equivalent with a minimum grade of B Plain in English or Kiswahili;
- (b) at least three Principal Passes in the Kenya Advanced Certificate of Education examination;
- (c) a degree from a recognised university; or
- (d) a Credit Pass in a diploma in law examination from an accredited institution.”

47. However, the validity of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016, was challenged in a Constitutional Petition lodged in the High Court at Nakuru in Petition No. 20 of 2016 - Javan Kiche Otieno & Another v Council of Legal Education & Another, on account of failure to obtain Parliamentary approval as required by the Statutory Instruments Act, 2013. The Hon. Justice Maureen Odero in a judgment delivered on the 30th January, 2018 and stated as follows;

“The first issue here is the legality of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016. The petitioners contend that the said regulations were made in contravention of article 10 of the Constitution. They further contend that the 1st respondent was not properly constituted in accordance with section 4 (5) of the Legal Education Act at the time of making the said Regulations and that the 1st respondent does not have the powers to accredit foreign institutions. However, the true position is that the Regulations have not yet become subsidiary legislation because they have not yet been adopted by Parliament as required by section 14 of the Statutory Instruments Act. Thus this provision renders the said regulations void and unenforceable.”

48. The Court of Appeal cited with approval the declaration of invalidity of the Regulations, in its judgment of 21st December 2021, in Javan Kiche Otieno & Another v Council of Legal Education, (2021) eKLR, and went on to add, that the declaration of invalidity would not affect actions already crystallized whilst the expunged law was still in force. Justices D. K. Musinga (P), R. N. Nambuye and A. K. Murgor; JJ.A in paragraphs 47 of the judgment stated;

47. consequently, it is explicit that a court having declared a piece of legislation or a section of an act to be unconstitutional, that act or law becomes a nullity from the date of inception or enactment and not from the date of judgment. But it will not be applicable to actions already crystallized whilst the expunged law was in force.”

49. The Court of Appeal in the above case not only affirmed the decision of the high court concerning the invalidity of the Regulations, it also limited the retrospective effect of declaration of invalidity such that it would not affect actions already crystallized whilst the expunged law was still in force. The crystallized action in this case would be the admission of the Appellant to bachelor of laws degree programme.

50. The operative date of the declaration of invalidity is 30th January 2018 (being the date of the decision by the High Court as affirmed by the Court of Appeal), on this date, the said Regulations which contained the criteria for admission based on academic progression among others ceased to have had any legal consequence from their inception. This included the set out admission criteria to the various legal education programmes contained in them.



51. For the action to have crystallized, it ought to have been performed before 30th January 2018. The Appellant was admitted in September 2018. The Tribunal therefore finds that his admission was made after the date of the declaration of invalidity of the 2016 Regulations, and his admission was therefore not a crystallized action, unfortunately, he cannot therefore obtain benefit from the Legal Education (Accreditation and Quality Assurance) Regulations, 2016.
52. The Tribunal notes the arguments by the parties on legitimate expectation. It follows that legitimate expectation cannot accrue if the action or benefit expected is not supported by the law. Discussing legitimate expectation, H. W. R. Wade & C. F. Forsyth (Administrative Law, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000), at pages 449 to 450 states thus:

It is not enough that an expectation should exist; it must in addition be legitimate. First of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation.

Second, clear statutory words, of course, override an expectation howsoever founded. Third, the notification of a relevant change of policy destroys any expectation founded upon the earlier policy...."

Disposition.

53. It Is Decreed:-
- a. That the appeal by Samuel Kivuva Simon as against the Respondent's decisions declining admission to the Advocates Training Programme as communicated by the respondent by Dr. Henry K. Mutai - Director of the Kenya School of Law in the decisions dated 12th January , 2023 is dismissed.
 - b. That each party to bear its own costs of the appeal.
 - c. That any party aggrieved by this decision is at liberty to appeal to the High Court under section 38 (1) of the *Legal Education Act*, 2012 on a point of law.

It is so ordered by the Legal Education Appeals Tribunal.

DATED AT NAIROBI THIS 21ST DAY OF JULY 2023.

ROSE NJOROGE – MBANYA - (MRS.) - CHAIRPERSON

EUNICE ARWA - (MRS.) - MEMBER

RAPHAEL WAMBUA KIGAMWA (MR.) – MEMBER

STEPHEN GITONGA MUREITHI (MR.) - MEMBER

