



Republic v Kenya School of Law & another; Immaculate (Exparte) (Judicial Review Miscellaneous Application E180 of 2021) [2022] KEHC 3349 (KLR) (Judicial Review) (26 May 2022) (Ruling)

Neutral citation: [2022] KEHC 3349 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E180 OF 2021
AK NDUNG’U, J
MAY 26, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

KENYA SCHOOL OF LAW 1ST RESPONDENT

COUNCIL FOR LEGAL EDUCATION 2ND RESPONDENT

AND

MOGUSU GESARE IMMACULATE EXPARTE

RULING

Introduction

1. Mogusu Gesare Immaculate, the ex parte Applicant herein moved this court vide a notice of motion application dated December 2, 2021 seeking the following Orders:
 - a) That the Honourable court be pleased to issue an order of Certiorari to remove into the Honourable court and quash the decision of the 1st respondent made through a letter dated November 19, 2021 effectively excluding or prohibiting the Ex parte Applicant from sitting for the mandatory oral examination in absence of the original transcripts and LLB degree certificate.
 - b) An order of Prohibition be and is hereby issued directed at the respondents prohibiting them from deregistering the Ex parte applicant and prohibiting the Ex parte applicant from sitting for the oral examination for lack of LLB Degree Certificate and/ or original transcripts.



- c) An order of mandamus compelling the 1st respondent to make arrangements for the Ex parte Applicant to undertake the oral examination on a date, time and venue to be communicated to her by the 1st respondent and the results be availed to her.
 - d) An order directing the respondents to permit the Ex parte applicant to sit for the bar examination when the same will be administered.
 - e) The Respondent to bear the costs of this application
2. Subsequently, the 1st respondent raised a Preliminary Objection dated 9th February, 2022 on the grounds that:
1. The Honourable Court lacks jurisdiction to hear and determine this matter on account of section 31(1) of the [Legal Education Act](#), 2012 as read together with Section 8(1) (f) of the said Act.
 2. The Applicant has not exhausted alternative statutory avenues for ventilating her grievance.
 3. Counsel for the 1st respondent filed written submissions dated 10th February, 2022 in support of the objection. On the jurisdiction, counsel submitted that this Court lacks jurisdiction to hear and determine this application by virtue of the provisions of Section 31 (1) as read with 8(1) of the [Legal Education Act](#) 2012. Indeed, counsel submitted that the issues raised in the instant application relate to examinations referred to under Section 8(1) (f) of the [Legal Education Act](#), which are administered by the 1st respondent on behalf of the 2nd respondent which is undoubtedly within the jurisdiction of the Legal Education Appeals Tribunal. It was therefore counsel's submissions that the Applicant is barred from seeking the reliefs, sought herein without first exhausting the alternative statutory avenues for ventilating her grievances.
 4. Without prejudice to the foregoing, counsel submitted that the Applicant has failed to demonstrate that the 1st Respondent misapprehended, misapplied, ignored and/or failed to follow the law or that its decision was arrived at arbitrarily, capriciously or mala fides. Indeed, counsel argued that the 1st Respondent's decision was fair and proportionate. In the circumstances, counsel sought to have the application dismissed with costs.

The Applicant's Case

5. The Applicant opposed the Preliminary Objection through her written submissions dated April 19, 2022. Counsel submitted that the clear wording of the provisions of section 31(1) imply that any party can indeed refer the matter to the tribunal without distinction. The 1st Respondent just like the ex parte applicant herein by dint of the provisions of the Act is not bared by law from referring the matter to the tribunal for adjudication.
6. Indeed, it was argued that the wording of the provisions of section 32 of the [Legal Education Act](#) No 27 of 2014 is crystal clear on the grounds on which any aggrieved party may appeal against the decision of the council to the tribunal which grounds are refusal to grant a licence; imposition of conditions on a license; and suspension or revocation of a licence. In counsel's view, the reading of the provisions of section 31(1) and 32(1) seems to suggest that one can only appeal to the tribunal if one, he/she is aggrieved by a decision made by the council and that decision must touch on the three thematic areas expressly enumerated on section 32 of the Act.
7. Counsel further noted that the decision subject of this Judicial Review proceedings was not made by the council but by the 1st respondent. Secondly, the impugned administrative action does not even



remotely fall under the three categories listed in section 32 and therefore it would imply that the drafters of the Act never intended to have decisions made by the 1st respondent challenged before the tribunal. Indeed, counsel submitted that the impugned administrative decision touches substantively on whether or not the ex parte applicant met the admission criteria for admission of prospective student to the Advocates Training Programme (ATP) which is the preserve of the 1st respondent and not the 2nd respondent. Therefore the impugned decision was made by the 1st Respondent and not the 2nd Respondent who is sued in its capacity as regulatory board of the bar examinations so as to ensure compliance of orders of this Court.

8. Counsel submitted that a clear scrutiny of the powers of the Tribunal on appeal as clearly enumerated under section 35 of the *Council of Legal Education Act* No 18 of 2014 leads one to conclude that the Tribunal does not have the requisite powers to grant the reliefs sought by the Applicant. In any event, counsel argued that that to require students aggrieved by the decisions of the 1st Respondent to be adjudicated upon by the Tribunal will greatly prejudice them as it will limit their right to access justice and may defeat the urgency of the matter as the Tribunal sits on specified dates and is strictly guided by the agenda of the day.
9. Counsel was therefore of the considered view that the High Court under section 9(4) of the *Fair Administrative Act* No 4 of 2015 has power and jurisdiction in exceptional circumstances and on application by an applicant or acting suo moto notwithstanding subsection (3), to exempt such a person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
10. In conclusion, counsel submitted that for all the reason(s) stated herein above the Preliminary Objection must fail for failure to meet the threshold set by the Court in the classical case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* to the effect that; a Preliminary Objection must raise a pure point of law and is argued on the assumption that all the facts pleaded by the other side are correct. In the circumstances, it was urged that the Preliminary Objection be dismissed with costs.

Analysis and Determination

11. I have considered the pleadings and the arguments advanced by the parties herein. The issue for determination is whether this court has jurisdiction to entertain the instant application. Differently put, whether the suit offends the doctrine of exhaustion.
12. The doctrine of exhaustion requires that before challenging the validity of an administrative action, a party ought to explore and exhaust all administrative remedies available.
13. In *Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 others* [2015] eKLR, the Court of Appeal held that,

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.....The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”



14. Similarly, in *Republic v National Environmental Management Authority* [2011] eKLR, the court held that,

“The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”

15. However, it is not in all circumstances that a party can pursue exhaustion doctrine to oust the jurisdiction of the court. It is only applied by courts where it has ascertained that the other alternative avenues are available, affordable, effective and sufficient in dealing with a dispute.

16. In *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR, Mativo J. captured the foregoing in the following terms;

“The exhaustion doctrine is only applicable where the alternative forum is accessible, affordable, timely and effective. A remedy is considered available if the Petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success and is found sufficient if it is capable of redressing the complaint [in its totality]...a remedy is considered available only if the applicant can make use of it in the circumstances of his case.”

17. In *Mui Coal Basin Local Community & 15 others v Permanent Secretary Ministry of Energy & 17 others* [2015] eKLR, the Court discussed the rationale for applying exhaustion doctrine as hereunder;

“The reasoning is based on the sound Constitutional policy embodied in Article 159 of *the Constitution*: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang’ has felicitously called an “Ascendant Judiciary.” *The Constitution* does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, *the Constitution* creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases...”

18. There are however limitations to the application of the doctrine. The Court in *Night Rose Cosmetics (1972) Ltd v Nairobi County Government & 2 others* [2018] eKLR stated as follows;

“The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks Judicial Review of that action without pursuing available remedies before the agency itself. The court must decide whether to review the agency's action or to remit the case to the agency, permitting Judicial Review only when all available administrative proceedings fail to produce a satisfactory resolution. This doctrine is now of esteemed juridical lineage in Kenya.”



19. The Court made reference to the Court of Appeal decision in *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR where it was stated that

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”

20. While speaking to the limitation on the principle, the Court in *Night Rose Cosmetics (supra)* held as follows;

“First, while, exceptions to the exhaustion requirement are not clearly delineated, courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. However, the High Court may, in exceptional circumstances, find that the exhaustion requirement would not serve the values enshrined in *the Constitution* or law and permit the suit to proceed before it.

... an internal remedy must be exhausted prior to Judicial Review, unless the appellant can show exceptional circumstances to exempt him from this requirement. What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action in issue. Factors taken into account in deciding whether exceptional circumstances exist are whether the internal remedy is effective, available and adequate. An internal remedy is effective if it offers a prospect of success, and can be objectively implemented, taking into account relevant principles and values of administrative justice present in *the Constitution* and our law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct. An internal remedy is adequate if it is capable of redressing the complaint.

33. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on constitutional interpretation especially in virgin areas or where an important constitutional value is at stake.
34. The principle running through decided cases is that where there is an alternative remedy or where Parliament has provided a statutory appeal process, it is only in exceptional circumstances that an order for Judicial Review would be granted, and that in determining whether an exception should be made and Judicial Review granted, it is necessary for the court to look carefully at the suitability of the appeal mechanism in the context of the particular case and ask itself what, in the context of the internal appeal mechanism is the real issue to be determined and whether the appeal mechanism is suitable to determine it.
35. The second principle suggested by case law for limiting the applicability of the doctrine of exhaustion in appropriate cases is that a statutory provision providing an alternative forum for dispute resolution must be carefully read so as not to oust the jurisdiction of the Court to consider valid grievances from parties who may not have audience before the forum created, or who may not have the quality of audience before the forum which is proportionate



to the interests the party wishes to advance in a suit. The rationale behind this reasoning is that statutory provisions ousting courts jurisdiction must be construed restrictively.”

21. The 1st Respondent has argued that this court has no jurisdiction to entertain the instant application pursuant to Section 31(1) as read with Section 8(1) of the *Legal Education Act*. The Applicant on the other hand argues that the issues raised in the application are outside the purview of the Legal Education Tribunal.
22. The gist of the Applicant’s case is that she was allowed to join the Kenya School of Law using her provisional transcripts with a commitment signed by her on May 17, 2021 to provide her final transcripts and a degree certificate by 30th September, 2021. However, she failed to graduate from the Kenyatta University as she had expected because she had not cleared all her outstanding university fees which stood at Kshs. 266,811/-, a fact she only disclosed to the 1st Respondent vide a letter dated November 10, 2021 when she was due to sit for her oral examinations. This request was denied by the 1st Respondent vide a letter dated November 19, 2021. Aggrieved by that decision, the Applicant sought leave of this court to file for judicial review orders.
23. The *Legal Education Act*, No 27 of 2012 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.”
24. 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;

“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.”
25. Section 8(1) of the Act provides that:
 8. Functions of the Council
 - (1) The functions of the Council shall be to—
 - (a) regulate legal education and training in Kenya offered by legal education providers;
 - (b) licence legal education providers;
 - (c) supervise legal education providers; and
 - (d) advise the Government on matters relating to legal education and training.
 - (e) recognise and approve qualifications obtained outside Kenya for purposes of admission to the Roll.
 - (f) administer such professional examinations as may be prescribed under section 13 of the *Advocates Act*.



26. Further, section 4 of the [Kenya School of Law Act](#) No 18 of 2014 provides that :

4. Objects and functions of the School

- (1) The School shall be a public legal education provider responsible for the provision of professional legal training as an agent of the Government.
- (2) Without prejudice to the generality of subsection (1), the object of the School shall be to—
 - (a) train persons to be advocates under the [Advocates Act](#) (Cap. 16);
 - (b) ensure continuing professional development for all cadres of the legal profession;
 - (c) provide para-legal training;
 - (d) provide other specialized training in the legal sector;
 - (e) develop curricular, training manuals, conduct examinations and confer academic awards; and
 - (f) undertake projects, research and consultancies.

27. My reading of the above provisions is that the body mandated to administer examinations for persons who intend to be admitted to the Bar is the Council of Legal Education and the Kenya School of Law remains a delegate for the purposes of admission to the programme and the conduct of the examinations. Thus the Tribunal has the mandate to inquire into the admission process that will eventually lead to the Bar examinations.

28. 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.”

29. The [Legal Education Act](#) establishes the Council for Legal Education. It also establishes the Legal Education Appeals Tribunal. One of the broad mandates of the council is to regulate legal education and training in Kenya offered by legal education providers. Section 4 of the [Kenya School of Law Act](#) No 18 of 2014 provides under subsection (1) that:

The School shall be a public legal education provider responsible for the provision of professional legal training as an agent of the Government.

As stated by Odunga J in [Nabulime Miriam & others v Council of Legal Education & 5 others case \(supra\)](#), the mandate to determine qualification for admission and registration of students to the Kenya school of law is the Council. Anyone aggrieved by a decision relating to qualification and admission process must there have recourse to the Legal Education Appeals Tribunal as the first port of call.



30. The issues raised by the Applicant relate to admission to the Advocates Training Programme as well as conduct of examinations. To my mind, these issues fall squarely within the mandate of the Legal Education Appeals Tribunal and the High Court has final appellate jurisdiction on the decisions made by the Tribunal.
31. From the foregoing, the doctrine of exhaustion is applicable in this case. The Applicant ought to have exhausted the available mechanism before approaching this court. She has not satisfied the exceptional circumstances requirement under section 9 (4) of the *Fair Administrative Action Act*.
This suit therefore offends section 9 (2) of the *Fair Administrative Action Act*.
32. With the result that the preliminary objection filed herein is successful. I allow the same. Consequently, I dismiss the application dated December 2, 2021 with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26 DAY OF MAY, 2022

A. K. NDUNG'U

JUDGE

