REPUBLIC OF KENYA

MISCELLANEOUS APPLICATION NO. 11 OF 2021

IN THE MATTER OF: ARTICLES 22 (1), 23 (1) & (3), 47,

50 (2) (a) and 53 (1) (b) OF THE CONSTITUTION OF KENYA, 2010

-AND-

IN THE MATTER OF: THE LAW REFORM ACT, CAP 26, LAWS OF KENYA, SECTIONS 8 AND 9

-AND-

IN THE MATTER OF: THE BASIC EDUCATION ACT, 2013 SECTIONS 54 (7) (m) & 59 (f)

-AND-

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT, 2015 SECTIONS 4,7,8,9,10 & 11

-AND-

IN THE MATER OF: AN APPLICATION FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

-BETWEEN-

REPUBLIC.....APPLICANT

AND

THE BOARD OF MANAGEMENT, MBAIKINI BOYS HIGH SCHOOL.....1ST RESPONDENT

THE PRINCIPAL, MBAIKINI BOYS HIGH SCHOOL.....2NDRESPONDENT

-AND-

AM K.....1ST EX- PARTE APPLICANT

SM M.....2ND EX-PARTE APPLICANT

BMM.....3RD EX-PARTE APPLICANT

R M (*Minor suing through the mother and next friend IMK*).....4TH EX-PARTE APPLICANT

JJM (*Minor suing through the father and next friend of PMM*).....5th EX-PARTE APPLICANT

JUDGEMENT

1. The ex parte applicants herein are students of Mbaikini Secondary School. According to their statement of facts, they were charged with

the offense of Arson contrary to section 332(a) of the ***Penal Code*** on 19th November, 2021 and 26th November, 2021 in Machakos Chief Magistrate's Criminal Case Number E234 of 2021: Republic vs. RM & 4 Others to which they pleaded not guilty on 19th November, 2021 and 26th November, 2021 and the matter set for hearing on 5th April, 2022.

2. According to the Applicants, they were arrested and charged with the offense of arson after one of the dormitories at Mbaikini Boys' High School was set on fire on 6th November, 2021.

3. As a result of the foregoing, the 2nd Respondent who is the school principal expelled the applicants immediately after they took plea in the criminal matter by asking them to clear from the despite the applicants pleading with the 2nd Respondent to give them an opportunity to be heard before expelling them from school, arguing that the matter was being handled by the court. The Applicants pleaded that through letters dated 26th November, 2021 written by the 2nd Respondent and which was issued to the ex-parte applicants after being forced to clear from the school by the 2nd Respondent, the applicants have since been expelled and/or indefinitely suspended from Mbaikini Boys High School. They reiterated that the said action was taken without being given an opportunity to be heard and being subjected to a fair disciplinary process as required by law.

4. The Applicants complained that the 2nd Respondent disregarded the fact that the applicants have a right to be presumed innocent of the offence they have been charged with unless and until the contrary is proven. As such, it is unlawful for him to expel and/or indefinitely suspend the applicants from school solely because they have been charged with a criminal offence in court.

5. It was further contended that the 2nd respondent's decision to expel and/or indefinitely suspend the applicants is unlawful as heads of schools do not have the power to suspend and/or expel students. To them, it is the duty of the Board of Management to determine cases of indiscipline among students and to report the same to the County Director of Education. The Applicants' case was that whereas they have a right to administrative action which is expeditious, efficient, fair and procedurally lawful, the respondents have infringed upon this right by unlawfully and indefinitely suspending them without giving them an opportunity to be heard against the rules of natural justice.

6. It was contended that as a result of the respondents unlawful and unfair act of expelling and/or indefinitely suspending the applicants, their right to education under Article 53 of the Constitution is under threat as they have been forced to stay out of school indefinitely, yet the 1st, 2nd and 3rd respondents are form four (4) students who should be in school preparing for the Kenya Secondary School Examinations (KCSE) which are set to begin in March 2022. They lamented that their continued stay out of school is highly likely to negatively affect their performance in the said examinations as they are yet to complete the syllabus.

7. It was their contention that it is unreasonable and unlawful for the respondents to keep them away from school until the criminal matter is heard and determined as alluded in the letter by the 2nd respondent dated 26th November, 2021 since to do so would be to subject the applicants to irreparable harm when they should be treated as innocent until the contrary is proven.

8. In support of their Motion, the ex parte applicants swore similar affidavits in which they reiterated the forgoing and added that on 6th November, 2021, one of the school dormitories was set on fire by unknown people and although they did not take part in the criminal act, they were arrested and charged with the offence of Arson contrary to section 332 (a) of the Penal Code in Machakos Criminal Case No. E234 of 2020 and they pleaded not guilty to the said charge, on 19th November, 2021 and the matter is scheduled for hearing on 5th April, 2022. Upon the said plea being enter, on 26th November, 2021 they went back to school accompanied by their parents and guardians but upon arrival, the 2nd respondent refused to talk to them and only directed us to pick our belongings and clear from the school, saying that he would only talk to them after the criminal case is hear and determined.

9. When their parents and guardians insisted to be given reasons in writing as to why the 2nd respondent was expelling and/or indefinitely suspending them from school, the 2nd respondent issued each of them with a letter dated 26th November, 2021 indefinitely suspending them from school. They were however, not given an opportunity to be heard before making the decision to expel and /or indefinitely suspend them from school.

10. According to the ex parte applicants who are candidates, they need to be in school so that they can finish the syllabus and properly prepare for the final Kenya Certificate of Secondary Education (K.C.S.E) examinations which are set to begin in March 2022. They were apprehensive that they would suffer irreparably because by the time the case is heard and determined, the Kenya Certificate of Secondary Education examinations will have been concluded.

11. There was a further affidavit sworn on behalf of the 5th ex parte applicant by his father in response to the averments in the replying affidavit. According to the deponent, sometime in February 2021, while in form 2 the 5th applicant accidentally broke a glass window while he was closing it. As a result, the 2nd respondent suspended him from school on false allegations that he was using drugs and in order to re-admit him, the 2nd Respondent required the deponent to submit a drug test report from a public hospital, a letter from the chief and a letter from the pastor. The deponent paid for the damaged window and complied with the school requirements by submitting the said documents including a negative drug test report from a doctor and the letter from the chief dated 28th February, 2021.

12. The deponent therefore denied that the 5th applicant had been suspended because of indiscipline and contended that the 2nd respondent had suspended the 5th applicant without good reason but he chose not to sue the school because they readmitted him.

13. Regarding the letter dated 9th July, 2021 in which the 5th applicant sought to be transferred from the school, it was contended that he wrote the same after a series of unfair insults and punishment by the principal who attempted to force him to take an elective subject he had dropped. The 5th applicant's parents were then summoned by the school administration and after being heard, the issue was resolved and that

is why he continued with his studies at the school until 26th November, 2021 when he was indefinitely suspended.

14. It was deposed that the 5th applicant has never been subjected to any disciplinary process by the respondents and he has been keen to adhere to school rules and regulations hence the reason he was in school until his unlawful suspension. The Court was urged to disregard the 2nd respondent's allegations against the 5th applicant as they are bereft of truth and are also irrelevant as they are past events completely unrelated to the decision dated 26th November, 2021 which the Court is being urged to quash.

15. Regarding the alleged minutes of a meeting by the school's executive committee, it was noted that the same were not by any board member hence the Court was urged to disregard the same as they are misleading.

> 16. On behalf of the Applicants, it was submitted that the ex-parte applicants were not given an opportunity to be heard and as such the decision by the 2nd respondent to indefinitely suspend them pending the hearing and determination of the criminal court case was unfair, unreasonable, irrational and against the rules of natural justice. Further, the 2nd respondent's decision to expel and/or indefinitely suspend the students is unlawful as he acted *ultra vires* his powers or legal mandate as a head of an institution does not have the power to expel or indefinitely suspend students. It was their case that the procedure laid down for dealing with cases of discipline by students under the Basic Education Regulations, 2015 was not followed thus making the decision dated 26th November, 2021 unfair, irrational, unreasonable and unlawful and that the said decision violated the ex-parte applicants right to Fair Administrative Action (under Article 47 of the Constitution) which is expeditious, efficient, fair and procedurally lawful by the respondents and also their right to education (Under Article 53 of the Constitution of Kenya, 2010) has been threatened.

17. According to the Applicants, although the principal states that he relied on the provisions of regulation 38 of the Basic Education Regulations, 2015 in suspending the students, even under the said regulation a suspension letter must specify the date the learner accompanied by the parent or guardian is required to appear before the Board of Management of the institution for hearing and that it is the Board of management which has the duty to determine case of pupils' discipline under Section 59 (f) of the ***Basic Education Act, 2013***. They cited Regulation 38 of the ***Basic Education Regulations, 2015*** and submitted that by 10th November, 2021 when the applicants moved this court for leave to apply for the judicial review remedies sought in the instant application, the respondents had neither heard the applicants nor had they communicated intention to hear them before the criminal case was heard and determined. The respondents only send a message on 17th December, 2021 to the applicants' parents and guardians inviting them for a hearing on 8th January, 2022 and by then the court had already given directions on 16th December, 2021 that *status quo* be maintained.

18. It was submitted that the head of the institution has a duty to specify a hearing date within a reasonable time. Otherwise, a principal who indefinitely suspends a learner usurps the powers of the Board of Management and also the County Education Board which are the organs with the duty to hear and determine cases of discipline under the ***Basic Education Act, 2013*** and the Basic Education Regulations, 2015. In support of this position, the ex parte applicants relied on **Republic vs. Board of Management St. Joseph's School Rapogi [2019] eKLR** and urged the Court to hold that the suspension letter dated 26th November, 2021 fell short of the requirements of regulation 38 for not specifying the date the students were to be heard which date should not have been later than 14 days from the date of the suspension letter.

19. It was submitted that the 2nd respondent's decision to expel and/or indefinitely suspend the students is unlawful as he acted *ultra vires* his powers or legal mandate. According to the Applicants by being accused of destroying school property, the applicants were, under regulation 33, deemed to have participated in mass indiscipline. However, the procedure for dealing with students accused of mass indiscipline is set out in regulation 34 through to 36 of the ***Basic Education Regulations, 2015*** under which the 2nd respondent ought to have closed the school on 6th November, 2021 and notified the County Director of Education accordingly with 24 hours. Thereafter, the Board of management ought to have submitted a report to the County Education Board within 2 days (i.e. by 9/11/2021) in order for the County Education Board to make a decision in accordance with regulation 36. By the time the applicants moved this court on 10th December, 2021, a month after the school was burned, the Board of management had neither heard the applicants nor had it forwarded a report to the County Education Board as required by law.

20. According to the ex parte applicants, for a principal to suspend a student under regulation 38, the indiscipline must have persisted despite warnings and the indiscipline must threaten the safety of other students. It was submitted that the applicants were not accused of persistent indiscipline and the respondents have admitted that the allegation is one of mass indiscipline. As such, the regulation applicable is 34, 35 and 36.

21. According to them, by indefinitely suspending students without involving both the Board of Management and the County Education Board as is the case in this matter, the principal usurped the powers of these two organs which are the ones charged with the responsibility of hearing and determining cases of indiscipline in schools and further curtails the students right to appeal the decision of the County Education Board at the Education Appeal Board.

22. The Court was therefore urged to declare the act of the 2nd respondent of indefinitely suspending the applicants as unlawful and *ultra vires* his legal mandate/powers.

23. According to the Applicants**,** suspending students indefinitely and later setting a Board of Management hearing two (2) months after their exclusion from school cannot be deemed as expeditious administrative action especially when some of the students should be preparing for their final secondary school examinations. Reliance was placed on the case of **F.B.O vs. Board of Governors (particulars withheld) HS [2017] eKLR** where the court held that a delay of two months cannot be described as handling the matter expeditiously and within reasonable time.

24. The Applicants contended that they were rightly before you since under Article 22 (1) of the Constitution, every person has a right to institute court proceedings claiming that a right or fundamental freedom has been denied, threatened, violated or infringed. As such, the allegation by the respondent that the applicants should have appealed the decision to the Education Appeals Tribunal is misinformed and

should be dismissed. The only decision appealable to the Education Appeals Tribunal is a County Education Board decision as per the provisions of regulation 40 of the ***Basic Education Regulations, 2015.***

25. The Court was therefore urged to grant the judicial review orders sought in the instant application since by quashing the decision dated 26th November, 2021 and compelling the respondents to re-admit the ex-parte applicants, this court will be protecting their rights to education and also fair administrative action. Also, the respondents should be prohibited from expelling and/or suspending the students until the disciplinary procedure laid down in law is followed.

26. In this judicial review application, the Applicants are seeking that the Court awards the following reliefs:

> **1) THAT an order of *CERTIORARI* do issue to remove into this Honorable court for purposes of quashing the decision of the Respondents to expel and/or indefinitely suspend the applicants from Mbaikini Boys' High School communicated through a letter dated 26/11/2021.**
>
> **2) THAT, an order of *MANDAMUS* do issue directed at the 1st and 2nd Respondents compelling them to re-admit the applicants to Mbaikini Boys' High School and to take the necessary steps to facilitate the applicants to access and continue with their education.**
>
> **3) THAT, an order of *PROHIBITION* do issue restraining the respondents from suspending and/or expelling the applicants unless and until their education at Mbaikini Boys High School is lawfully terminated or suspended following due procedure.**
>
> **4) That, the costs of this application be paid by the respondents.**

Respondents' Case

27. In response to the application the Respondents relied on the replying affidavit sworn by **Titus Mutua,** the Principal and Secretary to the Board of Management, Mbaikini High School in which he deposed that on 6th November 2021, unknown students burnt down the school dormitory. Following the arson, the school management made a report to the police on the same day and investigations were commenced. On 17th November 2021, officers from the Directorate of Criminal Investigations visited the school and informed the school management that from their investigations six students were found culpable, five of which were the five Applicants herein together with another student who was still at large and is being pursued.

28. According to him, the officers from the DCI further informed the school management of their intention to arrest the students for the purpose of charging them with the offense of Arson contrary to section 332(a) of the ***Penal Code***. Upon their arrest and being arraigned in Court on 19th November 2021, the Applicants together with their parents stormed the school precincts with the sole purpose of being re-admitted to the school. However, for good order, the school management found it rather absurd to re-admit the students immediately without consultations with the Board of Management for the reasons that-

> a) There was need for the Board of Management to meet and come up with recommendations to the County Education Board on the action to be taken against the Applicants;
>
> b) There was a likelihood of the Applicants being ganged up against by the other students and therefore their safety would be compromised;
>
> c) There was a likelihood of the Applicants inciting the rest of the students;
>
> d) There was need to guarantee safety of the rest of the students;
>
> e) There was need to liase with the officers from the DCI and seek advice on how best to deal with the Applicants.

29. Based on the foregoing, the deponent averred that he issued the letter dated 26th November 2021 which read as follows-

> ***"Your Son has been implicated in a serious crime of arson. He is currently being handled by the Court. Meanwhile he is advised to stay out of school and we will communicate to you and him. He is advised to continue preparing for KCSE examinations or and reading/revising while waiting for the communication."***

30. According to him, the school management was to issue communication to both the parents of the Applicants and the Applicants themselves at a later date which date was to be determined by so many factors including but not limited to investigations which were ongoing within the school precincts in which case the school management had to give ample time to the officers from the DCI to carry out their work and consultations with the Board of Management so as to set aside a date for hearing of the Applicants indiscipline case.

31. According to the deponent, based on legal advice, Regulation 33 of the ***Basic Education Regulations, 2015*** provides that Learners shall be deemed to have participated in mass indiscipline in the institution if they jointly take part in-unlawful demonstration, boycott of classes or meals, destruction of school property or invasion of other institutions, shopping centres or homesteads. In the present case the Applicants are accused of destruction of school property by burning. Further, based on the same legal advice, Regulation 38 of the ***Basic Education Regulations, 2015*** provides that if the head of the institution is of the opinion that the acts of indiscipline have persisted in spite of the warnings or corrective measures taken under these regulations; and If the act of indiscipline is likely to threaten the safety of the other

learners in the institution, the head of the institution shall issue the learner, with a suspension letter addressed to the parent or guardian indicating the nature of the indiscipline and specifying the date the learner, accompanied by the parent or guardian is required to appear before the Board of Management of the Institution. This explains the action he took of suspending the Applicants pending the hearing of their indiscipline case at a later date.

32. He further cited Regulation 39(5) which provides that the recommendations of the Board of Management shall within two days be communicated to the County Director of Education. Also cited was Regulation 40, that once the County Director of Education receives the recommendations of the Board, he shall seek the advice of the County Education Board as to whether to-

a) Order for conditional or unconditional re-admission of the learner;

b) Transfer the learner to an alternative institution; or

c) Transfer the learner to a corrective centre in the contest of education.

33. The deponent also relied on Regulation 41 that provides that any person aggrieved by the decision under Regulation 40 may appeal to the Education Appeals Tribunal while Regulation 42 provides that No school shall withdraw the registration of a learner as a candidate in a national examination as a form of punishment.

34. It was his position that in issuing the letter dated 26th November 2021, he was guided by Regulation 38 of the ***Basic Education Regulations, 2015*** and that communication to both the parents of the Applicants and the Applicants on the date to appear before the Board was to be communicated later. He disclosed that by the time the Application for Judicial Review was served upon the School on 10th December 2021, the Board of Management had set a meeting of 14th December 2021 to deliberate on the issue of the Applicants which meeting resolved that both the parents of the Applicants and the Applicants in person should be summoned for a meeting to deliberate on the indiscipline case on 8th January 2022.

35. It was therefore his position that the Judicial Review application is pre-mature for the reasons advanced and that equally the Applicants should have appealed the decision of the 2nd Respondent to the Education Appeals Tribunal prior to instituting the present Judicial Review application seeking to quash the letter dated 26th November 2021 under Regulation 40.

36. It was his view that the action of suspending the Applicants in the circumstances was reasonable pending the school disciplinary process and moreover awaiting the investigations from the officers of the DCI leading to the arrest and charging of the Applicants hence it would be in the interest of justice to dismiss the application for being an abuse of the Court process.

37. By a further affidavit, the same deponent deposed that once the school dormitory burnt down the school administration made a report to the police who upon carrying out their investigations narrowed down to eight (8) students whom they believed burnt down the school dormitory. He denied that the purpose of the letter dated 16th November 2021 was to forward names of accused persons to the police but the same was for the purpose of confirming to the police that the students whom they had identified as the offenders belonged to the school. Further, he was also to confirm to the police; the admission number of the students, the class or form of each of the students and whether their names were active in the school register and other school systems.

38. He deposed that it was within the authority of the police to consider whom among the eight students were to be charged based on the evidence. He asserted that regulation 38 of the ***Basic Education Regulations, 2015***, authorizes the head of the institution to issue a learner with a suspension letter where the learner is engaged in an act of indiscipline likely to threaten the safety of other learners pending the hearing of the indiscipline case before the Board of Management. In this case, he was guided by the fact that the Applicants had engaged in act of indiscipline which threatened the safety of other learners hence the immediate suspension.

39. He however denied that the suspension was indefinite for the reason that he had to notify members of the Board of Management to arrange for a meeting which meeting. That subsequently in the meeting held on 14th December 2021, it was resolved that the parents of the Applicants and the Applicants in person should be summoned for a meeting to deliberate on the indiscipline case on 8th January 2022. In his view, the letter issued to the parents and the Applicants was a suspension letter and not an expulsion letter as alleged. That further, under Regulation 40 of the ***Basic Education Regulations, 2015***, the County Education Board upon receipt of the recommendations of the Board is mandated to order conditional or unconditional re-admission of the learners.

40. His position was that the letter dated 26th November 2021 was clear that the parents and the students were to be called at a later date which was to be communicated to them at a later date, a meeting which was to be determined by the convening of a Board meeting and as such he could not have anticipated a particular date without consulting the Board.

41. He deposed that on 17th December 2021, the school sent text messages to the parents of the Applicants inviting them to a Board meeting for the purpose of defending themselves on 8th January 2022 but failed to appear.

42. The deponent also disclosed that the 5th Applicant vide a letter dated 9th July 2021 had written to the Principal seeking a transfer from the school in which case the school accepted the request but the 5th Applicant's father refused. This explains perhaps the reason why the 5th Applicant would engage in indiscipline as a way of protesting being in the school. That further sometimes in February 2021, the 5th Applicant had been suspended for indiscipline prompting his area chief to write a letter dated 28th February 2021 requesting the school to take him back.

43. On behalf of the Respondents, reliance was placed on the case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** and it was submitted that it is incumbent upon a party in a judicial review application who seeks the issuance of any of the orders to prove breach of any of the above criteria for that party to succeed in their claim which is not the case in this matter. Further reliance was placed on the case of **Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Gibb Africa Ltd & Another [2012] eKLR** and it was submitted that the present application does not warrant any issuance of the orders as framed in the Notice of Motion dated 20th December 2021.

44. As regards the first order seeking **CERTIORARI** for purposes of quashing the decision of the Respondents to expel and/or indefinitely suspend the Applicants from Mbaikini Boys' High school communicated through a letter dated 26th November 2021, it was submitted that the same is not tenable. In issuing the said order, the Applicants must prove that the decision did not meet the three tests of "legality", "rationality" and "procedural propriety" to the decision under review. In this case, the letter dated 26th November 2021, was meant to inform the Applicants that since they were arrested and charged in a Court of law, they should in the meantime stay out of school as they await further communication from the school management. The legality of the decision was based on regulation 38 of the ***Basic Education Regulations, 2015*** which authorized the 2nd Respondent as the head of the institution to issue a suspension notice to the Applicants.

45. It was submitted that based on the rational test, the 2nd Respondent's decision was based on the fact that setting a date for the hearing of the disciplinary case was dependent on factors beyond the control of the 2nd Respondent and further owing to the urgency and sensitivity of the matter and that every sensible person applying his mind to the issue at hand as at that time would not have rushed to fix a date for disciplinary hearing considering the urgency and magnitude of the matter. It was contended that the wording of the letter was not final in itself and in any case, the 2nd Respondent gave room for a hearing in which case the Applicants decided to file the suit prematurely before the hearing. Further, the Applicants did not issue any demand notice whatsoever, in which they would have got a response as to the steps the institution had taken in addressing their matter.

46. The Respondents distinguished the facts in the case of **Republic versus Board of Management St Joseph's School Rapogi** from the present one. In which led to the filing of the Judicial Review application in the case of ***St. Joseph's Rapogi*** it was submitted that the contents of the letter in the former case were as follows-

> ***"This is to inform you that your son is a suspect awaiting trial in Court. In view of that he is not allowed back in school until the court process is over. Kindly take note. With many thanks."***

47. From the above, it was submitted that the contents of the letter in ***St. Joseph's Rapogi*** case were couched with finality. That the students were **NOT** allowed back to the school until the finalization of the criminal matter which period was unknown. In the present case, the letter gave room for a hearing in that the 2nd Respondent was to communicate to the Applicants a date they would appear for hearing together with the parents. Equally, the 2nd Respondent advised the 1st, 2nd and 3rd Applicants to continue revising for the KCSE examinations while out of school. This meant that he had in mind that he would not keep them long without having called them for a hearing and in a worst case scenario allow them to sit for KCSE examinations. Further, in regard to the 4th and 5th Applicants who are in FORM 2 AND 3 respectively, the 2nd Respondent in his letter advised them to continue reading/revising while out of school. This meant that he had in mind that soon they may be called for a hearing whose verdict would have been a recommendation either to be re-admitted or transferred to another school.

48. Under the test for procedural propriety, it was submitted that the 2nd Respondent acted with procedural fairness towards the Applicants for the reason that he indicated in his letter that the school management would communicate to them at a later date. In any case, the 2nd Respondent deponed that by the time the Applicants filed the Judicial Review Application on 10th December 2021, the 2nd Respondent had already called for a Board meeting on 14th December 2021 which was to deliberate and set a date for the hearing of disciplinary cases which date was set for 8th January 2022. The Applicants could not have been in a position to contemplate the intentions of the Board.

49. However, though the ex parte applicants acknowledge receipt of the invitation, for 8th January 2022, they failed to appear and therefore no meeting took place. The above is an indication that the Respondents had all the intention to hear the Applicants before a final decision could be reached. It was therefore submitted that an order of **CERTIORARI** is untenable in the circumstances.

50. As regards the order of **MANDAMUS** do issue to compel the 1st and 2nd Respondents to re-admit the Applicants to Mbaikini Boys' High School and to take the necessary steps to facilitate the Applicants to access and continue with their education, it was submitted similarly the order is untenable for the reasons as deposed by the 2nd Respondent in his Replying affidavit dated 20th December 2021 and in the Further Affidavit dated 8th February 2022 some of them being-

a) Likelihood of the Applicants being ganged up against by the other students and therefore their safety would be compromised;

b) Likelihood of the Applicants inciting the rest of the students;

c) Need to guarantee the safety of the rest of the students; and

d) Need to liase with the officers from the DCI and seek advice on how best to deal with the Applicants.

51. This Court was urged to take into consideration the above raised issues in deciding whether to issue the orders of Mandamus. It was pointed out that the 5th Applicant's son had on numerous occasions written to the Principal seeking a transfer from the school, a request which the 5th Applicant declined hence explaining the reason why the 5th Applicant would engage in indiscipline cases as a way of protesting being in the school. There is also evidence that sometimes in February 2021, the 5th Applicant had been suspended for indiscipline prompting

his area chief to write a letter dated 28th February 2021 requesting the school to take him back.

52. It was therefore submitted that an order for **MANDAMUS** would not be tenable for the reason that the same would be issued in vain in such a scenario. It is a principle of the Court that it shall not issue orders in vain.

53. It was noted that in the cited case of ***St. Joseph's Rapogi***, the Court wondered how the expelled students were expected to sit for their KCSE examinations considering that they had been expelled until the criminal case was over. Bearing the above in mind, it was the Attorney Generals' submission that since the 1st, 2nd and 3rd Applicants are currently in FORM FOUR and the KCSE examinations commence in March, the 1st, 2nd and 3rd Applicants be allowed to sit for their national examinations while staying out of school guided by Regulation 42 of the ***Basic Education Regulations, 2015*** which provides that no school shall withdraw the registration of a learner as a candidate in a national examination as a form of punishment.

54. As regards the order of **PROHIBITION**, restraining the Respondents from suspending and/or expelling the Applicants unless and until their education at Mbaikini Boys High School is lawfully terminated or suspended following due procedure, it was submitted that the order of prohibition is not tenable for the reason that one cannot prohibit what has already been done. Further, the manner in which the prayer is couched means that should the Applicants engage in acts of indiscipline in future assuming that they are re-admitted to the school, they should not be suspended or expelled until they complete their education. This would amount to curtailing the authority of the Principal, the Board of Management and the County Education Board in regard to suspension or expulsion of students in disciplinary cases. Reliance was placed on the case of **Kenya National Examination Council Exparte Gathenji & Others Civil Appeal No. 266 of 1996.**

Determinations

55. I have considered the issues raised herein.

56. It is clear that this Motion is based on three major grounds. The same are that the Respondents' action was made in violation of the Rules of natural justice; secondly that the said decision was in violation of procedural fairness; and thirdly, that the decision was ultra vir3es the powers of the 3rd Respondent.

57. It is important to set out the contents of the letter that provoked these proceedings. The letter dated 26th November 2021 which provoked these proceedings was couched in the following terms:-

> ***"Your Son has been implicated in a serious crime of arson. He is currently being handled by the Court. Meanwhile he is advised to stay out of school and we will communicate to you and him. He is advised to continue preparing for KCSE examinations or and reading/revising while waiting for the communication."***

58. This letter was purportedly issued pursuant to Regulation 38 of the ***Basic Education Regulations, 2015*** which states as follows:

> ***If the Head of the institution is the opinion that-***
>
> ***(a) the acts of indiscipline have persisted in spite of warnings or corrective measures taken under these regulations; and***
>
> ***(b) if the act of indiscipline is likely to threaten the safety of the other learners in the institution,***
>
> ***The head of the institution shall issue the learner, with a suspension letter addressed to the parent or guardian indicating the nature of the indiscipline and specifying the date the learner, accompanied by the parent or guardian is required to appear before the Board of Management of the institution.***

59. These provisions have been the subject of judicial interpretation in **Republic vs. Board of Management St. Joseph's School Rapogi [2019] eKLR** where the court expressed itself as follows at paragraphs 24, 25, 26, 27, 28 and 29:

> **"24. A letter issued pursuant to Regulations 38 must contain the following details: -**
>
> **(i) Be addressed to a Parent or Guardian;**
>
> **(ii) State the nature of the act of indiscipline;**
>
> **(iii) Specify the date the student, accompanied by the Parent or Guardian, is required to appear before the Board for a disciplinary hearing."**

60. In this case the 2nd Respondent who issued the said letter averred that the letter dated 26th November 2021 was clear that the parents and the students were to be called at a later date which was to be communicated to them at a later date, a meeting which was to be determined by the convening of a Board meeting and as such he could not have anticipated a particular date without consulting the Board. He further deposed that the school management was to issue communication to both the parents of the Applicants and the Applicants themselves at a later date which date was to be determined by so many factors including but not limited to investigations which were ongoing within the school precincts in which case the school management had to give ample time to the officers from the DCI to carry out their work and consultations with the Board of Management so as to set aside a date for hearing of the Applicants indiscipline case.

61. While this Court appreciates that at the time the head of institution is taking a disciplinary action, the prevailing circumstances may not be conducive to his consulting the management in order to determine the exact return date hence he may not be able to specify the date when the student and his parent or guardian are to report back to school. However as appreciated in **Republic vs. Board of Management St. Joseph's School Rapogi (Supra):**

> **"26. There is no dispute that Regulations 38 empowered the Principal to suspend the Applicants from the School...Could it be that Regulations 38 in not specifying the period within which the student is to appear before the Board gave an open cheque to the head of an institution to determine whether a student excluded from that institution would ever appear before the Board? I do not think so for two reasons. First, it would not have been the intention of the Regulations to create room where a student is indefinitely excluded from school under Regulations 38 whereas in gravier circumstances under Regulations 35 where an institution is closed due to mass students' indiscipline the institution must be opened and the students recalled within 14 days. Second, the right to free and compulsory basic education under Article 53 of the Constitution must always be promoted and only curtailed in the most deserving cases. Even in such cases alternative ways to attaining that right must be considered in light of the constitutional requirement that a child's best interests are of paramount importance in every matter concerning that child. The right is however subject to the rights and interests of other children.**
>
> **28. In line with the foregone I must find and hold, which I hereby do, that the most favourable interpretation of Regulation 38 is that once a student is excluded from an institution the letter excluding the student must contain a date where the student while in the company of the parent or guardian must appear before the Board of Management of that institution and that the date should not be later than 14 days of the date of the letter.**
>
> **"29. In this case the impugned letters fell short of that compliance. The Principal acted without regard to due process and erred in not requiring the Applicants to appear before the Board within 14 days of the impugned letters. By so doing the Principal acted irrationally and ultra vires his legal mandate. He further illegally usurped the powers of the other organs charged with the responsibilities of dealing with cases of indiscipline in the School including the Board and the County Education Board. The Principal also curtailed the Applicants' right to appeal to the Education Appeals Tribunal in the event they were aggrieved by the decision the County Education Board. Although the Principal (and by extension the Respondent herein) was fully vested with the legal powers to exclude the Applicants from the School under Regulation 38, the decisions to indefinitely exclude the Applicants from the School and as contained in the impugned letters fell short of fully complying with the law. To that end the impugned letter cannot stand are hereby removed to this Court and quashed by an Order of Certiorari."**

62. While I do not entirely agree that the letter excluding the student must contain a date where the student while in the company of the parent or guardian must appear before the Board of Management of that institution and that the date should not be later than 14 days of the date of the letter, it is my position that the letter must, if no particular return date is stated, expressly state that the student is required to appear before the Board of Management of that institution not be later than 14 days of the date of the letter, the specific date to be communicated later. In other words, the letter dated 26th November 2021 which ought to have stated that the ex parte applicants herein were to appear before the Board on a date to be communicated within 14 days from the date of their suspension. However, by couching the letter in the terms is was drafted, the message that was being sent was that due to the fact that the matter was being handled by the Court the applicants were to stay out of school pending communication. In other words, their suspension was not to await the Board meeting but was to await further communication in light of the pending court proceedings. That is exactly what the Court frowned upon in **Republic vs. Board of Management St. Joseph's School Rapogi (Supra)** when it expressed itself as hereunder:

> **However, the letters did not have any return date before the Board but the Applicants were to stay out of the School since they were suspects until the finalization of the Case…On why the letters did not specify the return date before the Board the Principal deponed that the law did not specify the time within which the Applicants were to appear before the Board. The reason why the impugned letters did not have any return dates before the Board is simple. Since the Applicants were to stay out of the School until the finalization of the Case (which hearing of the Case was to begin after the KCSE examinations were fully administered) then by that time the Applicants would no longer be students and there would be no need for them to appear before the Board."**

63. I therefore agree that the letter dated 26th November 2021 did not comply with the Regulation 38 aforesaid.

64. By the time the applicants were called to appear before the Board of Management on 8th January 2022, it is clear that the 14 days within which the ex parte applicants ought to have appeared had already passed. It would seem that the real reason why the 2nd Respondent did not return date in the letter was, as he stated, to give ample time to the officers from the DCI to carry out their work. That however, was not one of the reasons for invoking Regulation 38.

65. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** the Court while citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** held:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with**

procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

66. The requirement for stringent compliance with procedural rules is even more crucial in disciplinary matters. The powers and the procedure before disciplinary bodies was dealt with in **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,** where the Court expressed itself as follows:

"The Disciplinary Committee as a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute…Secondly, the Disciplinary Committee has no authority to expand its ambit beyond what has been referred to it by the Council. The terms of section 30(1) say that where the Council has reason to believe that a member has been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee, which shall inquire unto the matter. Under section 31(1), on the completion of an inquiry under section 30 into the alleged professional misconduct of a member of the Institute, the Disciplinary Committee shall submit to the Council a report of the inquiry put the matters beyond question or doubt. The Disciplinary Committee can only conduct an inquiry into the actual matters referred to it for inquiry by the Council. In unilaterally expanding the said inquiry into something called "conduct short of expected standards of professionalism", and thereby expanding the said inquiry beyond its terms of reference, the Disciplinary Committee acted unlawfully…Thirdly, there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers Disciplinary Committee or indeed the Respondent, to delegate its Ad-judicatory functions to unnamed person under Section 28(1) of the Accountants Act. The Committee's findings of the Applicant guilty of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations. If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a 'determination' within the meaning of empowering legislation was accordingly a nullity…Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law…It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."

67. In **Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629**, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language. See **London County Council vs. Aylesbury Dairy Company Ltd [1899] 1 QB 106 at 109; Muini vs. R through Medical Officer of Health, Kiambu [2006] 1 KLR (E&L) 15; Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

68. What are the consequences of failure to adhere to the procedural rules? In my view however the right approach should be the one adopted in **Pastoli vs. Kabale District Local Government Council and Others** (supra) at page 305 that:

"When Parliament prescribes the manner or form in which a duty is to be performed or power exercised, it seldom lays down what will be the legal consequences of failure to observe its prescriptions. The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done (though in some cases it has been said that there must be "substantial compliance" with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision of the appropriate category. The whole scope and purpose of enactment must be considered and one must assess the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act. In assessing the importance of the provision, particular regard may be had to its significance as a protection of individual rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administrative scheme established by the statute. Although nullification is the natural and usual consequences of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if a serious public inconvenience would be caused by holding them to be mandatory or if the Court is for any reason disinclined to interfere with the act or decision that is impugned. In a nutshell, the above principles indicate that to determine whether the legislature intended a particular provision of Statute to be mandatory, the Court must consider the whole scope and purpose of the Statute. Then to assess the importance of the impugned provision in relation to the general object intended to be achieved by the Act, Court must consider the protection of the provision in relation to the rights of the individual and the effect of the decision that the provision is mandatory."

69. It is clear from the tone of the impugned letter, that the applicants were placed in a quandary as to what to do next since the letter did not give any indication as to when the Board would meet. They had no option but to approach this Court since they could not appeal against a decision which was yet to be made. In that state of anxiety, it is clear that the decision had the effect of impinging upon the applicants' right to education.

70. That said, where the action under challenge has the potential of restricting human rights and fundamental freedoms under the Bill of Rights, any procedural rule enacted with a view to ensuring the due process is adhered to before any adverse action is taken ought to be considered seriously since under Article 19 of the Constitution, the Bill of Rights is the framework for social, economic and cultural policies and the purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. Our Constitution appreciates that the rights and fundamental freedoms in the Bill of Rights belong to each individual and are not granted by the State.

71. In this case by not stating that the Board would deliberate on the matter at all and within what period, the 2nd Respondent was in effect

indefinitely suspending the applicants without affording them an opportunity of being heard. This position was restated with respect to the rules of natural justice by the Uganda Supreme Court in **The Management Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, as follows:

> **"It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."**

72. Our own High Court (**Nyamu, J as he then was**) in **Kenya Bus Services Ltd & 2 Others vs. Attorney General [2005] 1 KLR 787**, eloquently asserted as follows:

> **"The only difference between rights and the restrictions are that the restrictions can be challenged on the grounds of reasonableness, democratic practice, proportionality and the society's values and morals including economic and social conditions etc whereas rights are to the spiritual, God given, and inalienable and to the non-believers changeless and the eighth wonder of the World. The *ex parte* order could not have been spared in any event for the reason that it would have hindered the smooth flow of the streams of justice for all by blocking the 221 persons while the rivers of Constitutional Justice or any justice at all should flow pure for all to drink from them."**

73. In this case, it would seem that the Respondent deferred their action awaiting the decision of the investigative agencies. While the latter's action could be considered in arriving at the Respondents' decision, the Respondent could not withhold their action pending the decision by the investigative agencies since as was held in **Eliud Nyauma Omwoyo & 2 Others vs. Kenyatta University [2014] eKLR,** where the High Court cited with approval the decision in ***Republic vs. Kenyatta University and 2 Others Ex Parte Jared Juma, HC Misc Civil App No. 90 of 2009***:

> ***"Discipline at the Respondent's University is necessarily an internal process conducted using internal personnel. It would be impractical to sub-contract or delegate as it were, this function to an outside agency."***

74. This position is restated in section 7(2)(a)(i)(ii) and (iii) of the ***Fair Administrative Action Act, 2015*** where it is provided that a court or tribunal may review an administrative action or decision, if the person who made the decision was not authorized to do so by the empowering provision; acted in excess of jurisdiction or power conferred under any written law; or acted pursuant to delegated power in contravention of any law prohibiting such delegation.

75. In arriving at my decision, I must make it clear that this decision is not based on the merits of the complaints levelled against the applicants but only deals with the disciplinary process. In **Oluoch Dan Owino –vs- Kenyatta University, High Court Petition No. 54 of 2014**, this Court observed as follows:

> **"As I understand it, the right to education does not denote the right to undergo a course of education in a particular institution on one's terms. It is my view that an educational institution has the right to set certain rules and regulations, and those who wish to study in that institution must comply with such rules. One enters an educational institution voluntarily, well aware of its rules and regulations, and in doing so commits himself or herself to abide by its rules. Unless such rules are demonstrated to be unreasonable and unconstitutional, to hold otherwise would be to invite chaos in educational institutions."**

76. As was appreciated in **J M O O –vs- Board of Governors of St. M's School, Nairobi [2015] eKLR**:

> **"It is correct that the Constitution guarantees to children the right to education, and it also requires that in every matter concerning the child, the best interests of the child must be the primary consideration. However, it must be restated and re-emphasised that rights have their corresponding responsibilities, and the responsibility of students in school is to abide by the school's regulations. It would certainly not be in the best interests of the petitioner, or of the other students in the respondent school, were the respondent to ignore disruptive conduct on the part of the petitioner, or of any other student. As this Court observed in the case of *Fredrick Majimbo & Another vs The Principal, Kianda School, Secondary Section High Court Petition No. 281 of 2012*:**
>
> **[26.] In my view, the school, in suspending the petitioners' daughter, used the guidelines and processes set out in its Code of Conduct, and in accordance with the agreement reached between the school and the petitioners on 4th April 2012. From the evidence before me, the petitioners had accepted the school's regulations, as had their daughter, in gaining admission to the school. They had agreed on 4th April 2012, and they had confirmed this agreement on 1st May 2012, that in the event of one more transgression of the school's regulations by their daughter, she would be asked to leave the school. I can therefore find no basis for alleging violation of the rights of the petitioners' daughter. She does indeed have a right to education, and her best interests must be taken into account in any decision affecting her. The respondent has been, in my view, very accommodating of the petitioners' daughter in the face of frequent, and on the face of it, unapologetic infractions. To deal with the petitioners' daughter in a manner different from the way they have dealt with her would doubtless have been against her best interests as it would have been to condone indiscipline and misconduct, to the detriment of her long term interests.**
>
> **[27.] Further, as the respondent correctly argues, the rights of the petitioners' daughter must be considered alongside the**

rights of the other students in the school. The school has an obligation to all its students, and as the respondent submits, failing to discipline the students who break rules would set a bad precedent and affect students and parents who are willing to abide by school regulations

[28.] There is no material placed before me from which I can properly find any violation of the petitioners' daughter's rights under Articles 43(1)(f) or 53(2) The school must be allowed to govern its student body on the basis of the provisions of the Education Act and its Code of Conduct, and the court will be very reluctant to interfere unless very strong and cogent reasons for interfering with its decisions are placed before it, which has not been done in this case. I agree with the sentiments of Nyarangi, JA in *Nyongesa & 4 Others -v- Egerton University College (1990) KLR 692*, which were cited with approval by Musinga J in *Republic -v- Egerton University ex parte Robert Kipkemoi Koskey Nakuru Misc. Civil Application No 712 of 2005* that:

"Having thus stated, as I think to be desirable, the broad nature of the important issues and proposed procedure, I shall now state that courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run universities or indeed any other bodies. However, courts will interfere to quash decision of any bodies when the courts are moved to do so where it is manifest that, decisions have been made without fairly and justly hearing the person concerned or the other side."

77. The limited role of the Courts in such matters was appreciated in **Eliud Nyauma Omwoyo & 2 Others vs. Kenyatta University [2014] eKLR,** where the High Court cited with approval the decision in ***Republic vs. Kenyatta University and 2 Others Ex Parte Jared Juma, HC Misc Civil App No. 90 of 2009***, in which it was held that:

"Most bodies established under statute also establish disciplinary committees. Kenyatta University is no exception. The composition of the disciplinary committee is set out in the Statute, and it comprises University officers. The University has jurisdiction to conduct its own disciplinary proceedings. This must necessarily be so. The suggestion that disciplinary proceedings are a matter for courts is untenable…the existence of such a disciplinary committee has always been recognized by the courts. The courts also recognize that their relationship with such committees is limited to supervision."

78. In arriving at a decision, the disciplinary body must however ensure it complies with section 7(2)(l) of the ***Fair Administrative Act*** which provides that a court may review a decision of an administrative body if the decision is not proportionate to the interests or rights affected. In this case, where some of the *ex parte* applicants are candidates, the Respondents ought to have considered the effect of their indefinite suspension vis-à-vis other less harmful punishments such as directing the Applicants to attend school as day scholars, assuming that they were boarders. In other words, the mere fact that the criminal investigations had been undertaken and even the applicants charged in court does not necessarily bar the Respondents from undertaking their obligations. It may well turn out, after the criminal process, that there was no evidence linking the applicants to the alleged criminal action. If that be the case, and the applicants were locked out from enjoying their constitutional rights to education, the damage may well be beyond repair.

79. On the other hand, notwithstanding the readmission of the applicants, the criminal process may still proceed and if found guilty, the applicants would be subjected to the due process of the law. In the meantime, the applicants may, depending on the outcome of the disciplinary proceedings be readmitted, if necessary, conditionally. As appreciated in **Republic vs. Board of Management St. Joseph's School Rapogi (Supra):**

"the right to free and compulsory basic education under Article 53 of the Constitution must always be promoted and only curtailed in the most deserving cases. Even in such cases alternative ways to attaining that right must be considered in light of the constitutional requirement that a child's best interests are of paramount importance in every matter concerning that child. The right is however subject to the rights and interests of other children."

80. In this case, there is no doubt that the manner in which the ex parte applicants were suspended was unprocedural. However, in granting the reliefs which are, no doubt discretional, this Court must consider all the circumstances of the case and should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.**

81. I defer the Court to the case of **East African Cables Limited vs. The Public Procurement Complaints, Review & Appeals Board and Another [2007] eKLR** where the Court of Appeal set out principle of public interest;

"We think that in the particular circumstances of this case, if we allowed the application the consequences of our orders would harm the greatest number of people. In this instance we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most goods. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable"

82. In this case the Court must balance between the rights of the applicants as well as the rights of the other students. While a decision is yet to be made as regards the role, if any, that the applicants played in the arson, this Court has the duty to secure the safety of the applicants as well.

83. Accordingly, I hereby direct the Respondents to, within Ten (10) days from the date of this decision, convene a meeting for the Board of Management for Mbaikini Boys High School and deliberate upon the allegations made against the applicants. Not less than three (3) days' notice shall be given to the Applicants and their parents/guardians for the said meeting at which the Applicants shall be given the particulars of the allegations made against them and they be given an opportunity to respond to the same before a decision is thereby made.

84. In the event that no such a meeting is held, within the period stated hereinabove, an order of ***CERTIORARI*** shall issue removing into this court for purposes of quashing the decision of the Respondents suspending the applicants from Mbaikini Boys' High School communicated through a letter dated 26th November, 2021 and an order of ***MANDAMUS*** shall issue directed at the 1st and 2nd Respondents compelling them to re-admit the applicants to Mbaikini Boys' High School and to take the necessary steps to facilitate the applicants to access and continue with their education. An order of ***PROHIBITION*** shall also issue restraining the respondents from suspending and/or expelling the applicants based on the said letter unless and until their education at Mbaikini Boys High School is lawfully terminated or suspended following due procedure.

85. There will be no order as to the costs of this application and it is so ordered.

JUDGEMENT READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 21ST DAY OF FEBRUARY, 2022.

G. V. ODUNGA

JUDGE

In the presence of:

Mrs Nzau for the Applicants

Mr Munene for the Respondent

CA Susan