



**Republic v Judicial Service Commission & 4 others; Law Society of Kenya & 5 others (Interested Parties); Kioko & another (Exparte Applicants) (Judicial Review Application 223 of 2024) [2025] KEHC 5249 (KLR) (Judicial Review) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5249 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
JUDICIAL REVIEW  
JUDICIAL REVIEW APPLICATION 223 OF 2024**

**RE ABURILI, J  
APRIL 29, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
CHIEF JUSTICE ..... 2<sup>ND</sup> RESPONDENT  
PRESIDING JUDGE, COMMERCIAL & TAX DIVISION ..... 3<sup>RD</sup> RESPONDENT  
CHIEF REGISTRAR OF THE JUDICIARY ..... 4<sup>TH</sup> RESPONDENT  
OFFICE OF THE REGISTRAR TRIBUNALS ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**LAW SOCIETY OF KENYA ..... INTERESTED PARTY  
TAX APPEAL TRIBUNAL ..... INTERESTED PARTY  
KENYA REVENUE AUTHORITY ..... INTERESTED PARTY  
MINISTRY OF NATIONAL TREASURY & ECONOMIC  
PLANNING ..... INTERESTED PARTY  
THE INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS .... INTERESTED  
PARTY  
NATIONAL COUNCIL ON THE ADMINISTRATION OF JUSTICE  
(NCAJ) ..... INTERESTED PARTY**

**AND**



**SAMUEL KIOKO ..... EXPARTE APPLICANT**

**OWISO OWISO ..... EXPARTE APPLICANT**

## **RULING**

1. The application before this court is the Applicants chamber summons application dated 3<sup>rd</sup> October 2024. The application is brought under Order 53 Rules 1,2,3 and 4 of the Civil Procedure Rules, Section 1A,1B and 3A of the *Civil Procedure Act*, Sections 8 and 9 of the *Law Reform Act* and Articles 23(3) (f) and 159(2)(d) of the *Constitution*.
2. The prayers sought in the application are:
  1. Spent
  2. In the Interim, the 4<sup>th</sup> and 5<sup>th</sup> Respondent be restrained from interfering with the budget, planning and operations of the Tax Appeal Tribunal either by themselves or anyone acting under their instructions pending the hearing and determination of this application.
  3. In the Interim, the 3<sup>rd</sup> Respondent be prevented from directing the Tax Appeal Tribunal in the conduct of its internal statutory processes pending the hearing and determination of this application.
  4. That this Honorable Court do grant leave to the Applicants to apply for orders of Certiorari to remove into this Court for the purposes of quashing the decision of the 1<sup>st</sup> Respondent as communicated in the letter dated 30<sup>th</sup> September 2022 by the 4<sup>th</sup> Respondent deploying staff from the judiciary to the Tax Appeal Tribunal in contravention of Section 7(3) of *Tax Appeals Tribunal Act*.
  5. That this Honorable Court do grant leave to the Applicants to apply for orders of Certiorari to remove into this Court for the purposes of quashing the letter dated 25<sup>th</sup> January 2024 by the 4<sup>th</sup> Respondent, appointing Hon Grace Omodho as an AIE (Authority to Incur Expenditure) holder and designating her statutory functions ordinarily performed by the Secretary of the Tribunal contrary to Sections 7(1) and 7A of *Tax Appeals Tribunal Act*.
  6. That this Honorable Court do grant leave to the Applicants to apply for orders of Certiorari to remove into this Court and quash any regulations, policies, rules or guidelines given by the Respondents, jointly and severally, to the Tax Appeals Tribunal (TAT) which contravene and are in conflict with the *Tax Appeals Tribunal Act*;
  7. That this Honorable Court do grant leave to the Applicants to apply for orders of Certiorari to remove into this Court and quash the letter dated 29<sup>th</sup> May, 2024 by the 3<sup>rd</sup> Respondent purporting to direct the manner in which the Tribunal is to handle its matters, purporting to issue practice directions and interfering with the powers of the Chairperson under Section 9 of TAT with regards to orderly conduct of the Tribunal.
  8. That this Honorable Court do grant leave to the Applicants to apply for orders of Certiorari to remove into this Court and quash the decision of the 1<sup>st</sup> Respondent creating the office of the 5<sup>th</sup> Respondent; Registrar, Office of Registrar - Tribunals/ Head of Secretariat, Tribunals.
  9. That this Honorable Court does grant leave to the Applicants to apply for an order of Mandamus compelling the 2<sup>nd</sup> Respondents to publish/gazette the Tax Appeals



Tribunal(Procedure) Rules 2023 as approved by the stakeholders as contained in the letter dated 11<sup>th</sup> March 2024 by the Chairperson of Tax Appeals Tribunal.

10. That this Honorable Court does grant leave to the Applicants to apply for an order of Mandamus compelling the 1<sup>st</sup> Respondent to enact a policy framework for the regulation of Tribunals, pending the enactment of the Tribunals Act, within three (3) months, in strict compliance with the Constitution.
11. That this Honorable Court does grant leave to the Applicants to apply for an order of Mandamus compelling the 4<sup>th</sup> and 5<sup>th</sup> Respondents to produce a detailed account of all the manner of application of funds received and allocated to the Tax Appeals Tribunal from Judiciary Fund following the transitioning of the Tribunal to the Judiciary.
12. That this Honorable Court does grant leave to the Applicants to apply for an order of Mandamus compelling the 1<sup>st</sup> Respondent to proceed and acquire appropriate premises and/ or set up the Tribunal in an appropriately equipped and functional premises to facilitate its effective and efficient discharge its core statutory mandate.
13. That this Honorable Court does grant leave to the Applicants to apply for an order of Mandamus compelling the 1<sup>st</sup> Respondent to proceed to urgently advertise and cause to be recruited a Secretary and other senior staff to serve at the Tribunal in accordance with Section 7(3) of the Tax Appeals Tribunal Act.
14. That this Honorable Court does grant leave to the Applicants to apply for an order of Mandamus compelling the 1<sup>st</sup> Respondent to allow the Tax Appeals Tribunal to prepare its annual work plans and budgetary estimates pursuant to Section 7A(e) of the Tax Appeals Tribunal Act.
15. That this Honorable Court does grant leave to the Applicants to apply for an order of Mandamus compelling the 1<sup>st</sup> Respondent to surcharge the 4<sup>th</sup> and 5<sup>th</sup> Respondent and any other officer working under the directions of the 4<sup>th</sup> and 5<sup>th</sup> Respondent for any misappropriation of any Tax Appeals Tribunal funds.
16. That this Honorable court does grant leave to the Applicants to apply for an order of Prohibition to prohibit the Respondents from deploying any staff from the Judiciary to the Tribunal in contravention of Section 7(3) of Tax Appeals Tribunal Act.
17. That this Honorable court does grant leave to the Applicant to apply for an order of Prohibition to prohibit the 3<sup>rd</sup> Respondent from directing the manner in which the Tribunal handles its matters, purporting to issue practice directions and interfering with the powers of the Chairperson of the Tribunal under Section 9 of Tax Appeals Tribunal Act with regards to orderly conduct of the Tribunal's business and operations.
18. That this Honorable court does grant leave to the Applicants to apply for an order of Prohibition to prohibit the 5<sup>th</sup> Respondent from undertaking the functions of the office of Registrar- Tribunals/ Head of Secretariat, Tribunals.
19. That a declaration be issued affirming that Article 173 of the Constitution as read together with the Fifth Schedule to the Constitution and Section 8(2) of the Tax Appeals Tribunal Act requires the Respondents to appropriate a specified allocation of funds from the Judiciary Fund to the TAT.



20. That a declaration be issued that the 1<sup>st</sup> and the 4<sup>th</sup> Respondents' act of deploying staff from the Judiciary to the Tribunal without a competitive recruitment process is ultra vires Section 7(3) of the Tax Appeals Tribunal.
  21. That a declaration be issued that the 3<sup>rd</sup> Respondent's act of directing the manner in which the Tribunal handles its matters, issuing of practice directions and interfering with the powers of the Chairperson under Section 9 of TAT is in contravention of Section 7 of the [Fair Administrative Action Act](#).
  22. That a declaration be issued that the Respondent's act of appointing Hon Grace Omodho as an AIE (Authority to Incur Expenditure) holder and designating her statutory functions ordinarily performed by the CEO of the Tribunal is ultra vires Section 7 of the [Tax Appeals Tribunal Act](#).
  23. That a declaration to be issued that the relocation of the Tribunal to under the Judiciary's shared services undermines access to and administration of justice and interferes with the Tribunals' efficient discharge of its statutory mandate which is in contravention of Sections 3,4, 5 and 7 of the [Fair Administrative Action Act](#).
  24. That a declaration be issued that the 3<sup>rd</sup> Respondent's supervisory jurisdiction in matters relating to the Tribunal's discharge of its core mandate is entirely juridical and not operational.
  25. That LEAVE granted do operate as a STAY of all enforcement proceures by the Respondents arising out of or related to the subject matter of this application pending the hearing and determination of the substantive application.
  26. That costs of this application be in the cause
3. The application is supported by the verifying affidavit of Samuel Kioko sworn on 3<sup>rd</sup> October 2024 and a statutory statement dated the even date.
  4. The Applicants' case is that he Tax Appeals Tribunal (Tribunal or TAT) is a quasi-judicial body established under the [Tax Appeals Tribunal Act](#), 2013 to resolve disputes between taxpayers and the Kenya Revenue Authority (KRA) relating to Income Tax, Value Added Tax-VAT, Customs duties, and Excise duties. It is the Applicants' case that the Tribunal plays a pivotal role in ensuring equitable tax administration and collection, and users of the Tribunal expect an efficient and functional institution. According to the Applicants, the Tribunal's decisions significantly impact local businesses and influence foreign investment decisions.
  5. It is urged that Tribunals were incorporated into the mainstream administration of justice following the promulgation of the [Constitution](#) of Kenya, 2010 under Article 169(1)(d). Further, that the Tax Appeals Tribunal was among the Tribunals that were regularized in the High Court judgment in Petition No. 197 of 2018 - Okiya Omtatah v JSC, Attorney General, Parliament & Katiba Institute (Interested Party), where the Applicants state that it was held that tribunals must be transferred to the Judiciary, with their members appointed and removed by the Judicial Service Commission (JSC).
  6. The Applicants assert that prior to its transition, the Tribunal operated under the Ministry of National Treasury and received operational support through Kenya Revenue Authority-KRA. That its Budgetary allocation, infrastructure and staffing were managed by the National Treasury and KRA. The Secretariat of the Tribunal was drawn from KRA. That the Tribunal's transition to the Judiciary is said to have been finalized in 2023 and all administrative, budgetary operations and human resource functions were transferred to the Judiciary.



7. According to the Applicants, amendments through the Tax Appeals Tribunal (Amendment) [\*Act No. 7 of 2022\*](#) aligned its legal framework with the [\*Constitution\*](#), mandating among other issues, full-time basis by the Chairperson and members, with staffing to be provided by the Judicial Service Commission-JSC under section 7(3) of the Act.
8. It is the Applicants' case that following the judgment in Petition No. 197 of 2018, it was anticipated that a statutory law would be enacted to regulate all tribunals uniformly. In this regard, it is urged that the Tribunals Bill, 2023 was developed and approved by Cabinet on 27<sup>th</sup> June 2023 to rationalize and regulate tribunal administration, establish a tribunal registry and provide for the structure, membership and administration of Tribunals. The JSC, it is urged, has failed to develop a policy framework to guide the onboarding of the Tribunal into the Judiciary as required by Article 172(e) of the [\*Constitution\*](#) and as such, in the absence of an enacted Tribunals Act, the Tribunal continues to be governed by the [\*Tax Appeals Tribunal Act\*](#), 2013.
9. The Applicants further urge that the absence of a clear policy framework has led to deliberate actions by the Respondents that frustrate the Tribunal's operations and undermine its statutory autonomy. According to them, one of such instances is the relocation of the Tribunal from the CBC Building to Kenya Re-Towers which according to them, was done without notice to stakeholders and during a Tribunal service week which was being held at Naivasha.
10. This relocation according to the Applicants, led to a downgrade in facilities. Further, that experienced staff seconded from KRA were abruptly replaced without any knowledge, leading to operational inefficiencies. It is urged that the lack of professional stenographers and transcribers has caused delays in issuing proceedings and in the determination of appeals before the Commercial and Tax Division of the High Court.
11. The Applicants also state that no Tribunal Secretary or senior staff has been recruited following the resignation of the previous Secretary in October 2023, and this is despite statutory requirements. Also, that, the Respondents have unlawfully designated a Deputy Registrar to perform the Secretary's functions, including acting as an Authority to Incur Expenditure (AIE) without the legal mandate.
12. It is their case that the Tribunal funds were reallocated without consulting the Chairperson, affecting key activities such as sensitization and outreach programs, capacity building and development of the Tribunal's service charter. The 5<sup>th</sup> Respondent it is urged, interfered with the Tribunal's workplan without any reference to the Chair and relevant committees of the Tribunal. The 2024/2025 budget is said to have unlawfully been capped at approximately Kshs. 20 million without stakeholder engagement.
13. It is also the Applicant's case that the funds meant for the Tribunal were improperly used to finance overseas trips for a Judge, the Deputy Registrar, and the Registrar of Tribunals, contrary to the approved workplan and budget. The Presiding Judge of the Commercial and Tax Division is also said to have unlawfully issued Practice directions for the Tribunal, a function reserved to the Chief Justice under Section 24(2) of the TAT Act, exposing Tribunal proceedings to the risk of nullification for procedural impropriety.
14. According to the Applicants, the Judge has unlawfully taken over operational management of the Tribunal, leading delegations abroad, dictating hearing procedures and convening members' meetings, all outside the statutory framework. That although the Office of the Registrar of Tribunals (ORT) was established by the JSC in February 2017, there is no specific legal framework establishing it within the [\*Tax Appeals Tribunal Act\*](#). That incomplete transition due to the lack of a Tribunals Act means



that the Tribunal remains governed by the [Tax Appeals Tribunal Act](#), 2013, yet the Respondents have unlawfully exercised governance functions over the Tribunal.

15. According to the Applicants, the staff deployed by the Office of Registrar of Tribunals- ORT are performing ultra vires functions outside their statutory mandate, reporting directly to the Registrar of Tribunals instead of the Chairperson. This is said to undermine the Chairperson's statutory authority, causes operational confusion, delays in service delivery and results in the misplacement or loss of pleadings. It is also urged that the Tribunal's Registry, a core operational arm, has been destabilized without lawful authority, and despite statutory requirements.
16. Further, it is the Applicants' case that the Tribunal's 2024-2025 budgetary estimates were interfered with unlawfully, in violation of Article 221(5) of the [Constitution](#) and Section 7A(e) of the TAT Act. According to the applicants, the funds belonging to the Tribunal, although part of the Judiciary budget, should under Section 8(2) of the TAT Act be deposited into a separate Tribunal account, which has not been done. It is also urged that failure to comply with constitutional and statutory requirements has paralyzed Tribunal operations and caused funding delays.
17. The 3<sup>rd</sup> Respondent is said to have unlawfully usurped the operational powers of the Tribunal Chairperson under Section 9 of the Tax Appeals Tribunal- TAT Act. It is also urged that the High Court's supervisory jurisdiction does not extend to operational management of quasi-judicial tribunals. It is urged that the Tribunal is by its very nature quasi-judicial and as such it exercises inquisitorial jurisdiction in the manner it handles the disputes filed before the Tribunal. Further, that it will thus be inappropriate to expect the Tribunal to handle and determine disputes as the ordinary subordinate courts under the judicial hierarchy of courts in Kenya.

## Responses

18. In response, the 1<sup>st</sup> Respondent-Judicial Service Commission filed grounds of opposition dated 10<sup>th</sup> February 2025. the 1<sup>st</sup> Respondent contends that the application seeks to overturn its constitutional mandate and to bring into disarray the operation of the Tax Appeals Tribunal and by extension other Tribunals hampering efficiency in the administration of Justice.
19. It is contended by JSC that the [Constitution](#) under Article 169(1)(d) classifies Tribunals as subordinate Courts which provision placed all Tribunals under the Judiciary within its oversight realm. Further, that under Article 172(1)(c), the 1<sup>st</sup> Respondent is vested with the mandate to appoint Registrars, Magistrates, other Judicial officers and staff of the Judiciary and as such, the establishment of the office of the Registrar Tribunals and the Secretary to the Tax Appeals Tribunal was in accordance with the [Constitution](#).
20. According to the 1<sup>st</sup> Respondent, the question on the operations of the Tax Appeals Tribunal and other Tribunals established by Statute at the time of filing the said grounds of opposition was still live and pending before a court of Appellate jurisdiction in Civil Appeal No E416/201, the Hon. Attorney General v. Okiya Omtatah Okoiti, JSC, Katiba Institute & others, which judgment has since been delivered.
21. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents also filed grounds of opposition dated 10<sup>th</sup> February 2025. Similar to the 1<sup>st</sup> Respondent's contentions in which the 2<sup>nd</sup> to 5<sup>th</sup> Respondents in their grounds of opposition urge that the instant application at the time they were filing their grounds of opposition offended the doctrine of sub judice as the issues raised were still pending before the Court of Appeal.



## Written submissions

22. In their written submissions dated 19<sup>th</sup> March 2025, the applicants argued that the Respondents, especially the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, have acted beyond their lawful authority by issuing practice directions, reallocating the Tribunal's budget, and appointing a Deputy Registrar to serve as the Tribunal's Secretary. These actions it is submitted, violate Section 7 of the [Tax Appeals Tribunal Act, 2013](#), which mandates that the Tribunal Secretary must be competitively recruited and serves as the accounting officer. That the appointment of the Deputy Registrar is said to be unlawful and ultra vires.
23. It is also submitted that the Respondents have circumvented Article 173 of the [Constitution](#), which directs those financial allocations for judicial and quasi-judicial institutions be made through the Judiciary Fund. The Applicants submit that the unilateral reallocation of the Tribunal's budget violates this provision. Moreover, that Article 169(1)(d) ensures the independence of tribunals as part of the Judiciary, but that the Respondents' interference undermines this independence, undermining public confidence in the Tribunal's ability to function free from executive control.
24. On the prayer for leave to operate as stay, the Applicants rely on Order 53 Rule 1(4) of the Civil Procedure Rules, arguing that without the stay, the Tribunal will suffer irreversible harm, including delays in tax dispute resolution, unlawful expenditure of public funds and loss of institutional independence. The Applicants assert that failure to grant the stay would render the judicial review proceedings nugatory, as the decisions would already be implemented.
25. The Applicants further urge that at the leave stage, they need only demonstrate a prima facie case for judicial scrutiny. It is submitted that the issues raised in this application are serious and substantive grounds for judicial review based on illegality, procedural impropriety, unreasonableness, breach of legitimate expectation and violation of constitutional provisions. According to the Applicants, it is in the interest of justice that the Court grants them leave to institute judicial review proceedings and a stay of the impugned actions pending determination of the substantive application.
26. The 2<sup>nd</sup> to 5<sup>th</sup> Respondents filed written submissions dated 17<sup>th</sup> March 2025.
27. It is their contention that the decision in Civil Appeal No. E416 of 2021, involving the Attorney General v Okiya Omtatah Okoiti and others, has significant implications for the status and operation of local tribunals in Kenya. The Court of Appeal it is submitted, upheld the High Court's decision that local tribunals, under Article 169(1)(d) of the [Constitution](#), are subordinate courts and should be under the Judiciary, not the Executive.
28. The Court of Appeal decision is said to have revolved around whether a petition seeking reliefs that required Parliament to pass legislation to transition local tribunals from the Executive to the Judiciary from the Executive was justiciable, the nature of local tribunals, the appointment and removal of its members.
29. The High Court in Petition No.197 of 2018; Okiya Omtatah Okoiti vs. JSC, The Attorney General and Parliament it is urged, had previously ruled that the Executive's involvement in appointing and removing tribunal members violated the principle of separation of powers and the right to a fair hearing under Article 50 of the [Constitution](#). The court, it is submitted ordered that the tribunals be transitioned to the Judiciary, with the Judicial Service Commission (JSC) responsible for appointments and removals.
30. The 2<sup>nd</sup> to 5<sup>th</sup> Respondents relied on the cases of Affordable Medicines Trust and Others v Minister of Health and Others [2005] ZACC 3; 2006(3) SA 247 (CC) at paras 49,75 and 77 and Minister of



- Health and others v Treatment Action Campaign and others (2002) 5LRC 216,248 where the said position was reiterated.
31. It is submitted further, that the Court of Appeal in Petition No.197 of 2018; Okiya Omtatah Okoiti vs. JSC, The Attorney General and Parliament affirmed that the tribunals should be under the Judiciary and that the JSC should handle appointments, as established in Article 172(1)(c) of the *Constitution*. The Court of Appeal it is submitted, further agreed with the High Court's decision that the tribunals must transition to the Judiciary, with an Act of Parliament facilitating the process.
  32. According to the 2<sup>nd</sup> to 5<sup>th</sup> Respondents, the transition of the Tax Appeals Tribunal from the Executive to the Judiciary was in line with these constitutional requirements, ensuring judicial independence, as emphasized in the case of Gachuri v Attorney General & Another; Kenya Judges Welfare Association & another (Interested Parties) Constitutional Petition E304 of 2024 (2024) KEHC 5836 (KLR), which reinforced the Judiciary's autonomy from the Executive and Legislative branches. They also submit that the move also included logistical changes, such as relocating the TAT to Kenya Re-Towers, aimed at increasing efficiency and accessibility.
  33. The Respondents also submit that the replacement, deployment and recruitment of staff to the Tax Appeals Tribunals was in line with the transition. Further, that it is keen to note that the JSC identified judicial staff to be deployed to TAT in line with the Tax Appeals Tribunal and that the deployed staff were competitively recruited. Moreover, that in line with tribunals being subordinate courts, the JSC has mandate to recruit its members and staff under Article 172 (1) (c). This position it is submitted, was rehashed at paragraph 85 and 86 of the decision of the Court of Appeal referred to herein.
  34. It is also submitted that the Court of Appeal held that appointments to tribunals remain valid under existing statutes until new laws are enacted under Article 169(2) of the *Constitution*. However, that new appointments must involve the Judicial Service Commission (JSC) and comply with the *Constitution*. The Court of Appeal is also said to have affirmed the High Court's finding that the JSC is responsible for appointing tribunal staff and overseeing tribunal operations, including the designation of officers like Deputy Registrars.
  35. The Respondents also submit that the Court of Appeal clarified that the JSC has statutory authority under Section 10 of the *Judicial Service Act* to appoint necessary judicial officers. On the claims of inefficiency raised by the Applicants, it is submitted that the same are blatant and misconceived and that the respondents continuously aim to strengthen the same, noting the transition timelines given to the Judiciary.
  36. In conclusion, the respondents argue that the Tribunal is operating in compliance with constitutional requirements, and that the Applicants' case constitutes an abuse of court process. It is submitted that the Applicants are attempting to relitigate matters already conclusively determined by the Court of Appeal. Further, that unresolved issues are to be addressed progressively through structural interdicts, as upheld by the courts. The Court of Appeal is said to have upheld this position at paragraph 50 of its determination,

### **Analysis & Determination**

37. I have considered the parties' respective positions and arguments. The issue for determination at this stage is not the substantive merits of the intended application, but rather, whether the Applicants have demonstrated an arguable case warranting the grant of leave to institute judicial review proceedings in the terms sought, and if so, whether the applicants are entitled to the stay orders sought.



38. The main reason for the leave was 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 and 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, where 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. Leave is thus meant 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.
39. However, the grant of leave to apply is not automatic, even where the application is heard ex parte. In the present case, the Court allowed the application for leave to be argued inter partes, at the risk of letting the parties ventilate the merits of the issues involved in the matter.
40. That aside, the Respondents have drawn the Court's attention to a of Court of Appeal decision in Attorney General v Okoiti & 3 others (Civil Appeal E416 of 2021) [2025] KECA 309 (KLR) (21 February 2025) (Judgment) where the court is said to have conclusively addressed the issues raised in the instant application.
41. As stated above, this being an application for leave to apply for judicial review orders, the Court ought not to delve deep into the merits of the case. Nonetheless, it is this court's humble opinion that it is in interest of justice that the court comprehends the above stated decision of the Court of Appeal in order to avoid a situation where this Court is made to sit on appeal or review of the decision of a superior Court, contrary to Article 165(6) of the Constitution which expressly bars this Court from exercising supervisory jurisdiction over superior Courts and thereby wasting judicial time and resources by determining issues that were already determined by the Court of Appeal. That would in itself be in contravention of two important doctrines of res judicata and stare decisis.
42. At the risk of repeating myself for clarity purposes, the Applicants' case is that the administrative actions taken by the Respondents with regard to the operations of the Tax Appeals Tribunal are unconstitutional, illegal and unlawful. Some of the actions that the Applicants challenge include the management of the Tribunal which includes issues of budgets, appointment and deploying of staff within the Tribunal, and also alleged procedural and administrative operations by the Presiding Judge of the Commercial and Tax Division of the High Court. It is urged by the Applicants that actions by the Respondents have caused inefficiency in service delivery and improper management of resources of the Tribunal.
43. According to the applicants, there are grave concerns regarding the unlawful deployment of Judiciary staff to the Tribunal devoid of any competitive process, the unauthorized appointment of an AIE holder, the creation of a Registrar's Office without statutory basis and the Respondents' directives that undermine the Tribunal's independence.
44. Further issues include whether the Respondents are obligated to allocate Judiciary Funds resources to the Tribunal, gazette procedural rules, establish proper premises, recruit senior staff and fulfill statutory duties such as budget preparations. Additionally, there is concern about whether the Tribunal's relocation under the Judiciary's shared services infringes on fair administrative action and access to justice and whether the enforcement of the Respondents' actions should be stayed pending the resolution of the substantive application by this Court, once filed.
45. In their responses opposing the application for leave and stay, the Respondents contend and argue that the issues raised in the instant application are issues that have already been conclusively addressed by the Court of Appeal Attorney General v Okoiti & 3 others (Civil Appeal E416 of 2021) [2025] KECA 309 (KLR) (21 February 2025) (Judgment).



46. A brief background of the High Court Petition No.197 of 2018 which culminated in the Court of Appeal's decision in *Attorney General v Okioti & 3 others (Civil Appeal E416 of 2021)* [2025] KECA 309 (KLR) (21 February 2025) (Judgment) is that Okiya Omtatah, a well-known public interest litigator filed an amended petition dated 18<sup>th</sup> December 2018 seeking inter alia the following orders:

- i. A declaration that:
    - a. tribunals established pursuant to Article 169(1)(d) of the Constitution of Kenya, 2010 are not part of the Executive machinery, nor are they independent adjudicatory bodies, but are subordinate courts which are an integral part of the Judiciary.
    - b. The Judicial Service Commission is exclusively responsible for appointing and removing member of the tribunals established pursuant to Article 169(1)(d) of the Constitution of Kenya 2010, for establishing their rules of procedure and for doing anything incidental thereto to ensure their smooth operations as courts of law.
    - c. The doctrine of separation of powers under the Constitution of Kenya is an absolute bar to the Executive and its agencies, or any other entities who are not the Judicial Service Commission, being mandated by Parliament to appoint or remove any members of tribunals created under article 169(1)(d) of the Constitution of Kenya, 2010.
    - d. Any law which vests in the executive and its agencies, or in any other entities who are not the Judicial Service Commission, the mandate to appoint or remove any members of tribunals created under article 169(1)(d) of the Constitution is unconstitutional and, therefore, invalid, null and void ab initio.
    - e. The budget for tribunals should be a line budget in the Judiciary.
    - f. Parliament has failed to enact necessary legislation pursuant to Article 169(2) to give effect to Article 169(1)(d) within the time specified in the Fifty Schedule to the Constitution.
  - ii. An Order
    - i. Annulling all appointments to tribunals created under Article 169(1)(d) of the Constitution which were not made by the Judicial Service Commission through a competitive process.
    - ii. Compelling Parliament and the Attorney-General to enact legislation pursuant to Article 169(2) to give effect to Article 169(1)(d) of the Constitution within three months, and to report the progress to the Chief Justice.
    - iii. That if Parliament fails to enact legislation pursuant to Article 169(2) to give effect to Article 169(1)(d) of the Constitution within three months, the Chief Justice shall advise the President to dissolve Parliament and the President shall dissolve Parliament.
    - iv. Compelling the Judicial Service Commission to immediately but not later than three months re-constitute all tribunals created under Article 169(1)(d) of the Constitution upon Parliament enacting legislation pursuant to Article 169(2) to give effect to Article 169(1)(d).
- (c) Suspending order (a) above for a period of six months to allow for a smooth transition.



- (d) Compelling the respondent to bear the costs of this suit.
- (e) Any other relief the court may deem just to grant.
47. The petitioner argued that while tribunals are intended to provide accessible, efficient and fair administrative justice in Kenya, they were currently incapable of doing so due to a lack of consistency and accountability. He pointed out the proliferation of over 100 tribunals, each operating under different laws and procedures, causing confusion for both lawyers and the public. The petitioner also argued that many of the said tribunals were controlled by the Executive, which undermined the principle of separation of powers, as the Executive was often a party in the disputes before them.
48. Additionally, the petitioner highlighted that some tribunals followed formal court like procedures, while others were informal, leading to unequal access to justice.
49. It was his case that the absence of a right of appeal in certain tribunals further violated the constitutional right to fair hearing. The petitioner also claimed that the respondents had failed to transition these tribunals from the Executive to the Judiciary as required by the *Constitution*.
50. The Petition was prosecuted with the Respondents filing their responses and, in its determination, the High Court made the following observations that are key to the instant case:
- i. That Article 169 of the *Constitution* recognizes local tribunals as subordinate courts, distinguishing them from courts established under Article 162(2). The court in interpreting "local tribunals," applied the ejus dem generis rule, which reconciles general and specific terms by ensuring that specific words define a class, while general words extend the scope to all entities within that class.
  - ii. The Court observed that local tribunals were subordinate courts and their affairs, just like the other subordinate courts, ought to be managed by the Judiciary through JSC. That in doing so, the constitutional dictates would be achieved. Further that it would create transparency in the appointment and removal of members of the tribunals which would be done in accordance with the law and the *Constitution*.
  - iii. It was also observed that although, most disputes that were before the tribunals involved the Executive, the latter held the power to appoint and remove tribunal members, giving it an inherent advantage and contravening the principle of separation of power and was contrary to Article 50(1) of the *Constitution*. The court also observed that the state of affairs also infringed on the independence of the Judiciary.
  - iv. The court also held that the local tribunals, which were subordinate courts, under the administration of the Executive ought to be transitioned to the Judiciary. Further, that the rationale for that was provided under Article 160(1) of the *Constitution* which provided that the Judiciary would not be subject to the control or direction of any person in the exercise of judicial authority.
  - v. The court also observed that under Article 171, of the *Constitution*, the Judicial Service Commission was tasked with promoting judicial independence and accountability. Further, that the JSC should support the Judiciary in fulfilling its constitutional mandate and that member of local tribunals, categorized as "other judicial officers" under Article 172(1)(c), must be appointed by the JSC. The court reiterated that for such appointments to be made by the JSC, it was necessary to transition the tribunals to the Judiciary and that under article 169(2) of the *Constitution*, there was need for a statute to assist in the transition.



- vi. It was also observed that in line with this constitutional mandate, the Kenya Law Reform Commission (KLRC) and JSC undertook efforts to facilitate the transition, culminating in the Tribunals Bill, 2017, which at the time was awaiting Cabinet approval. That the JSC had also worked on a Draft Tribunals Bill, 2015, which resulted in the transfer of 20 local tribunals. Parliament is said to have at the time undertaken discussions with the JSC and the relevant authorities concerning the Tribunals Bill, 2017.
51. Aggrieved by this decision of the High Court, the Attorney General filed an appeal to the Court of Appeal in *Attorney General v Okoiti & 3 others (Civil Appeal E416 of 2021)* [2025] KECA 309 (KLR) (21 February 2025) (Judgment).
52. This Court has examined the above decision and the following are key to the instant proceedings:
- i. The Court of Appeal reiterated that Article 169(1)(d) of the *Constitution* applies to all local tribunals, whether new or existing. Further, that the learned Judge of the High Court had acknowledged the challenges of transitioning tribunals to the Judiciary immediately and granted a six-month window for the necessary legislative and procedural changes. It observed that this period was sufficient to initiate the transition.
  - ii. On the application of the ejusdem generis rule by the High Court, the Court of Appeal agreed with the High Court that this rule ought to apply to constitutional interpretation, as well as statutory interpretation, even citing previous decisions such as *Kigula and Others v Attorney General* [2005] 1 EA 132 where it was observed that while the widest construction possible, in its context, should be given according to the ordinary meaning of the words used, it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions.
  - iii. The Court of Appeal emphasized that local tribunals under Article 169(1)(d) should be treated in the same manner as courts listed under Article 169(1) of the *Constitution*. Further, that Article 159(1) of the *Constitution* grants judicial authority to courts and tribunals established under the *Constitution* while Article 160(1) of the *Constitution* ensures judicial independence, free from external control.
  - iv. The Court of Appeal referenced the principles of constitutional interpretation, which require the *Constitution* to be read as an integrated whole, ensuring harmony between its provisions. It further relied on the case of *Equity Bank Limited v West Link Mbo Limited* [2013] eKLR where the Court observed that courts should reject a strict constructionist approach where provisions conflict, advocating instead for an interpretation that allows for the smooth and harmonious operation of the *Constitution*. In conclusion, the Court of Appeal observed that based on these principles, the tribunals under Article 169(1)(d) ought to fall under the Judiciary.
53. Other than the issues revolving around the operations of the Tribunal, the Applicants have raised the pertinent issue of lack of legislation in respect to tribunals. It is urged that as legislation has not been enacted, the provisions under the *Tax Appeals Tribunal Act* on issues such as deployment of staff such as the Secretary of the Tribunal ought to apply.
54. The above concern was addressed by the High Court in its order no (e) where it directed that any new appointment or removal of a member of any Tribunals under Article 169(1) (d) of the *Constitution* must be undertaken by the Judicial Service Commission. This High Court decision was upheld by the Court of Appeal as such any issue of appointment has already been canvassed by the courts.



55. This Court also notes that the issue of the absence of specific legislation to facilitate the transition of tribunals from the Executive to the Judiciary was addressed by the Court of Appeal, which noted that there are ongoing efforts to transition the tribunals, including the Tribunals Bill of 2017, and that the six months period granted by the High Court was necessary for legislative and procedural changes. This shows that while the legislative process may not be fully complete, as it is not true that enacting legislation can be done in one day or one month, the transition is actively being pursued and the delay does not warrant the extraordinary remedy of judicial review at this stage.
56. In light of the above considerations, I find that the Applicants have not demonstrated an arguable case that justifies the grant of leave to proceed and apply for judicial review orders sought in the chamber summons.
57. I am persuaded that the issues raised by the applicants have been sufficiently dealt with by the Court of Appeal and therefore, there is no compelling reason to revisit these matters at this stage. This Court must exercise restraint in matters already adjudicated upon and resolved by a superior Court whose decisions are binding on this Court, in order to uphold the principle of judicial consistency and to avoid wasting judicial resources.
58. Accordingly, I find that the applicants have not demonstrated an arguable prima facie case for consideration substantively in terms of the orders that they seek before this Court.
59. In the end, I find the chamber summons dated 3<sup>rd</sup> October, 2024 to be devoid of merit and the same is hereby dismissed.
60. As the applicants filed the application in the public interest, I make no orders as to costs.
61. This file is closed.

**DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 29<sup>TH</sup> DAY OF APRIL, 2025**

**R.E. ABURILI**

**JUDGE**

