Republic v Director, Kenya School of Law & 2 others; Abdi (Exparte) (Application E114 of 2023) [2023] KEHC 26299 (KLR) (Judicial Review) (8 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26299 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E114 OF 2023

J NGAAH, J

DECEMBER 8, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

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

KENYA SCHOOL OF LAW ..... 2ND RESPONDENT

ATTORNEY GENERAL ..... 3RD RESPONDENT

AND

FARAH AHMED ABDI ..... EXPARTE

Acquisition of a certificate of equation from the Commission for University Education would be described as a properly acquired equation of grades

The Legal Education Appeals Tribunal (the Tribunal) had directed that the applicant submits his application to join the Advocates Training Program for reconsideration upon equation of grades by an authorised body. The application sought to compel the 1st and 2nd respondents to comply with the judgment of the Tribunal. The court found that in the absence of any obvious alternative route for execution or enforcement the Tribunal's judgment, the applicant was entitled to initiate the judicial review proceedings. The court further held that an acquisition of a certificate of equation from the Commission for University Education would properly be described as a properly acquired equation of grades. The court also held that if the Kenya National Qualifications Authority was ill-equipped to provide the requisite certification it would be irrational to insist on its certification as the properly acquired equation of grades.

Reported by Kakai Toili

Jurisdiction *– jurisdiction of the Commission for University Education and the Kenya National Qualifications Authority - power of equation/certification of grades - whether the Commission for University Education had*

the power of equation of grades - whether it was irrational to require certification from the Kenya National Qualifications Authority of grades where the Authority was ill-equipped to provide such certification – Universities Act, Cap 210, section 5(1)(g).

Judicial Review *– judicial review remedies – availability of judicial review remedies where there were alternative remedies - what were the factors to consider in deciding whether to grant relief by judicial review when an alternative remedy was available - whether judicial review proceedings could be initiated in the absence of an alternative route of executing or enforcing a Legal Education Appeals Tribunal's judgment.*

Constitutional Law *- doctrines of constitutional avoidance and ripeness of a matter – applicability - whether the doctrines of constitutional avoidance and ripeness of a matter were applicable where there existed an alternative remedy which had not been embraced.*

Brief facts

The applicant applied to join the Advocates Training Program (the ATP) offered by the Kenya School of Law, the 2nd respondent. The 2nd respondent issued the applicant with an admission letter. Subsequently, the applicant was registered and admitted into the ATP. However, the applicant claimed that the 2nd respondent revoked his admission without according him any hearing. Aggrieved, the applicant lodged an appeal at the Legal Education Appeals Tribunal (the Tribunal). The Tribunal set aside the decision made by the 2nd respondent and directed that the applicant submits his application for reconsideration by the 2nd respondent upon equation of grades by an authorised body.

The applicant submitted his grades for alignment to the Commission for University Education (the Commission). The Commission confirmed that the applicant had the requisite qualifications to undertake a bachelor's degree in Kenya. Subsequently, the applicant served the respondents with the decision of the Commission and resubmitted his application for consideration. The 1st and 2nd respondents rejected the applicant's application and directed him to obtain another equation for them to reconsider his application. The Director of the Kenya School of Law (the 1st respondent) insisted that the applicant had to obtain equation of his grades from the Kenya National Qualification Authority.

The applicant claimed that the Tribunal had declared that the Authority did not have authority of aligning grades in Kenya. The application sought the judicial review order of *mandamus* to compel the 1st and 2nd respondents to comply with the order and judgment of the Tribunal.

Issues

i. Whether the Commission for University Education had the power of equation of grades.
ii. Whether it was irrational to require certification from the Kenya National Qualifications Authority of grades where the Authority was ill-equipped to provide such certification.
iii. What were the factors to consider in deciding whether to grant relief by judicial review when an alternative remedy was available?
iv. Whether judicial review proceedings could be initiated in the absence of an alternative route of executing or enforcing a Legal Education Appeals Tribunal's judgment.
v. Whether the doctrines of constitutional avoidance and ripeness of a matter were applicable where there existed an alternative remedy which had not been embraced.

Held

1. There was no provision in the Legal Education Act on execution of the Tribunal's judgment. It was not clear whether the Tribunal had made any rules which would inform execution of the Tribunals judgments, as part of "other matters" for which such rules were to be made. However, the court doubted that such a material aspect of the appeal process as execution of the Tribunal's judgments would be catered for in the rules rather than in the primary legislation. The power to enforce its own judgments would ordinarily be part of the jurisdiction with which the Tribunal had been clothed and it would be expressly provided in the Act rather in subsidiary or secondary legislation.

2. It would be asking too much of the applicant, to adopt a non-existent procedure to enforce what he believed were the fruits of his judgment. He certainly could not be faulted for not following a process that had not been provided for. Judicial review stepped in where there was such a gap in addressing grievances such as the applicant's where no other alternative form of redress existed or where the alternative, if it existed, was not as convenient, beneficial and efficacious.
3. In exercise of their discretion, courts would not normally make the remedy of judicial review available where there was an alternative remedy by way of appeal or internal complaints procedure or where some other body had exclusive jurisdiction in respect of the dispute. But judicial review may be granted where the alternative statutory remedy was nowhere near convenient, beneficial and effectual.
4. Factors which would be taken into account by a court when deciding whether to grant relief by judicial review when an alternative remedy was available were;
    1. whether the alternative statutory remedy would resolve the question at issue fully and directly; and
    2. whether the statutory procedure would be quicker, or slower, than the procedure by way of judicial review.
5. The question whether an alternative remedy existed did not even arise in the instant case because there was no evidence either in the Legal Education Act or in the rules (assuming they had been made) that such an alternative remedy existed.
6. In the absence of any obvious alternative route by which the applicant could execute or enforce the Tribunal's judgment and for reasons given, the applicant was entitled to initiate the judicial review proceedings. Accordingly, the court was properly seized of jurisdiction to entertain the suit.
7. The arguments that the suit was either not ripe or that it was premature under the doctrine of constitutional avoidance were unsustainable. Neither of those doctrines would apply where it had not been demonstrated, to the satisfaction of the court, that there existed an alternative remedy or internal dispute resolution or appellate mechanisms which the applicant had failed to embrace.
8. In the face of section 5(1)(g) of the Universities Act, the applicant could not be faulted for approaching the Commission for equation of his qualifications because the Commission had the mandate not only to recognise degrees, diplomas and certificates conferred or awarded by foreign universities and institutions but it also had the mandate to equate such qualifications as contemplated by the Tribunal. In other words, owing to the provisions of section 5(1)(g), an acquisition of a certificate of equation from the Commission would be properly described as a properly acquired equation of grades.
9. It was rather perturbing that the 1st respondent would disregard the equation certification of the applicant's qualifications by the Commission after the applicant approached the Commission for the certification. No reason was given why the applicant's application could not be reconsidered on the basis of the of the certification by the Commission and if, for any reason the certification by the Commission was wanting in any respect, why it was so wanting.
10. In the absence of any reason why the applicant's application could not be considered on the basis of the certification by the Commission and considering that the 1st respondent had neither given nor suggested any other alternative entity from which the applicant could obtain the requisite certification, it could only be assumed that, perhaps, the 1st and 2nd respondents were insistent on a certification by Kenya National Qualifications Authority. However, that would amount to compelling the applicant to obtain a certification of equation from a body that had been lacking in law to undertake the equation exercise.
11. In purporting to align the applicant's qualifications, the Kenya National Qualifications Authority was relying on rules or regulations that were contrary to the law, in particular section 11(1) of the Statutory Instruments Act. That was a fact which the Tribunal established as having been conceded by both the 2nd respondent and the Kenya National Qualification Authority itself.

12. If the Kenya National Qualifications Authority was ill-equipped to provide the requisite certification it would be irrational, in the language of judicial review, to insist on its certification as the properly acquired equation of grades. It would also be irrational, and to a certain degree unlawful, to reject the equation by the Commission when it was clear from section 5(1) of the Universities Act that among the Commission's functions was to equate qualifications such as degrees, diplomas and certificates conferred or awarded by foreign universities and institutions with those obtained locally and, at any rate, in accordance with the standards and guidelines set by the Commission.
13. In its judgment rendered on June 23, 2023, the Tribunal imposed a duty upon the 1st respondent to reconsider the applicant's application. The duty was, for all intents and purposes, in the nature of a public duty. A demand for payment performance of that duty having been made and the 1st respondent's Director having come out in clear terms that he would not be performing the duty, and having held that there was no reason or any viable reason why the 1st respondent should not reconsider the applicant's application, no other evidence was required to demonstrate that the 1st respondent had failed to perform a public duty with which he was charged in the Tribunal's judgment. A *mandamus* order would issue in such circumstances.

Application allowed.

Orders

i. *Order of mandamus issued compelling the 2nd respondent to reconsider and determine the applicant's application for admission to the ATP based on the evidence with which it had been presented by the applicant.*
ii. *The applicant to have costs of the suit.*

Citations

Cases

Kenya

1. *AB & another v RB* Civil Application 4 of 2016; [2016] KECA 597 (KLR); [2016] eKLR - (Mentioned)
2. *B v Attorney General* Miscellaneous Civil Application 1609 of 2003 (OS); [2004] eKLR; (2004) 1 KLR 431 - (Mentioned)
3. *Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 others* Petitions 14, 14 A, 14 B & 14 C of 2014 (Consolidated); [2014] eKLR - (Mentioned)
4. *Hinga v Gaitho Oil Limited* Environment & Land Case 1069 of 1998; [2019] KEELC 2542 (KLR); [2019] eKLR - (Mentioned)
5. *Jamal, Salim v Yusuf Abdulahi Abdi & Ali Salado Abdi* Civil Appeal 103 of 2016; [2018] KECA 14 (KLR); [2018] eKLR - (Mentioned)
6. *Kenya Shell Limited v Benjamin Karuga Kibiru & another* Civil Application 97 of 1986; [1986] KECA 94 (KLR); [1986] eKLR; (1986) KLR 410 - (Mentioned)
7. *Kilonzo, Francis Musyoki & another v Vincent Mutua Mutiso* Succession Cause 215 of 2013; [2013] KEHC 1291 (KLR); [2013] eKLR - (Mentioned)
8. *Kiriro Wa Ngugi & 19 others v Attorney General & 2 others* Petition 254 of 2019; [2020] KEHC 8819 (KLR); [2020] eKLR - (Mentioned)
9. *Macharia & another v Kenya Commercial Bank & Another* Application 2 of 2011; [2012] eKLR; [2012] 3 KLR 199 - (Mentioned)
10. *Musakali, John v Speaker County of Bungoma & 4 others* Petition 11 of 2015; [2015] KEHC 2131 (KLR); [2015] eKLR - (Mentioned)
11. *Muthinja, Geoffrey & another v Samuel Muguna Henry & 1756 others* Civil Appeal 10 of 2015; [2015] KECA 304 (KLR); [2015] eKLR - (Mentioned)

12. *Nyaga, John Njue v Nicholas Njiru Nyaga & another* Civil Appeal 175 of 2010; [2013] KECA 235 (KLR); [2013] eKLR - (Mentioned)
13. *Oraro v Mbaja* Civil Suit 85 of 1992; [2005] KEHC 731 (KLR); [2005] eKLR; [2005] KLR 141 - (Mentioned)
14. *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* Civil Appeal 50 of 1989; [1989] eKLR; [1989] KLR 1 - (Mentioned)
15. *Republic v Town Clerk of Webuye County Council & Ex parte Ayub Murumba Kakai Suing As The Legal Representative of The Estate of Willington Welakhasia Kakai (Deceased))* Miscellaneous Civil Application 448 of 2006; [2014] KEHC 7207 (KLR); [2014] eKLR - (Mentioned)
16. *Republic v Attorney General & 2 others Ex parte James Alfred Koroso* Miscellaneous Application 44 of 2012; [2013] KEHC 90 (KLR); [2013] eKLR - (Mentioned)
17. *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex parte Stanley Muturi* Miscellaneous Civil Application 221 of 2016; [2017] KEHC 7857 (KLR); [2017] eKLR - (Mentioned)
18. *William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* Constitutional Petition 159 of 2018 & 201 of 2019 (Consolidated); [2020] eKLR - (Mentioned)

United Kingdom

1. *Hadkinson v Hadkinson* [1952] 2 All ER 56 - (Mentioned)
2. *R v Hillingdon London Borough Council, ex p Royco Homes Ltd* [1974] 2 All ER 643 - (Applied)
3. *R v Paddington Valuation Officer, ex p Peachey Property Corporation Ltd* [1965] 2 All ER 836 at 840 - (Applied)
4. *R v Visitors to the Inns of Court, ex parte Calder* [1993] 2 All ER 876 - (Applied)

Regional Court

Mukisa Biscuits Manufacturing Company Limited v West End Distributors [1969] EA 696 - (Mentioned)

Statutes

1. Civil Procedure Act (cap 21) sections 30, 31 — (Interpreted)
2. Civil Procedure Rules (cap 21 Sub Leg) order 53 rule 3 — (Interpreted)
3. Constitution of Kenya, 2010 articles 22(7); 23(1); 23(3); 43; 159; 165(6); 165(7) — (Interpreted)
4. Fair Administrative Action Act (cap 7L) sections 9(2); 9(3) — (Interpreted)
5. Kenya National Qualifications Framework Regulations, 2018 (cap 214 Sub Leg) In general— (Cited)
6. Kenya School of Law Act (cap 16C) In general— (Cited)
7. Law Reform Act (cap 26) section 8 — (Interpreted)
8. Legal Education Act (cap 16B) sections 32, 33(3); 38(1); 39 — (Interpreted)
9. Statutory Instruments Act (cap 2A) section 11(1) — (Interpreted)
10. Universities Act (cap 210) sections 4, 5, 5(1)(g) — (Interpreted)

Texts

1. Garner, BA., Black, HC., (Eds) (2014) *Black's Law Dictionary* (St Paul, Minnesota: Thomson Reuters 10th Edn)
2. Garner, BA., (Ed) (2009) *Black's Law Dictionary* (St Paul Minnesota: West Group 9th Edn)
3. Hogg, QM., (Lord Hailsham) *et al* (Eds) (1995) *Halsbury's Laws England* London: Butterworth 4th Edn Vol 17 para 13)
4. Saunders, JB., Burrows, R., (Eds) (1989) *Words and Phrases Legally Defined* London: Butterworths Vol 3 p 113)

Advocates

None mentioned

JUDGMENT

Application

1. The application before court is a motion dated 28th August 2023 in which the applicant seeks the judicial review order of *mandamus*. It is the only primary prayer sought in the application and it is framed, thus:

> "1. That an order of *mandamus* do (*sic*) issue compelling the 1st and 2nd respondents to comply with the order and judgment of the Legal Education Appeals Tribunal delivered on July 23, 2023."

2. Besides this substantive order, the applicant has also sought an order on costs.

3. The application is expressed to be brought under section 8 of the *Law Reform Act*, cap 26 and order 53 rule 3 of the *Civil Procedure Rules*.

4. It is based on a statutory statement dated 18th August 2023 and an affidavit sworn by the applicant, on even date, in verification of the facts relied upon.

5. According to the applicant, sometime in September 2022, he applied to join the Advocates Training Program (also, hereinafter referred to as "the ATP") offered by the 2nd respondent. Upon conducting due diligence and establishing that the applicant is qualified for admission, the 2nd respondent issued the applicant with an admission letter on 10 February 2023.

6. The applicant paid the requisite fees after which he was registered and admitted into the advocates training program. According to the admission letter, he was due to complete the program within twelve months from the date of admission.

7. However, by a letter dated February 20, 2023, the 2nd respondent revoked the applicant's admission without according the applicant any hearing. Being dissatisfied with the 2nd respondent's decision, the applicant lodged an appeal at the Legal Education Appeals Tribunal (or, hereinafter, "the Appeals Tribunal").

8. The Tribunal rendered its decision dated June 23, 2023. In its decision, the tribunal set aside the decision made by the 2nd respondent and directed that the applicant submits his application for reconsideration by the 2nd respondent upon equation of grades by an authorised body.

9. On July 5, 2023, the applicant served the judgment upon the 1st and 2nd respondents. The respondents acknowledged receipt of the judgment and directed the applicant to obtain another equation for them to reconsider his application.

10. Following the respondents' direction, the applicant submitted his grades for alignment to the Commission for University Education. By a letter dated July 11, 2023, the Commission for University Education confirmed that the applicant has the requisite qualifications to undertake a bachelor's degree in Kenya. On even date, the applicant served the respondents with the decision of the Commission for University Education and resubmitted his application for consideration in accordance with the order of the Appeals Tribunal.

11. By a letter dated July 17, 2023, the 1st and 2nd respondents rejected the applicant's application and directed him to obtain another equation for them to reconsider his application. Upon further enquiry,

the 1st respondent insisted that the applicant has to obtain equation of his grades from the Kenya National Qualification Authority, yet the Legal Education Appeals Tribunal had declared that Kenyan National Qualification Authority had no authority of aligning grades in Kenya.

12. By a letter dated July 26, 2023, the applicant demanded the respondents to comply with the order of the Appeals Tribunal. However, as at the time the applicant filing the instant application, the 1st and 2nd respondents had not responded to the applicant's demand letter.

13. The applicant contends that the 1st and 2nd respondents' blatant violation of the order and judgment of the Appeals Tribunal continue to deprive him of the right to education enshrined in article 43 of the *Constitution*. The respondents have also failed to comply with the decision of the Appeals Tribunal yet they have not appealed against it in accordance with section 38 of the *Legal Education Act*, No 27 of 2012.

1st and 2nd Respondents' Response

14. The 1st and 2nd respondents raised a preliminary objection to the applicant's application to the effect that this honourable court lacks jurisdiction to hear and determine this suit on account of section 9(2) and (3) of the *Fair Administrative Action Act*, No 4 of 2015 as read with section 33(3) and 38(1) of the *Legal Education Act*. It is also pleaded in the same notice of preliminary objection that the application is not properly before this honourable court and that it offends the doctrine of constitutional avoidance. The application is said to be malicious, vexatious and an abuse of the process of the court.

15. Apart from the preliminary objection, the 1st And 2nd respondents also filed a replying affidavit opposing the applicant's application.

16. The affidavit was sworn by Fredrick Muhia who has described himself as the principal officer in, apparently, the 2nd respondent's academic services department.

17. Muhia admitted that the applicant applied for admission to the ATP for the 2023/24 academic year. However, the applicant was found unqualified because his academic qualifications were below the statutory threshold.

18. The applicant then moved to the Legal Education Appeals Tribunal for orders that the equation by the Kenya National Qualifications Authority be set aside and a declaration that the applicant is qualified to be admitted to the 2nd respondent's Advocates Training Program.

19. Muhia has also admitted that on June 23, 2023, the applicant obtained a judgment according to which the 2nd respondent was directed to reconsider the applicant's qualification upon being provided with a certificate of equation of his grades from a lawfully mandated entity. The applicant is said to have failed or refused to provide the certificate of equation specific to his grades. Instead, the applicant is demanding that he be admitted on the strength of what has been described as "a non-specific letter of recognition and equation" by the Commission of University Education.

20. According to Muhia, the specificity in the equation of academic qualifications is pertinent to the making of a determination whether the applicant meets the standard set out in the *Kenya School of Law Act* on admission requirements. The applicant, it is alleged, did not comply with the directions of the Appeals Tribunal by providing a certificate specifically equating his international grades with the Kenyan academic grades.

21. If the applicant was to comply with the directions of the Appeals Tribunal, it has been urged, he would have been admitted to the Advocates Training Program. This compliance entailed, obtaining and availing the equivalent of a minimum grade B (plain) in English language or Kiswahili and a mean

grade of C (plus) in the Kenya Certificate of Secondary Education as required by the *Kenya School of Law Act*.

22. The applicant's application, it is alleged, is a derogation of the explicit statutory and regulatory provisions governing the Advocates Training Program.

23. It has also been sworn that this honourable court does not have jurisdiction to entertain this application because the question of enforcement or execution of the judgment of the tribunal lies with the Appeals Tribunal itself and not this court. In any event, the tribunal has not transferred its decree to this honourable court for execution. The applicant has also not appealed against the decision of the Appeals Tribunal. And if, per adventure, the judgment of the Appeals Tribunal was ambiguous, it was incumbent upon the applicant to seek clarification of the judgment from the Tribunal. When all these factors are considered, the respondents plead, the applicant's application turns out to be an abuse of this honourable court.

Applicant's Submissions

24. In the submissions filed on behalf of the applicant, it was submitted that the Legal Education Appeals Tribunal does not have jurisdiction to enforce its orders. According to section 32 of the *Legal Education Act*, the jurisdiction of the tribunal is restricted to notifying the parties concerned of an appeal lodged against them; summoning witnesses; taking evidence on oath or affirmation and calling for the production of books and other documents which the tribunal may receive by affidavits and administration of interrogatories.

25. Articles 165(6), 165(7) and 22(1) of the *Constitution* were cited in support of the submission that this honourable court has the jurisdiction to entertain this suit in exercise of its supervisory jurisdiction and that it is the right forum to institute court proceedings where a person's right or fundamental freedom in the Bill of Rights has been denied, violated or infringed upon or is, otherwise, threatened. Also invoked in the same breath are articles 23(1) and 23(3) of the *Constitution*.

26. The decision of the Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank & Another* [2012] eKLR was also cited for the Submission that the jurisdiction of the court flows from either the constitution or legislation or both. As far as the suit is concerned, the provisions of the *Constitution* which have hitherto been cited by the applicant form the basis of the jurisdiction of this honourable court to determine the applicant's grievances and grant the appropriate orders.

27. Unlike this honourable court, the Legal Education Appeals Tribunal is not vested with such a jurisdiction and, in particular, it cannot enforce its judgment nor issue the order of mandamus sought by the applicant.

28. Speaking of the order of *mandamus*, the applicant has urged that the order should issue because the respondents have, in their replying affidavit, admitted that they were aware of the judgment of the tribunal which was delivered in their presence on June 23, 2023.

29. The specific order by the tribunal and which is in issue in this application was that the applicant's application was remitted subject to

> " a properly acquired equation of grades."

30. On his part, the applicant duly acquired the equation from the Commission for University Education by a letter dated July 11, 2023, certifying that the applicant has the requisite qualifications to pursue a bachelor of laws degree in Kenya. The tribunal held that the Kenya National Qualification Authority had no legal authority to equate the applicant's grades and, therefore, it is unconscionable that the

1st and 2nd respondents would insist on denying the applicant admission to the Advocates Training Program only because the applicant did not acquire a certificate of equation from the Kenya National Qualification Authority.

31. By insisting on a certificate of equation from the Kenya National Qualification Authority, the 1st and 2nd respondents are not only blatantly disobeying the order of the Tribunal, but also, by extension, they are infringing upon the applicant's right to education as guaranteed under article 43 of the *Constitution* and the right to enjoy the fruit of his judgment. To this end, the applicant relied on the decision in *Republic v Town Clerk of Webuye County Council & another* (HCCC 448 of 2006) where it was held, *inter alia*, that a decree holder's right to enjoy fruits of his judgment must not be thwarted and that the court should adopt an interpretation that favours enforcement of the accrued rights.

32. It was also urged that judicial bodies and tribunals do not issue orders in vain and in this regard the case of *Kenya Shell Ltd v Kibiru & another* [1986] KLR 410 was cited. The Court of Appeal held that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without a just cause.

33. On the general question of compliance with the court orders, the applicant cited the cases of *AB & another v RB*. Civil Application No 4 of 2016 [2016] eKLR and *B v Attorney General* [2004] 1KLR 431. The courts in these cases stressed the need to comply with court orders. That compliance is an issue of fundamental concern for a society whose existence is based on the rule of law and that courts do not issue orders in vain. Also cited in the same breath are the decisions of *Hadkinson v Hadkinson* [1952] 2 All ER 56; *Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County; ex parte Stanley Muturi* [2017] eKLR.

34. With particular reference to compliance with the order of mandamus, the applicant cited the case of *Republic v Attorney General & another; ex parte James Alfred Koroso* (Miscellaneous Application No 44 of 2012) where it was held that the order of mandamus would issue where there is no other option of realising the fruits of a judgment against the government since the latter is insulated from execution process. It was urged that unless this honourable court issues an order of mandamus, the applicant has no other means of realising the fruits of his judgment and will continue to suffer violation of his constitutional right to education.

1st and 2nd Respondents' Submissions

35. In response to the applicant's submissions, the 1st and 2nd respondents submitted on their preliminary objection and, in particular, on the questions of whether this court has jurisdiction to entertain this suit and whether the application offends the doctrine of constitutional avoidance.

36. The respondents have from the outset submitted on what constitutes a preliminary objection and cited several court decisions in this respect. The decisions cited include the oft-cited case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* [1969] EA 696; *John Musakali v Speaker County of Bungoma & 4 Others* (2015) eKLR and *Oraro v Mbaja* [2005] KLR 141.

37. The foundation upon which the preliminary objection is built is the question of jurisdiction and, for this reason, the respondent have submitted quite extensively on what jurisdiction entails. Several decisions have been cited in this regard including the *Halsbury's Laws of England*, 4th Edition Volume 9; *Black's Law Dictionary* 9th Edition and *Words and Phrases Legally Defined* Volume 3. All these authorities gave been cited for their definition of the word "jurisdiction" as employed in its technical sense. Other authorities which the respondents have cited the cases of *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1; *Jamal Salim v Abdulahi Abdi & Another* Civil Appeal No

103 of 2016 [2018] eKLR and the Supreme Court decision of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & Others* (*supra*).

38. Of course there is no dispute, and indeed there ought to be any dispute on what both a preliminary objection and jurisdiction entail and the need for the court to satisfy itself that it is seized of the latter before it can entertain and dispose of any particular matter before it.

39. Of particular relevance to this application is the reason why the respondents would take the position that the court lacks jurisdiction to determine the dispute before it. The answer to this question will be considered in due course as a preliminary point.

40. On the question of constitutional avoidance, the 1st and 2nd respondent's learned counsel tied it to the concept of non-justiciability of disputes. It has been urged that this particular concept of non-justiciability is itself rooted in article 159 of the *Constitution* which advocates for alternative dispute resolution mechanisms. According to the 1st and 2nd respondents, the concept is made up of three doctrines; first, the political question doctrine; second, the constitutional avoidance doctrine and, third, the ripeness doctrine. These doctrines are said to have been discussed in Constitutional Petition No 254 of 2019, *Kiriro wa Ngugi & 19 others v Attorney General & 2 others* [2020] eKLR. The three-judge bench in that petition, is said to have held that the three doctrines are

> " cross-cutting and closely intertwined."

41. The court made cited the Supreme Court decision in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 Others* [2014] eKLR in which the court adopted the definition ascribed to "constitutional avoidance" by the *Black's Law Dictionary* (10th Edition at page 377). The definition given by the dictionary is

> " the doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion".

42. It was also urged that the doctrine of constitutional avoidance is similar to the doctrine of exhaustion. This latter doctrine arises when a litigant aggrieved by an action, more often than not, by a public body, seeks redress from a court for his grievances before pursuing available remedies before the body. In this argument, the learned counsel for the 1st and 2nd respondents relied on the decisions in Mombasa High Court *Constitutional Petition No 159 of 2018* as consolidated with *Constitutional Petition No 201 of 2019*. Parties in the petition have not been given but the petitions are said to have been reported in [2020] eKLR. also cited in support of this submission was the decision in the case of *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR.

43. It was urged that the doctrine of ripeness, on the other hand, refers to readiness of a case for litigation and that a claim is not ripe for adjudication if it rests upon contingent further events that may not occur as anticipated or at all. The purpose of this doctrine is to prevent premature adjudication.

44. According to the 1st and 2nd respondents, the application before court ought not be adjudicated in this court according to the doctrines of constitutional avoidance and ripeness. It is a dispute that ought to have been determined elsewhere or, rather, before a different forum. In any event, it is urged, there is no evidence that the 1st and 2nd respondents' decision has failed the test of legality.

45. In conclusion, it has been urged that the applicant does not deserve the orders sought because he has come to court with unclean hands. The basis of this submission is that like any other prospective student, the applicant ought to have been aware of the requirements that must be met before being

admitted to the advocates training program more so considering his qualifications are "foreign". In particular, the applicant failed to provide a certificate of equation from a suitable authority.

46. The omission to provide the requisite certificate is what has been urged to be the "unclean hands" on the part of the applicant. Counsel for the 1st and 2nd respondents relied on *Francis Munyoki Kilonzo & another v Vincent Mutua Mutiso* [2013] eKLR where it was held, inter alia, that a court of equity shall no assist a person in extricating himself from circumstances he has created. For the same submissions counsel also relied on the cases of *Anne Mubi Hinga v Gaitho Oil Limited* [2019] eKLR and *John Njue Nyaga v Nicholas Njiru Nyaga & another* (2013) eKLR.

47. The 1st and 2nd respondents concluded their submissions by urging that to the extent the applicant seeks to enforce the judgment of the Legal Education Appeals Tribunal, the order for mandamus cannot be granted. According to them, the law has provided avenues for execution and enforcement of such judgments without necessarily invoking the judicial review order of mandamus.

Analysis and Determination

48. What, in my humble view, are facts fundamental to the determination of this suit are not in dispute. It is common ground, for instance, that the applicant's admission to the Advocates Training Program was revoked by the 1st and 2nd respondents after which the applicant took up the matter with the Appeals Tribunal. The Appeals Tribunal took up the matter and rendered its dispute on 23 June 2023. The decision was not only rendered in the presence of the parties or their representatives but it was subsequently served upon the 1st and 2nd respondents.

49. The point of departure, as far as I understand the parties, is that, while the applicant is of the view that the 1st and 2nd respondents have either ignored, neglected or refused to comply with the terms of the judgment of the Appeals Tribunal, the 1st and 2nd respondents' position is that it is the applicant who has failed to make the first move and obtain the requisite certificate of equation in order to enable the 1st and 2nd respondents to reconsider his application as ordered by the Appeals Tribunal. The 1st and 2nd respondents contend further that, assuming they have not complied with the decision of the Appeals Tribunal, it is the Tribunal and not this honourable court, that ought to enforce the judgment. This latter question has been raised as a jurisdictional issue and, therefore, by its very nature, it ought to be determined *in limine*.

50. As far as I understand the 1st and 2nd respondents, it is their case that the whole purpose of the applicant's application is to seek to enforce or execute the judgment of the Appeals Tribunal. To quote them:

> " 15. The application is frivolous, incompetent, vexatious, misconceived and an outright abuse of the court process to the extent that it seeks execution of a judgment of the Legal Education Appeals Tribunal (hereinafter, LEAT), a role that is vested in the aforesaid Tribunal unless duly transferred as provided under the law that is the provisions of section 30 and 31 of the *Civil Procedure Act*, as read together with section 33(3) and 38(1) of the *Legal Education Act* which provide that:
>
> 30. Court by which decree may be executed
>
> A decree may be executed either by the court which passed it or by the court to which it is sent for execution.

31. Transfer of decree

(1) the court which passed a decree may, on the application of the decree holder, send it for execution to another court..."

51. According to the respondents, the tribunal is capable of executing its own decrees unless it transfers them for execution to another court. In support of this argument, the applicant has invoked sections 38 and 39 of the *Legal Education Act*. Section 38 provides as follows:

38. Appeals to the High Court

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

And section 39 states:

1. The tribunal may make rules with respect to the filing, hearing and disposal of appeals and other matters before it.

52. It is the applicant's case that, "other matters before it" would include making rules for execution of its judgments and, therefore, there would be no need of seeking to enforce those judgments by way of an application for judicial review such as the one that has been instituted by the applicant.

53. It has also been urged that it is only through an appeal against the decision of the Tribunal that a dissatisfied applicant can move this honourable court. But this is not an appeal and, for this very reason, this court has no jurisdiction to dispose of it.

54. There is no provision in the *Legal Education Act* on execution of the Appeals Tribunal's judgment. It is not clear whether the Tribunal has made any rules which, going by the 1st and 2nd respondents' submissions, would inform execution of the Tribunals judgments, as part of "other matters" for which such rules are to be made. I doubt, however, that such a material aspect of the appeal process as execution of the Appeals Tribunal's judgments would be catered for in the rules rather than in the primary legislation. In my humble view, the power to enforce its own judgments would ordinarily be part of the jurisdiction with which the Appeals Tribunal has been clothed and, for this very reason, it would be expressly provided in the *Act* rather in subsidiary or secondary legislation.

55. But even if the court was to proceed on the presumption that execution of the judgments by Appeals Tribunal would be catered for in the rules that the Tribunal is bound to make under section 39(1) of the *Act*, none of these rules that would be applicable in these circumstances has been cited as the rule which the applicant ought to have invoked in execution of his judgment. As a matter of fact, neither has the court been presented with such rules nor has it even been suggested that that the Tribunal has made the rules, in the first place.

56. The furthest the 1st and 2nd respondents have gone is to argue that the Appeals Tribunal is capable to make rules that, among other things, would govern enforcement or execution of its judgments without providing any evidence that the rules have been made and, in particular, the rule that the Appeals Tribunal can enforce its own judgments.

57. In these circumstances, I opine that it would be asking too much of the applicant, to adopt a non-existent procedure to enforce what he believes are the fruits of his judgment. He certainly cannot be faulted for not following a process that has not been provided for.

58. Judicial review steps in where there is such a gap in addressing grievances such as the applicant's where no other alternative for redress exists or where the alternative, if it exists, is not as convenient, beneficial and efficacious.

59. It is, of course, trite that courts, in exercise of their discretion, will not normally make the remedy of judicial review available where there is an alternative remedy by way of appeal or internal complaints procedure or where some other body has exclusive jurisdiction in respect of the dispute (see *R v Visitors to the Inns of court, ex p Calder* [1993] 2 All ER 8 76, CA). But judicial review may be granted where the alternative statutory remedy is

> " nowhere near so convenient, beneficial and effectual" (see *R v Paddington Valuation Officer, ex p Peachey Property Corporation Ltd* [1965] 2 All ER 836 at 840, CA, per Lord Denning MR)

or

> " where there is no other equally effective and convenient remedy" (per Lord Widgery LCJ in *R v Hillingdon London Borough Council, ex p Royco Homes Ltd* 2 All ER 643 at 648)

It has been held in the foregoing cases that factors which will be taken into account by a court when deciding whether to grant relief by judicial review when an alternative remedy is available are whether the alternative statutory remedy will resolve the question at issue fully and directly; whether the statutory procedure would be quicker, or slower, than the procedure by way of judicial review.

60. In the applicant's case, the question whether an alternative remedy exists does not even arise because, as earlier noted, there is no evidence either in the *Legal Education Act* or in the rules (assuming they have been made) that such an alternative remedy exists.

61. In the absence of any obvious alternative route by which the applicant can execute or enforce the Appellate Tribunal's judgment, and for reasons given, the applicant was entitled to initiate these judicial review proceedings. Accordingly, this honourable court is properly seized of jurisdiction to entertain this suit.

62. For the same reasons, the 1st and 2nd respondents' arguments that this suit is either not ripe or that it is premature under the doctrine of constitutional avoidance are unsustainable. Neither of these doctrines would apply where it has not been demonstrated, to the satisfaction of the court, that there exists an alternative remedy or internal dispute resolution or appellate mechanisms which the applicant has failed to embrace.

63. The only other substantive ground upon which the 1st and 2nd respondents opposed the applicant's application is that the applicant has not complied with the directions of the Appeals Tribunal by providing a certificate specifically equating his international grades with the Kenyan academic grades. This certificate of equation would, apparently, show that the applicant, amongst other qualifications, obtained the equivalent of a minimum grade B (plain) in English language or Kiswahili and a mean grade of C (plus) in the Kenya Certificate of Secondary Education as required by the *Kenya School of Law Act*.

64. The applicant, it is urged, seeks to be admitted to the Advocates Training Program without either meeting these qualifications or demonstrating that he has met them by presenting a certificate of equation from a recognised institution or entity.

65. I have had the opportunity to read the judgment of the Appeals Tribunal. In its introduction, the judgment captured the prayers in the applicant's memorandum of appeal. Two of these prayers, pertinent to this application were captured as follows:

> " c. That the tribunal be pleased to quash the decision of the director of the 1st respondent dated February 20, 2023;
>
> d. That the Tribunal issues an order compelling the 1st respondent to admit the appellant to the Advocates Training programme for the academic year 2023/2024."

66. The decision referred to in paragraph c was, of course, the 1st respondent's revocation of the applicant's admission to the Advocates Training Program. The basis of the revocation was apparently an alignment of qualifications given by the Kenya National Qualifications Authority that equated the applicant's international qualifications with the local equivalent of a mean grade C plain in Kenya Certificate of Secondary Education. According to the 1st respondent, this qualification was below the minimum threshold of C plus set by the *Kenya School of Law Act, 2012*.

67. The Appeals Tribunal quashed the revocation because the purported alignment was based on the *Kenya National Qualifications Framework Regulations*, 2018 which had not been tabled before the National Assembly in accordance with section 11(1) of the *Statutory Instruments Act*. At paragraphs 47 and 48 of it judgment the tribunal noted as follows:

> " 47. The tribunal notes that the matter of the equation would resolve the issue of the appellant's eligibility to the ATP a fact which even the 1st respondent well deposes to in paragraphs 13-14 of the replying affidavit of Fredrick Muhia it's (*sic*) Academic Services Manager as follows;
>
> > " That without equation of qualifications, there is no way of making a determination whether the applicant is qualified for the ATP. That I am advised by my advocate on record which advice I verily believe to be true, that if the 2nd respondent's equation of the applicant's qualification was not lawful, then the remedy for the same is for the qualifications to be reconsidered owing to the fact that the question of whether the appellant is qualified for the ATP still stands."
>
> 48. The Tribunal holds that given that the question of legality of the regulations has been raised by the appellant and conceded by the 2nd respondent, the 1st and 2nd respondents have a duty to consider the impact of the lack of validity of the Regulations on the alignment process and take the necessary steps to ensure that alignment of grades is undertaken as per the law."

68. The appeals Tribunal then proceeded to make several dispositions one of which was that:

> " ii. That the application by the appellant to the Advocates Training Programme be and is hereby remitted to the 1st respondent for reconsideration and determination, based on a properly acquired equation of grades."

69. A plain reading of this disposition reveals that first, the 1st respondent was under duty to reconsider and determine the applicant's application and, second, the reconsideration and determination of the application would be based on

> " a properly acquired equation of grades."

70. The applicant took steps and approached the Commission for University Education for what he must have thought was

> " the proper acquisition of the equation of grades".

71. The Commission is established under section 4 of the *Universities Act*, No 42 of 2012. Its functions are outlined in section 5 of the *Act* which reads as follows:

> 5. Functions of the Commission
>
> (1) The functions of the Commission shall be to—
>
> (a) promote the objectives of university education;
>
> (b) advise the Cabinet Secretary on policy relating to university education;
>
> (c) promote, advance, publicise and set standards relevant in the quality of university education, including the promotion and support of internationally recognised standards;
>
> (d) monitor and evaluate the state of university education systems in relation to the national development goals;
>
> (e) licence any student recruitment agencies operating in Kenya and any activities by foreign institutions;
>
> (f) develop policy for criteria and requirements for admission to universities;
>
> (g) recognize and equate degrees, diplomas and certificates conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set by the Commission from time to time;
>
> (h) undertake or cause to be undertaken, regular inspections, monitoring and evaluation of universities to ensure compliance with the provisions of this Act or any regulations made under section 70;
>
> (i) on regular basis, inspect universities in Kenya;
>
> (j) approve universities in Kenya;
>
> (k) regulate university education in Kenya;
>
> (l) approve and inspect university programme in Kenya;
>
> (m) promote quality research and innovation; (Emphasis added).

72. Section 5(1) (g) would be of particular relevance to the issue at hand. According to this provision, it is a function of the Commission to

> " recognize and equate degrees, diplomas and certificates conferred or awarded by foreign universities and institutions in accordance with the standards and guidelines set by the Commission from time to time."

73. In the face of this provision of the law, the applicant cannot be faulted for approaching the Commission for equation of his qualifications because it is clear that the Commission has the mandate not only to recognise degrees, diplomas and certificates conferred or awarded by foreign universities and institutions but it also as the mandate to *equate* such qualifications as contemplated by the Appeals Tribunal. In other words, owing to the provisions of section 5(1)(g) of the *Universities Act*, an acquisition of a certificate of equation from the Commission for *Universities Act* would, in the words of the Appeals Tribunal be properly described as

> " a properly acquired equation of grades."

74. It is, therefore, rather perturbing that the 1st respondent would disregard the equation certification of the applicant's qualifications by the Commission for University Education after the applicant approached the Commission for the certification. As a matter of fact, the letter by the 1st respondent rejecting the applicant's application did not make any reference to the Commission for University Education's certification which the applicant had availed to the institution. The letter dated 17 July 2023 addressed to the applicant reads as follows:

> " Dear Abdi,
>
> Re: Case No LEAA/e020/2023
>
> Your letter dated July 11, 2023refers.
>
> Kindly be advised that you are required to comply with the order of the Tribunal on the matter of equation before your application to the Advocates Training Programme will be considered.
>
> Thank you
>
> Yours faithfully,
>
> signed
>
> Dr Henry K Mutai
>
> Director/Chief Executive"

75. The letter dated 11 July 2023 to which Dr Mutai made reference is the letter that forwarded the equation certification by the Commission for University Education.

76. For our purposes, it is apparent from this letter, and it has not been denied, that the applicant's application was not reconsidered as directed by the Appeals Tribunal. Although the Dr. Mutai intimates that the application has not been reconsidered because the applicant has not complied with the judgment of the Appeals Tribunal "on the matter of equation", there is no reason given why the certification by the Commission for University Education has been presumed not to have satisfied the equation requirement.

77. Differently stated, no reason was given why the applicant's application could not be reconsidered on the basis of the of the certification by Commission for University of Education and if, for any reason the certification by the Commission was wanting in any respect, why it was so wanting.

78. In the absence of any reason why the applicant's application could not be considered on the basis of the certification by the Commission for University Education, and considering that Dr Mutai has neither given nor suggested any other alternative entity from which the applicant can obtain the requisite certification, it can only be assumed that, perhaps, the 1st and 2nd respondents were insistent on a certification by Kenya National Qualifications Authority. But that would amount to compelling the applicant to obtain a certification of equation from a body that has been lacking in law to undertake the equation exercise. It was established that in purporting to align the applicant's qualifications, the Kenya National Qualifications Authority was relying on rules or regulations that are contrary to the law, in particular section 11(1) of the *Statutory Instruments Act*. Again, this is a fact which the Appeals Tribunal established as having been conceded by both the Kenya School of Law and the Kenya National Qualification Authority itself.

79. If the Kenya National Qualifications Authority is ill-equipped to provide the requisite certification it would be irrational, in the language of judicial review, to insist on its certification as the

> " properly acquired equation of grades."

In the same breath, it would also be irrational, and to a certain degree unlawful to reject the equation by the Commission for University Education when it is clear from section 5(1) of the *University Education Act* that, among the Commission's functions, is to equate qualifications such as degrees, diplomas and certificates conferred or awarded by foreign universities and institutions with those obtained locally and, at any rate, in accordance with the standards and guidelines set by the Commission.

80. For the foregoing reasons, I am satisfied that the applicant has made a case for the grant of the order of mandamus.

81. This order which in England is referred to as a mandatory order is explained in *Halsbury's Laws of England*Judicial Review (volume 61 (2010) 5Th Edition)5. Judicial Remedies (1) Introduction paragraph 689 the following terms:

> " A mandatory order is, in form, a command issuing from the High Court, directed to any person, corporation or inferior tribunal requiring him, or them, to do some particular thing specified in the command which appertains to his or their office and is in the nature of a public duty (See *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, [1968] 1 ALL ER 694, HL). The breach of duty may be a failure to exercise a discretion, or a failure to exercise it according to proper legal principles."

This is reiterated in paragraph 703 which states:

> " A mandatory order is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or it to do some particular thing specified in the order which appertains to his or its office and is in the nature of a public duty... the purpose of a mandatory order is to compel the performance of a public duty, whether of an infer ior court or tribunal to exercise its jurisdiction, or that of an administrative body to fulfil its public law obligations. It is a discretionary remedy."

82. And with particular reference to public officers who fail to perform their duty, paragraph 706 is clear that a mandamus order may be issued to compel them to carry out the duty. It reads as follows:

> " 706. Public duties by government officials.
>
> If public officials or public bodies fail to perform any public duty with which they have been charged, a mandatory (*mandamus*) order may be made to compel them to carry out the duty (See *R v Metropolitan Police Comr, ex p Blackburn* (No 3) [1973] QB 241, [1973] 1 ALL ER 324, CA; *R v London Transport Executive, ex p GLC* [1983] QB 484, [1983] 2 All ER 262, DC.)"

83. In its judgment rendered on 23 June 2023, the Appeals Tribunal imposed a duty upon the 1st respondent to reconsider the applicant's application. The duty is, for all intents and purposes, in the nature of a public duty. A demand for payment performance of this duty having been made and the 1st respondent's Director having come out in clear terms that he will not be performing the duty, and having held that there is no reason or any viable reason why the 1st respondent should not reconsider the applicant's application, no other evidence is required to demonstrate that the 1st respondent has failed to perform a public duty with which he is charged in the Appeal Tribunal's judgment. A mandamus order would issue in such circumstances. Accordingly, I hereby allow the applicant's motion dated 23 August 2023 and hereby grant the order of mandamus compelling the 2nd respondent to reconsider and determine the applicant's application for admission to the Advocates Training Program based on the evidence with which it has been presented by the applicant. The applicant will also have costs of the suit. It is so ordered.

SIGNED, DATED AND DELIVERED AT NAIROBI ON 8 DECEMBER 2023

NGAAH JAIRUS

JUDGE