Ngisa v Disciplinary of the Law Society of Kenya; Harvest Limited (Interested Party) (Judicial Review Application E106 of 2024) [2025] KEHC 6002 (KLR) (14 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6002 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW APPLICATION E106 OF 2024

RE ABURILI, J

MAY 14, 2025

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE FAIR ADMNISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE ADVOCATES' ACT CHAPTER 16

BETWEEN

RONALD MORARA NGISA ..... APPLICANT

AND

THE DISCIPLINARY OF THE LAW SOCIETY OF KENYA ..... RESPONDENT

AND

HARVEST LIMITED ..... INTERESTED PARTY

JUDGMENT

1. Pursuant to leave granted on 18th May 2024, the exparte applicant Ronald Morara Ngisa filed a Notice of Motion dated 22nd May, 2024 seeking judicial review orders of Certiorari to being into this court for purposes of quashing and to quash the decision of the Advocates Disciplinary Tribunal of the law Society of Kenya expressed vide its judgment finding the applicant guilty of professional misconduct. The applicant also seeks an order of prohibition to stop the respondent Disciplinary Tribunal from further proceeding with the Disciplinary Cause Number 93 of 2022. He further sought that the leave so granted do operate as stay of the decisions of the Respondent and any consequential proceeding before the Respondent in respect of the said Disciplinary Cause. He also prayed for costs of the application.

2. The facts of this case are that sometime in 2017, Harvest Haven Limited entered into an agreement with Doreen Wangari Muthemba for purchase of Land known as L.R No. 9363/1092 Nairobi. Doreen Wangari the seller was represented by the applicant herein as her advocate. The buyer then paid to the applicant advocate herein Kshs 11 million being deposit for the purchase price which was Kshs 25 million.

3. The transaction aborted when the seller allegedly declined to appear before the Land Registrar as demanded and the complainant demanded for refund of its deposit from the advocate applicant herein as the money was deposited in his bank account.

4. The applicant is said not to have honored the demand as a result of which the complainant filed a complaint with the Advocates Complaints Commission. The ADC found that a prima facie case had been established against the applicant herein for withholding the Kshs 11 million being money received as stakeholder in the sale of land transaction which aborted. He was also charges with failing to account for client's money, failure to respond to ACC Correspondence and for disgraceful conduct incompatible with the status of an advocate.

5. There are no proceedings of the ADT annexed but from the Notice dated 6/9/2023, judgment was set for delivery on 18th September, 2023 at 10.am From the undated judgment of the ADT which is impugned before this Court, the applicant was found guilty of the charges of withholding Kshs 11million plus interest received on 21/6/2017 and professional misconduct for breach of professional undertaking and failing to refund the amount received plus interest to the complainant despite demand. He was convicted and ordered to refund the said money and pay costs to the complainant.

6. The matter was then fixed for mention for mitigation and sentencing on 2nd October, 2023.

7. The applicant in his Notice of motion dated 22nd May 2024 laments that he was condemned without being given an opportunity to be heard and that the ADT ignored his replying affidavit sworn on 20th February 2023 which he had filed in response to the complaint. It is however not clear whether that affidavit was filed before the ADT as the stamps of 21/2/2023 and 1st March 2023 are not visible. The applicant claims that he was not given notice of the date for judgment.

8. That aside, the respondent vigorously opposes the application and filed a replying affidavit sworn on 24th February, 2025 by Florence Muturi, the Chief Executive Officer of the Law Society of Kenya and Secretary of the Respondent by dint of section 58(3) of the *Advocates Act* denying the allegations that the applicant was condemned unheard. She deposes that at all times, the applicant was served with process requiring him to appear and at one time he asked for time since he was outside the country. That several reminders were send to him but he did not appear hence the complaint proceeded under Rule 18 but the applicant was still granted time to file a replying affidavit, as shown by letter to him dated 5.4.2023 annexed as well as notice of judgment date.

9. The respondent further contends that the application offends Section 62 of the *Advocates Act* which provides for the avenue for challenging decisions of the ADT by way of appeal to the High Court and not Judicial Review proceedings. She urges this court to dismiss the application with costs.

10. Both parties filed written submissions relying on several authorities both statutory and judicial pronouncements which I have considered.

11. The main issue is whether this court has jurisdiction to hear and determine the application for judicial review, in view of the objection by the respondent that section 62 of the Advocates provides an avenue for appeal from its decisions and not judicial review.

12. Jurisdiction refers to the authority or power of a court to hear and determine a case, and to issue legally binding orders or judgments. It is a fundamental principle in the administration of justice and plays a crucial role in judicial proceedings.

13. Jurisdiction provides the foundation for the orderly conduct of legal proceedings, safeguarding both the integrity of the judicial system and the rights of individuals. Without jurisdiction, decisions made by courts would be invalid, leading to potential chaos in the legal system.

14. Jurisdiction is vital in upholding the rule of law, ensuring that legal principles are applied consistently and predictably. When cases are heard by courts with the proper jurisdiction, it ensures that legal determinations are made in line with established legal standards and frameworks.it therefore follows that courts must adhere to the jurisdictional limits set by the law to avoid arbitrary decisions and ensure that the law is applied equally to all.

15. The significance of jurisdiction was considered by the Supreme Court in the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR. where the Supreme Court held that:

> " A court's jurisdiction flows from either *the Constitution* or legislation... Courts derive their authority from the law, and the authority of any court to hear a matter is determined by the subject matter, the persons involved, and the geographical limits within which the court is established. The court must ensure that it does not act beyond its jurisdiction."

16. The Supreme Court in the above case was clear that jurisdiction is a fundamental aspect of any judicial proceeding, and a court must have the proper authority to hear a case. The court explained jurisdiction as stated in the paragraphs that follows below.

17. Jurisdiction is conferred by law, and not by the parties' agreement. In other words, the parties cannot confer jurisdiction on a court; it must be granted by *the Constitution* or statute. If a court lacks jurisdiction, it cannot proceed with the matter, regardless of the parties' consent.

18. A court's jurisdiction is determined by the legal framework governing it. The Supreme Court emphasized that jurisdiction is not merely a matter of procedure but goes to the very core of a court's authority to hear and determine a matter. Without jurisdiction, a court cannot make any binding decision.

19. Without jurisdiction, any step taken by a court in the matter is a nullity. This means that if a court does not have the jurisdiction to hear a matter, any decision it makes, including granting orders, ruling on matters of law, or making a judgment, is void. Such decisions have no legal effect and are incapable of being enforced.

20. The issue of jurisdiction can be raised at any time during the proceedings. The parties can challenge the court's jurisdiction at any stage, even after a judgment is delivered, as jurisdiction is a matter of law and must be addressed before the court can proceed to hear or determine the case.

21. Jurisdiction is not a technicality but a matter that affects the court's power to entertain the dispute. The Supreme Court explained that jurisdiction is not a mere procedural issue but an essential element of the rule of law. Courts must therefore act within the limits of their jurisdiction to ensure justice is done.

22. Still on the aspect of jurisdiction, the respondent has raised an important issue, that the avenue for challenging its decisions is by way of appeal and not judicial review hence this court as a judicial review Court has no jurisdiction to hear and determine the merits of the decision rendered by the

respondent.in other words, that there is an effective remedy provided in law for the applicant who should not be allowed to bypass that remedy.

23. The Applicant, an advocate of the High Court of Kenya, filed this judicial review application seeking orders of certiorari to quash the decision of the Advocates Disciplinary Tribunal (ADT) in Disciplinary cause No. 93 of 2022 and prohibition to restrain the enforcement of the said decision.

24. The main complaint advanced by the Applicant is that the Tribunal reached its decision without affording him an opportunity to be heard, thus violating his right to a fair hearing under Article 50 (1) of *the Constitution*.

25. While the Applicant couches this grievance as a matter of procedural impropriety, this Court notes that the remedy for any person aggrieved by a decision of the ADT is expressly provided for under Section 62(1) of the *Advocates Act* (Cap 16, Laws of Kenya), which states:

> " Any advocate aggrieved by the decision or order of the Disciplinary Tribunal may appeal against the decision to the High Court..."

26. It is trite law that where a statute provides a specific remedy, in this case, an appeal, that procedure must be strictly followed before invoking judicial review. This principle was underscored by the Court of Appeal in Speaker of the National Assembly v Karume [1992] eKLR, where it was held:

> " 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."

27. This decision established the idea that where an appeal mechanism is available, the party must use that remedy and cannot bypass it by seeking judicial review.

28. In Republic v Kenya National Examination Council ex parte Geoffrey Gathenji & 9 Others [1997] eKLR, the court emphasized that judicial review is concerned with the legality of a decision, not its merits. Where a statute or regulation provides a clear appeal process, that process must be followed first. The court stated:

> " Judicial review is not an appeal. The Court does not sit as an appellate tribunal, but it reviews the decision of the body to ensure that it was made in accordance with the law."

29. In Republic v ADT ex parte Apollo Mboya [2019] eKLR, it was held that an appeal procedure provided by statute (such as under Section 62 of the *Advocates Act*) must be followed where available, and judicial review should only be used in exceptional cases, such as where there is no alternative remedy, or where there are jurisdictional issues.

30. The law requires parties to exhaust the remedies available to them before seeking judicial review. This rule is rooted in the principle of exhaustion of remedies doctrine.

31. Section 9(2) of the *Fair Administrative Action Act* provides:

> " The High Court or a subordinate court shall not hear or determine an application for judicial review unless the court is satisfied that the applicant has exhausted all the remedies available under any written law or proceedings."

32. The above section establishes a clear legal principle that judicial review cannot be sought unless the applicant has first exhausted all other available remedies. This means that the applicant must attempt

to resolve the matter through the administrative or statutory channels provided, such as appeals or internal review mechanisms, before seeking judicial review intervention.

33. The doctrine ensures that parties use the mechanisms provided by law to resolve their grievances before approaching the court through judicial review.

34. Although the Act at section 9(4) provides that a party could be exempted from resorting to the alternative mechanism, the rider is that there must be exceptional circumstances and even then, on application. The section provides:

> (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.

35. Subsection 3 on the other hand provides:

> (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 subsection (1).

36. Courts have clarified what may constitute “exceptional circumstances,” including: if the internal remedy is ineffective or unavailable, if there is a clear violation of rights requiring urgent intervention, and if the internal process is unreasonably delayed or biased.

37. In the following decisions, the courts have interpreted what constitutes "Exceptional Circumstances."

38. In Republic v Kenya Revenue Authority Ex Parte Style Industries Limited [2019] eKLR, the court emphasized that "exceptional circumstances" are those that are out of the ordinary and render it inappropriate to require a party to first pursue available internal remedies. Such circumstances must necessitate immediate court intervention rather than resorting to the applicable internal remedy.

39. In Aly Khan Satchu v Capital Markets Authority [2019] eKLR, the High Court quashed a decision by the Capital Markets Tribunal, noting that the Tribunal was not properly constituted. The applicant had not satisfied the exceptional circumstances requirement under Section 9(4) of the *Fair Administrative Action Act*. The Court recognized that exceptional circumstances may arise when an internal remedy is unavailable, ineffective, or inadequate.

40. In Republic v Firearms Licensing Board & another Ex parte Boniface Mwaura [2019] e KLR, the court considered factors such as whether the internal remedy is effective, available, and adequate. An internal remedy was deemed effective if it offers a prospect of success and can be objectively implemented. It is available if it can be pursued without obstruction and adequate if it is capable of redressing the complaint.

41. In Republic v Council for Legal Education ex parte Desmond Tutu Owuoth [2019] e KLR the Court highlighted that the doctrine of exhaustion of remedies would not apply where a party may not have an audience before the forum created, or the party may not have the quality of audience before the forum created which would be proportionate to the interests the party wishes to advance within the suit.

42. In Okioma & 12 Others v Kagwe, Cabinet Secretary for Health & 8 Others [2023] eKLR the Court reiterated that for an exemption to be granted under Section 9(4) of the *Fair Administrative Action Act*, the petitioners must demonstrate the existence of exceptional circumstances and that such exemption

is in the interest of justice. In this case, the petitioners failed to demonstrate exceptional circumstances and their application was dismissed.

43. The Court of Appeal's decision in Ndiara Enterprises Ltd v Nairobi City County Government (Civil Appeal 274 of 2017) provides significant insights into the application of the doctrine of exhaustion of remedies in Kenya.

44. In the said case, Ndiara Enterprises Ltd, (supra) the appellant, sought judicial review orders of mandamus to compel the Nairobi City County Government, the respondent, to demolish illegal structures on its property and to approve its plans for constructing a perimeter wall. The appellant contended that the respondent had failed to act despite issuing notices to the trespassers. The High Court (Aburili J) dismissed the application, citing the appellant's failure to exhaust available internal remedies under the Physical Planning Act (PPA) and the *Fair Administrative Action Act* (FAAA). The appellant appealed this decision.

45. The Court of Appeal upheld the High Court's decision, emphasizing the importance of exhausting alternative remedies before seeking judicial review.

46. The Court reiterated that where a clear and specific procedure for redress is provided, that procedure should be strictly followed. In that case, the appellant had not utilized the internal mechanisms provided under the PPA and FAAA before resorting to judicial review. The court noted that under Section 9(4) of the FAAA, a court may exempt a party from the obligation to exhaust remedies if it considers such exemption to be in the interest of justice. However, the appellant did not demonstrate any exceptional circumstances warranting such an exemption.

47. The Court of Appeal stated as follows in upholding the decision of this Court:

> " 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.
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> 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;
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> "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.
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> (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 suction (1)

(4) Notwithstanding Subsection (3) the High Court or 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 exception to be in the interest of justice ...

64. From the above provisions of the law and decided cases, it is clear that even the *Fair Administrative Action Act* which the exparte applicant in this case claims has been violated mandates an applicant to show that they have exhausted the alternative remedies available under any other written law or avenue before resorting to court by way of judicial review. However, the onus is on the applicant to demonstrate to the court that there exist exceptional circumstances to warrant his or her exemption from resorting to the available remedies; and on application for such exemption."

No doubt, the applicant had an avenue for ventilating his grievances where the respondent refuses to approve the building plans. There is no evidence that the applicant lodged any such complaint or appeal to the Liaison Committee, the National Liaison Committee and or to the High Court. The Physical Planning Act provides elaborate mechanisms for resolution of disputes relating to approval of development plans and therefore no party is permitted to bypass those mechanisms and jump into a judicial review Court to obtain orders which are discretionary."

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."

48. In the present case, the applicant advocate has not demonstrated that there were any exceptional circumstances warranting him to by-pass the appeal procedure provided under section 62 of the *Advocates Act*. There was also no such application for exemption from resorting to the alternative remedy by way of appeal.

49. The existence of an appeal process allows the parties to have their case reviewed by a higher court or tribunal, ensuring that the decision-making process remains within the bounds of legal authority. Judicial review is concerned with ensuring that lower courts or bodies act within their jurisdiction and do not abuse their powers. If judicial review were allowed in situations where an appeal process exists, it could undermine the role of appellate courts and lead to overlapping roles and powers between and among courts.

50. Additionally, Judicial Review is not a substitute for appeal, noting that it focusses on issues such as procedural fairness, legality, and irrationality and does not allow a court to re-evaluate the facts of a case or the merits of a decision. An appeal, on the other hand, is designed to examine both the facts and the law to determine whether the decision was correct. Where an appeal is available, judicial review cannot substitute for the opportunity to have the merits of a case reviewed.

51. Even if the applicant claims that he was not accorded a hearing, the proper remedy under the *Advocates Act* and the *Fair Administrative Action Act* (FAAA) is not immediate judicial review, but to file an appeal to the High Court, which has jurisdiction to determine whether due process was followed, including: whether the party was heard, whether relevant evidence (like a replying affidavit) was considered and whether bias or procedural irregularity occurred.

52. As was stated in the Ndiara Enterprises Ltd and others (supra),

> " The existence of an appeal mechanism bars resort to judicial review, unless it is shown that the remedy is inadequate, ineffective, or that exceptional circumstances exist."

53. Thus, the mere allegation of unfair hearing or being denied the right to be heard does not, on its own, qualify as an exceptional circumstance unless it's demonstrably urgent or the appeal mechanism is structurally biased or unavailable.

54. Furthermore, if the applicant claims that his replying affidavit which he had filed was not considered as his defence, nothing prevented the applicant from seeking a review or reconsideration of the judgment, noting that the judgment did not refer to the replying affidavit at all.

55. Section 64 of the *Advocates Act* provides for powers of the Court on appeal, similar to powers of the Court under section 78 of the *Civil Procedure Act* in civil appeals. Section 64 of the *Advocates Act* provides:

> Powers of Court
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> The Court, after considering the evidence taken by the Tribunal, the report of the Tribunal and the memorandum of appeal, and having heard the parties, and after taking any further evidence, if it thinks fit so to do, may—
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> a. refer the report back to the Tribunal with directions for its findings on any specified point; or
>
> (b confirm, set aside or vary any order made by the Tribunal or substitute therefor such order as it may think fit; and may also make such order as to the payment by any person of costs, or otherwise in relation to the appeal, as it may think fit.

56. Judicial review not being a substitute for appeal, to determine the merits of the application dated 22nd May 2024 amounts to allowing a collateral attack on a statutory process, which this Court declines to do.

57. The applicant cannot at this stage claim that he has no remedy as the law is in black and white as to which avenue was available to him for addressing his grievances.

58. For the foregoing reasons, this Court finds that the Applicant has prematurely and improperly invoked the judicial review jurisdiction of this Court in disregard of the statutory appellate procedure under Section 62 of the *Advocates Act*.

59. Accordingly, for want of exhaustion of remedies provided for under section 62 of the *Advocates Act*, I find and hold that this court is devoid of jurisdiction to hear and determine the applicant's application for judicial review orders of certiorari and prohibition.

60. There being no jurisdiction in this court to hear and determine the application, the application dated 22nd May, 2024 is hereby struck out with an order that each party do bear their own costs of these proceedings.

61. This file is closed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MAY, 2025

R.E. ABURILI

JUDGE