



Republic v Director, Kenya School of Law & 2 others; Kitsao (Exparte Applicant) (Judicial Review Application E001 of 2024) [2024] KEHC 2975 (KLR) (22 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2975 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
JUDICIAL REVIEW APPLICATION E001 OF 2024**

**M THANDE, J
MARCH 22, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

DIRECTOR, KENYA SCHOOL OF LAW 1ST RESPONDENT

KENYA SCHOOL OF LAW 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

ANTHONY WAZIRI KITSAO EXPARTE APPLICANT

JUDGMENT

1. This Court is tasked to determine the Application dated 15.1.24 in which the Applicant Anthony Waziri Kitsao seeks orders THAT:
 1. Spent.
 2. That an order of certiorari be issued to remove to this Honourable Court and quash the decision made by the 2nd Respondent through the 1st Respondent whereby it was adjudged on the 10th January, 2024, that the Ex-Parte Applicant does not qualify for the Advocates Training Programme (ATP)
 3. That an order of mandamus do issue compelling the 1st and 2nd Respondents to comply with the judgment and orders of the Legal Education Appeals Tribunal delivered on 5th April 2023.
 4. That costs in the LEAA/E013/2023 and this suit be provided for.



5. That this Honourable Court be pleased to issue any other of further consequential Orders and/or directions that it may deem fit and just to issue.
2. The Applicant's case is that he on 28.11.22 applied for the Advocates Training Programme (ATP) offered by the 2nd Respondent. Through the 1st Respondent however, the 2nd Respondent rejected his application on 4.1.23 for the reason that he had not attained the minimum threshold in KCSE grades. Being aggrieved, the Applicant filed an appeal dated 2.2.23 with the Legal Education Appeals Tribunal (the Tribunal). In its judgment dated 5.4.23, the Tribunal set aside the decision of the 2nd Respondent and directed that he be admitted to the ATP for the 2023/2024 academic year. The Applicant contends that the Respondents have failed to comply with the said judgment which has not been varied, reviewed, set aside or appealed against in accordance with Section 18 of the [Legal Education Act](#). Further that in response to his written demand dated 8.1.24 that the Respondents comply with the said judgment, the 1st Respondent vide an email dated 10.1.24 informed him that his application for admission had been rejected. The Applicant thus claims that failure of the Respondents to comply with the said judgment has resulted in irreparable harm and damage to his right to education enshrined in Article 43 of [the Constitution](#) and to fair administrative action under Article 47. He urged the Court to grant the judicial review orders as sought.
3. The 1st and 2nd Respondents filed a preliminary objection (PO) dated 14.2.24 challenging the jurisdiction of this Court to hear and determine this matter as it offends the doctrine of Constitutional avoidance, on account of Section 9(2) of the [Fair Administrative Action Act](#) as read together with Sections 33(3) and 38(1) of the [Legal Education Act](#).
4. The Application is further opposed vide a replying affidavit sworn on 23.2.24 by Frederick Muhia, the 2nd Respondent's Principal Officer, Academic Services. It is deposed that the judgment of the Tribunal contradicts the explicit determination of the Court of Appeal on the issue of admission criteria. Further that this Court lacks jurisdiction in this matter as the Tribunal is capable of enforcing its own decisions. The Applicant ought therefore to have moved the Tribunal to clarify its directions. It is further contended that the Application seeks to chip away explicit statutory provisions and regulations that govern the ATP and will lead to a state of anarchy and harm the legal profession.
5. The 3rd Respondent filed grounds of opposition dated 28.2.24. The grounds are that this Court cannot issue orders on an illegal judgment in that the Applicant did not give details of the date and month in 2013, in which he started his diploma studies. He cannot therefore be admitted to the ATP, as was held in a similar case of *Ian Lutta v Kenya School of Law* [2020] eKLR.
6. In a rejoinder by way of a supplementary affidavit sworn on 19.2.24, the Applicant averred that the Tribunal made a decision that he be admitted to the ATP. If the 1st and 2nd Respondents were aggrieved by the decision, they ought to have appealed against the same as provided under Section 38(1) of the [Legal Education Act](#). He further stated that the Act does not make provision for execution of the Tribunal's judgments and that the 1st and 2nd Respondents' position will lead to a state of anarchy and harm the legal profession and the rule of law.
7. Parties filed their respective written submissions and the issues distilled for determination are:
 - i. Whether this Court has jurisdiction to deal with the matter before it.
 - ii. Whether the orders sought should be granted.
 - iii. Who should have costs.



Whether this Court has jurisdiction to deal with the matter before it

8. The law, is that this Court may only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR the Supreme Court succinctly stated:

A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.

9. The Court went on to state:

Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.

10. This Court derives its jurisdiction principally from Article 165 of *the Constitution*. Article 165(3) provides as follows:

Subject to clause (5), the High Court shall have—

- (a) unlimited original jurisdiction in criminal and civil matters;
- (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
- (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
- (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
- (e) any other jurisdiction, original or appellate, conferred on it by legislation.



11. It is not in doubt that Article 165(3) of *the Constitution* confers upon the High Court unlimited original jurisdiction in civil and criminal matters, including the jurisdiction to hear any question with respect to the interpretation of *the Constitution*. In particular and relevant to the matter herein, Article 165(6) confers supervisory jurisdiction on this Court as follows:

The High Court has 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.

12. The jurisdiction of this Court may however be limited by *the Constitution* and statute in certain instances. The Court may thus only exercise that jurisdiction which has been conferred upon it by *the Constitution*, statute or both.
13. The jurisdiction of this Court has been challenged by the Respondents. The 1st and 2nd Respondents' position is that this Court lacks the jurisdiction to hear and determine this matter as it offends the doctrine of constitutional avoidance, on account of Section 9(2) of the *Fair Administrative Action Act* as read together with Sections 33(3) and 38(1) of the *Legal Education Act*. They thus urged the Court to decline jurisdiction on the basis that the matter does not meet the threshold for constitutional ripeness and the Court should adopt the doctrine of avoidance.
14. It is well settled that this Court will decline to decide a constitutional question when a matter may be properly decided on another basis. This is the doctrine of constitutional avoidance. What the doctrine means is that while this Court can indeed hear and determine a matter before it, it restrains itself from entertaining the same because there exists another appropriate forum that can hear and determine the matter effectively.
15. The doctrine of constitutional avoidance was expounded by the Supreme Court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR. The Court held as follows: -

(256) The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).

(258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.



16. And in *Uhuru Muigai Kenyatta v Nairobi Star Publications Limited* [2013] eKLR, Lenaola, J. (as he then was) stated:

I need say no more. Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in *Haco Industries* (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in *AG vs S.K. Dutambala Cr. Appeal No.37 of 1991* (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions.

The complaint in this case is not so serious as to attract Constitutional sanction.

17. It can be discerned from the foregoing that where another legal course is available through which a matter can be properly decided and which can give an applicant the relief sought, such course should be pursued and the constitutional court should decline to determine a constitutional issue in such matter.
18. The PO herein is anchored on Section 9(2) and (3) of the *Fair Administrative Action Act* (FAAA) and Sections 33(3) and 38(1) of the *Legal Education Act*.
19. Section 9 of the FAAA makes provision for judicial review. In order to appreciate the full import of the provision, it is necessary to reproduce the entire Section 9 as hereunder:
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 sub-section (1).
 4. Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.
 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.
20. A person aggrieved by an administrative action may apply to this Court, for review of such action. Where such administrative action results in denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights has been denied, such person may pursuant to Article 22 of *the Constitution*, institute court proceedings. An order of judicial review is one of the appropriate reliefs that this Court may grant, under Article 23.
21. Section 33 of the *Legal education Act* provides for the procedure of the Tribunal. Subsection (3) cited by the Respondents stipulates:

Except as is expressly provided in this Act or any Rules made thereunder, the Tribunal shall regulate its own procedures.



22. Section 38 of the Act relates to appeals from the Tribunal to this Court and provides:
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.
23. The circumstances herein are that the Applicant aggrieved by the Respondents' decision to deny him admission to the ATP, appealed to the Tribunal as provided under the Act. The Tribunal rendered its decision on 5.4.23 directing the Respondents to admit the Applicant to the ATP. To date, the decision of the Tribunal is yet to be complied with. The Respondents contend that the decision contradicts the explicit determination of the Court of Appeal on the issue of admission criteria. It is therefore quite clear that the party aggrieved is the Respondents who ought to have invoked the provisions of 38(1) of the Act, to appeal the same in this Court.
24. On the other hand, the Applicant being aggrieved by the decision of the Respondents followed the procedure laid down and appealed to the Tribunal. This accords with the provisions of Section 9 of the FAAA, which requires that all the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
25. A careful reading of the Act will show that it does not make provision for the mechanisms for enforcing the orders of the Tribunal. As such, another legal course does not exist through which the Applicant can pursue the enforcement of the order in question and thereby give him the relief sought. This leaves him with the option of approaching this Court as he has done.
26. Article 22(1) of *the Constitution* guarantees to every person the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. As indicated herein, this Court has unlimited original jurisdiction in civil and criminal matters, including the jurisdiction to hear any question with respect to the interpretation of *the Constitution*. Article 23 provides that the Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights and grant appropriate relief. The remedies available are stipulated in Article 23(3) as follows:

In any proceedings brought under Article 22, a court may grant appropriate relief, including–

- a. a declaration of rights;
- b. an injunction;
- c. a conservatory order;
- d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24; (e) an order for compensation; and
- e. an order of judicial review.



27. As can be seen, the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, is guaranteed under the Constitution. This right is not among those limited under Article 24. In light of the foregoing, the Court finds that it has the requisite jurisdiction to entertain the matter before it. Accordingly, the PO dated 14.2.24 fails.

Whether the orders sought should be granted

28. The main challenge of the Respondents to the grant of the orders sought is that the judgment of the Tribunal contradicts the decision of the Court of Appeal in the case of Kenya School of law v Otene Richard Akomo & 41 Others, Nairobi Civil Appeal No. E472 of 2021, (Otene Richard Akomo case), in so far as the admission criteria to the ATP is concerned.
29. It is the Respondents' case that the Applicant does not qualify for admission to the ATP by reason of academic progression because the applicable law is the Kenya School of Law Act does not provide for academic progression.
30. The 1st and 2nd Respondents submitted that the Tribunal acted in blatant disregard of the judgment of the Court of Appeal and has moved to the High Court to appeal the decision of the Tribunal and seek orders for stay pending the said appeal. With respect, this contention is not supported by any evidence on record. The replying affidavit sworn by Frederick Muhia did not allude to this nor was a copy of the alleged appeal exhibited. This is thus a new issue raised in submissions.
31. It is trite that parties are bound by their pleadings and that new issues cannot be raised in submissions as the Respondents seek to do, and any issues so raised, are best ignored. This was well articulated by Korir, J. (as he then was) in the case of Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting and Training Limited & another [2014] eKLR where he stated:
- The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.
32. The Applicant stated that following the decision of the Tribunal, he on 22.8.23 applied afresh for admission to the ATP, attaching the same and all requisite documents. He continued to follow up the matter with the Principle Legal Officer of the 2nd Respondent who assured him that he would get a letter of admission for the 2024/2025 intake, scheduled to begin on 5.2.24. However, on 8.1.24, the said Principle Legal Officer informed him that he would not be admitted and should await the ongoing amendments to the Kenya School of Law Act. In response to his letter dated 8.1.24 demanding admission in compliance with the Tribunal's judgment, the 2nd Respondent vide a letter dated 10.1.24 signed by the 1st Respondent informed him that his application for admission to the ATP was rejected based on the interpretation of the Second Schedule of the Kenya School of Law Act by the Court of Appeal in the Otene Richard Akomo case (supra).
33. The issue that the Tribunal's decision contradicted the decision of the Court of Appeal was raised by the Respondents in January 2024, about 9 months after the decision was rendered. As indicated earlier, the correct procedure would have been for the Respondents being dissatisfied with the decision, to invoke the appellate jurisdiction of this Court under Section 38(1) of the Act, to challenge the decision of the Tribunal.



34. Our courts have repeatedly stated that where a clear, sufficient and adequate legal avenue and procedure for redress has been provided by law, such procedure must be followed to the letter. In the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR where the Court of Appeal stated:

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

35. Similarly, in the case of Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR the Court of Appeal expressed itself thus:

Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime. In the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, this Court emphasized:-

“...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. We observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions....”

36. Section 38 of the Act relied on by the Respondents, provides that 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. It is not clear why the Respondents, who clearly aggrieved by the decision of the Tribunal, did not invoke the said provision, to appeal to this Court against the decision of the Tribunal. The issue now raised that the decision of the Tribunal contradicts the decision of the Court of Appeal ought to have been raised in an appeal contemplated under Section 38(1) of the Act.

37. The Court is keenly aware that in the matter before it, the relief sought is in the nature of judicial review. In such a case, the Court exercises a special jurisdiction in which it is only concerned with the decision making process and not the merits of the decision under review. In the case of Nation Media Group Limited v Cradle - The Children’s Foundation Suing Through Geoffrey Maganya (Civil Appeal 149 of 2013) [2016] KECA 839 (KLR) (22 January 2016) (Judgment), the Court of Appeal had this to say concerning this Court’s special jurisdiction of judicial review:

In judicial review, the High Court has special jurisdiction to issue orders of mandamus, prohibition and certiorari as the remedies against acts or omissions by public entities. See Biren Amritlal Shah & Another v Republic & 3 Others (2013) eKLR. It is not concerned with reviewing the merits or otherwise, of a decision by a public entity, in respect of which the application for judicial review is made, but the decision making process itself. It is important to note in every case, that the purpose of judicial review is to determine whether the applicant was accorded fair treatment by the concerned public body, and that it is not within the remit of the court to substitute its own opinion with that of the public entity charged by law to decide the matter in question. See R v Judicial Service Commission - Misc. Civil Application No 1025 of 2003.



38. The circumstances herein are that a decision was made by the Tribunal on 5.4.23, directing that the Applicant be admitted to the ATP. That decision which was neither stayed nor appealed against is yet to be complied with to date. As guided by the Court of Appeal in the cited decision, it is not within the remit of this Court exercising judicial review jurisdiction, to substitute its own opinion for that of the Tribunal.
39. The Applicant has submitted that failure by the 1st and 2nd Respondents to admit him to the ATP as directed by the Tribunal has subjected him to the same hurdle twice, and is unfair, unjustified and unreasonable. He is thus aggrieved by the decision making process of the said Respondents, which is tainted with illegality, irrationality and procedural impropriety. It has also deprived him of the right to education and fair administrative action and further violated his legitimate expectation of joining the ATP.
40. The orders given by the Tribunal as indeed by any court of competent jurisdiction, are not in vain and a party to whom an order is directed is required to obey the same. In the case of *B vs. Attorney General* [2004] 1 KLR 431 Ojwang, J (as he then was) in stated:
- The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.
41. And in *Teachers Service Commission v Kenya National Union of Teachers & 2 others* [2013] eKLR, Ndolo, J. considered defiance of a court order and had this to say:
- A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.
- A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.
42. Compliance with court orders is central to the rule of law, which is one of the national values and principles of governance provided in Article 10 of *the Constitution*, which stipulates:
- (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them–
- (a) applies or interprets this Constitution;
- (b) enacts, applies or interprets any law; or
- (c) makes or implements public policy decisions
43. The said national values and principles of governance are binding on all persons including all state organs, state and public officers. As such, the 1st and 2nd Respondents are bound by the same when interpreting *the Constitution* or any law or making or implementing public policy decisions. In particular, being bound by the rule of law, they ought to have complied with the decision of the Tribunal or being dissatisfied thereby, appealed against it as set out in law. There being no appeal against the decision of the said decision or stay thereof, the Respondents were obligated to comply with the



same and admit the Applicant to the ATP as directed. Defiance of the said decision is not an option available to them. Accordingly, the Court would be justified to grant the orders sought.

44. The Court has considered the case of *Ian Lutta v Kenya School of Law* (supra) relied on by the 3rd Respondent and notes that it does not relate compliance with a decision of the Tribunal as in the present case. As such, the same is not relevant.

Who should have costs

45. Costs always follow the event and are at the discretion of the court. In the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR, the Supreme Court stated that the purpose of costs is not to penalise the losing party but to compensate the successful party for costs incurred in prosecuting or defending the suit:

- (14) So the basic rule on attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party; rather, it is for compensating the successful party for the trouble taken in prosecuting or defending the suit. In Justice Kuloba's words [Judicial Hints on Civil Procedure, at p.94]:

“[T]he object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. It must not be made merely as a penal measure... Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting an action.”

46. While the law provides that the costs of and incidental to all suits shall be in the discretion of the court, which shall have full power to determine by whom and to what extent such costs shall be paid, this Court must determine whether the circumstances of this case call for an award of costs. In this regard, I find useful guidance in the case of *Jasbir Singh Rai* (supra), where the Supreme Court went on to state that the principle of law that costs follow the event is not invariable as follows:

Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the Appellant.

47. In the case of *Mbithi Peter Mutuku v Council of Legal Education & 2 others* [2016] eKLR, Odunga, J. (as he then was) found that in determining the issue of costs, the conduct of parties ought to be considered. The learned Judge stated:

In determining the issue of costs, the Court is entitled to consider the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the legal proceedings, the events which eventually led to their termination, the stage at which the proceedings were terminated, the manner in which they were terminated, whether a party has succeeded on part of his case, even if he has not been wholly successful, the extent of such success, the subject of litigation and the relationship between the parties and the need to promote reconciliation amongst the disputing parties pursuant to Article 159(2)(c) of *the Constitution*. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation, the eventual termination thereof and the likely consequences of the order for costs. With respect to the conduct of the parties this includes the conduct before as well as during, the proceedings and in particular



the extent to which the parties followed any relevant pre-action protocol and directions issued by the Court; whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; the manner in which a party has pursued or defended his case or a particular allegation or issue; and whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.

48. The circumstances of this case are that the Applicant moved to the Tribunal to challenge the decision of the 2nd Respondent to deny him admission in the ATP for the 2023/2024 academic year. A decision was made in his favour on 5.4.23. Since then, he has been pursuing the 2nd Respondent to comply with the said decision and admit him to the program. He lost out on the 2023/2024 intake and was told to wait for the 2024/2025 intake, only to be later informed through the 1st Respondent that his application was rejected. The conduct of the 2nd Respondent is quite unbecoming and has undermined the rule of law. It has further compromised and violated the Applicant's right to education under Article 43 and his right under Article 47 of *the Constitution* to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The 1st and 2nd Respondents' failure to comply with the Tribunal's decision necessitated the filing of this suit. In light of this, I find that the Applicant is entitled to costs.
49. In the end and in view of my analysis and conclusion herein above, it is my finding that the Applicant has established grounds for the Court to grant the orders sought. Accordingly, I make the following orders:
1. An order of certiorari be and is hereby issued quashing the decision of 10.1.24 by the 2nd Respondent through the 1st Respondent rejecting the Applicant's Application to the Advocates Training Programme.
 2. An order of mandamus be and is hereby issued compelling the 1st and 2nd Respondents to comply with the judgment and order of the Legal Education Appeals Tribunal delivered on 5.4.23.
 3. The Applicant shall have costs of this suit which shall be borne by the 1st and 2nd Respondents.

SIGNED DATED AND DELIVERED IN MALINDI THIS 22ND DAY OF MARCH 2024.

M. THANDE
JUDGE

