REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 47 OF 2019

IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL COMMENCE PROCEEDINGS SEEKING ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF KENYA SCHOOL OF LAW, 2012 (ACT NO. 26 OF 2012 AS AMENDED THROUGH STATUTE LAW (MISCELLANEOUS AMENDMENTS) 2014 (ACT NO. 18)

AND

IN THE MATTER OF THE LEGAL EDUCATION ACT, (ACT NO. 27 OF 2012)

AND

IN THE MATTER OF THE LEGAL EDUCATION (KENYA SCHOOL OF LAW)REGULATIONS

AND

IN THE MATTER OF THE KENYA NATIONAL QUALIFICATIONS REGULATIONS, 2018

AND

IN THE MATTER OF APPLICATION

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA SCHOOL OF LAW.....1ST RESPONDENT

KENYA NATIONAL QUALIFICATIONS AUTHORITY.....2ND RESPONDENT

AND

COUNSEL OF LEGAL EDUCATION.....INTERESTED PARTY

AND

KGABORONE TSHOLOFELO WEKESA.....EX PARTE APPLICANT

RULING

Introduction.

1. This ruling disposes a preliminary objection raised by counsel for the second Respondent objecting to this court's jurisdiction to entertain this case citing the doctrine of exhaustion of dispute resolution mechanism provided under a statute.

2. Differently stated, the objection as I understand is an invitation to this court to determine whether this suit bad in law under the said doctrine and or whether this court is divested of Jurisdiction under the doctrine of exhaustion of remedies? The question here is whether the *ex parte* Applicant ought, first, to have filed her grievance before the Legal Education Appeals Tribunal established under section **29** of the Legal Education Act.[1]

The Parties.

3. The applicant is female adult. She obtained a Bachelor of Laws Degree from Mt. Kenya University in August 2018.

4. *The first Respondent is the Kenya School of Law established under section **3** of the Kenya School of Law Act.*[2] *It's a* body corporate with perpetual succession and a common seal and is, in its corporate name, capable of—suing and being sued; taking, purchasing or otherwise acquiring, holding or disposing of movable and immovable property; entering into contracts; and doing or performing such other things or acts necessary for the proper performance of its functions under the Act which may lawfully be done by a body corporate. It is the successor of the Kenya School of Law established under the Council of Legal Education Act.[3]

5. *The second Respondent is the Kenya National Qualifications Authority established pursuant to section **6(1)** of the Kenya National Qualifications Authority Act.*[4] *It is* a body corporate with perpetual succession and a common seal and, in its corporate name, is capable of —suing and being sued; taking, purchasing or otherwise acquiring, holding, charging and disposing of movable and immovable property; and doing or performing such other things or acts as may be necessary for the proper performance of its functions under the Act as may be properly performed by a body corporate.

6. The Interested Party is the Council of Legal Education established under section **4** of the Legal Education Act.[5] It is a body corporate with perpetual succession and a common seal and in its corporate name, is capable of suing and being sued; taking, purchasing or otherwise acquiring, holding, charging or disposing of movable property and doing or performing any other things or acts for the furtherance of the provisions of the act which may be lawfully done or be performed by body corporate. It is the successor to the Council of Legal Education established under the Repealed Council of the Legal Education Act.[6]

The factual matrix.

*7. The ex parte applicant moved this court by way of a Chamber Summons dated **20th** February 2019 seeking leave to apply for Judicial Review orders of Certiorari and Mandamus. The grounds relied upon are that she passed her Advanced Level examinations and was admitted for a law degree at Mt. Kenya University where she graduated with a Bachelor of Laws Degree on **3rd** August 2018. She states that in May 2017, she wrote to the Interested Party seeking confirmation whether her high school qualifications met the requirements for admission to the Bachelor of Laws Degree and it responded in the affirmative.*

*8. She also states that on **7th** September 2019, she applied to the first Respondent for admission to the Advocates Training Programme for the year 2019/2010, but vide a letter dated **5th** December 2018, the first Respondent declined the application on grounds that she did not attach clearance from the second Respondent. Further, she states that she approached the second Respondent on **14th** December 2018 seeking equation of her certificates in line with the first Respondents requirement, but on **24th** January 2019, the second Respondent replied stating that "in accordance with the Kenya National Qualifications Framework Act and the Kenya National Qualifications, 2018, your qualifications are not equated within the Kenya National Qualifications Framework."*

*9. The ex parte applicant contends that she submitted the above letter to the applicant on **15th** February 2019, and, that, between **14th** December 2018 and **15th** December 2019, the second Respondent represented to her that they were still consulting and that they were not yet through with the process. However, she states that vide a letter dated **19th** February 2019, the first Respondent wrote to her declining her application due to lack of "an equation of your secondary school qualifications." She contends that the first Respondent has added a requirement for admission, namely, "proof of equation (for secondary school qualifications not offered by KNEC) which requirement did not exist in the Council of Legal Education (Kenya School of Law) Regulations, 2009 which are applicable to her case.*

Legal foundation of the application.

*10. The ex parte applicant contends that the Kenya School of Law Act, 2012 which was amended by Statute Law (Miscellaneous Amendment) 2014 provided at section **16** that "a person shall not qualify for admission to a course of study at the school, unless that person has met the admission requirements, set out in the Second Schedule for that course. She also cites section **16** of the Second Schedule which provides for admission requirements into the Advocates Training Programme and contends that based on the above section and the said schedule, applying the disjunctive interpretation to the listed qualifications, by dint of the use of the word "or" therein, she meets the entry requirements to the school.*

*11. She also cites section **8(3)** of the Legal Education Act*[7] *which provides that in carrying out its functions, the council shall make Regulations in respect of requirements for admission of persons seeking to enroll in the legal education programmes; and, where any conflict arises between the provisions of the section and the provisions of any other written law for the time being in force, the provisions of the section shall prevail. Additionally, she invoked the transitional provision in section **48** of the act band contended that prior to the 2016 Council of Legal Education (Accreditation and Quality Assurance) Regulations, the operational Regulations pursuant to the transitional provision were the Council of Legal Education (Kenya School of Law) Regulations, 2009, and, more specific, Regulation **18** thereof.*

*12. It is the ex parte applicant's contention that under the operational Regulations at the material time, she met the requirements for admission, a position she states was confirmed by the Interested Party. She also states that the Kenya National Qualifications Framework Act[8] which came into effect on **14th** January 2015 and the Regulations made there under cannot be applied retrospectively. In her view, the Respondents' position is not supported by law. Accordingly, she states that the impugned decision is ultra vires, null and void*

The reliefs sought

*13. As a consequence of the foregoing, she seeks leave to apply for orders of certiorari and mandamus to quash the letters issued by the first Respondent dated **5th** December 2018, **4th** February 2019 and **19th** February 2019 and the second Respondent's letter dated **24th** January 2019; and, an order of Mandamus to compel the first Respondent to admit her to the Advocates Training Programme (ATP) immediately and in any case for the academic year 2019/2020.*

14. She also seeks an order that the leave sought if granted do operate as stay of the impugned letters until the hearing and determination of these proceedings.

The Preliminary Objection.

*15. On **25th** February 2019, the second Respondent's Advocates filed a Notice of Preliminary objection objecting to this court's jurisdiction to hear and determine the application citing the doctrine of exhaustion statutory dispute resolution mechanism invoking the provisions of sections **29, 31** and **38** of the Legal Education Act.[9]*

The arguments.

*16. In his bid to persuade the court to uphold the Preliminary Objection, **Mr. Mokua**, counsel for the second Respondent relied on the provisions of Article **159 (2)(c)** of the Constitution which provides that in exercising judicial authority, the courts and tribunals shall be guided by alternative form of dispute resolution including reconciliation, mediation, and traditional dispute resolution mechanisms subject to sub-clause (3) thereof. He also argued that pursuant to Article **47** of the Constitution, Parliament enacted the Fair Administrative Action Act[10] and argued that by dint of section **9(2)** of the act, this court ought to decline jurisdiction.*

*17. To buttress his argument, he cited Speaker of the National Assembly v Karume [11] discussed later in this ruling. It was his submission that there exists an alternative remedy for the ex parte applicant at the Legal Education Appeals Tribunal established under section **29** of the Legal Education Act.[12] He submitted that section **31** of the act provides that a party may appeal to the Tribunal and if aggrieved by its decision, may appeal to the High Court as provided under section **38** of the Act.*

*18. **Mr. Mokua** conceded that there are instances where a party may by-pass the statutory provided remedy particularly where the Tribunal cannot offer an appropriate remedy. However, he argued that , to by-pass such a mechanism, an applicant must demonstrate exceptional circumstances. It was his submission that there are no exceptional circumstances in this case.*

*19. **Mr. Simiyu,** counsel for the first Respondent supported the objection. The Interested Party, though served did not participate in the proceedings.*

*20. **Prof. Moni Wekesa**, counsel for the ex parte applicant fiercely opposed the Preliminary Objection. He started by orally applying for exemption as provided under section **9(4)** of the Fair Administrative Action Act[13]submitting that the act allows for exemption in exceptional circumstances. He relied on paragraph **34** of the decision rendered in Night Rose Cosmetics (1972) Ltd v Nairobi Country Government & 2 Others[14] cited by counsel for the second Respondent..*

*21. **Prof. Wekesa** also relied on Republic of the Philippines v Carlito Lacap[15]in which the Supreme Court of the Philippines held that the doctrine of exhaustion of administrative remedies and the corollary doctrine of primary jurisdiction, which are based on sound public policy and practical considerations are not inflexible rules. The Supreme Court of the Philippines further to stated that there are accepted exceptions, such as **(a)** where there is estoppels on the part of the party invoking the doctrine; **(b)** where the challenged administrative act is patently illegal, amounting to lack of jurisdiction; **(c)** where there is unreasonable delay or official inaction that will irretrievably prejudice the complainant; **(d)** where the amount involved is relatively small so as to make the rule impractical and oppressive; **(e)** where the question involved is purely legal and will ultimately have to be decided by the courts of justice; **(f)** where judicial intervention is urgent; **(g)** when its application may cause great and irreparable damage; **(h)** where the controverted acts violate due process; **(i)** when the issue of non-exaustion of administrative remedies has been rendered moot; **(j)** when there is no other plain, speedy and adequate remedy; **(k)** when strong public interest is involved; and, **(l)** in quo warranto proceedings.*

*22. **Prof. Wekesa** urged the court to find that the decision falls within the permissible exceptions and in particular argued that the impugned decision is patently illegal and amounts to lack of jurisdiction. He also argued that there is inordinate delay on the part of the Respondents in addressing the applicant's complaint; and, that, the question under consideration is purely legal and will ultimately be determined by the courts. He also argued that there is an urgent need of judicial intervention. In the circumstances, counsel argued that the application of the doctrine may cause great and irreparable damage to the ex parte applicant since classes began in January 2019.*

Determination.

23. A casual look at the *ex parte* applicant's pleadings shows that she is aggrieved by the Respondents' refusal to admit her at the Kenya School of Law. The crux of the dispute is whether she attained the required qualifications to be admitted to the Advocates Training Programme and in particular whether her qualifications are or are not equated within the Kenya National Qualifications Framework, and whether the Kenya National Qualifications Framework are applicable to her case or whether they operate retrospectively.

24. The above being the crux of her case, the question that falls for determination is whether or not this court has the jurisdiction to entertain the dispute in view of the provisions of sections **29, 31** and **38** of the Legal Education Act.[16] Differently stated, the phrase that best describes the Preliminary objection under consideration is ***whether this suit is bad in law under the doctrine of exhaustion of statutory provided dispute resolution mechanism.***

25. 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. I have severally stated that this doctrine is now of esteemed juridical lineage in Kenya[17] and was felicitously stated by the Court of Appeal[18] in *Speaker of National Assembly vs Karume**[19]*** in the following words:-

> *"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 procedures*."

26. The above case was decided before the Constitution of Kenya, 2010 was promulgated. However, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution.[20] The Court of Appeal provided the constitutional rationale and basis for the doctrine in *Geoffrey Muthinja Kabiru & 2 Others – vs – Samuel Munga Henry & 1756 Others*,[21] where it stated 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...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution*."

27. In the *Matter of the Mui Coal Basin Local Community,**[22]*** the High Court stated the rationale thus:-

> *"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..."*

28. From the above jurisprudence at least two principles can be discerned:- *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.[23] The High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

29. **Mr. Mokua's** assault on the applicant's failure to exhaust the statutory provided dispute resolution mechanism as I understood it, is premised on two fronts. *First*, he cited the provisions of sections **29, 31** and **38** of the Legal Education Act. The *second* limp of **Mr. Mokua's** objection was premised on the provisions of section **9(2)** and **(4)** of the Fair Administrative Action Act[24] which provides that a court may in exceptional circumstances entertain a case notwithstanding the requirement for exhaustion, subject to the applicant applying for exemption from the court.

30. Section **29** of the Legal Education Act[25] establishes the Legal Education Tribunal. It provides as follows:-

> ***29. Establishment of the Legal Education Appeals Tribunal***
>
> ***(1)*** *There is established a tribunal to be known as the Legal Education Appeals Tribunal which shall consist of—*
>
> *a. a chairperson who shall be—*
>
> *i. an advocate of the High Court of Kenya of not less than ten years standing; or*
>
> *ii. a person who has attained at least ten years experience in the field of legal education or as a distinguished academic in law;*
>
> *b. one person who shall be an advocate of the High Court of Kenya of at least seven years standing or a person with at least ten years experience in the field of legal education or as a distinguished academic in law;*
>
> *c. three persons who have demonstrated competence in the field of legal education; and*
>
> *d. the registrar who shall be an advocate of the High Court of Kenya with at least five years experience.*

(2) The Judicial Service Commission shall appoint the members of the Tribunal through an open, competitive and transparent process.

(3)The Tribunal shall be ad hoc and shall sit at such times and in such places as it may appoint

31. Section **31** of the act provides for the jurisdiction of the tribunal in the following words:-

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.

2) For the purposes of hearing an appeal, the Tribunal shall have all the powers of the High Court to summon witnesses, to take evidence on oath or affirmation and to call for the production of books and other documents.

3) Where the Tribunal considers it desirable for the purposes of avoiding expenses, delay or for any other special reasons, it may receive evidence by affidavit and administer interrogatories within the time specified by the Tribunal.

4) When determining any matter before it, the Tribunal may take into consideration any evidence, which it considers relevant to the subject of an appeal before it, notwithstanding that such evidence, would not otherwise be admissible under the law relating to evidence.

32. Section **38** of the act provides as follows:-

38 Appeals to the High Court

1) Any party to proceedings before the Tribunal who is dissatisfied by a decision or order of the Tribunal on a point of law may, within thirty days of the decision or order, appeal against such decision or order to the High Court.

2) The Tribunal may of its own motion or on the application of an interested. person, if it considers it appropriate in the circumstances, grant a stay of execution of its award until the time for lodging an appeal has expired or where an appeal has been commenced until the appeal has been determined.

33. The preamble to the Legal Education Act[26] provides that it is 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. Section **31** of the act provides for the jurisdiction of the Tribunal. A reading of the section leaves me with no doubt that the Tribunal's jurisdiction is to determine 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 the Act. The *ex parte* applicant's dispute distilled above in my view squarely falls within the Tribunal's jurisdiction. In fact this position was not contested. The crux of **Prof. Wekesa's** argument was that the case falls within the permissible exceptions.

34. Section **9(2)** of the Fair Administrative Action Act[27] (an act of Parliament that enacted to bring into operation Article **47** of the Constitution) provides that the High Court or a subordinate court under subsection **(1) shall not** review an administrative action or decision under the Act **unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted**. Also relevant is sub-section **(3)** which provides that "the High Court or a subordinate Court *shall*, if it is not satisfied that the remedies referred to in sub-section **(2)** have been exhausted, direct that applicant *shall* first exhaust such remedy before instituting proceedings under sub-section **(1).**

35. It is instructive to note the use of the word *shall* in the above provisions. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.[28]There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.[29] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

36. It is the duty of courts of justice to try to get at the real intention of the Constitution or legislation by carefully attending to the whole scope of the Constitution or a statute to be considered. The Supreme Court of India pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

37. The word *"shall"* when used in a statutory provision imports a form of command or mandate. It is **not permissive**, it is **mandatory**. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.[30] The Longman Dictionary of the English Language states that *"shall"* is used to express a command or exhortation or what is legally mandatory.[31] Ordinarily the words *'shall'* and *'must'* are mandatory and the word *'may'* is directory.

38. A proper construction of section **9(2) & (3)** above leads to the conclusion that they are couched in mandatory terms. The only way out is the exception provided by section **9(4)** which provides that:- "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. Two requirements flow from the above sub-section. *First,* the applicant must demonstrate exceptional circumstances.

39. **Prof. Wekesa** placed heavy reliance on a decision rendered by the Supreme Court of the Philippines. Foreign jurisprudence is of value because it shows how courts in other jurisdictions have dealt with the issues that confront us in this matter. At the same time, it is important to appreciate that foreign case law will not always provide a safe guide for the interpretation of our Constitution. When developing our jurisprudence in matters that involve constitutional rights, we must exercise particular caution in referring to foreign jurisprudence.

40. The decision cited by **Prof. Wekesa** defines exceptional circumstances as enumerated earlier. In my view, and with great respect, what constitutes exceptional circumstances depends on the facts of each case[32] and it is not possible to have a closed list. Article **47** of the Constitution is heavily borrowed from the South African Constitution. Also, the Fair Administrative Action Act[33] is also heavily borrowed from the South African equivalent legislation, hence, jurisprudence from South African Courts interpreting similar circumstances and provisions are of greater value, relevance and may offer more useful guidance.

41. Flowing from my above conclusion, I find that the following points from a South African decision rendered by **Thring J** relevant:-[34]"

> *i. What is ordinarily contemplated by the words "exceptional circumstances' is something out of the ordinary and of an unusual nature; something which is accepted in the sense that the general rule does not apply to it; something uncommon, rare or different . . . ."*
>
> *ii. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.*
>
> *iii. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion: their existence or otherwise is a matter of fact which the court must decide accordingly.*
>
> *iv. Depending on the context in which it is used, the word "exceptional" has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.*
>
> *v. Where, in a statute, it is directed that a fixed rule shall be departed from only under exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional.? In a nutshell the context is essential in the process of considering what constitutes exceptional circumstances.*

42. Additionally, in yet another South Africa decision***[35]*** the court said the following about what constitutes exceptional circumstances:-

> *"What constitutes exceptional circumstances depends on the facts and circumstances of the case and the nature of the administrative action at issue. Thus, where an internal remedy would not be effective and/or where its pursuit would be futile, a court may permit a litigant to approach the court directly. So too where an internal appellate tribunal has developed a rigid policy which renders exhaustion futile."*

43. I should perhaps add that there is no definition of 'exceptional circumstances' in the Fair Administrative Action Act,[36] but this court interprets exceptional circumstances to mean circumstances that are out of the ordinary and that render it inappropriate for the court to require an applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the court rather than to resort to the applicable internal remedy. By definition, exceptional circumstances defy definition, but, where Parliament provides an appeal procedure, judicial review will have no place, unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.[37]

44. The need for the circumstances of the case to be exceptional means that those circumstances must be well outside the normal run of circumstances found in cases generally. The circumstances do not have to be unique or very rare but they do have to be truly an exception rather than the rule.

45. In my view, the circumstances cited by the *ex parte* applicant do not meet the tests prescribed in the above South African decisions which I find highly persuasive considering that their constitutional and statutory provisions are similar to ours. A close look at the Philippines decision relied upon by **Prof. Wekesa** shows that it does not support the applicants case. *First*, the doctrine of estoppels has not been cited in this case. *Second*, the impugned decision cannot be said to be patently illegal. This is a matter that can only be determined after a full hearing. This is because the Respondent's decisions has a statutory underpinning and whether or not they acted within the four corners of the enabling statute(s) is truly a matter for courts determination. Whether or not there was an unreasonable delay in making the decision is a matter of fact that must be proved. Unreasonable delay is context sensitive and depends on circumstances of the case and the nature of the decision. What may be unreasonable delay in one case may not qualify in another. It must be proved after considering the facts. It has not been established that applying the dispute resolution mechanism will be impractical nor has it been demonstrated that the dispute is purely legal and must be determined by the court. A look at the jurisdiction of the Tribunal and the facts of this case suggests otherwise. The provisions are very clear on the jurisdiction of the Tribunal. It has not been shown that the mechanism in question is not effective nor has it been demonstrated that the *ex parte* applicant cannot obtain an effective remedy from the Tribunal.

46. The *second* requirement is that on application by the applicant, the court may exempt the person from the obligation. My reading of the law is that it is compulsory for the aggrieved party in all cases to exhaust the relevant internal remedies before approaching a court for review, unless exempted from doing so by way of a successful application under section **9(4)** of the Fair Administrative Action Act.[38] The person seeking exemption must satisfy the court, first that there are exceptional circumstances, and, second, that it is in the interest of justice that the exemption be given.[39] Section **9(4)** of the Fair Administrative Action Act[40] postulates an application to the court by the

aggrieved party for exemption from the obligation to exhaust any internal remedy. No such application for exemption was made to this court prior to filing the application.

47. **Prof. Wekesa**, in his submissions in opposition to the Preliminary Objection, perhaps in recognition of the requirement that an applicant must apply for exemption purported to apply for an exemption in the course of his submission. I found this rather strange and a clever way of going round the requirements of section **9(4)** of the Fair Administrative Action Act.[41] My understanding of the law is that Section **9(4)** of the Fair Administrative Action Act[42] postulates an application to the court by the aggrieved party for exemption from the obligation to exhaust any internal remedy. Put differently, an applicant must formally apply to the court and demonstrate exceptional circumstances.

48. By purporting to make "an oral applicant in the course of his reply to the objection," the *ex parte* applicant's counsel took a dangerous step not contemplated by section **9(4).** The law contemplates a situation where by an applicant makes his application, demonstrates the existence of exceptional circumstances and consistent with rules of fair play, afford the other party the opportunity to respond or disapprove his case and leave it to the court to determine. By purporting to make the application in the course of his reply to the objection, **Prof. Wekesa** created a scenario whereby he deprived the other party the opportunity to respond and rebut his allegations on the existence or otherwise of exceptional circumstances. It follows that no competent application was presented before this court for determination on the question whether or not the *ex parte* applicant demonstrated exceptional circumstances; nor do I see any exceptional circumstances in the circumstances of this case even if I were to entertain **Prof. Wekesa's** informal application.

49. Perhaps, I should add that it is uncontested that the impugned decision constitutes an administrative action as defined in section **2** of the Fair Administrative Action Act.[43] Therefore, an internal remedy **must** be exhausted prior to Judicial Review, **unless** the *ex parte* applicant can show exceptional circumstances to exempt her from this requirement.[44] 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 the law, and available if it can be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct.[45] An internal remedy is adequate if it is capable of redressing the complaint.[46]

50. There was no argument before me that the internal remedy is not effective. There was no suggestion that the remedy under the act does not offer a prospect of success. There is no argument before me that the remedy under the act cannot be objectively implemented, taking into account relevant principles and values of administrative justice present in the Constitution and the law. There was no suggestion that the remedy cannot be pursued, without any obstruction, whether systemic or arising from unwarranted administrative conduct. Lastly, there was no suggestion, even in the slightest manner that the internal remedy is inadequate and incapable of redressing the complaint.

51. 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. In the case before me, no argument was advanced that the mechanism under the act was not adequate nor do I find any reason to find or hold so.

52. The other 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 court's jurisdiction must be construed restrictively. This argument was not advanced before me nor do I discern it from the facts of this case.

53. The next question is whether the dispute resolution mechanism established under the Act is competent to resolve the issues raised in this application. The jurisdiction of the Tribunal is expressly provided under the act. No argument was advanced to challenge the jurisdiction of the Tribunal to entertain the dispute.

54. In view of my analysis and the determination of the issues discussed above, it is my conclusion that the *ex parte* applicant ought to have exhausted the available mechanism before approaching this court. I find that this case offends section **9 (2)** of the Fair Administrative Action Act.[47] Second, the *ex parte* applicant has not satisfied the exceptional circumstances requirement under section **9(4)** of the Fair Administrative Action Act.[48]

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

Orders accordingly.

Signed, dated and delivered at Nairobi this **12th** day of **March** 2019

John M. Mativo

Judge

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[1] Act No. 27 of 2012.

[2] Act No. 26 of 2012.

[3] Act No. 9 of 1995.

[4] Act No. 22 of 2014.

[5] Act No. 27 of 2012.

[6] Cap 16A, Repealed.

[7] Act No. 27 of 2012.

[8] Act No. 22 of 2014.

[9] Act No. 27 of 2017.

[10] Act No. 4 of 2015.

[11] {2008}1KLR.

[12] Act No. 27 of 2012.

[13] Act No. 4 of 2015.

[14] {2018}eKLR.

[15] http://www..chanrobes.com/scdecisions/jurisprudencre2007/mar2007/gr_158253_2007.php.

[16] Act No. 27 of 2012.

[17] *Republic v Independent Electoral and Boundaries Commission* (I.E.B.C.) Ex parte National Super Alliance (NASA) Kenya & 6 others [2017] eKLR

[18] Ibid.

[19] {1992} KLR 21.

[20] Ibid.

[21] {2015} eKLR.

[22] {2015} eKLR

[23] Ibid.

[24] Act No. 4 of 2015.

[25] Act No. 27 of 2012.

[26] Act No. 27 of 2012.

[27] Act No. 4 of 2015.

[28]*Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions.* International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[29] Ibid.

[30] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[31] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[32] See *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 (23/9/14) para 4; *S v Dlamini; S v Dladla & others*; *S v Joubert; S v Scheitikat* [1999] ZACC 8; 1999 (4) SA 623 (CC) paras 75-77).

[33] Act No. 4 of 2015.

[34] In *MV Ais Mamas Seatrans Maritime v Owners, MV Ais Mamas & another* 2002 (6) SA 150 (C) at 156H

[35] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as Amicus Curiae)*2010 (4) SA 327 (CC) para 39, Mokgoro J

[36] Act No. 4 of 2015.

[37] Sir John Donaldson MR in *R v Secretary of State for the Home Department, Ex parte Swati* [1986] 1 All ER 717 (CA) at 724a-b.

[38] Act No. 4 of 2015.

[39] See *Nichol & another v Registrar of Pension Funds & others* 2008 (1) SA 383 (SCA) para 15; *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining & Development Co Ltd & others* 2014 (5) SA 138 (CC) para 115.) [21]

[40] Act No. 4 of 2015.

[41] Act No. 4 of 2015.

[42] Act No. 4 of 2015.

[43]Act No.4 of 2015. (See *SA Veterinary Council & another v Veterinary Defence Force Association* {2003} ZASCA 27; 2003 (4) SA 546 (SCA) para 34).

[44] *Koyabe & others v Minister for Home Affairs & others (Lawyers for Human Rights as amicus curiae)* {2009} ZASCA 23; 2010 (4) SA 327 (CC) para 34, *Nichol & another v Registrar of Pension Funds & others* [2005] ZASCA 97; 2008 (1) 383 (SCA) para 15).

[45] Ibid para 44.

[46] Ibid paras 42, 43 and 45.

[47] Act No. 4 of 2015.

[48] Ibid.