Republic v Tribunal; Kenya School of Law & another (Interested Parties); Chepkwony (Exparte Applicant) (Judicial Review Application E062 of 2024) [2025] KEHC 5231 (KLR) (Judicial Review) (28 April 2025) (Judgment)

Neutral citation: [2025] KEHC 5231 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E062 OF 2024

RE ABURILI, J

APRIL 28, 2025

BETWEEN

REPUBLIC .... APPLICANT

AND

LEGAL EDUCATION APPEALS TRIBUNAL .... RESPONDENT

AND

KENYA SCHOOL OF LAW .... INTERESTED PARTY

AND

EVANS KIPKOECH CHEPKWONY .... EXPARTE APPLICANT

AND

COUNCIL OF LEGAL EDUCATION .... INTERESTED PARTY

JUDGMENT

1. Pursuant to leave granted on 20th May 2024, the Exparte applicant filed his substantive notice of motion dated 31st May 2024. The motion which is the subject of this Judgment is brought pursuant to the provisions of Order 53 Rule 3 of the Civil Procedure Rules and Sections 8 and 9 of the *Law Reform Act*. The exparte applicant seeks an order of Certiorari quashing the decision of the Respondent, Legal Education Appeals Tribunal, dated 19th April 2024 in the matter of Evans Kipkoech Chepkwony v Kenya School of Law and The Council of Legal Education, LEAA/E004/2024.
2. The exparte Applicant also seeks an order of Mandamus to compel the Interested Party to register and admit him for the Advocates Training Program.

3. He further prays for an order of Prohibition prohibiting the Interested Parties from denying him admission to the Advocates Training Program and admission as an Advocate of the High Court of Kenya.

4. The Application is supported by a verifying affidavit sworn by the Applicant and a statutory statement dated 20th May 2024.

5. The exparte Applicant's case is that on 19th April 2024, the Respondent delivered a decision dismissing the Ex parte Applicant's appeal against 1st Interested Party's decision to deny him admission to the Advocate Training Program. The Respondent, it is urged upheld the determination that the Applicant was unqualified for admission. The Applicant challenges this decision as irrational, unlawful, and contrary to the rules of natural justice.

6. According to the applicant, at the time of his admission to the Bachelor of Laws (LLB) program at Moi University in 2019, he had met the academic progression requirements as set out under the Third Schedule of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016, which were in force at the time.

7. He asserts that although these Regulations were later declared null and void on 17th December 2021, by the Court of Appeal in Otieno & another v Council of Legal Education [2021] KECA 349 (KLR) and Kenya School of Law v Akomo & 41 others [2022] KECA 1132 (KLR)(21 October 2022) (Judgment) the courts had observed that the declaration of invalidity could not apply retrospectively to the detriment of individuals whose rights or actions under the Regulations had already crystallized as at that date.

8. The Applicant contends that as at the time he had commenced his LLB studies on 2nd September 2019, having previously obtained a degree in Business Management (Accounting) from the University of Eldoret, his admission was therefore lawful under the prevailing Regulations. He also avows that the Respondent's decision of 19th April 2024 is illegal, unlawful, irrational, and in violation of the rules of natural justice.

9. The Applicant in his submissions dated 3rd February 2025 argues that at the time of his enrolment at Moi University to pursue a Bachelor of Law Degree, he relied on Paragraph 6 of the Third Schedule to the Legal Education (Accreditation and Quality Assurance) Regulations, 2016, which recognised academic progression as a valid pathway to the Advocates Training Programme (ATP). It is his submission that as was held by the court in Kalpana H. Rawal v Judicial Service Commission & 4 Others [2015] eKLR the general presumption is that statutes apply in a prospective manner.

10. He also cites the case of Javan Kiche Otieno & Another v Council of Legal Education [2021] eKLR where the Court of Appeal is said to have held that the declaration that the Regulations were unconstitutional did not affect actions that had already crystallised under the law while it was still in force. The same principle is said to have been reaffirmed by the court in the case of Kenya School of Law v Akomo & 41 others [2022] KECA 1132 (KLR).

11. According to the Applicant, his admission to study Law was lawful under the prevailing legal framework and that therefore, his right to proceed to the ATP had already crystallised. He further submits that the decision by the Respondent to deny him admission based on the subsequent invalidation of the Regulations is therefore unlawful, irrational, and procedurally unfair.

12. The applicant further argues that he held a legitimate expectation protected under the principles outlined in Kevin K. Mwiti & Others v Kenya School of Law & 2 Others [2015] eKLR and De Smith,

Woolf & Jowell in Judicial Review Administrative Action,6th Edition, Sweet & Maxwell at page 609. disregards them.

13. The parties canvassed the application by way of oral submissions before the court on 4th March 2025. In his submission on the issue of section 38 of the *Legal Education Act* requiring that the Applicant pursue an appeal and not judicial review, Dr. Okubasu submitted that this court has the jurisdiction to examine decisions of subordinate courts and tribunals notwithstanding appellate mechanisms.

14. He further submitted that the appeal jurisdiction is on a point of law only and restrictive as it does not extend to factual issues such as irrationality. It was also his submission that the Act does not define what exactly an Appeal is. He gave an example of the PPAD Act which clearly states that an aggrieved party should file a judicial review.

15. Dr. Okubasu submitted that the court should interpret the word 'Appeal' liberally to include any challenge to the decision made by the Tribunal. He also submitted that if the court finds that it has no jurisdiction in the matter it would be foreclosing the Applicant's right to education.

16. He also submitted that there was nothing wrong with enjoining the Tribunal as judicial review has a special jurisdiction. Further, that the Respondent can be defended by the Attorney General. It was his submission that prayer 4 is a consequential relief because admission to Kenya School of Law is consequential on the admission to the bar. According to Mr. Okubasu, if not raised in these proceedings the same can become res judicata.

Response.

17. The Respondent in response to the application filed Grounds of Opposition dated 11th February 2025 contending that by naming the Legal Education Appeals Tribunal as a Respondent in these proceedings, the Applicant improperly seeks to challenge a judicial decision of a quasi-judicial body in a manner that is inconsistent with the adversarial structure of our legal system, and contrary to the well-established principle that judicial officers and courts enjoy immunity from suits for actions taken in their judicial capacity.

18. It is also the Respondent's case that while the Tribunal, as a subordinate court under Article 169(1) (d) of *the Constitution*, may have its decisions reviewed or appealed before a higher court, it cannot itself be sued or joined as a party to proceedings that challenge its judicial decisions. According to the Respondent, the proper course for challenging such decisions lies in an appeal or review, as the case may be brought against the opposing party to the original proceedings not the judicial tribunal that rendered the decision.

19. The Respondent further urges that the statute establishing it provides for a right of appeal for any person aggrieved by its decisions and as such, the Applicant, having failed to pursue that statutory appellate avenue, cannot circumvent the same. According to the Respondent, the grounds now advanced could and should have been raised on appeal, not in this forum.

20. It is contended that the Applicant seeks orders relating to his admission as an Advocate of the High Court of Kenya, a matter which according to the Respondent, was neither the subject of the impugned proceedings before the Tribunal nor its resulting decision. It is the Respondent's argument that granting such relief would not only be premature but may also unjustly foreclose any legitimate objections that may arise when the Applicant eventually seeks admission in the prescribed manner.

21. The Respondent in its submissions dated 25th February 2025 argues that the Applicant has not followed the proper procedure for challenging the Tribunal's decision. Further, that Section 38(1) of the *Legal Education Act* clearly provides that any party dissatisfied with the Tribunal's decision on a

point of law may appeal to the High Court within 30 days. The Applicant is said to have instead chosen to invoke judicial review, which is inappropriate in this context.

22. The Respondent relies on the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, where the Court of Appeal is said to have emphasized that where a clear statutory procedure for redress of a particular grievance exists, that procedure must be followed. Reliance is also placed on the case of Jacinta Muthoni Mwangi v Hon. Charity C Oluoch & Frankline Albert Lateo Amuma (Nairobi HCJR E045/2024), where the High Court dismissed a judicial review application in favor of the appeal process. According to the Respondent, the same principle was reiterated in Republic v RO Mbogo & another; Alfred Ndemo Nyakundi (Interested Party) Ex parte Diana Mutheu & another [2020] eKLR, where the High Court held that the judicial review process was not the proper avenue when grounds for appeal existed.

23. It is the Respondent's submission that judicial review applies to administrative or quasi-judicial decisions, not judicial decisions. Reliance is placed in the case of *Attorney General v Okoiti & 3 others (Civil Appeal E416 of 2021)* [2025] KECA 309 (KLR), where the court is said to have observed that as the impugned decision was a judicial function and not an administrative function, the same ought to be challenged by appeal, not judicial review.

24. The Respondent also relies on the case of Republic vs Chief Magistrate, Mombasa & 3 others; Sega Ventures Limited *& another (Interested Parties) Kirima (Ex parte) Judicial Review Application 1 of 2022*)[2023] KEELC 180 (KLR)in Mombasa Judicial Review Application 1 of 2022, where the Court emphasized that where judicial decisions are appealable, judicial review should not be used to challenge such decisions. The Respondent also relies on the case of National Social Security Fund v Sokomania Ltd & Chief Magistrate's Court Milimani [2021] eKLR where a similar position is said to have been held by the court.

25. The Respondent also relies on the case of Republic v National Environment Management Authority Ex parte Sound Equipment Ltd [2011] eKLR where the court observed that where an alternative remedy is provided for, it is only in exceptional circumstances that judicial review orders may be granted.

26. The Respondent argues that its decisions are judicial in nature and protected by judicial immunity under Section 6 of the *Judicature Act* and Article 160(5) of *the Constitution*, Section 45 of the *Judicial Service Act*, adding that under Section 6 of the *Judicature Act*, the Respondent and its members are immune from suits arising out of actions taken in good faith while performing their judicial duties. Reliance was placed on Bellevue Development Company v. Francis Gikonyo & 3 Others, SC Pt No. 42 of 2018; [2020] eKLR, where the Supreme Court is said to have affirmed the importance of judicial immunity in maintaining the independence of the judiciary.

27. In his oral submissions, counsel for the Respondent Mr. Ogutu reiterated the contents of the written submissions and concluded his submission by saying that the prayer touching on admission of the Applicant should not be entertained as the process of admissions into the ATP and as an advocated are different, with the latter being a later process depending on the former process.

28. The 1st Interested Party filed Replying Affidavit sworn by Lawrence Ndirangu on 14th February 2025 opposing the application. The 1st Interested Party's position is that its mandate includes providing training for the Advocates under the *Advocates Act* (Cap 16), particularly through its Advocates Training Programme (ATP).It argues that it had advertised for applications to the ATP, specifying the eligibility criteria outlined in the Second Schedule of the *Kenya School of Law Act*. That the Ex Parte Applicant is said to have applied for admission into the ATP program but he did not meet the eligibility criteria required under Section 16 of the *Kenya School of Law Act*, as read with Paragraph 1 of the

Second Schedule. Specifically, that the Ex Parte Applicant did not achieve the required mean grade of C+ in KCSE, nor did he meet the grade requirements for English or Kiswahili, being a (B plain).

29. The 1st Interested Party contends that its admission criteria are strictly governed by the provisions of the *Kenya School of Law Act*, 2012 and that it is bound by the legal framework set out in the Act, including the decision of the Court of Appeal in Kenya School of Law v Richard Otene Okomo and 42 others, which confirmed the Respondent's interpretation and application of the admission criteria.

30. It was further argued that after the Legal Education Appeals Tribunal in its decision in LEAA E004 of 2024 Evans Kipkoech Chepkwony v. Kenya School of Law and Anor dated 19th April 2024 ruled that the Ex Parte Applicant was not qualified to join the Advocates Training Program, the Ex Parte Applicant is said to have neither applied for a review of the Tribunal's judgment nor filed an appeal.

31. The 1st Interested Party filed written submissions dated 24th February 2025, arguing that the Court's inherent powers, while allowing the 1st interested party to regulate its own procedures, do not extend to the assumption of jurisdiction not conferred by statute.

32. The 1st Interested Party further argues that the Court does not have jurisdiction to entertain the judicial review application since the matter at hand has already been determined by the Legal Education Appeals Tribunal, and the Ex Parte Applicant must pursue an appeal instead, as provided under Sections 38 and 39 of the *Legal Education Act*.

33. On the issue of jurisdiction, the 1st Interested Party relies on Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1 and Jamal Salim v. Yusuf Abdulahi Abdi & another Civil Appeal No.103 of 2016 [2018] eKLR. Reliance is also placed on the case of Samuel Kamau Macharia & Another v. Kenya Commercial Bank & others [2012] eKLR where the Supreme Court in the latter case is said to have observed that a Court must operate within the jurisdiction conferred by *the Constitution* and cannot expand it beyond what is provided.

34. The 1st Interested Party contends that the Ex Parte Applicant's action is an abuse of process, as the Tribunal is the proper forum for appeals, and judicial intervention should be avoided when other mechanisms exist. It is urged that Article 159 of *the Constitution* supports alternative dispute resolution.

35. It is the 1st Interested Party's further argument that the concept of non-justiciability of disputes before Courts is based on Article 159 of *the Constitution*, which encourages alternative dispute resolution mechanisms. Further, that non-justiciability comprises three doctrines: the Political Question Doctrine, the Constitutional-Avoidance Doctrine and the Ripeness Doctrine, which are crosscutting and closely intertwined.

36. Reliance is placed in the case of Kiriro wa Ngugi & 19 Others v Attorney General & 2 Others [2020] eKLR, where the Court is said to have described justiciability as a matter proper to be examined in courts of justice and stressed the need to determine whether a case is caught by non-justiciability.

37. The 1st Interested Party also relies on the case of Kenya Ports Authority v William Odhiambo Ramogi & 8 Others Mombasa [2019] eKLR, citing with approval Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 [2014] eKLR where it was held that constitutional questions should not be decided when a matter may properly be resolved otherwise.

38. According to the 1st Interested Party, ripeness concerns the readiness of a case for litigation, preventing premature adjudication. The Court in Communications Commission of Kenya & 5 Others v Royal

Media Services Ltd & 5 Others is said to have explained ripeness with reference to the Black's Law Dictionary and emphasized avoiding hypothetical, premature or academic disputes.

39. It is also the 1st Interested Party's submission that the doctrine of constitutional avoidance relates to instances where another remedy exists in law that has not been utilized, aligning with the doctrine of exhaustion. This according to the Interested Party, was elaborated by a 5-judge bench in Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 [2020] eKLR where the Court is said to have stated that litigants must first pursue available remedies before seeking judicial review, promoting alternative dispute resolution under Article 159.

40. The 1st Interested Party also submits that the matter before the Court does not meet the threshold for constitutional ripeness, and invoking constitutional jurisdiction affronts Article 159. Further, that public bodies must act within the confines of the law under the doctrine of legality, as was stated in AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another where it was held that public power must have a source in law.

41. The 1st Interested Party submits that the Applicant seeks to escape consequences arising from his own omission to equate his high school grades and should not benefit from Court intervention. Reliance is placed on the case of Francis Munyoki Kilonzo & Another v Vincent Mutua Mutiso [2013] eKLR, where the Court is said to have emphasized that equity does not aid a party responsible for their own predicament. Similarly, in Anne Mumbi Hinga v Gaitho Oil Limited [2019] eKLR, the court is said to have held that one must come to equity with clean hands. This was also the position in John Njue Nyaga v Nicholas Njiru Nyaga & Another [2013] eKLR.

42. It is submitted that the 1st Interested Party acted within its statutory mandate as per the Kenya School of Law (KSL) Act 2012 and the decision of the court in Peter Githaiga Munyeki v Kenya School of Law [2017] eKLR, where it was held that KSL's admission requirements are governed solely by the KSL Act without reference to any other legislation.

43. The 1st Interested Party's counsel during oral submissions reiterated the contents of the 1st Interested Party's written submissions adding that the instant matter does not meet the minimum requirement for judicial review.

Analysis and Determination

44. I have considered the judicial review application, statutory statement, verifying affidavit and annexures filed by the Applicant, the responses by the Respondent and Interested Party and the respective parties' written and oral submissions and case law relied on by the parties' counsel on record. The two main issues for determination are whether this court has jurisdiction to entertain the judicial review application before it and whether this court ought to grant the orders sought by the Applicant.

Whether this court has jurisdiction to entertain the application before it

45. The Applicant challenges the Respondent's decision of 19th April 2024, which upheld the 1st Interested Party's denial of his admission to the Advocates Training Programme (ATP), arguing that the decision was irrational, unlawful, and violated natural justice. He asserts in his depositions that when he was admitted to Moi University's LLB program in 2019, he lawfully met the academic progression requirements under the then valid Legal Education (Accreditation and Quality Assurance) Regulations, 2016.

46. According to the applicant, although these Regulations were later declared invalid, he asserts that the invalidation could not retrospectively affect his crystallised rights. He submits that the Respondent's

reliance on the Regulations' subsequent nullification to deny him admission was illegal, irrational and breached his legitimate expectation to be admitted into the ATP.

47. In response, the Respondent contends and argues that the Applicant has improperly sued the Legal Education Appeals Tribunal, a quasi-judicial body protected by judicial immunity, thereby contravening established legal principles that judicial decisions can only be challenged by appeal or review, not through judicial review. The respondent contends that since the Tribunal operates as a subordinate court under Article 169 of *the Constitution*, it cannot be sued for its decisions, which should instead be appealed against via the statutory framework provided for under Section 38(1) of the *Legal Education Act*.

48. The Respondent further contends that the Applicant has ignored this appeal route and instead inappropriately invoked judicial review jurisdiction of the High Court to challenge a judicial, not administrative, act. The Respondent also maintains that judicial review is not the correct forum and emphasizes the importance of judicial immunity, procedural propriety and the distinction between ATP admission and eventual admission to the Bar.

49. The 1st Interested Party in response also sides with the respondent and argues in contention that it is mandated to provide training under the *Advocates Act* through the Advocates Training Programme (ATP) and that it had advertised for applications specifying eligibility criteria set out in the *Kenya School of Law Act*. It argues that the Ex Parte Applicant applied but failed to meet the required academic qualifications, namely the KCSE mean grade of C+ and a B plain in English or Kiswahili, as required under Section 16 and the Second Schedule of the Act. The 1st Interested Party emphasizes that its admission process strictly follows this legal framework, as affirmed by the Court of Appeal in the cited cases. It adds that the Tribunal, in its decision of 19th April 2024, confirmed the Applicant’s disqualification and that the Applicant neither sought a review before the Tribunal nor appealed the decision as provided for in law.

50. The Respondent herein, the Legal Education Appeals Tribunalis established under section 29 of the *Legal Education Act* and its jurisdiction is outlined under sections 31 and 32 of the same Act. The Act under section 38 provides the procedure to be followed by any person aggrieved by the decision of the Tribunal in the following terms:

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.[emphasis added]

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

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

(1) Any advocate aggrieved by order of the Tribunal made under section 60 may, within fourteen days after the receipt by him of the notice to be given to him pursuant to section 61(2), appeal against such order to the Court by giving notice of appeal to the Registrar, and shall file with the Registrar a memorandum setting out his grounds of appeal within thirty days after giving by him of such notice of appeal.

(2) The Court shall set down for hearing any appeal filed under subsection (1) and shall give to the Council of the Society and to the advocate not less than twenty-one days' notice of the date of hearing.

(3) An appeal under this section shall not suspend the effect or stay the execution of the order appealed against notwithstanding that the order is not a final order."

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

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

52. It is important for parties to note that this Court as the High Court, exercises jurisdiction conferred by Article 165 (3), (4), (6) and (7) of *the Constitution* and statutes. The jurisdiction to grant judicial review remedies to a party who claims that their rights and fundamental freedoms under the Bill of Rights have been violated or are threatened with violation can be found at Article 23 which confers the authority on the Courts in the enforcement of rights and fundamental freedoms.

53. Under Article 165(6) of *the Constitution*, the High Court exercises supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

54. In the exercise of jurisdiction under sub article (6) above, the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

55. It follows, therefore, that, this Court as the High Court has jurisdiction conferred by *the Constitution* at Article 165 to hear and determine all matters therein listed therein. This Court too has jurisdiction to grant judicial review orders including the prayers sought by the applicant in this case.

56. However, the statute which establishes the respondent whose decision is impugned in these proceedings is the *Legal Education Act* that statute provides for the procedure for challenging decisions of the respondent. The procedure is by way of an appeal to the High Court. That is exactly what section

38 of the Act as reproduced above stipulates. The question is whether the applicant having bypassed that procedure and instead, filed these judicial review proceedings, he should be allowed to get away with it.

57. The applicant argues that although the Act provides for appeals to the High Court, that is only on points of law yet there are factual matters raised in these proceedings that needed to be ventilated by way of judicial review proceedings.

58. I have carefully read the prayers sought in the notice of motion and the statutory statement together with the verifying affidavit and the annextures thereto. The applicant's main lamentation is that he was disqualified from being admitted into the ATP based on regulations which the Court of Appeal held could not apply retrospectively. That in my humble view is a point of law, that can be ventilated on appeal by this Court exercising appellate jurisdiction. No other facts can alter that position held by the applicant.

59. The High Court on appeal has powers under section 78 of the *Civil Procedure Act* which powers involve reassessing and reevaluating the evidence adduced before the trial court or tribunal and arriving at its own independent conclusion. The High Court on appeal can also set aside any order which is illegal.

60. The section provides:

78. Powers of appellate court

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a) to determine a case finally;

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require the evidence to be taken;

(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

61. In the instant case, the onus was on the applicant to demonstrate that the appeal as contemplated in section 38 of the *Legal Education Act* is not an effective remedy available to him to ventilate his grievance and that he therefore ought to be exempted from resorting to the available procedure for challenging the decision of the 1st respondent tribunal. This was the position adopted by the Court of Appeal in Republic v National Environment Management Authority [2011] eKLR, where it was held that where there is an alternative remedy and especially where Parliament has provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted. The Court of Appeal had this to say at pages 15 and 16 of its judgment,

> "The principle running through these cases is where there was an alternative remedy and especially where Parliament had provided a statutory appeal process, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the

particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it. – see for example R v Birmingham City Council,ex parte Ferrero Ltdcase. The Learned judge , in our respectful view, considered these strictures and come to the conclusion that the Appellant had failed to demonstrate to her what exceptional circumstances existed in its case which would remove it from the appeal process set out in the statute with respect we agree with the judge."

62. The above position agrees with the earlier and often cited decision by the Court of Appeal in the case of Speaker of the National Assembly vs Njenga Karume's Nrb. C.A.C.A. No. 92 of 1992 where it was held inter alia, that:

> " ...Irrespective of the practical difficulties enumerated...these should not in our view be used as a justification for circumventing the statutory procedure...In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that Order 53 of the Civil Procedure Rules cannot oust clear constitutional provisions and statutory provisions....Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedure."

63. The basis for this court stating that the applicant has not sought any exemption from resorting to the appeal procedure provided for under section 38 of the *legal Education Act* finds support in section 9(2) of the *Fair Administrative Action Act* which I will revert to later in this judgment. Nonetheless, long before the enactment of the *Fair Administrative Action Act*, the Courts did pronounce themselves on this issue of resorting to alternative procedure or remedy provided for in law. In Republic v Ministry of Interior and Coordination of National Government and Another ex parte ZTE Judicial Review Case No. 441 of 2013, it was stated that:

> " ...one must not lose sight of the fact that the decision whether or not to grant judicial review orders is an exercise of judicial discretion and as was held by Ochieng, J in John Fitzgerald Kennedy Omanga v The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003, for the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute."

64. In Francis Gitau Parsimei & 2 Others v National Alliance Party & 4 Others Petition No.356 and 359 of 2012, it was stated that where a statute has provided a remedy to a party, this Court must exercise restraint and first give an opportunity to the relevant bodies or State organs to deal with the dispute as provided in the relevant statute. The same position was taken in Kipkalya Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others [2008] 3 KLR (EP) 291.

65. The above decisions are post 2010 pronouncements such that a party cannot argue that they are old adage positions taken by Courts. Then came the enactment of the *Fair Administrative Action Act* in 2015 which in essence, codified the positions taken by Courts on the question of resorting to the

alternative procedure enacted in the statutes. Section 9(2), (3) and (4) of the *Fair Administrative Action Act*, 2015 provides:

9. Procedure for judicial review

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of *the Constitution*.

(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal. [emphasis added]

66. In Ndiara Enterprises Ltd v Nairobi City County Government [2018] eKLR *CA 274 of 2017*, the Court of Appeal stated as follows, in an appeal arising from this very judicial review Division of the High 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. 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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> ....
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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…
>
> 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."

67. Thus, a key principle of administrative and constitutional law is that where a statute provides an appeal procedure, that remedy should generally be exhausted before seeking judicial review. This is often expressed as part of the doctrine of exhaustion of alternative remedies. The doctrine postulates that when legislation sets out a clear process for appealing decisions (for example, an internal tribunal or appellate body), courts typically expect parties to follow that process before seeking a judicial review in the High Court or equivalent. Judicial review is a special procedure used to challenge the legality, procedural fairness, or reasonableness of a decision made by a public authority.

68. Exceptions (when judicial review may be allowed without exhausting remedies) include, the alternative remedy being inadequate or ineffective; delay in the statutory process would cause irreparable harm; there is evidence of bias or lack of impartiality in the appellate body

69. None of the above situations were pleaded in this case and neither is there any prayer for an exemption to resort to appeal nor are there any manifest extraordinary circumstances that would permit the Applicant to approach the judicial review court, or for this court to consider exempting him from resorting to the clear appeal procedure provided for, under section 38 of the *Legal Education Act*. It is important to bear in mind that section 9(2) of the *Fair Administrative Action Act*, which Act implements Article 47 of *the Constitution* makes judicial review a last resort and except where the statute expressly provides for judicial review or where the statute is silent on the mode of challenging decisions of subordinate courts or tribunals, bodies, authorities or persons exercising judicial or quasi-judicial function, judicial review should not be resorted to when there are other suitable ways of redressing the grievance.

70. Section 38 of the *Legal Education Act* clearly provides that where a party is aggrieved by the decision of the Respondent herein, that party or person may file an appeal to the high Court on points of law within thirty days.

71. In the instant case, and at the risk of repeating myself, the Applicant contends that the Respondent in its decision of 19th April 2024 erred in placing reliance on the nullification of the Legal Education (Accreditation and Quality Assurance) Regulations, 2016 to deny him admission to the Advocates Training Program this are points of law which the appellate court has jurisdiction to determine.

72. This court would therefore not usurp the Court's appellate jurisdiction.

73. In the premises, it would be a waste of judicial time to determine the merits of the judicial review application including the question of whether the 1st respondent in exercising its judicial function is immune from being sued as a party to proceedings.

74. I find and hold that the Applicant should have pursued, and he still has the opportunity, applying the provisions of the *Civil Procedure Act* and, to pursue his complaints through the appeal process. The *Civil Procedure Act* even provides for extension of time for appealing out of time and therefore the applicant cannot claim that he has been left without a remedy.

75. Having found that the applicant should have filed an appeal and not a judicial review application, I decline jurisdiction and having declined jurisdiction, the second issue for determination is rendered moot.

76. Accordingly, and for the above reasons, the notice of motion dated 31st May, 2025 is hereby struck out on account that the law provides for appeal against the decision of the Legal Education Appeals Tribunal and not judicial review.

77. The applicant is directed to approach the High Court by way of appeal as mandated by Section 38 of the *Legal Education Act*.

78. Each Party to bear their own costs of the judicial review proceedings.

79. This file is closed.

DATED, SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 28TH DAY OF APRIL, 2025

R.E. ABURILI

JUDGE