REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 36 OF 2019

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA NATIONAL EXAMINATIONS COUNCIL.....1ST RESPONDENT

MINISTRY OF EDUCATION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

MOHAMED ABDI DIGALE (SUING ON

BEHALFOF PARENTS OF IKHLAS

INTERGRATED HIGH SCHOOL FORM

FOUR CLASS OF 2018).....EX PARTE APPLICANT

ADIRAZAK OMAR IBRAHIM & 124 OTHERS

(SUING AS PARENTS OF IKHLAS

INTERGRATED HIGH SCHOOL).....EX PARTE APPLICANT

RULING

Introduction

1. The 1st and 2nd *ex parte* Applicants herein are the Director of Ikhlas Integrated High School, and the parents of candidates in the said school who sat for the Kenya Certificate of Secondary Education (KCSE) examinations in 2018. They seek to bring proceedings against the Kenya National Examinations Council (hereinafter the 1st Respondent), which is a body corporate established by statute, and charged with the mandate of administering national examinations to the candidates who register for them. Also sued as the 2nd Respondent is the Ministry of Education, which is the Ministry in charge of the education sector in Kenya. The 3rd Respondent is the Attorney General, who is enjoined in these proceedings in his capacity as legal advisor to the national government.

2. The *ex parte* Applicants have filed an application by way of Chamber Summons dated 14th February 2019 in which they sought and were granted leave to commence judicial review proceedings against the Respondents. They consequently filed a Notice of Motion dated 20th February 2019 seeking orders of certiorari, prohibition and mandamus in relation the 1st Respondent's decision contained in a letter dated 21st December 2018, that cancelled the 2018 examination results of the candidates of Ikhlas Integrated High School.

3. The main grounds for the application are that the Form Four students of Ikhlas Integrated High School undertook their 2018 KCSE examination and were expecting the results of the said examinations. However, that on the release of the results, the 1st Respondent through a letter dated 21stDecember 2018, wrote to the School's management informing them that it had received a report of an alleged examination irregularity in the said school for a number of candidates in the English Paper, and had consequently cancelled the results of the candidates.

4. The *ex parte* Applicants allege that all procedures for the preparations and administration of the said examination were followed, and there were no reports of any impropriety by the invigilators and /or supervisors of the examination, neither was any incidence of examination malpractice brought to the attention of the School's management. Further, that through their letter dated 4th January 2019, the *ex parte* Applicants requested the 1st Respondent to review their decision on the basis that they were never accorded a right to be heard, and due process was not followed. However, that the 1st Respondent on 8th February 2019 issued another letter which informed the School's management that the decision to cancel the results still remains, despite not according the *ex parte* Applicants an audience. Therefore, that the cancellation of the results were in violation of the candidates, parents and School's rights enshrined in the Constitution, and was done arbitrarily.

5. The 1st Respondent opposed the application through a replying affidavit sworn on 4th March 2019 by Keith Maleche. The deponent is the Principal Research Officer within the Research and Quality Assurance Division of the 1st Respondent. He contended that the 1st Respondent's functions of setting examination standards and conducting national examinations are set out in the Kenya National Examination Council Act No 29 of 2012. Further, that in the performance of these functions, the 1st Respondent is also guided by subsidiary legislation, which addresses specific aspects of its role and relevance, including marking of examination; the release of examination results; and handling of examination irregularities.

6. The deponent averred that during the administration and examination of the 2018 KCSE examination, the 1st Respondent received a number of reports from around the country of schools involved in malpractices. That the examination marking experts identified Ikhlas Integrated High School as one of the schools involved in examination irregularities, and in particular after receiving and investigating a report from the examiners of the English Paper 2 (101/2). It was determined that out of the 128 students who had sat the examinations 125 had colluded, either by themselves or with the help of unknown persons.

7. According to the 1st Respondent, they have powers under the applicable rules to cancel results once it is satisfied that there has been widespread examination irregularities at an examination centre, or that the circumstances in which an examination is conducted are unsatisfactory. Further, that the law allows the 1st Respondent to determine the manner and procedure of conducting its investigations, and it is not obliged to interview the teachers, candidates or parents. The deponent confirmed in this respect that when they cancelled the results they informed the ex parte Applicants of their right of review, and also received their request for review, which was responded to as alleged by the *ex parte* Applicants.

8. Therefore, that the decision to cancel the results of Ikhlas Integrated High School was neither arbitrary nor irrational, and neither was it unjust and unfair, as the collusion witnessed in the school cannot be condoned. Lastly, the 1st Respondent averred that it is precluded and insulated from releasing marking reports, investigation reports, supervisors' reports, security reports, examination monitors reports, or Chief Examiners report, beyond what they have divulged in the replying affidavit.

The Preliminary Objection

9. The 1st Respondent filed a Notice of Preliminary Objection dated 4th March 2019 simultaneously with its replying affidavit. The main ground of objection is that the instant judicial review application is incompetent, as it violates section 9 of the Fair Administrative Action Act No.4 of 2015 read together with Part IV A of the Kenya National Examinations Council Act 2012. This Court directed that the said preliminary objection would be heard and determined first, by way of written submissions. The 1st Respondent's Advocates on record, Obura Mbeche & Company Advocates, accordingly filed submissions dated 18th March 2019, while Weda & Company Advocates, the *ex parte* Applicants Advocates, filed submissions dated 28th March 2019 in opposition to the Preliminary Objection.

10. The 1st Respondent submitted that section 40B of the Kenya National Examinations Council Act establishes the National Examination Appeals Tribunal, whose jurisdiction is provided for at section 40 H, which is that is to consider appeals against the decision of the 1st Respondent. Therefore, that the Respondent having declined the *ex parte* Applicants' review, their next port of call as provided under rule 15 of the Kenya National Examinations Council (Handling of Examination Irregularities) Rules, was to appeal to the Tribunal. In addition, that taking into account that the *ex parte* Applicants have instituted these proceedings under article 47 of the Constitution which is read together with the Fair Administrative Action Act, the provisions of section 9 of the Act are therefore applicable.

11. The 1st Respondent contended that there is no evidence that the *ex parte* Applicants exhausted the internal mechanisms of appeal, and that while it is aware that section 9(4) of the Fair Administrative Action Act allows the High Court to entertain a judicial review application even where an applicant has not complied with section 9(2), the applicant must show evidence of exceptional circumstances. That the *ex parte* Applicants have however not done so.

12. According to the 1st Respondent, the issue of cancellation of results is best suited to dealt with by the Tribunal, which has the expertise to deal with the *ex parte* Applicants' complaints, and establish whether there is merit in them. That the Courts can only intervene if the Tribunal fails to observe fair procedure. Reliance was placed on the Court of Appeal decision in **Cortec Mining Kenya Limited vs The Cabinet Secretary, Ministry of Mining and the Attorney General (2017) eKLR** for the holding that where Parliament has provided a statutory procedure, a party must disclose the alternative remedy and explain why it is not efficacious and he or she resorted to judicial review. Also relied on was the case of **Republic vs Sacco Societies Regulatory Authority, ex-parte Joseph Kiprono Maiyo and Others, (2017) eKLR** where the Court struck out judicial review proceedings because there existed alternative remedies. In closing, the 1st Respondent submitted that this Court lacks the jurisdiction to entertain the instant judicial review proceedings.

13. The counsel for *ex parte* Applicants on their part submitted that they have raised fundamental constitutional issues enshrined under Article 47 of the Constitution, and that it is not contested that the 1st Respondent indeed failed to grant the *ex-parte* Applicants audience before they took the decision to cancel their results. That through their lawyers, they applied for review of the decision and it was discarded without fair consideration. This, they submit, is what necessitated the filing of the instant judicial review proceedings.

14. The *ex parte* Applicants further submitted that Article 47 read together with Article 23 of the Constitution gives this Court unfettered jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights, and that the said Articles give the High Court oversight mandate over statutory bodies and quasi-judicial institutions. Further, that the *ex parte* Applicants have raised fundamental constitutional issues which the Tribunal does not have Jurisdiction or powers to hear and determine, as they are only vested in the High court.

15. The *ex parte* Applicants pointed out that under section 40J of the Kenya National Examinations Council Act, a person who is aggrieved by a decision to withhold or cancel the results of a candidate may lodge an appeal to the Tribunal in the prescribed form. It was their submission that the permissive terms dictates that it's not compulsory to lodge an appeal at the Tribunal, and that it is discretionary to do so. Further, that the ex parte Applicants have chosen to file the proceedings herein as they did not get a fair hearing before the 1st Respondent.

16. Further, that the lengthy process of the tribunal would hinder access to justice for the student who await the release of the results to further their studies, and would fly in the face of Article 48 of the Constitution, which is to the effect that the state shall ensure access to justice for all persons. In addition, that under Article 258, it's the right of every person to institute court proceedings where he she feels aggrieved that their right is being threatened and or contravened.

17. Various judicial decisions were cited by the *ex parte* Applicants in support of their arguments. They placed reliance on the case of **Smith v East Elloe Rural District Council, (1965) AC 736** for the holding that the jurisdiction of the court may be ousted by legislative draft that is not mandatory and or compulsory. The case of **Republic v Kenya National Examinations Council & 2 Others Ex-parte Echesa Abubakar Busalire, Chairman Parents Association of Chebuyusi High school(suing on behalf of parents of Chebuyusi High School) and 190 Others (2018) eKLR** was also relied upon for the holding that the constitutional issues raised cannot be canvassed before a tribunal.

18. Lastly, the *ex parte* Applicants relied on the cases of **Mukisa Biscuits Manufacturing Ltd vs West End Distributors Ltd, Civil Appeal No 9 of 1969 EA 696, Omondi vs National Bank of Kenya Ltd & Others (2001) KLR 579** and **Oraro vs Mbaja (2005) 1 KLR 141** to argue that a preliminary objection consists of a pure point of law, and that the 1st Respondent's Preliminary Objection is misplaced as this Court's jurisdiction cannot be based on a provision of law that is neither mandatory nor compulsory.

The Determination

19. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, as follows:

> ***"a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

20. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro -vs- Mbaja (2005)1KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd(supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

21. The issues for determination herein therefore are whether the grounds raised in the 1st Respondent's preliminary objection raise pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. Sections 9(2) (3) and (4) of the Fair Administrative Action Act provide as follows in this regard:

> **"(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 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."**

22. In addition, a National Examinations Appeals Tribunal is established under section 40B of the Kenya National Examinations Council Act, and under section 40H and 40J of the Act the Tribunal's jurisdiction is to consider all appeals made against a decision of the Council to withhold, nullify or cancel examinations prepared and administered by the Council. Sections 9(2) (3) and (4) of the Fair Administrative

Action Act and section 40H and 40J of the Kenya National Examinations Council Act are operative in the instant application, as it is not disputed that the impugned decision made by the 1st Respondent cancelled the examination results of the *ex parte* Applicants, and that the *ex parte* Applicants have not filed an appeal at the Tribunal. In addition, if upheld, the said provisions will divest this Court of jurisdiction to hear and determine the *ex parte* Applicant's application.

23. The *ex parte* Applicants have argued that the said provisions are not mandatory, and therefore do not raise a pure point of law. Similar arguments were made in **Republic v Kenya National Examinations Council & 2 Others Ex-parte Echesa Abubakar Busalire, Chairman Parents Association of Chebuyusi High School (suing on behalf of parents of Chebuyusi High School) and 190 Others (supra),** where Odunga J. interpreted the use of the word "may" in section 40H of the Kenya National Examinations Council Act and held as follows:

> **"117. In this case, did the Legislature intend that a person aggrieved by the decision of the Council could at his own volition decide to bypass the alternative dispute resolution mechanisms to invoke the Court's jurisdiction? I respectfully disagree with this interpretation since to do so would render the alternative dispute resolution mechanism a *dodo*. To my mind the word "may" only connotes the fact that a person aggrieved by a decision of the Council is not obliged to challenge the same but may do so at his own volition. However if he decides to challenge the decision, a procedure for doing so is thereby prescribed.**
>
> **118. Even if it were accepted that the provision is not mandatory, section 9(2), (3) and (4) of the Fair Administrative Action Act, No. 4 of 2015 provides:……**
>
> **119. In my view where alternative dispute resolution mechanisms are provided by statute, whether expressed in mandatory terms or whether prima facie directory only, they must be resorted to unless the applicant is exempted from doing so pursuant to section 9(4) of the Fair Administrative Action Act. That is not only a statutory requirement but is also a constitutional requirement pursuant to Article 159(2)(c) of the Constitution."**

24. I am in agreement with the said holding, and the requirement in Article 159 (2)(c) of the Constitution is exemplified by emerging jurisdiction on the doctrine of exhaustion of alternative remedies, which was initially stated in **Speaker of National Assembly vs Karume (1992) KLR 21** in the following words:

> **"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

25. The doctrine of exhaustion was further explained by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR** as follows:

> **"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews….. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."**

26. I therefore find for the foregoing reasons that a pure question of law has been raised by the 1st Respondent.

27. As to whether the preliminary objection has merit, the *ex parte* Applicants argue that they are raising issues of infringement of their constitutional rights, which the National Examinations Appeals Tribunal does not have jurisdiction and is not competent to hear. The 1st Respondent on the other hand postulates that the National Examinations Appeals Tribunal is the best suited forum to address the technical issues raised by the application.

28. The Courts may, in exceptional circumstances, find that the exhaustion of alternative remedies requirement would not serve the values enshrined in the Constitution or law, and permit the suit to proceed before it, particularly, where dispute resolution mechanism established under an Act is not competent to resolve the issues raised in this Petition, or where it is not available or accessible to the parties for various demonstrated reasons. Section 9(4) of the Fair Administrative Action Act however suggests an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy.

29. The approach to be taken by the Courts when this issue is raised was suggested by the Court of Appeal in **R vs National Environmental Management Authority (2011) eKLR** as follows*:*

> **".. in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it…."**

30. Various considerations have been taken into account by Courts in considering whether an exception lies, and the list of exceptional circumstances is not closed. **In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya (2017) eKLR** the High Court held as follows as regards the application of the exception:-

"[46] What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.

[47]. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others(2016)eKLR. "

31. Upon perusal of the *ex parte* Applicant's pleadings herein, it is evident that their grounds for the application impugn the process employed by the 1st Respondent in addressing their request for review, which they allege contravenes various constitutional provisions, and do not address the merits of the decision made to cancel the examination results. It is also evident that the jurisdiction of the National Examinations Appeals Tribunal is limited to reviewing decisions made by the 1st Respondent cancelling the examination results of a candidate follows:

"40H. The Tribunal shall consider all appeals made against a decision of the Council to withhold, nullify or cancel examinations prepared and administered by the Council.

40J. (1) A person who is aggrieved by a decision of the Council to withhold or cancel the results of a candidate may lodge an appeal to the Tribunal in the prescribed form.

(2) An institution that is aggrieved by the decision of the Council to withhold or cancel the results of the candidates in that institution may lodge an appeal to the tribunal in the prescribed form.

(3) Notwithstanding the provisions of subsection (1), a person aggrieved by a decision of the Council may appeal to the Tribunal through the County Director of Education in the County in which the applicant resides."

32. The said Tribunal cannot therefore be an effective remedy to the *ex parte* Applicants in the circumstances of this application, as the issues the application raises do not fall within the Tribunal's jurisdiction, and are within the jurisdiction of this Court. The exception in section 9(4) of the Fair Administrative Action Act therefore applies.

33. The 1st Respondent's Preliminary Objection dated 4th March 2019 is thus found not to have merit, and the costs arising therefrom shall be in the cause.

34. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF JUNE 2019

P. NYAMWEYA

JUDGE

DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2019

J. MATIVO

JUDGE