REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAPENGURIA

JUDICIAL REVIEW APPLICATION NO. 9 AND 10 0F 2018 (CONSOLIDATED)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OR CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF LAW REFORM ACT SECTION 8 AND 9 CAP 26 LAWS OF KENYA

AND

IN THE MATTER OF A DECISION BY KENYA NATIONAL EXAMINATION COUNCIL TO CANCEL KCSE RESULTS OF 320 CANDIDATES OF ORTUM

AND

IN THE MATTER OF SECTION 32 OF THE KENYA NATIONAL EXAMINATION COUNCIL ACT, 2012

REPUBLIC..... APPLICANT

VERSUS

KENYA NATIONAL EXAMINATI ON COUNCIL .....1ST RESPONDENT

THE CHIEF EXECUTIVE OFFICER/ COUNCIL SECRETARY, THE KENYA

NATIONAL EXAMINATION COUNCIL .....2ND RESPONDENT

EX PARTE

1. THE BOARD OF MANAGEMENT ORTUM SECONDARY SCHOOL;

AND

2. LOSHARIPO MANAGAT BOAZ AND 319 OTHERS (SUING THROUGH NEXT FRIEND STEPHEN TIRONG'OLE)

JUDGMENT

Background

1. The Notice of Motion the subject of this ruling seeks the following orders;

> **i. That this Honourable Court be pleased to issue an order of Certiorari to remove into the High Court for the purpose of its being quashed forthwith the decision of the Kenya National Examination Council as contained in its letter dated 26/04/2018 cancelling the examination result in respect of all the 320 Kenya Certificate of Secondary Examination candidates for the year 2017 for Ortum Secondary (24504201), on the ground of an alleged irregularity referred to as "collusion in English (101), Biology (231) and Physics (232) subjects" without following the lawful process and without affording the affected candidates a hearing.**
>
> **ii. That this Honourable Court may be pleased to issue an order of Mandamus directed at the Kenya National Examination Council to compel the Kenya National Examinations Council to certify the KCSE results released to the candidates, the**

school, the parents and the entire Country on the 20th December, 2017 as the valid final results of the 2017 KCSE for the 320 students of Ortum Secondary School (24504201).

iii. That the respondents may be condemned to pay costs of this application.

Applicant's Case.

2. The application was supported by an affidavit sworn by Stephen Tirong'ole a representative of the parents of the candidates who sat for the 2017 KCSE Examination in Ortum Secondary School. In his affidavit he depones that there was a consent order dated 13th April 2018 quashing the initial decision of the respondent that was contained in the respondent's letter dated 18th January, 2018, which letter had cancelled the results of all 2017 KCSE candidates of Ortum Secondary School. That the court further directed that unless the respondents initiates a lawful process of cancellation of the results within 14 days then an order of mandamus would issue compelling the respondent to certify the KCSE results released to the School, the parents and the entire country on 20th December 2017. The respondent then sent a letter dated 16th April 2018 to the school inviting them for a hearing meeting in Nairobi on 19th April 2018 in which they invited one representative of the parents of the candidates, one representative of the Board of management of the School, the school Principal and the advocate of the School. The deponent avers that the said notice was too short, in addition to the fact that the applicants were not informed in advance what the purported hearing would involve so as to enable them to prepare in advance. When the applicants attended the meeting they were handed the same investigation report that had led to the decision of the respondent canceling the said results that had already been nullified vide the court order issued on 13th April 2018.

3. The applicants also contend that the respondent later communicated to them through a letter dated 26th April 2018 their decision canceling the examination results without following the due process and without affording the candidates a hearing; that the respondent should not have relied on the said investigation without affording the affected candidates a hearing and therefore that the decision was against the rules of natural justice, pre-determined, outrageous and unconstitutional. The applicants also contend that the respondent's letter was contradictory as it held that the respondent was not obligated to conduct fresh hearings as the students were represented by their parents which decision was unlawful and irrational.

4. The applicants had initially approached the honourable court seeking orders of certiorari and mandamus but were directed vide a judgement dated 17th July 2018 to seek leave of the court first which they did within the timelines set by the law.

5. The applicants filed written submissions in which they inform the court that they arrived at the meeting in which the hearing was being conducted way after 9.00 a.m. and upon arrival, they were handed the investigation report and expected to respond to issues raised in the report and yet they had not been given enough time to prepare for that. In the applicant's view the investigations were the same that had led to the cancellation decision that was quashed through the court order issued on 13th April 2018 therefore no new investigations were conducted. They maintained that they were not accorded a chance to be heard contrary to **Article 50** of the **Constitution**.

6. Counsel relied on the case of **Republic –v- National Examination Council and 2 others Ex parte Echesa Abubakar Busalire and another (Nairobi JR, Misc. Cause no. 11 of 2018 as consolidated with JR No. 40 of 2018)**

Respondent's Case.

7. In response counsel for the respondents filed a replying affidavit dated 5th October 2018. The same was sworn by Befley Bisem in his capacity as the Corporation Secretary and Deputy Director Legal Service division of the 1st respondent. He states that the matter arose from the withholding and cancellation of the results of students of Ortum Secondary School. The decision was communicated to the school through a letter dated 16th January 2018. The High Court however ordered that a proper cancellation process be initiated by the 1st respondent by giving the applicants an opportunity to be heard before cancellation of the examination results. The respondents abided by this order by giving the applicants a hearing date which was upheld by the High Court in a subsequent ruling. The hearing date was set for the 19th April 2018. In the meeting the respondents accorded the applicants a chance to have their case heard and also supplied them with the investigation report before the meeting proceeded. After the proceedings the Examinations Management Committee weighed and considered all the issues before concluding that there was clear evidence that examination irregularities were committed by all the 320 candidates of Ortum Secondary School. The deponent further stated that the initial court order did not quash the investigations on record rather it required the respondent to initiate fresh cancelation process meaning that there already existed a cause for cancellation of examination results.

8. The deponent also stated that the investigations were conducted in a legal manner that was free and fair; that the law does not require the applicants or the affected candidates to be involved in the investigation process. He also averred that having handed over the investigation report to the applicants on 6th March 2018, there was sufficient time for the applicants to prepare for the hearing on 19th April 2018. It was deponent's view that supply of the investigation report, coupled with granting the applicants the opportunity to be heard satisfied the rules of natural justice and the requirements of **Article 47** of the **Constitution.** He also averred that at the said meeting the applicants and their legal representative did not raise any objection to the process nor did they seek time to furnish any grounds to discredit the investigation report. It is the deponent's contention that if the honourable court orders that the respondents certify the examination results then that would amount to the court usurping the statutory powers of the respondents. The said 320 candidates had registered for the examinations to be conducted in the 2018 KCSE period and the respondents were determined to ensure the process was credible.

9. Counsel for the respondent also filed written submissions. The first issue they address is that of Jurisdiction. They opine that if the applicants were aggrieved by the decision of the respondent they ought to have lodged an appeal with the National Examination Appeals Tribunal Established under **Section 40 B** of **The Kenya National Examination Council Act**. Further to that **Section 9** of the **Fair Administration Action Act** provides that all remedies available under any other written law should first be exhausted before the parties can come before a High Court or a Subordinate Court. The exemption will be after the court considers it to be that in the interest of justice, and in exceptional circumstances an application ought to be made and such evidence be produced. There is no evidence in this particular case that

internal mechanisms were sought or that the applicants made an application for exemption.

10. Counsel then addressed the issue of the consent order that was recorded on 13th April. The consent was guided by the decision in **Judicial Review Misc. Application no. 57 of 2011 – Republic versus National Examination Council Ex-parte Echesa Abubakar Busalire** and thereafter the court proceeded to quash the letter dated 16th January 2018 and further ordered that unless the 1st respondent initiated a lawful process of cancellation of the examination result within 14 days then an order of mandamus would issue compelling the 1st respondent to certify the examination results which had earlier been released on 20th December 2017. The obligation of the respondent, they opine, was to initiate a lawful process and nothing more. The respondents contend that they were not under any duty to conduct fresh investigations. They rely on **Republic vs University of Nairobi Civil Application no. Nai. 730f 2001 2 EA 572** in which it was held that **"the court would only be entitled to quash the decision and leave it for the Respondents to take the legal course available"**

11. The respondents urge the court to look into the question whether the respondent initiated a lawful process within 14 days as ordered by the court. The applicants did not seek time to respond to the investigation report during the meeting that was regarded as the hearing, they did not raise the issue that they did not understand the contents of the investigation nor did they object to the meeting proceeding.

12. The respondents also hold that the applicants were given a fair hearing. First is that they were given sufficient notice to attend the meeting on 19th April 2018. They were then availed a copy of the investigation report by the respondents. Further that the applicants entered into a consent with the respondents for initiating a legal process for cancellation of results within 14 days. Since the respondents complied, the applicants cannot now allege that they were not given sufficient time to prepare or that the period was too short as it was within the 14 days the parties had consented to. Reliance on this issue was placed on the decision in the Chebuyusi High School case in which the consent they entered into was based on.

13. On the issue of a fair hearing, counsel submits that the individual candidates cannot each be heard. Since their complaint was common. Reliance was placed on the **Chalbi Case** (aute) to the effect that it is not necessary to give each and every candidate a personal hearing.

14. The respondents pray that the application for Judicial Review be dismissed for lack of merit.

Issues for Determination

15. The first issue for determination is that of Jurisdiction, for without jurisdiction this court has no business handling this matter. In **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the Court of Appeal expressed itself this on the question of jurisdiction:

> **"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."**

16. The constitution of Kenya defines subordinate courts under Article 169 thus:

> **"1) the subordinate courts are-**
>
> **a. the magistrate's courts;**
>
> **b. the Kadhis' courts;**
>
> **c. the courts martial;**
>
> **d. any other court or local tribunal as may be established by an act of parliament, other than courts established under clause 1"**

17. Section 9 of the Fair Administrative Actions Act provides as follows,

> **"9 (1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.**
>
> **(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. (3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies**

referred to in subsection (2) have been exhausted, direct that the applicant shall first exhaust such remedy before instituting proceedings under sub-section (1). (4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice. (5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal."

18. From the above provisions, the first option open to the applicants was to refer their issues to the Tribunal that is established to address the issues raised against the decisions of the Kenya National Examinations Council. They did not raise their issues with the Tribunal neither did they indicate to the court why they did not do so, nor did they seek leave of this court to be exempt from that process.

19. In **Management Chalbi Boys High School and 2 others versus the Cabinet Secretary Ministry of Education Science and Technology and 4 others [2018] eKLR** the Court held that

"I do find that the petitioners ought to have first pursued the mechanism under rules 15 of legal notice no. 132 of 2015 as well as the procedure under Section 40J of the Act no. 29 of 2012. The petitioners were aware of the right from 20.12.2017 that the school's results had been withheld. They had reason to apply to the council or appeal to the Tribunal. Be that as it may, I do find that the application dated 16th February lacks merit and is hereby dismissed."

Conclusion

20. In light of the foregoing, and considering that the instant application was brought before this court without regard to the fact that the first option open to the applicants was to approach the Tribunal as established by the Kenya National Examination Council unless they were exempt, and noting further that the applicants did not file any application seeking exemption from approaching the Tribunal in the first instance, I find and hold that the application as filed is lacking in merit for lack of jurisdiction on the part of this court. Further, it has also been overtaken by events. The same be and is hereby dismissed.

Costs

21. Each party in this matter shall bear its own costs.

Judgment delivered, dated and signed in open court at Kapenguria on this 28th day of February, 2019.

RUTH N. SITATI

JUDGE

In the Presence of

Miss Chebet holding brief for M/s Arunga for Applicant

Miss Opondo holding brief for Oburu Mbech for Respondents

Mr. W. Juma - Court Assistant