



Nyende v Advocates Disciplinary Tribunal & 3 others (Judicial Review Application E084 of 2025) [2025] KEHC 4533 (KLR) (Judicial Review) (7 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4533 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E084 OF 2025**

RE ABURILI, J

APRIL 7, 2025

BETWEEN

WILLIS O NYENDE APPLICANT

AND

THE ADVOCATES DISCIPLINARY TRIBUNAL 1ST RESPONDENT

ADVOCATES COMPLAINANTS COMMISSION 2ND RESPONDENT

HON ATTORNEY GENERAL 3RD RESPONDENT

SUSAN MWELU EDWARD 4TH RESPONDENT

RULING

Ruling On Leave To Apply

1. the chamber summons dated 31st March, 2025 is brought under the provisions of Order 53 of the Civil Procedure Rules, sections 8 and 9 of the [Law Reform Act](#) and all other enabling laws.
2. The applicant, Willis O. Nyende who is an advocate of the High Court of Kenya seeks leave of Court to apply for judicial review orders of certiorari to quash the judgment delivered by the 1st respondent Advocates Disciplinary Tribunal in DTC/172/2022 between the Advocates Complaints Commission and the applicant herein. The applicant also seeks for mandamus to compel the 1st respondent to give the applicant the right to be heard and make his defence and cross examine the complainant, based on her complaint at the Tribunal and that leave do operate as stay of proceedings before the Tribunal in the DTC/172/2022 until the hearing and determination of his application.
3. The applicant prays further for appropriate relief of damages to be granted for constitutional violation of Articles 47 and 50 of [the Constitution](#) as read with Article 23.



4. In the grounds in support, as well as the statutory statement and the verifying affidavit, the applicant laments that despite him opposing the complaint and filing a replying affidavit, the 1st respondent condemned him unheard in violation of the rules of natural justice and made a finding that the complaint was undefended.
5. That at paragraph 4 of the judgment of the 1st respondent, it ignored the said replying affidavit which was his defence upon which the tribunal convicted the applicant for withholding a client's money and set a date for mitigation and sentencing, which decision has the effect of depriving the applicant of his livelihood as an advocate.
6. That he filed his replying affidavit on 11th April 2023 and served on the ACC on 22nd May 2023 which reply the Tribunal ignored thereby infringing his right to a hearing and fair administrative action.
7. That he became aware of the judgment rendered on 21st March 2025 when it was supplied to him via email on correspondence.

Determination

8. I have considered the above depositions and perused the annexures which include the impugned judgment and at this leave stage, in the application brought under Order 53 of the Civil procedure Rules, the main reason for the leave as explained by Waki J. (as he then was), in *Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others*, Mombasa HCMCA No. 384 of 1996, is to ensure that an applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration.
9. The question therefore, at this stage, is not to indulge in the merits of the intended application but for this court to establish whether the Applicant has made out an arguable case for leave to commence judicial review proceedings to issue, and if so whether he merit the stay orders sought.
10. In the cases of *Republic vs County Council of Kwale & Another Ex-parte Kondo & 57 others* (supra) and *Meixner & Another vs A.G* [2005] eKLR, it was held that the leave of court is required with a view to filtering out frivolous applications and the test to be applied is whether the applicant has an arguable case.
11. I must highlight that leave would be unnecessary had the applicant approached the court under the Fair Administrative Action and Rules. However, a party is at liberty to choose whether to apply under Order 53 of the Civil procedure Rules and the [Law Reform Act](#) or under the [Fair Administrative Action Act](#) and Rules.
12. However, leave to apply is not automatically granted by the court even where the matter is being handled ex parte. It is in the discretion of the Court having regard to the facts of each case. Where there exists an alternative effective remedy, or where the statute provides for appeal mechanisms from the decision which is sought to be challenged, then the court would be slow to interfere with the alternative dispute resolution mechanisms.
13. In the instant case, section 62 of the [Advocates Act](#) provides for appealing of orders of the 1st Respondent.
14. In the present chamber summons, the ex parte Applicant has supplied evidence of the impugned decision by the 1st Respondent, and the grounds why he considers the 1st Respondent's decision to be illegal.



15. The issue that this Court must clarify is whether, and the extent to which, the exercise of a discretion granted to a judicial or administrative body is subject to judicial review.

16. The concept of discretion in its legal context implies power to make a choice between alternative courses of action or inaction. K.C. Davis in his text *Discretionary Justice* (1969) explains at page 4 that:

“a public officer has discretion whenever the effective limits of his power leave him free to make a choice among possible courses of action or inaction”. If only one course can lawfully be adopted, the decision taken is not the exercise of a discretion but the performance of a duty.

17. In *Republic v Architectural Association of Kenya & 3 others Ex Parte Paragon Ltd* [2017] eKLR, Odunga G.V. (as he then was) had this to say regarding discretion and alternative avenues for ventilating grievances in a matter similar to the present one:

“The improper exercise of a discretion being an illegality, also means that it can be effectively challenged by other forms of remedies. In the present case, there is a remedy expressly provided for in the *Advocates Act* section 62 of direct appeals from orders of the Respondent as follows:

- “(1) Any advocate aggrieved by order of the Tribunal made under section 60 may, within fourteen days after the receipt by him of the notice to be given to him pursuant to section 61(2), appeal against such order to the Court by giving notice of appeal to the Registrar, and shall file with the Registrar a memorandum setting out his grounds of appeal within thirty days after giving by him of such notice of appeal.
- (2) The Court shall set down for hearing any appeal filed under subsection (1) and shall give to the Council of the Society and to the advocate not less than twenty-one days’ notice of the date of hearing.
- (3) An appeal under this section shall not suspend the effect or stay the execution of the order appealed against notwithstanding that the order is not a final order.”

Section 60 of the Act deals with the hearing of complaints made against an Advocate, and therefore any order made in the course of that hearing is subject to appeal. The grounds raised by the Applicant in the present application as regards the unreasonable decision by the Respondent can therefore also be adequately and more effectively addressed by way of appeal.

More importantly, the limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion. Therefore, to the extent that the prayer seeking stay of the Respondent’s decision has the effect of overturning the Respondent’s substantive decision refusing a similar stay, the said prayer makes is not amenable to judicial review.



I accordingly decline to exercise my discretion in the Applicant’s favour for the foregoing reasons, and to this extent also find that the Applicant has not met the threshold of an arguable case, and is therefore not entitled to the leave sought to commence judicial review proceedings against the Respondent.”

18. The above position is on all fours with this case. The applicant laments that the tribunal ignored his defence of response filed via a replying affidavit, in its judgment. If that be the case, nothing stops an appellate court from making a finding that sets aside the judgment rendered erroneously by leaving out the applicant’s defence. The High Court on appeal has powers under section 78 of the Civil Procedure Act which powers involve reassessing and reevaluating the evidence adduced before the trial court and arriving at its own independent conclusion. The High Court on appeal can also set aside any order which is illegal or order that the party who was not heard be heard by the Tribunal. Any defence filed and not considered can also be ordered to be considered on appeal.
19. The section provides:
78. Powers of appellate court
- (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—
- (a) to determine a case finally;
 - (b) to remand a case;
 - (c) to frame issues and refer them for trial;
 - (d) to take additional evidence or to require the evidence to be taken;
 - (e) to order a new trial.
- (2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred
20. Section 62 of the Advocates Act prohibits a stay of orders of the Tribunal pending appeal. In this application brought under Order 53 of the Civil Procedure Rules, the applicant can obtain a stay of enforcement or implementation of the decision which is impugned.
21. As stated by Odunga J in the above case, It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion. Therefore, to the extent that the prayer seeking stay of the Respondent’s decision has the effect of overturning the Respondents substantive decision refusing a similar stay, the said prayer makes is not amenable to judicial review.
22. It is not in doubt that there is an effective alternative remedy available to the applicant to ventilate his grievances. This has been the position since the Court of Appeal decision in Speaker of the National Assembly –vs- Njenga Karume’s Nrb. C.A.C.A. No. 92 of 1992 where it was held that:

“There is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure.”



23. Although the applicant claims that he has sought for damages for violation of his rights under Articles 47, 50 and 23 of *the Constitution*, this Court does not find from the material placed before me, with no proceedings of the Tribunal availed, that the issue of violation of rights has been sufficiently pleaded for determination by this Court in the substantive motion.
24. Additionally, the applicant has not sought for exemption to resorting to the alternative dispute resolution mechanisms as mandated by section 9(2) of the *Fair Administrative Action Act*.
25. Long before the enactment of section 9(2) of the *Fair Administrative Action Act*, courts have consistently held, as was in the case of Republic vs. Ministry of Interior and Coordination of National Government and Another ex parte ZTE Judicial Review Case No. 441 of 2013 that:
- “...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute.”
26. In Francis Gitau Parsimei & 2 Others vs. National Alliance Party & 4 Others Petition No.356 and 359 of 2012, it was stated that where statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. See Kipkalya Kones vs. Republic & Another ex-parte Kimani Wanyoike & 4 Others (2008) 3 KLR (EP) 291.
27. This position has acquired statutory underpinning vide section 9(2), (3) and (4) of the *Fair Administrative Action Act*, 2015 which provides:
- (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
 - (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).
 - (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
28. In Republic vs. National Environment Management Authority Civil Appeal No. 84 of 2010 the Court of Appeal expressed itself as follows:
- “...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 real issue is to be determined and whether the statutory appeal procedure was suitable to determine it...The learned judge, in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute. With respect we agree with the judge.”

29. In *Ndiara Enterprises Ltd v Nairobi City County Government* [2018] eKLR [CA 274 of 2017](#), the Court of Appeal stated as follows:

“ ...

Cognizant of the clear procedure for redress provided under the Act, the learned Judge refused to admit jurisdiction in determining the application on the basis that where a clear and specific procedure for redress of a grievance is provided, then that procedure should be strictly followed. The Judge cited the cases of *The speaker of The National Assembly v Njenga Karume* (2008) 1 KLR 425, *Mutanga Tea & Coffee Company Ltd v Shikara Ltd & Anor* (2015) eKLR for that proposition.

The appellant also alleged that the respondent’s refusal or failure to demolish the illegal structures or to approve its plan for a perimeter wall infringed on its constitutional right to fair administrative action. It invoked sections 4, 7, 8, 9 and 11 of the FAA as the basis for which it sought the order of mandamus. However, the Judge noted that the High Court was expressly prohibited by section 9 (2) of the Act from reviewing “an administrative action or decision under the Act unless the mechanisms for appeal or review and all remedies available under any other written law are first exhausted.”The Act however gives the High Court power to exempt a person from the obligation to exhaust any remedy if the court considers such exception to be in the interest of justice. Faced with that scenario, the learned Judge delivered herself as follows;

.....

“In addition under Section 9(2) of the *Fair Administrative Action Act* No. 4 of 2015, (1) the High Court or a subordinate court under Subsection (1) is expressly prohibited from and “shall not” review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

.....

We see no reason to warrant interference with those findings as in our view they are based on sound law and evidence. The record does not reflect any attempt by the appellant to first resolve its grievances against the respondent under the procedure provided for redress under PPA or FAA. There is no evidence that the appellant made any complaints in the nature of the respondent’s refusal to approve its plans for construction of a perimeter wall to the liaison committee under section 13 of the PPA. It’s clear that the appellant could only approach the High Court on appeal against the decision of the National Liaison Committee. Though the High Court can exempt a party from following such clear laid procedures for redress of grievances before approaching it in the noble interests of justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court’s power to exercise its jurisdiction under Article 165 of *the*



Constitution was therefore limited or restricted by statute in this instance as found by the Judge. The appellant had complained before this Court that the learned Judge erred in failing to appreciate that though there exists an alternative procedure for redress, the same was less convenient, beneficial and effective in its circumstances. However, that argument must be taken as an afterthought. The same was never raised or pursued before the High Court thus denying the respondent the opportunity for rebuttal and denying this Court the benefit of the reasoning of the High Court on the same issue.

30. In the instant application, there is no prayer for exemption to resorting to the alternative remedy and neither is there any exceptional circumstances warranting allowing the applicant approach the judicial review court as opposed to the clearly established appeal mechanisms provided for under section 62 of the Advocates Act.
31. Judicial review, it ought to be remembered, is a remedy of last resort and ought not to be applied for where there exist appropriate remedies to redress the grievance complained of.
32. In the premises, I hold that the applicant ought to pursue his grievances through an appeal which is the correct procedure provided for the challenge of decisions of the 1st respondent so that the law is allowed to take its course as contemplated.
33. Accordingly, the chamber summons dated 31st March, 2025 is struck out.
34. The applicant is directed to file his appeal to the High Court as mandated by section 62 of the Advocates Act.
35. I make no orders as to costs.
36. This file is closed.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 7TH DAY OF APRIL, 2025

R.E. ABURILI

JUDGE

