



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CONSTITUTIONAL & HUMAN RIGHTS DIVISION)

JUDICIAL REVIEW CASE NO. 707 OF 2017

IN THE MATTER OF: BASIC EDUCATION ACT 2013

AND

IN THE MATTER OF: ARTICLE 47, 48,159(a),(b),(c),258 & 259 OF THE CONSTITUTION OF KENYA

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

AND

IN THE MATTER OF: VIOLATION OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

REPUBLIC.....APPLICANT

AND

MINISTRY OF EDUCATION.....1ST RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF EDUCATION.....2ND RESPONDENT

REGIONAL COORDINATOR OF

EDUCATION NAIROBI REGION.....3RD RESPONDENT

THE HON.ATTORNEY GENERAL.....4TH RESPONDENT

EXPARTE: COMPIT EDUCATION CENTER

RULING

1. By Notice of Motion dated 24th January, 2018, the *Ex parte* Applicant herein, **Jesse Otieno Aboge** seeks the following orders:

a. That an order of certiorari to remove into this honourable court and quash the decision of the 1st Respondents deregistering the Applicant vide its letters dated 13th November 2017 and 6th December 2017.

b. Costs of this application be provided for.

Ex Parte Applicants' Case

2. According to the *ex parte* Applicant, it is a duly registered education center situated at Pangani Primary School within Nairobi.

3. The Applicant avers that the 1st Respondent through the 2nd Respondent vide its letters dated **13th November 2017 and 6th December 2017**, purported to deregister and evict the Applicant from its premises situate at Pangani Primary School allegedly due to examination malpractice without affording them a right to be heard.

4. According to the Applicant, the purported reasons for the said deregistration and eviction were contradicted by the release of the Kenya Certificate of Secondary Education results by the Kenya National Examination Council and the Ex-parte Applicant was not among schools found to have engaged in examination malpractice. Hence the 1st Respondent's actions were irrational and efforts to reach out to the ministry of education were unfruitful.

5. The Applicant also averred that it was deregistered by the 1st Respondent pending the outcome of investigations only to be vindicated after a report was released by Kenya National Examination Council and all the Applicant's candidates received their examination results as there were no examination irregularities.

6. The *ex-parte* Applicant further averred that it has never relocated from the initial location of registration and/or converted itself into a Private Nursery and Secondary School. It only used the facility at Starehe Sub-County as an examination center, a fact that was well within the knowledge of Kenya National Examination Council and the Sub-County Director of Education since the year 2012 and no difficulty could be experienced by the Ministry of Education officials as alleged, since the institution and the facility at Starehe Sub-County used as an examination center are only separated by a road.

6. It is the *ex-parte* Applicant's case that there is no merit at all or any known legal procedure that has been undertaken for the Respondents to purport to close down the school.

7. The *ex-parte* Applicant contends that the decision to de-register the school and evict it from the Pangani premises is a knee jerk reaction anchored in impunity not well thought out or backed by tangible or lawful reasons.

8. The *ex-parte* Applicant therefore urged this Court to exercise its discretion and grant the orders sought to prevent the misuse of the criminal process and abuse of the court process.

1st -4th Respondents Case

9. In response to the substantive Application, the 1st to 4th Respondents filed Grounds of Opposition dated **10th January 2018** and filed on **the 8th January 2018** together with a Replying affidavit sworn on the **9th May 2018** by Mr. John Otula, the Nairobi Regional Coordinator for Education. The grounds of opposition are that:-

*i. THAT the Application offends the Statutory Provisions of Section 9(2) (3) of the Fair Administrative Action Act, the legal principle of setting aside an order & exhaustion of Alternative Dispute Resolution mechanisms. See **CORTEC MINING KENYA LIMITED VS CABINET SECRETARY MINISTRY OF MINING & 9 OTHERS {2015} ECLR MUTUNGI J NAD MEGALITH MINING COMPANY LIMITED VS HON AG & CABINRT SECRETARY MINISTRY OF MINING, NRB ELC MISC (JR) CIVIL APPLICATION NO. 948 OF 2015.***

*ii. THAT further to the foregoing ,the application offends the principle of alternative dispute resolution see **Speaker of the National Assembly v Hon. James Njenga Karume Civil Application no.92 of 1992 KLR22{1992}, Peter Oduor Ngoge v. Hon. Francis Ole Kaparo, SC Petition 2 of 2012 (para.29~30), Yusuf Gitau Abdallah v Building Centre (k)LTD & Others [2014]eKLR.***

iii. THAT the application offends the provision of section 85 and 93 of the Basic Education Act.

10. In their Replying affidavit the Respondents stated:

*i. That the Applicant converted its adult learning center into a private nursery and secondary school on the **26th March 2013**. Initially the school was registered and located at Kamukunji Sub-County but was moved to the Pangani primary school facilities.*

*ii. That following an investigative assessment report conducted on the **10th October 2017** in the presence of the Ex-parte Applicants managers, it was discovered that the school had relocated to Starehe Sub-County under unclear circumstances and was operating a private school within the premises of Pangani Primary School (a public school) which is contrary to the provisions of the Basic Education Act and guidelines on registration of schools.*

iii. That if a school relocates from its previous site by law, it is supposed to re-register to reflect its new location. This process was never followed by the ex-parte Applicant.

*iv. That based on the aforementioned report the 3rd Respondent on the **24th October 2017** wrote to the Head teacher Pangani Primary School requesting her to close down the ex-parte Applicants facility.*

*v. The 3rd Respondent visited the school on the **9th November 2017** acting on a tip off on KCSE examination irregularity and found incriminating evidence of cheating that had been shredded to conceal evidence. Further, the ex-parte Applicant's managers were interrogated but they basically denied any knowledge of examination irregularity. Consequences of which the school was deregistered on the **13th November 2017**.*

vi. That the Respondents acted within the confines of the law and have not in any way violated the principles of natural justice, neither have they made a decision through procedural impropriety as alleged.

vii. That the Application dated 24th January 2018 is defective and offends the provisions of order 53 of the civil procedure Rules and that the orders sought by the Ex-parte applicant should not be granted.

viii. That the Notice of motion Application is defective has no merit and is based on a misconception of the law.

ix. That the ex-parte Applicant has not exhausted the principle of Alternative Dispute Resolution provided by the Basic Education Act. They relied on **Speaker of the National Assembly v Hon. James Njenga Karume Civil Application No.92 of 1992 KLR22{1992}, Peter Oduor Ngoge v. Hon. Francis Ole Kaparo, SC Petition 2 of 2012(para.29~30), Yusuf Gitau Abdallah v Building Centre (K)Ltd & others [2014]Eklr.**

11. The Respondents avers that they fully complied with the requirements of the Basic Education Act and they had not in any way violated the principles of Natural justice and it is of greater public interest that education and examinations issues are provided and handled in a manner that upholds integrity and good quality as stipulated by the law.

Determinations

12. This Court has gone through the pleadings and written submission from both parties herein. The issues which arise for determination are as follows:-

(i) Whether the subject matter of the dispute was justiciable as a JR;

(ii) Whether the Ex-parte Applicant is entitled to the relief sought.

(iii) Whether the subject matter of the dispute was justiciable as a JR

13. The 3rd Respondent argues that the Ex-parte Applicant has not exhausted all the avenue of Alternative Dispute Resolution as provided under the Basic Education Act, one being lodging of an appeal against the decision at the County Education Board.

14. In **Child Welfare Society of Kenya vs Republic & 2 Others Ex-parte Child in Family Focus Kenya [2017] eKLR** the scope of judicial review was revisited *in extenso*. The Court had this to say:

“For a long time in the history of the common law, JR has been tried and tested as the most efficacious remedy for control of administrative decisions. It was not concerned with private rights or the merits of the decision being challenged but with the decision making process. See Commissioner of Lands vs Kunste Hotel Limited [1997] eKLR and R vs Secretary of State for Education and Science ex-parte Avon County Council [1991] 1 ALL ER. 282. It was also principally concerned with the 3 'Is' --- "Illegality, Irrationality and (procedural) Impropriety" --- and many are the decisions which followed such narrow considerations. For example:- An Application by Bokobu Gymkhana Club [1963] EA 478; Council of Civil Unions vs Minister for the Civil Service [1985] AC 2; both cited with approval in the Ugandan case of Pastoli vs Kabale District Local Government Council and Others [2008] 2 EA 300 which courts in this country have followed, stating:

“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.”

15. In this case, it's the ex-parte's Applicant's position that despite being duly registered by the 2nd Respondent herein, vide its registration certificated dated 6th January 2013, the Respondents have in violation of the rules of natural justice decided to deregister the Applicant and evict it from its premises at Pangani Primary school. Therefore, the ex-parte Applicant having been duly registered to operate an adult learning center, any action by the Respondents against the school including the cancellation of its registration is an administrative action as defined under Section 2 of the ***Fair Administrative Action Act*** which defines the same to include:

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

16. The Respondents being public bodies have a constitutional and statutory obligation placed on them to give the applicant the following:-

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;*
- (b) an opportunity to be heard and to make representations in that regard;*
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;*
- (d) a statement of reasons pursuant to section 6;*
- (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.*

17. It must also be noted that section 5(1) of the *Fair Administrative Act, 2015* provides that:

In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall-

- a. Issue a public notice of the proposed administrative action inviting public views in that regards;*
- b. Consider all views submitted in relation to the matter before taking administrative action;*
- c. Consider all relevant and material facts;*

18. Accordingly, this court's finds that the scope of judicial review proceedings is in the decision making process of a public body and it's not concerned with private rights and/or the merits of a decision being challenged. Hence the issue of exhausting Alternative dispute resolution mechanisms does not arise.

2. Whether the Ex-parte Applicant is entitled to the relief sought.

19. Article 47(1) and (2) of the Constitution provides as follows:

- (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.*

20. Apart from that provision section 4(1), (2) and (3) of the *Fair Administrative Action Act* provides as follows:

- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.*
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.*
- (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-*

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;*
- (b) an opportunity to be heard and to make representations in that regard;*
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;*
- (d) a statement of reasons pursuant to section 6;*
- (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.*

21. In **Republic v County Director of Education, Nairobi & 4 others Ex-parte Abdukadir Elmi Robleh [2018] eKLR** Odunga J stated as follows.

“What the Constitution requires in my view is the notification of the intention to take an action against a person likely to be adversely affected thereby and the reasons for the intended action. The said reasons, it is my view must depend on the peculiar circumstances of each case and it is those peculiar circumstances which ought to be considered which consideration must under Article 47 of the Constitution entail an opportunity to the applicant to be heard on the circumstances alleged to constitute satisfactory reasons for the taking of the adverse action.”

22. In **Republic v County Director of Education, Nairobi (supra)** Odunga J while relying in the case of **Onyango Oloo vs. Attorney General [1986-1989] EA 456**: stated as follows...

“Whereas the authority concerned may well have proper reasons to act in the manner it intends to act, where its decision is tainted by procedural impropriety the same cannot stand.”

Onyango Oloo vs. Attorney General [1986-1989] EA 456

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone’s advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio.”

23. It is not in dispute that the impugned decision of the Respondents was likely to materially and adversely affect the legal rights or interests of the students and their parents/guardians of the school. This position is emphasized by the provision of section **4(3)** of the Fair Administrative Action Act which provides that:

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-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

24. This court makes a finding that the Respondents have not provided any evidence to show that they complied with the provision section **4(1), (2) and (3)** of the **Fair Administrative Action Act** as they are obligated to by the law.

25. Mr. **John Otula** who is the Respondent’s Nairobi Regional Coordinator for Education, avers that the *ex-parte* Applicant’s Managers were present when the 3rd Respondent officers visited the school unannounced to investigate examination irregularities and that the managers were interrogated but they basically denied any knowledge of examination irregularity, consequences of which the school was deregistered on the **13th November 2017**.

26. The 3rd Respondent also maintains that their actions were within the law and that it is in the greater public interest that education and examinations are handled in a manner that upholds integrity and good quality as stipulated by law and that gives effect to the objectives of the Act.

27. The *ex-parte* Applicant further avers that the main reason for its deregistration was because of the alleged examination malpractice as stated in the letter dated **13th November 2017**. The investigations carried out by the Kenya National Examination Council vindicated the *ex-parte* Applicant, as it was not among schools blacklisted for engaging in examination malpractice. Unfortunately, the 3rd Respondent had already deregistered it by the time Kenya National Examination Council released its findings on examination irregularities.

28. It is this Court’s view that the notice contemplated under **Article 47** of the Constitution as read together with **Section 4(3)** of the **Fair Administrative Action Act** must not only be prior to the decision but must also be adequate and must disclose the nature and reasons for the proposed administrative action.

29. **Lord Denning** in **Breen vs. Amalgamated Engineering Union [1971] All E.R. 1148**, expressed himself as follows:

“It is now settled that a statutory body which is entrusted by Statute with discretion must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand or as administrative on the other or what you will, still it must act fairly. It must in a proper case give chance to be heard.”

30. In **Ridge vs. Baldwin [1963] 2 All ER 66 at 81**, Lord Reid expressed himself as follows:

“Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void.”

31. The letter by the 1st Respondent dated **6th December 2017** requiring the *Ex parte* Applicant to vacate its premises at Pangani Primary School, did not even give the *ex-parte* Applicant prior and adequate notice of the nature and reasons for the proposed administrative action, information, materials and evidence to be relied upon in making the decision or taking the administrative action.

32. The *ex-parte* Applicant was not given an opportunity to defend itself against the 3rd Respondent’s decision communicated by the letter dated **13th November 2017** as its letter dated **24th November 2017** addressed to the 3rd Respondent was never responded to.

33. There is no indication that before the impugned decision was arrived at the Respondents issued a public notice of the proposed administrative action inviting public views in respect of the proposed deregistration of the Applicant’s school let alone considering the resultant views.

34. From the explanation offered by the 3rd Respondents to this Court, it is crystal clear that the provision section **4(1), (2) and (3)** and **5(1)** of the **Fair Administrative Action Act** were never adhered to and as a result, the *ex-parte* Applicant’s right to a Fair Administrative action was violated. Consequently, this Court taking into consideration the explanation given by the 3rd Respondent has no option but to declare that the impugned decision by the 1st Respondent was not only irrational but was marred with procedural impropriety and as a result the letters dated **13th November 2017** and **6th December 2017** by the 1st Respondent are hereby null and void *ab initio* for not meeting the threshold of a fair administrative action as envisioned under Article 47 of the Constitution.

35. in the premises the Motion dated **24th January, 2018** is merited and succeeds.

Order

Accordingly:

a) An order of certiorari is hereby issued removing into this Court for purposes of quashing the 1st Respondent’s decision made on the 13TH November 2017 and 6th December 2017 deregistering and evicting the Applicant which decision is hereby quashed.

c) The Applicant is awarded the costs of these proceedings against 1st to 3rd Respondents.

It is so ordered.

Dated, Signed and Delivered in Nairobi this 11th day of April, 2019.

E. K. OGOLA

JUDGE

In the Presence of:

N/A for the Applicant

N/A for the Respondent

Mr. Ibrahim Court Assistant