REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 404 OF 2018

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

AND

IN THE MATTER OF THE LAW REFORM ACT

AND

IN THE MATTER OF THE CONSTITUTION

AND

IN THE MATTER OF THE BASIC EDUCATION ACT

AND

IN THE MATTER OF THE CHILDREN'S ACT

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

K.S. BUNYASI, THE PRINCIPAL- HOSPITAL

HILL HIGH SCHOOL.....1ST RESPONDENT

HOSPITAL HILL HIGH SCHOOL.....2ND RESPONDENT

THE BOARD OF MANAGEMENT,

HOSPITAL HILL HIGH SCHOOL.....3RD RESPONDENT

THE ATTORNEY GENERAL.....4TH RESPONDENT

EXPARTE:

AWO (Minor Suing through his father and next friend NO)

AHG (Minor suing through his father and next friend AGH)

JUDGMENT

The Application

1. The Application before the Court for determination is a Notice of Motion dated 23rd October 2018, filed by AWO and AHG, the *ex parte* Applicants herein, (hereinafter "the 1st and 2nd Applicants"). The 1st and 2nd Applicants are minors and students in Hospital Hill High School, which is the 3rd Respondent herein. They have sued the said school, its Principal (the 1st Respondent herein), its Board of Management (the 2nd Respondent herein), and the Attorney General (the 4th Respondent herein), and are seeking the following orders:

a) An order of Certiorari to remove into this Court and quash the suspension letters dated 2nd October 2018 issued by the 1st, 2nd and 3rd Respondents through the 1st Respondent purporting to communicate a decision to suspend the Applicants pending hearing and determination of Criminal Case No 1658 of 2018

b) An order of Mandamus to compel the 1st, 2nd and 3rd Respondents to re-admit the Applicants into Hospital Hill High School with immediate effect.

c) An order of Prohibition to remove into this Court and prohibit the 1st,2nd and 3rd Respondents from taking any other or further disciplinary action against the Applicants in respect of the alleged offence which is currently subject of Criminal Case No 1658 of 2018.

d) That costs of and incidental to the application be provided for, and such further and other reliefs that this Court may deem just and expedient to grant.

2. The application was supported by a statutory statement dated 4th October 2018, and a verifying affidavit and supporting affidavit sworn by NO, the 1st Applicant's guardian on 4th October 2018 and 23rd October 2018 respectively. The said deponent also stated that he was swearing the affidavits on behalf of the 2nd Applicant, and filed an authority to this effect given by the 2nd Applicant dated 4th October 2018.

3. The grounds for the application are that the 1st, 2nd and 3rd Respondents issued the 1st and 2nd Applicants with letters of suspension which are indefinite pending the outcome of a criminal case, and without giving the said Applicants an opportunity to be heard. Further, that the decision contravenes section 35(2) and (3) of the Basic Education Act, is unlawful and violates the Applicants' Constitutional rights.

4. The 1st and 2nd Applicants contend that they were arrested on 26th September 2018 and charged before the Kiambu Magistrate Court on 28th September 2018, and released on bail pending the hearing and determination of their criminal case. That on 2nd October 2018, the 1st, 2nd and 3rd Respondents issued the 1st and 2nd Applicants with the letters of suspension pending hearing and determination of the said criminal case without giving them an opportunity to be heard. Further, that the suspension was indefinite and is pegged on the conclusion of the criminal case whose outcome is indefinite, contravenes section 35 (2) and 3 of the Basic Education Act, and amounts to subjecting them to double jeopardy and therefore offends Article 50(2) of the Constitution.

5. Lastly, the Applicants averred that the actions of the Respondents grossly violates their constitutional rights enshrined in Article 53 of the Constitution and section 7 of the Children's Act to free and compulsory education. They asked the court to take judicial notice of the fact that if the indefinite suspension continues, their education will be affected irreparably and their future life destroyed beyond repair.

6. The 1st and 2nd Applicants' Advocate's, Bake Hassan, Hisham and Associates, filed written submissions dated 29th October 2018, in which they put forward various legal arguments on the application. They relied on the decisions in **Council of Civil Service Unions vs Minister of State for Civil Service, (1984) 3 All ER 935; Pastoli vs Kabale District Local Government Council and Others,(2008) 2 EA 300**, and **Rahab Wanjiru Njuguna vs Inspector General of Police & Another, (2013) e KLR** for the proposition that in order to succeed in an application for judicial review, one has to show that the decision complained of is tainted with illegality, irrationality and procedural impropriety.

7. The decisions in **Republic vs The Commissioner of Lands ex parte Lake Flowers Limited, Nairobi HC Misc. Application No. 1235 of 1998** and **Republic vs Commissioner General , Kenya Revenue Authority ex parte BOC Kenya Limited (2014) eKLR** were also cited for the holding that the grounds upon which the court exercises its judicial review jurisdiction are incapable of exhaustion. Further, that availability of other remedies is no bar to the granting of judicial review relief, but can however be an important factor in exercising the discretion whether or not to grant the relief. In addition, that the Court is not concerned with the merits of the decision but the decision making process.

8. The Applicants identified and submitted on three grounds for the application. The first was that of unreasonableness, and reliance as placed on the definition of irrationality in the case of **Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1947) 2All E.R 680** and submitted that acting unreasonably renders an administrative action *ultra vires*, null and void. They urged that the 1st, 2nd and 3rd Respondents were unreasonable to suspend the Applicants indefinitely pending the conclusion of the criminal case. Further, that after the conclusion of the case, which takes a long time, there would no return to the *status quo*, as they would have lost interest in school or outgrown school age or turn out to be social rejects and miscreants.

9. The second ground submitted upon was that of illegality, and reliance was in this regard placed on the case of **Pastoli vs Kabale District Local Government Council and Others, (2008) 2 EA 300** for the description of illegality, which is when the decision making authority commits an error of law in the process of taking or making the decision or action which is the subject of the complaint. Further, that acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.

10. The Applicants also relied on the case of **JGH Marine a/s Western Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co.Ltd/Pride Enterprises vs Public Procurement administrative Review Board and 2 others, (2015) eKLR** for the proposition that where a body errs in law in reaching a decision or making an order, the Court may quash that decision or orders. They submitted the decision to suspend them was illegal as they were already facing criminal proceedings, and the same offends the general

principal against double Jeopardy. Further, that that double jeopardy has taken root in Article 50(2)(0) that every accused person has the right to a fair trial which includes the right not to be tried for an offense, in respect of an act or omission for which the accused person has previously been either acquitted or convicted.

11. The last ground raised was that of breach of procedure and of the rules of natural justice, as the Applicants were not given an opportunity to be heard. Pointing to the case of **University Of Ceylon v Fernando 1960 1 All ER 631** it was the Applicants' submission that the rules of natural justice requiring fairness apply to everyone who decides anything. That the Applicants were not accorded sufficient and reasonable time to respond to the charges and allegations they were accused of.

12. While placing reliance on Article 47 of the Constitution, the Applicants submitted that every person has the right to administrative action that is expeditious efficient, lawful and procedurally fair. This right to be heard, they added, entails ideals such as the need for prior notice before adverse proceedings are taken against a person, and the need to grant the affected party fair opportunity to defend himself. They relied on the case of **Onyango Oloo vs AG (1986-1989) EA 456** for this proposition and assertion.

13. Under this head, the Applicants submitted that they did not participate in any proceeding which lead to their suspension, as they were not afforded an opportunity to be heard by any committee of the 1st ,2nd and 3rd respondents. Therefore, that the Respondents' decision making process was rendered illegal and unlawful for being in violation of S.4(3)(a),(b)and (e), and section 4(4)(a),(b) and (c) of the Fair Administrative Action Act.

The Response

14. The application was opposed through a replying affidavit sworn on 28th November 2018 by the 1st Respondent. He averred that on 22nd September 2018 around 6.50 pm while the students were taking their meals in the 2nd Respondent school dining hall, the school captain raised an alarm that there was fire in one of the dormitories. That a Sergeant Maundu from Nyari Police Post and the Gigiri Officer Commanding Station thereafter arrived at the school, and took a brief of the fire incident from the Deputy Principal of the school. He further averred the fire was put off after an hour and the injured students given first aid treatment. That the following Monday morning, before the school could take any disciplinary action, the Officer Commanding Police Division, Gigiri Police Station came to the school and commenced investigations into the fire incident.

15. The deponent stated that several meetings were held in his offices chaired by the County Commissioner, and that four boys who were the main suspects were called out separately and asked to document what they knew about the events that led to the fire incident. That the said boys were later taken away by a team from the Criminal Investigations Office of Gigiri Police Station for further investigations and prosecution immediately after the incident, and this made it difficult for the school to take the necessary disciplinary procedures which would have involved setting up a disciplinary committee.

16. In conclusion, the Respondents averred that since the matter was with the police, they felt it was prudent to leave the matter fully with the police, and that it was necessary and in the best interests to suspend the students until investigations were completed, in order to prevent the interference with the evidence.

17. The Respondents did not file any submissions, despite being given ample opportunity by the Court to do so.

The Determination

18. Four issues have been raised in this application that require determination. These are firstly, whether the Respondents' actions were made in error of law, secondly, whether the decision to suspend the 1st and 2nd Applicants from the 2st Respondent school was unreasonable; thirdly, whether the Respondents acted unfairly in suspending the Applicants; and lastly, whether the Applicant is entitled to the reliefs he seeks.

19. The applicable principles as regards these issues were explained in the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300** as follows:

> **"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: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).**
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> **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…..**
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> **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: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".**
>
> **Procedural impropriety is when there is 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. (*Al-Mehdawi v***

Secretary of State for the Home Department **[1990] AC 876).”**

20. I have considered the arguments made on the first issue on the error of law by the Respondent on account of the double jeopardy rule. Article 50 (2) (o) of the Constitution provides that every accused person has a right to a fair trial, which includes the right not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted. Therefore, to establish that there was double jeopardy, one must establish firstly, that you are an accused person in a criminal trial, and secondly, that you have previously been acquitted or convicted of the same offence by a competent court of law.

21. In the present application, the Applicants were not subjected to a second criminal trial by the Respondents, but were subjected to administrative action. Therefore, the rule against double jeopardy does not arise nor apply, and there was no illegality committed by the Respondents on this account. In deed it is also notable in this regard that administrative proceedings can be contemporaneously undertaken with criminal proceedings arising from the same action or event, and the two types of proceedings are different. Lastly, the Applicants did not cite any law that bars the two proceedings from carried on at the same time. This ground of illegality on the part of the Respondents was thus not proved by the Applicants.

22. On the second issue on whether the Respondents' decision was unreasonable, the ground of unreasonableness as giving rise to judicial review on merits of a decision were discussed in great length by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR** as follows at paragraphs 55 to 58 :

> **“….*Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.”**

23. It is also an established principle of law that the decision of a public body will be unlawful if it is irrational or unreasonable, in the sense of being a decision which no public body acting reasonably would have reached. This was principle was settled by the decisions in **Associated Provincial Picture Houses vs Wednesbury Corporation (1948)1KB 223** and **Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374**. This ground was also explained in **Pastoli vs Kabale District Local Government Council & Others, (supra)** as follows:

> **“…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…”**

24. In the present application, the impugned suspension by the Respondents dated 2nd October 2018 was annexed by the Applicants as Annexure “NO 3” to the verifying affidavit by Nicholas Oyugi, and the reasons were given therein as :

> **“Gross indiscipline in school , suspected to have planned and set ablaze a section of the red house dormitory on Saturday 22nd September 2018 causing damage to school property worth more that Kshs 1.5 million”.**

25. The Respondents in their response also explained that there were initial investigations by the police leading to the criminal charges that were brought against the Applicant's, and that this influenced the decision to suspend the Applicant's without giving them a hearing. Therefore, even though the Respondent's actions may have been illegal in other respects, given the reasons given for the suspension, I find that the Respondents' decision to suspend the Applicants was not irrational or unreasonable in the circumstances.

26. In addition, the arguments that the Applicants were suspended indefinitely are strictly not true, as the suspension was clearly stated to await the outcome of the criminal case against them which is a definite event. In addition it is speculative to argue that the said criminal case may take a very long time, and these arguments therefore did not make the said suspension unreasonable as they were not factual.

27. On the third issue on whether the Respondents acted fairly, I have considered the Applicants' submissions, and also note that the Respondents did concede that they did not grant the Applicants a hearing, and gave the reasons why they did not do so. Article 47 of the Constitution and the provisions of the Fair Administrative Act import and imply a duty to act fairly by a decision maker in any administrative action. In addition it was held in **Lloyd vs McMahon, (1987) AC 625** that where a statutory procedure is insufficient to ensure that the requirements of fairness are satisfied, courts will imply procedural steps to ensure the said requirements are met.

28. Article 47 of the Constitution provides as follows in this regard:

> **“(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
>
> **(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.”**

29. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers as follows:

> **"(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**
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> **(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**
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> **(b) an opportunity to be heard and to make representations in that regard;**
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> **(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
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> **(d) a statement of reasons pursuant to section 6;**
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> **(e) notice of the right to legal representation, where applicable;**
>
> **(f) notice of the right to cross-examine or where applicable; or**
>
> **(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**
>
> **(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**
>
> **(a) attend proceedings, in person or in the company of an expert of his choice;**
>
> **(b) be heard;**
>
> **(c) cross-examine persons who give adverse evidence against him; and**
>
> **(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing."**

30. The ingredients of fairness incorporate the requirements of natural justice which are that firstly, a person must be allowed an adequate opportunity to present their case where his or her interests and rights may be adversely affected by a decision-maker; and secondly, that no one ought to be judge in his or her case which is the requirement that the deciding authority must be unbiased when according the hearing or making the decision.

31. In the case of **David Oloo Onyango v Attorney-General [1987] eKLR** Court of Appeal observed as follows:

> **"There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore that in applying the material sub-section the Commissioner is required to act fairly and so to apply the principle of natural justice."**

32. The requirement of notice is to give an adequate opportunity to an affected party to make representations as regards a prospective decision, and notice will only afford an effective opportunity if the affected person receives it in sufficient time to enable him or her to prepare the representations as was held in **Local Government Board vs Arlidge, (1915) AC 120**.

33. In the present application, no such notice or hearing was afforded to the Applicants before the decision by the Respondents to suspend them, and it is not in contention that due process was not followed by the Respondents before making the decision to suspend them. There was thus clearly unfair action on the part of the Respondents.

34. Lastly, on the remedies sought by the Applicant, I am guided by the parameters for the grant of judicial review orders, as set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** thus:

> **"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 or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a**

statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

35. This Court has found and the Applicants have established that the Respondents acted unfairly, and the order of certiorari is therefore merited. The orders of prohibition and mandamus sought by the Applicant cannot however lie on the terms sought, for two reasons. Firstly, the Applicants have not shown that the Respondents have no powers to suspend the Applicants, and secondly, this Court cannot direct the Respondents to undertake their duties or powers in any particular manner.

36. In addition, even where a Court finds that a particular decision or action was unlawful , it has discretion as to whether or not to grant the remedy sought, and if it does grant the remedy, the nature of the remedy to be granted. One of the factors that come to play in the exercise of the Court's discretion is the public interest, and in this particular case, the public interest in ensuring good administration of justice, and that no prejudice is caused to the rights of Applicants as well as of other third parties.

37. This Court notes in this respect that there is a pending criminal case against the Applicants, and the charge sheets were annexed by the Applicants, which show that they are accused of arson and destroying the Respondents' and other students property. The Respondents also stated that they considered the fact of interference with evidence as a factor in suspending the Applicants without a hearing. This is also a relevant factor that this Court needs to consider in granting the appropriate remedy.

38. In the premises, I find that the Applicant's Notice of Motion dated 23rd October 2018 is merited only to the extent of the following orders:

1) The Principal and Board of Management of Hospital Hill High School be and are hereby compelled to give a hearing to AWO and AHG (the 1st and 2nd Applicants herein), and to follow due process and make a decision on any disciplinary actions they intend to take against the said 1st and 2nd Applicants within sixty (60) days of the date of this judgment.

2) An order of certiorari shall issue after sixty (60) days of the date of this judgment to bring to this Court for purposes of quashing the suspension letters dated 2nd October 2018 issued by the Principal of Hospital Hill High School, suspending AWO and AHG from Hospital Hill High School, pending the hearing and determination of Criminal Case No 1658 of 2018.

3) The Respondents shall meet the 1st and 2nd Applicants' costs of the Notice of Motion dated 23rd October 2018.

39. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF FEBRUARY 2019

P. NYAMWEYA

JUDGE