



Hassan v County Education Board Garissa County & another (Judicial Review 3 of 2020) [2022] KEHC 12501 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEHC 12501 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
JUDICIAL REVIEW 3 OF 2020**

**A ALI-ARONI, J
MAY 26, 2022**

BETWEEN

OMAR ABDI HASSAN APPLICANT

AND

COUNTY EDUCATION BOARD GARISSA COUNTY 1ST RESPONDENT

**COUNTY DIRECTOR OF EDUCATION GARISSA COUNTY 2ND
RESPONDENT**

JUDGMENT

1. On the May 31, 2021 the County Education Board, Garissa County; the 1st respondent through the 2nd respondent; the County Director of Education, Garissa County dissolved the School Board of Management of the Boystown Secondary School where the applicant was the Chairman.
2. With the dissolution of the said Board chaired by the applicant a new board was appointed and has since then managed the affairs of the school.
3. Aggrieved by the decision of the respondents the applicant moved the court seeking for an order of certiorari to issue to remove to this court and to quash the said decision. Further he sought for an order of prohibition to issue restraining the respondents from implementing the decision contained in the letter of May 31, 2021 and for costs.
4. The application is brought on grounds that the respondents acted in excess of their mandate, failed to observe rules of natural justice as they did not give a hearing to the Board of Management, further the Law only allows the 1st respondent to make recommendations to the Cabinet Secretary of Education for the Dissolution of a Board of Management of a school. And that without any colour of right the respondents instructed KCB Bank and the First Community Bank to freeze the school's account in a bid to frustrate the applicant's Board and without due regard for the welfare of the students; that the decision of the respondents has far reaching consequences and an appeal to the Education Appeals



Tribunal was not appropriate as the action of the respondents was outside the determination of the Board's mandate.

5. The respondents objected to the application through a replying affidavit of Khalif Issack Hassan the 2nd respondent; County Director of Education, Garissa County.
6. In the said affidavit the 2nd respondent stated that the 1st respondent met on May 17, 2021 and unanimously resolved to dissolve the Board of Management of Boys town Secondary School citing constant wrangles amongst members due to tenders, differences between the school Principal and his deputies and resignation of some Board members due to allegations of misappropriation of school funds by the applicant.
7. He contended further that the said board lacked purpose, failed to adhere to requisite laws, to promote diversity, was not accountable and did not recognize the role of the principal and his deputies. He confirmed further that a new board was appointed.

Applicant Submissions

8. The 1st respondent dissolved the Board of Management vide a letter dated May 31, 2021 written by the 2nd respondent at the behest of the 1st respondent. He cited contravention of regulation 9 of the [Basic Education Regulations](#) which provides as follows;

- 9(1) The Cabinet Secretary may, on recommendations of the County Education Board dissolve the Board of Management of an institution where
 - a. Such Board
 - i. Is found guilty of gross misconduct.
 - ii. Is deemed to be incapable of discharging its mandate as provided for in the Act; or
 - b. The institution changes its mandate or ceases to operate.
- (2) where a Board of Management is dissolved under paragraph (1) the Board shall appoint an interim committee of five members to assume the responsibility of managing the institution.”

9. It is clear from the letter of May 27, 2021 who dissolved the board. No evidence has been brought forth to show that the two steps set in the regulations; ie, recommending to the Cabinet Secretary and the Cabinet Secretary making a decision were undertaken.

10. In total disregard of the law the respondents appointed a new board which is clear indication that the action and decision of the respondents was *ultra vires* the [Basic Education Regulations](#) and therefore illegal. Counsel cited the case of [Pastoli v Kabale District Local Government Counsel & others](#) [2005] 2 EA 300 as cited in [Republic v The County Education Board & another Ex-parte Bridge International Academies Limited](#) [2017] eKLR where it was stated;

Illegality is when the decision-making authority commits an error of law in the process of taking the decision 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...”



11. Further it was argued that a public body ought to observe rules of natural justice yet the respondents failed to do so on their part. Reference was made to the case of Ridge v Baldwin [1963] ALL ER 66.
12. As to the reliefs sought it was submitted that the applicant has established that the decision of the respondents was tainted with illegality and procedural impropriety and therefore the remedy of certiorari to quash the said decision is appropriate so is the order of prohibition to stop the illegality. Further since the respondents acted in excess of their powers, failed to adhere to the rules of natural justice and have persisted despite notice of the suit they should bear cost of the suit.

Respondents' Submissions

13. On their part the respondents submitted that after the 1st respondent met on May 17, 2021 and unanimously resolved to dissolve the Board of Management of Boys town Secondary School due to constant wrangles amongst the members arising from school tenders, differences between the administration; the principal and his deputies and resignation of some members due to lack of confidence and credibility of the remaining members. And following the said resolution on the May 27, 2021 the 1st respondent recommended dissolution of the board and on June 5, 2021 a new board was put in place.
14. It was argued that the applicant has failed to prove a prima facie case to warrant the issuing of orders of certiorari and prohibition as the process and decision made by the 1st respondent was not irrational, illegal or with any procedural impropriety. Reference was made to the case of Republic v Public Procurement Administrative Review Board & 2 others [2019] eKLR where Mativo, J stated:

Certiorari issues to quash a decision that is *ultra vires*. Review on a writ of *certiorari* is not a matter of right but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exists. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles.”

15. Having considered the pleadings, submissions and authorities relied upon by the rival parties the issues before the court are;
 - (i) whether the decision by the respondents to dissolve the board of management of the Boystown Secondary School was *ultra vires*.
 - (ii) whether there was procedural unfairness on the decision to dissolve the board and
 - (iii) Whether the orders of *certiorari* and prohibition sought for are the most efficacious remedy in the circumstances of the case.

Analysis And Determination

16. It is not in dispute that a meeting held by the 1st respondent on May 17, 2021 unanimously agreed that the Board of Management of Boystown Secondary School be dissolved and at its behest the 2nd respondent in his letter of May 31, 2021 communicated that resolution to the principal of the school and subsequently a new board was put in place.
17. The applicant's case is that the respondents had no power to dissolve the Board of Management. The law only mandates them to make a recommendation to the Cabinet Secretary of Education who may



or may not act on the recommendations and if he dissolves the school management, he would have to appoint an interim committee to run the school.

18. The respondents admit the allegation that the 1st respondent resolved to dissolve the Board of Management and attempted to justify their action based on the allegation of misconduct on the part of the said board of management.
19. The remedy of judicial review is not concerned with the merit of a decision; whether it was right or wrong but rather with the decision making process, whether the authority concerned acted within the scope of its authority, whether the process was fair and reasonable.
20. In *Municipal Council of Mombasa v Republic & Umoja Consultants Limited*, Nairobi Civil Appeal No 185 of 2001 [2002] eKLR the Court of Appeal stated:

The court would duly be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power i.e the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of Judicial review is concerned with; and such court is not entitled to act as a court of appeal over the decider acting on appeal would involve going into the merit of the decision itself such as whether there was or there was not sufficient evidence to support the decision and that, as we have said, is not the province of judicial review.

21. With the above in mind the court has considered what the law says on dissolving of Board of Management of Secondary School. Section 9 of the *Basic Education Regulations, 2015* provides that

“9(1) The Cabinet Secretary may, on the recommendation of the County Education Board dissolve the Board of Management of an institution where

- a. Such board
 - i. Is found guilty of misconduct.
 - ii. Is deemed to be incapable of discharging its mandate as provided for in the Act; or
 - iii. The institution changes its mandate or ceases to operate.

(2) where a Board of Management is dissolved under paragraph (1) the Board shall appoint an interim committee of five members to assume the responsibility of managing the institution.”

22. What has come out in evidence from both the applicant and the respondents is that there were allegations of misconduct amongst the board members. As a result, the 2nd respondent in a meeting held on the May 17, 2021 unanimously resolved to have the board dissolved.

The said decision of the 1st respondent, was not forwarded as envisaged by section 9(1) of the *Basic Education Act* as a recommendation to the Cabinet Secretary of Education. What followed the decision was a letter from the County Education Board Secretary to the Principal of the School informing him of the decision. As rightly stated by the applicant the only duty the 2nd respondent has under the law once such a decision was arrived at, was to make recommendation to the Cabinet Secretary, and leave



it to the Cabinet Secretary to dissolve the said board of management. No such recommendation was made.

23. Further, even if the allegations as contained in the averments of the 2nd respondent were made there is no indication that the applicant and the Board members were advised of the same and given a chance to explain or defend the allegations of misconduct contrary to good practice and rules of natural justice.

24. In the Ugandan Case of *Pastoli v Kabale District Local Government Council & others* [2008] 2 EA 300 the court stated *inter alia*

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. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...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....”

25. The above authority squarely fits in the circumstances of this case. The respondents acted illegally without jurisdiction overlooking the statutory provision of dissolving and replacing the board. Secondly there was equally procedural impropriety as the allegations were never communicated to the board members nor were they given a hearing.

26. 28. In granting an order of certiorari which is discretionary the court must weigh several things even if an authority committed an illegality the order is not automatic, the remedy must be the most efficacious. *Halsbury's Laws of England* 4th edition volume II page 805 paragraph 1508 states as follows;

Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for it grant exist. The court has to weigh one thing after another to say whether or not the remedy is the most efficacious in the circumstances The discretion of the court being a judicial one, must be exercised on the basis of evidence and sound principles.”

27. This matter involves a school which has learners and any decision made will impact on them. The dissolution and installation of a new board took place one year ago. The interest of the students is paramount in a school set up and re-installing back the old board may not be to the best interest of the learners as it is likely to disrupt the education and smooth running of the school in as much as the 2nd respondent was on the wrong. The balancing of the competing interest is a delicate balance and militates against issuance of such an order.



28. As for the order of prohibition it looks to the future to prohibit the action contemplated. The applicant seeks to prohibit the decision undertaken by the 2nd respondent on the May 31, 2021, of nominating and appointing a new board of management. On the facts of the case the 2nd respondent in a meeting held on June 5, 2021 decided to nominate a new team and to forward names to the Ministry of Education.

In *Republic v Kenya National Examination Council Ex-parte Gatheji & others* Civil Appeal No 260 of 1996 the Court of Appeal stated

Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which has already been made. It can only prevent the making of a contemplated decision.”

29. Consequently for the reasons above the court declines to grant the remedies sought for.

30. In this matter the respondent who committed an illegality should not go scot free. Their action necessitated this suit and in as much as the court decline to issue the writ the respondents ought to be condemned to pay the costs. Costs to the applicant in any event.

DELIVERED AND SIGNED AT GARISSA THIS 26TH DAY OF MAY, 2022

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ALI ARONI

JUDGE

