REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CONSTITUTIONAL PETITION NO. 21 OF 2019

Between

DOMINICK OBEL OBONGO ……...…….1ST PETITIONER/APPLICANT

THE BOARD OF MANAGEMENT, RALIEW

SECONDARY SCHOOL...……...…….… 2ND PETITIONER/ APPLICANT

VERSUS

COUNTY DIRECTOR OF EDUCATION,

SIAYA COUNTY……...…… .1st RESPONDENT

COUNTY EDUCATION BOARD, SIAYA COUNTY ……...2nd RESPONDENT

RULING ON CONSERVATORY ORDERS

1. This ruling determines the petitioner's interlocutory application by way of Notice of Motion dated 3rd June 2019 and filed on the even date under certificate of urgency. The application is supported by an affidavit sworn by the 1st applicant/ petitioner **DOMINICK OBEL OBONGO** on 3rd June 2019.

2. The Notice of motion which was filed simultaneous with the petition seeks the following prayers:

1. Spent

2. Spent

3. Spent

4. THAT pending the hearing and determination of this petition, the Honourable court be pleased to issue conservatory orders: staying and or suspending the implementation and or operation of the directive and or decision issued in a letter dated 21st May, 2019 (Ref: CDE/SYA/BOARD OF MANAGEMENT .APPT/1138/106) by the Respondents dissolving and disbanding Raliew Secondary School's Board of Management together with all subsequent actions taken thereto by the Respondents including appointing and inaugurating the Caretaker Committee to exercise powers of the School Board of Management replacement of Raliew Secondary School's Bank Account signatories; And Reinstating forthwith the petitioners forthwith for continuation in discharging their functions as mandated under the Basic Education Act No.14 of 2013 for management of the School.

5. That pending the hearing and determination of the petition, conservatory orders do issue refraining the Respondents, either by themselves, assigns, representatives, employees, employers, officers, agents and or any person whatsoever from interfering with and stultify the petitioner's discharge of all their functions as in conformity with the Basic Education Act No 14 of 2013 for the conduct of business and affairs of Raliew Secondary School Management.

6. That upon hearing the application inter partes, this honourable court be pleased to make a declaration that the petitioners' /applicants' rights to equality before the law and the right to equal protection and equal benefit of the law as provided for under Article 27 (1) of the Constitution have been denied, violated, infringed, breached and threatened.

7. That upon hearing the application inter partes, this Honourable court be pleased to make a declaration that the

petitioners'/applicants' rights to fair trial and administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair were denied, violated and infringed on, contrary to Article 47(1) of the Constitution.

8. THAT upon hearing the application inter partes, this Honourable Court be pleased to make a declaration that the petitioners/applicants' rights to legitimate expectation in discharge of their functions as constituted in the Basic Education Act No.14 of 2013 for the conduct of business and affairs of Raliew Secondary School management has been gravely violated.

9. THAT the costs of this application be provided for.

3. The Notice of Motion is premised on the grounds listed (a) to (n) and on the written submissions filed by the applicants' counsel Mr. Arika canvassing the application.

4. According to the petitioners/applicants, the Respondents vide letter dated 21st May, 2019 Ref: CDE/SYA/BOARD OF MANAGEMENT .APPT/11381/106 purported to dissolve the Board of Management of Raliew Secondary School without fair administrative action.

5. It is alleged by the applicants that following the said dissolution of the Board of Management of the subject School, the Respondents proceeded to appoint a Caretaker Committee to run and manage the said School, that they also disbanded operations of the School's Bank Accounts by the Board members' signatories and replaced them with new signatories from the Caretaker Committee and threatened appointment of new Board, which further actions, according to the petitioners/ applicants, contravened the petitioners' right to efficient, lawful, reasonable and procedurally fair administrative action, right to a fair hearing and the right not to be discriminated upon as stipulated in Article 27 and 47 of the Constitution, and the Fair Administrative Action Act, 2015.

6. In addition, the applicants aver that the respondents or the parent Ministry never issued any public Notice or Communication to the petitioners explaining the factual and lawful basis of the dissolution of the School's Board of Management.

7. Further, that Regulation 9 (1)(a) of the Basic Education Regulations stipulate that it is the Cabinet Secretary who can dissolve the Board of Management on the advice of the County Education Board, where such Board is found to be guilty of gross misconduct, is deemed to be incapable of discharging its mandate as provided for in the Act.

8. The applicants further averred that the Respondents acted in a bias manner as they retained Mr. Martin Oracha as a member of the Caretaker Committee yet he was a member of the Board of Management of the subject School. They therefore claim that they were discriminated upon contrary to Article 27 (1))2) (4) and (5) of the Constitution.

9. Further, it was asserted that the petitioners' right to conduct the business of the Scholl in accordance with section 59 of the Basic Education Act and Article 53 of the Constitution has been arbitrarily deprived, violated and infringed on and that they have been discriminated to the prejudice of the school children for reasons that the School's 2019 budget was partially approved and that it ought to have been approved before the end of May 2019.

10. The applicants further claimed that by dissolving the Board of Management of the School the Respondents were usurping powers of the Cabinet Secretary and violating Article 47 of the Constitution, and breaching the fiduciary duty bestowed upon them by Article 3(1) of the Constitution.

11. The applicants urged the court to break the chain of alleged violations in order to protect the interests of the School and those of the nominating bodies, Parents, Teachers, suppliers and community at large who risk being materially affected by the impugned decision which lacks basis in fact and in law.

12. The applicants asserted that unless the conservatory orders were granted, the legitimate expectation of the Children will be affected and that the Respondents will be setting an unconstitutional precedent in handling queries against school administration on school public funds, contrary to sections 3,30,74,92,102,121 and 149 of the Public Finance Management Act No 18 of 2012.

13. In the applicants' view, unless the conservatory orders are issued, the threat against the school's sponsor (the Catholic Church) is worrying and that its possible consequences are unknown.

14. It was argued that the petition has good chances of success hence, the application for conservatory orders has merit and finally, that it was in the public interest that the orders sought are granted to protect the fundamental rights of the petitioners.

15. The supporting affidavit narrates the history of the matter and reiterates the grounds reproduced above.

16. In opposition to the application, the Respondents, represented by the Office of the Attorney General and Department of Justice filed a replying affidavit sworn on 13th June, 2019 by **JOSEPH K. WAMOCHO**, the County Director of Education, Siaya County and who is also the Secretary to the County Education Board, Siaya County.

17. According to the deponent, on 18th March 2019, the Chairman of the Board of Management of the subject school-Raliew Secondary School wrote to him requesting for an investigation audit on financial and procurement Expenditure of the School as they were unhappy with the manner in which the School's Principal handled the finances.

18. He deposes that the Directorate of Quality Assurance too had done a report on the same issues raised by the BOARD OF

MANAGEMENT in the Chairman's letter and that it was discovered that most of the allegations were not trues as they hinged on the poor relations between the Parish Priest and the Principal and some of the BOARD OF MANAGEMENT members following the transfer of the Deputy Principal.

19. That the Quality Assurance report concluded that matters raised by the Chairman of the Board of Management did not warrant a transfer of the Principal. That the said report recommended dissolution of the Board of Management for reasons that had not been nominated and vetted in line with the provisions of the relevant guidelines; it did not reflect the status of the School as a county institution and that a section of the members had a conflict of interest.

20. That on 3rd April 2019 the deponent received a report of the Special Board of Management meeting held on 30th March 2019 where the Chair of Board of Management reiterated that they found it difficult to work with the School Principal as he did not consult on important decisions affecting the management of the School. As a result, the deponent called for a special Board of Management to be held on 30th March 2019 to discuss among other agenda items, the investigation report on the complainants and concerns by the Board of Management as earlier requested by the Chairman, and that he explained to the Chairman that the Quality Assurance Investigations report would be tabled.

21. That on the material day, the Chairman the local priest and some Board of Management members resisted presentation of the report and that as a result the school's operations were paralyzed as some signatories refused to sign cheques and collaborating with the Principal of the School.

22. That on 26th April 2019 the deponent invited the Board of Management Chairman and the School Principal to a Special County Education Board Sub-Committee Meeting for 9th May 2019 to try and have the conflict resolved by the County Education Board. However, that the meeting aborted but the matter was referred to the County Education Board who called for a meeting on 16th May 2019 and both the Principal and the Chair of the Board of Management of the School were invited.

23. It was deposed that a crowd of villagers tried to storm the meeting but were prevented by the County Commissioner and that the meeting went on, with the issues raised against the principal by the Chair of Board of Management being responded to by the Principal.

24. That after the meeting they noted that the relationship between the BOARD OF MANAGEMENT and the Principal of the School was severely damaged and that it was affecting operations of the School and that therefore the County Education Board appreciated the need to create a peaceful working environment and resolved to dissolve the School's BOARD OF MANAGEMENT and further recommended for the transfer of the Principal but that unknown to the meeting, the Principal had already been transferred.

25. That at the said meeting, the County Schools Auditor also presented a report which showed a major conflict of interest by members of the Board who were supplying various items to the School as shown by the annexed report and that the report blamed the management for the conflict of interest and mismanagement of the School's finances.

26. That following the recommendations of the County Education Board, the deponent wrote t the Principal Secretary on 17th May 2019 conveying the said recommendations to dissolve the BOARD OF MANAGEMENT of the School and that the Principal Secretary endorsed the recommendation and gave authority to dissolve the School's BOARD OF MANAGEMENT and appointing of a Caretaker Committee.

27. That the Deputy County Commissioner had also prepared a report on the conflict at the School which was threatening to be a source of insecurity hence the need to dissolve the BOARD OF MANAGEMENT, but that the Parents, Teachers Association were retained in the Caretaker Committee and that on 23rd May 2019 the Caretaker Committee were inaugurated by the County Commissioner hence the petitioners' claims have been overtaken by events.

28. The deponent maintained that the dissolution of the BOARD OF MANAGEMENT followed the procedure and that it was in the best interest of the Children. The deponent urged the court to dismiss the application.

29. In a further supporting affidavit sworn by **Dominick Obel Obongo** on 19th June 2019, the petitioners/applicants reiterated their earlier depositions and reproduced what the respondent's replying affidavit set out in the annextures emphasizing that the meeting of 16th may as per the minutes annexed show that the County Education Board Ordered dissolution of the School's **BOARD OF MANAGEMENT**, directed the County Director of Education to nominate a Caretaker Committee in place of the **BOARD OF MANAGEMENT** and recommended for transfer of Catholic Priest Father Richard Odhiambo Oloo to work away from his home as he promoted was and conflict instead of peace.

30. Further, it was deposed that the County Schools' Audit report was never shared with those who were adversely mentioned. It was further deposed that the vetting and nomination of the petitioners was done by the Respondents hence beyond the petitioners' control. That in any event the inauguration of the Board of Management on 17th November 2018 was presided over by the Sub County Director of Education, Rarieda.

31. On allegations of conflict of interest by members of the Board of Management, it was stated that the allegations were never brought to their attention hence no due process was followed.

32. The deponent also denied that any member of **BOARD OF MANAGEMENT** resisted the presentation of the Quality Assurance and Audi Reports but that the Rarieda County Commissioner in his wisdom advised the Quality Assurance and Standards Director not to present the report to the 2nd petitioner/applicant.

33. The deponent denied that the signatories declined to sign cheques and stated that the cheques presented had no supporting documents for

the purpose for which they were to be issued.

34. On postponement of the meeting it was deposed that this was at the discretion of the 1st Respondent without being influenced by the petitioners. That on 16th May 2019 the whole BOARD OF MANAGEMENT was present to attend to the meeting but that the 2nd Respondent's Chairman informed them that only the Chairman and Parish PRIEST would be allowed in the meeting and that no Deputy County Commissioner engaged them on any activity. He denied seeing a crowd of villagers. He also denied that the BOARD OF MANAGEMENT were accorded a fair hearing on the complaints raised against them.

35. The petitioners reiterated that the respondents dissolved the BOARD OF MANAGEMENT without involving the Cabinet Secretary contrary to the mandatory legal requirements. The deponent denied that they had control over transfer of teachers. The deponent further denied allegations of his involvement in the alleged malpractices of trading with the School and maintained that as a BOARD OF MANAGEMENT, they had never been called upon to explain themselves on the allegations levelled against them. The deponent then raised issues on the audit report findings and asserted that the petitioners had not failed to manage the school as per the mandate bestowed on them under section 59 of the Basic Education Act.

36. He also denied allegations of conflict of interest and asserted that such alleged conflict had never been brought to the attention of the petitioners since the tender committee is supervised by the School Principal.

37. The deponent maintained that s they complained of not being consulted on decisions on major procurements and expenditures, they cannot take full responsibility for mismanagement of school finances.

38. The deponent maintained that it was discriminatory to retain the School's PTA members of the BOARD OF MANAGEMENT. He deposed that the respondents' replying affidavit lacked any reason for the actions of the respondents

SUBMISSIONS

39. The parties' advocates filed written submissions which they adopted as canvassing the application and also made brief oral highlights on the same.

40. In the petitioners'/ applicants' submissions, their counsel Mr. Arika reiterated the grounds and depositions by his clients. The applicants faulted the respondents for usurping powers of the Cabinet Secretary under Regulation 9(1) (a) of the Basic Education Act. Counsel submitted that under the said regulation only the Cabinet Secretary has the power to dissolve a School's Board of Management on the grounds set out in the Regulation and not the Respondents. Further, he maintained that the respondents in dissolving the Board of Management failed to accord the applicants a hearing prior to the decision being made to dissolve the BOM, contrary to the Fair Administrative Action Act and Article 47 of the Constitution. He claimed that the so called investigations carried out by the Respondents was skewed, and that the information supporting the dissolution of the Board of Management was on the basis of incompetent hearsay. Reliance was placed on the ruling in ***Christopher Mogambi Omonywa & Another v The Hon. Attorney General & County Education Board, Nyamira, HC Petition No. 16 of 2014*** where Sitati J granted a conservatory order in a petition challenging the dissolution of the Board of Management of the Nyariacho Secondary School on account of lack of jurisdiction by the County Education Board to dissolve the Board, citing section 18 (a-n) of the Basic Education Act.

41. In addition, the applicants relied on the Supreme Court decision in **Gatirau Peter Munya v Dickson Mwenda Kithinji SC Appl. No 5of 2014** where the apex Court held inter alia:

> ***"Conservatory should be granted on an inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."***

42. Further reliance was placed on ***Miguna Miguna v Dr Fred Okengo Matiangi, CS Ministry of Interior and Coordination of National Government*** where the SC stated that in applications for conservatory orders, a party need not demonstrate that he has a prima facie case with a likelihood of success and that unless a conservatory order is granted, there is real danger he will suffer prejudices as a result of violation or threatened violation of the Constitution. It was therefore submitted that as the applicants have a mandate of collecting and accounting for school funds accruing to the School pursuant to section 59(0) of the Basic Education Act, there is real danger of suffering prejudices as the governance issues of the School have not been addressed by the Respondents.

43. The Respondents' counsel Miss Langat filed written submissions too, and reiterated the depositions by Mr. Wamocho as reproduced above. They contended that the petitioners/applicants had not demonstrated that they have a prima facie case to warrant grant of conservatory orders. In addition, it was submitted that the apparent conflict between the applicants and the disbanded Bboard of Management had hampered service delivery to the School and that it was the students who were suffering as a result of the said conflict.

44. According to the Respondents, the applicants had not met the threshold for grant of conservatory orders as was set out in the case of ***Centre for Rights Education and Awareness (CREAW) & 7 others vs Attorney General (2011)e KLR*** where Musinga J stated:

> ***"At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution."***

45. On what amounts to a prima facie case, the respondents relied on **Mrao v First American Bank of Kenya Ltd & 2 others (2003) KLR 125** where it was stated:

> ***"A prima facie case in a civil application includes but it is not confined to a*** *"genuine and arguable case."* ***It is a case on which the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."***

46. Further submission was that the Petitioners had not satisfied the provisions of Article 23(3)(c) of the Constitution in that they had not shown what danger they will suffer if the court does not grant the conservatory orders. It was submitted that the grant of conservatory orders must be weighed against public interest. Reliance was placed on ***Simeon Kioko Kiheka & 18 others vs County Government of Machakos & 2 others (2018)eKLR,*** where Justice G. V. Odunga held:

> ***"71. Therefore as the applicants have failed to aver, leave alone prove, that they face imminent, evident, true and actual dangers that they will suffer prejudice as a result of the violation or threatened violation of the Constitution, the applicants have failed the test for the grant of conservatory order. In the absence of proof, to grant the conservatory orders in the circumstances of this case would be disproportionate to the mischief that is sought to be cured by such orders. In other words it does not necessarily follow that in every petition that the petitioner discloses a prima facie case, conservatory orders must be issued as a matter of course. Whereas I cannot at this stage make definite findings on the fate of the petition, it is clear to me that the petitioners have not made out a case for the grant of the conservatory orders sought."***

47. The respondents' counsel also relied on Platinum Distillers Limited v Kenya Revenue Authority (2019)eKLR, where Justice W. Korir:

> ***"15. It is important to note that the orders the applicant seeks if granted at this stage, will substantively determine the petition. The orders are in the nature of a mandatory injunction. Discussing the circumstances under which mandatory injunctions can be issued, the Court of Appeal in the case of Kenya Breweries Ltd & another v Washington O. Okeyo (2002)eKLR; Nairobi Civil Appeal No. 332 of 2000 cited with approval Col. 24, 4th Edition of Halsbury's Laws of England where it is written at paragraph 948 that:***
>
> > ***"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a march on the plaintiff…..a mandatory injunction will be granted on an interlocutory application."***

48. The Respondents submitted that they had demonstrated that the conflict between the Board of Management and the school principal was already hampering service delivery since the Board of Management signatories had refused to sign cheques. Secondly, that it was revealed that some Board of Management members were trading with the school hence creating conflict of interest and that the actions of the Board of Management go against the paramount interest of the child.

49. On allegations by the Petitioners that Article 27 of the Constitution was violated, in that the caretaker committee comprises of 2 former members of the Board of Management, it was submitted that the 2 members are parents and parents' representatives, who by virtue of the Basic Education Act 2013 are co-opted members and do not have voting rights as provided for under Section 56(2) of the Act hence the issue of violation of Article 27does not arise in the circumstances.

50. The Respondents submitted that the petitioners will not suffer any prejudice should the court not grant the conservatory orders and that it had been shown by the report by the Quality Assurance and Standards team that the Board of Management was not nominated and vetted in line with the Basic Education Regulations 2015 which under Regulation 7(3), provides for the constitution of the ad hoc committee to vet suitable proposed nominees. In this case, it was contended that the TSC Sub-County Director and KUPPET representatives were not to be part of the committee and may have compromised the vetting process.

51. It was also submitted that the Board of Management was not well constituted as it did not reflect the composition of the school as a County School, as most of its members were drawn from the immediate locality. Thirdly, that some of the Board of Management were trading with the school raising serious issues of conflict of interest contrary to the provisions of fourth schedule of the Basic Education Act, Regulation 10 which provides for disclosure of interest where a member is directly or indirectly interested in any contract before a Board of Management. The respondents maintained that the Board of Management can be dissolved under Regulation 9(1) on grounds of gross misconduct and incapability of discharging its mandate.

52. On due process, the respondents submitted in contention that due process was followed in dissolving the Board of Management as per the procedure stipulated in Regulation 9(1) of the Basic Education Regulations 2015. They denied the allegation that the decision to dissolve the Board had been finalized by the County Education Board but instead by the letter dated 17th May 2019 to the Principal Secretary which recommended the dissolution of the Board of Management and which was responded to in the affirmative in the interest of the learners and for compliance with the laws and regulations.

53. The respondents' counsel submitted that the petitioners had not demonstrated that the interim committee is incompetent to discuss and finalize Budget 2019 matters and that in any event, the same had even been overtaken by events.

54. The Respondents further submitted that the Petitioners/Applicants had come to court with unclean hands as all they were seeking is to paralyze the smooth running of the school and violate the rights of the child whose interest comes first. They prayed that the Notice of Motion dated 3rd June 2019 be dismissed with costs.

DETERMINATION

55. The petitioners and respondents have said so much in their depositions and submissions. However, they focused mainly on the main petition as opposed to the prayers for conservatory orders which are interlocutory orders.

56. In addition, this court observes that prayers Nos 6 to 8 cannot be granted because they relate to the main petition, not the interlocutory conservatory orders. Granting the said orders as prayed would be tantamount to determining the merits of the petition at the interlocutory stage.

57. Therefore, having carefully considered the application, the response thereto and submissions for and against, in my view, the main issue for determination in this interlocutory application is under what circumstances can the Court grant conservatory orders and whether the applicants/petitioners have demonstrated that they warrant grant of conservatory orders. Commencing with judicial precedent, the Supreme Court in ***Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others*** [Appl No 5 of 2014] held:

> ***"Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the "prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success' in the applicant's case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."[emphasis added].***

58. In ***Judicial Service Commission v Speaker of the National Assembly & Another [2013] e KLR,*** the Court expressed itself thus:

> ***"Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute in situ. Therefore, such remedies are remedies in rem as opposed to remedies in personam. In other words, they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person."***

59. The question that I must answer is therefore whether the applicant has established a *prima facie* case. A *prima facie* case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the applicant has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues.

60. In the ***Gatirau Peter Munya*** **[supra]** case, the Supreme Court stated, with regard to conservatory orders:

> ***"Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the Courts, by their established attribute of line-drawing, must ever have an interest in contributing to the safeguarding of such resources…These principles dictate that our conscientious sense of proportions, stands not in favour of allowing the conduct of fresh elections for Meru County's gubernatorial office, during the pendency of an appeal. By our sense of responsibility, the Court's contribution to good governance in that context, takes the form of an expedited hearing for the appeal. Just that."***

61. Further in ***Centre for Rights Education and Awareness (CREAW) & 7 Others v Attorney General &Others Petition No. 16 of 2011***, it was held that a party seeking a Conservatory Order only requires to demonstrate that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution. What amounts to real danger was dealt with by Mwongo, J in ***Martin Nyaga Wambora v Speaker of The County of Assembly of Embu & 3 Others [2014] e KLR*** thus:

> ***"To those erudite words I would only highlight the importance of demonstration of "real danger". The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court's attention."***

62. In the instant case, the burden is on the petitioners/applicants seeking to overturn the dissolution of the Board of Management of the Raliew Secondary School and suspend the operationalization of the Caretaker Committee to demonstrate that there is danger which is looming and apparent, real and genuine and not fictitious and which danger deserves immediate remedial attention or redress by the court. A remote danger will not do. Thus, the applicant must show that the probability as opposed to mere possibility of the danger occurring is real and imminent. The question that arises is whether in the circumstances of this case that burden has been discharged.

63. First and foremost, is the claim by the applicants/petitioners that the respondents- Siaya County Education Board has no power or jurisdiction to dissolve the School's Board of Management as the said power is vested in the Cabinet Secretary responsible for Education under Regulation 9 of the Basic Education Regulations, 2015 which provides for situations where the Board of Management may be dissolved, and by the Cabinet Secretary for Education, not by the County Education Board.

64. The applicants' counsel submitted that under section 38 of the Interpretation and General Provisions Act, the respondents could not exercise delegated power of the Cabinet Secretary because there is no delegation of such power and that where there is delegation, such delegation must be in writing. The applicants/petitioners maintained that the decision by the Respondents was made without jurisdiction and excess of jurisdiction and that as they were not accorded a hearing prior to the said decision, their right to fair administrative action as contemplated in Article 47 of the Constitution was violated hence they have a prima facie case to warrant grant of conservatory orders, as their constitutional rights are violated and that they stand to suffer.

65. On the part of the respondents, it was submitted in contention that there was no prejudice occasioned to the petitioners by the dissolution of the Board of Management and the appointment of a caretaker Committee, as it was in the interest of the School children, owing to several issues of mismanagement of the school by the Board of Management, including conflict of interest. Further, that the applicants were accorded an opportunity to discuss the investigations report but that they declined.

66. I have considered the above rival arguments. I observe the following: that albeit Regulation 9 (1) of the Basic Education Regulations, 2015 gives power to the Cabinet Secretary to dissolve a Schools' Board of Management in the situations stipulated thereunder, section 53 of the Basic Education Act is clear that the Board of Management as established under section 55 of the Act is appointed by the County Education Board and in this case, it is not in doubt that the second applicant Petitioner was established by the County Education Board of Siaya County.

67. Thus the question is whether in cases where the law gives power to appoint, would that same law divest of the appointing authority the power to dissolve or to terminate the appointment? In my humble view, Regulation 9(1) made under the Act is subsidiary legislation which cannot supersede substantive legislation. As such, Regulation 9 of the Basic Education Regulations, 2015 cannot override the provisions of section 51(1) of the ***Interpretation and General Provisions Act (Cap 2) Laws of Kenya*** which provides:

> ***"Where by or under a written law a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, condition or establishment of, or dissolve, a board, commission, committee or similar body appointed, constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it***."

68. It is trite that unless a contrary intention is proved, a power to make includes a power to unmake. A power to recruit includes the power to cancel the recruitment. A power to appoint or constitute includes the power to revoke the appointment or to dissolve. See ***Independent Policing Oversight Authority & another v Attorney General & 660 others [2014] e KLR.***

69. For the above reasons, I am not persuaded that the petitioners' claim that the dissolution of the School's Board of Management and the appointment of a Caretaker Committee by the Respondent was made without jurisdiction or that it was in contravention of Regulation 9 (1) of the Basic Education Regulations which are subsidiary legislation to the Basic Education Act and Interpretation and General Provisions Act, Chapter 2, Laws of Kenya.

70. Secondly, this court has considered whether the petitioner had any other alternative avenue for the redress of his grievances, following the alleged violation of the Fair Administrative Action Act. The petitioners claim that Article 47 of the Constitution as implemented by the Fair Administrative Action Act, 2015 was violated in that they were not accorded an opportunity to be heard on matters contained in the investigation reports. They also claim that the appointment of some of the former members of the BOARD OF MANAGEMENT into the Caretaker Committee is discriminatory against the petitioners and therefore they seek in the main petition, declarations and directives against the respondents, which orders have the net effect of reversing the entire process undertaken by the respondents in dissolving the BOARD OF MANAGEMENT of Raliew Secondary School and in appointing a caretaker Committee.

71. It is trite that where the Constitution or statute confers jurisdiction upon a court, tribunal, person or body or any authority, that jurisdiction must be exercised in accordance with the Constitution or statute. In ***Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017]e KLR*** the Court of Appeal stated:

> ***"time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."***

72. The Court of Appeal in ***Kenya Revenue Authority &2 others v Darasa Investments Ltd [2018] e KLR*** [Visram,Karanja and Koome JJA] stated as follows when it posed the following question:

> ***"what then, ids the consequence, if any, of the respondent's failure to invoke the alternative remedies? As appreciated by the parties, availability of an alternative remedy is not a bar to judicial review proceedings. It is only in exceptional cases that the High Court can entertain judicial Review proceedings where such alternative remedies are not exhausted. Tis position is fortified by the decisions of this court in Cortec Mining Kenya Limited v Cabinet Secretary Ministry of Mining & 9 others[2017]e KLR and Kenya Revenue Authority & 5 others v Keroche Industries Limited CA No. 2 of 2008. Perhaps that why the legislature at section 9(4) of the Fair Administrative Action Act stipulates that:***
>
> > ***"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."***
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> > ***"Our reading of the above provision reveals that contrary to the appellant's contention, the High Court or a subordinate court may on its own motion or pursuant to an application by the concerned party, exempt such a party from exhausting the alternative remedy."***

73. Section 93 of the Basic Education Act establishes the Education Appeals Tribunal. Under section 93(2) of the Act:

"any person aggrieved by the decisions of the County Education Board may appeal to the Education Appeals Tribunal. (3) ***The Cabinet Secretary in consultation with the National Education Board and relevant stakeholders shall prescribe regulations on the operation and structure of the Education Appeals Tribunal. (4) The Education Appeals Tribunal shall comprise of— (a) the chairperson of the National Education Board; the Secretary to the Teachers Service Commission; (d) a representative of the Education Standards and Quality Assurance Council; (e) a representative of the Kenya Private Sector Alliance; (f) a representative of the Attorney-General; and (g) the Chief Executive Officer of the National Council for Nomadic Education in Kenya."***

74. In ***Ndiara Enterprises Ltd v Nairobi City County Government [2018] eKLR*** the Court of Appeal in upholding the judgment of the High Court, Aburili J in ***Nairobi J.R Misc. Civil Application No. 91 of 2016) stated:***

"Though the High Court can exempt a party from following such clear laid procedures for redress of grievances before approaching it in the noble interests of justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court's power to exercise its jurisdiction under Article 165 of the Constitution was therefore limited or restricted by statute in this instance as found by the Judge. The appellant had complained before this Court that the learned Judge erred in failing to appreciate that though there exists an alternative procedure for redress, the same was less convenient, beneficial and effective in its circumstances. However, that argument must be taken as an afterthought. The same was never raised or pursued before the High Court thus denying the respondent the opportunity for rebuttal and denying this Court the benefit of the reasoning of the High Court on the same issue.

On the authority of Owners of the Motor Vehicle "Lilian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, which the Judge had in mind and cited, the High Court was bound to lay down its tools the moment it held that it lacked jurisdiction. We concur with its finding that it lacked jurisdiction to entertain and determine the proceedings."

75. The above holding was informed by the provisions of section 9(1) (2),(3) and (4) of the Fair Administrative Action Act, 2015 which implements Article 47 of the Constitution on the right to fair administrative action, and which clearly stipulate that an applicant must first exhaust the available internal dispute resolution mechanisms before resorting to court although in exceptional circumstances and on application, the court may exempt such party from resorting to alternative internal dispute resolution mechanisms. In this case, the applicants have neither shown that there is exceptional circumstances to warrant exemption nor applied for such exemption from resorting to the Education Appeals Tribunal as stipulated in the Act, for resolution of the dispute involving dissolution of the School's Board of Management and appointment of a caretaker Committee.

76. Moreover, even before the enactment of the above provisions of the Fair Administrative Action Act, the Court of Appeal had earlier on in the case of ***MUTANGA TEA & COFFEE COMPANY LTD v SHIKARA LIMITED AND MUNICIPAL COUNCIL OF MOMBASA*** determined the issue of whether a party aggrieved by a decision of the ***Director of Physical Planning*** under the ***Physical Planning Act***, C***ap 286 (PPA)*** or of the ***National Environment Management Authority (NEMA)*** under the ***Environmental Management and Co-ordination Act***, ***Cap 387 (EMCA), may invoke the original jurisdiction of the High Court instead of the dispute resolution mechanisms prescribed under those Acts***. By a ruling dated ***12th July 2012***, the subject of that appeal, ***Okwengu, J.*** (as she then was), sustained a preliminary objection raised by the 1st respondent, ***Shikara Ltd*** and supported by 2nd respondent, the former ***Municipal Council of Mombasa***, and held that under the two Acts, the jurisdiction of the High Court is appellate rather than original. Accordingly, the learned judge struck out the suit by ***Mutanga Tea & Coffee Company Ltd. (the appellant)***, which had sought to challenge, by invoking the original jurisdiction of the High Court, the change of user and consent for development given to the 1st respondent by the relevant authorities under the PPA and the EMCA. Court of Appeal held:

"Like under the PPA, any person aggrieved by a decision of the Director General, of NEMA or of any of its Committees has a right of appeal to the National Environment Tribunal under section 129(2) of EMCA, which may confirm, set aside, or vary the impugned decision and make such order as it may deem fit. A decision of the Tribunal is, under section 130 appealable to the High Court.

The real question then becomes whether an aggrieved party can ignore these elaborate provisions in both the PPA and the EMCA and resort to the High Court, not in an appeal as provided, but in the first instance. This Court has in the past emphasized the need for aggrieved parities to strictly follow any procedures that are specifically prescribed for resolution of particular disputes. SPEAKER OF THE NATIONAL ASSEMBLY V. KARUME (supra), was a 5(2)(b) application for stay of execution of an order of the High Court issued in judicial review proceedings rather than in a petition as required by the Constitution. In granting the order, the Court made the often-quoted statement that:

"[W]here there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed." (See also KONES V. REPUBLIC & ANOTHER EX PARTE KIMANI WA NYOIKE & 4 OTHERS (2008) 3 KLR (ER) 296).

It is readily apparent that in those cases, the Court was speaking to issues of the correct procedure rather than of the correct forum for resolution of a dispute. However, we entertain no doubt in our minds that the reasoning of the Court must apply with equal force to require an aggrieved party, where a specific dispute resolution mechanism is prescribed by the Constitution or a statute, to resort to that mechanism first before purporting to invoke the inherent jurisdiction of the High Court.[Emphasis added].

The basis for that view is first that Article 159 (2) (c) of the Constitution has expressly recognized alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. The use of the word "including" leaves no doubt that Article (159(2)(c) is not a closed catalogue. To the extent that the

Constitution requires these forms of dispute resolution mechanisms to be promoted, usurpation of their jurisdiction by the High Court would not be promoting, but rather, undermining a clear constitutional objective. A holistic and purposive reading of the Constitution would therefore entail construing the unlimited original jurisdiction conferred on the High Court by Article 165(3)(a) of the Constitution in a way that will accommodate the alternative dispute resolution mechanisms.[emphasis added].

Secondly, such alternative dispute resolution mechanisms normally have the advantage of ensuring that the issues in dispute are heard and determined by experts in the area; and that the dispute is resolved much more expeditiously and in a more cost effective manner. In RICH PRODUCTIONS LTD. V. KENYA PIPELINE COMPANY & ANOTHER, PETITION NO. 173 OF 2014, the High Court explained why it must be slow to undermine prescribed alternative dispute resolution mechanisms thus:

***"The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2nd respondent, such supervision is limited in various respects, which I need, not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is* not."[emphasis added].**

77. Similarly, the Court of Appeal in ***REPUBLIC V. THE NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY, CA NO 84 OF 2010*** upheld a decision of the High Court, which declined to entertain a judicial review application by a party who had a remedy, which he had not utilized, under the National Environment Tribunal. The Court reiterated that ***where Parliament has provided an alternative remedy in the form of a statutory appeal procedure, it is only in exceptional circumstances that an order of judicial review will be granted.***

78. **In *VANIA INVESTMENT POOL LTD. V. CAPITAL MARKETS AUTHORITY & 8 OTHERS, CA NO 92 OF 2014*** the Court of Appeal also upheld a decision of the High Court in which the court declined to entertain a judicial review application by an applicant who had failed to first refer its dispute to the **Capital Markets Appeals Tribunal** established by the **Capital Markets Act**.

79. The Court of Appeal in all the above cases made it clear that it was satisfied that the learned judges did not err by striking out the appellants' suits and applications which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellants the right to access the High Court by way of appeal, which mechanisms the appellants had refused to invoke.

80. The Court of Appeal concluded that ***"to hold otherwise would, in the circumstances, would be to defeat the constitutional objective behind Article 159(2)(c) and the very raison d'etre of the mechanisms provided under the two Acts."***

81. Even where the appellant claimed that the High Court had failed to invoke its inherent jurisdiction or abdicated its jurisdiction, or that the failure to follow the prescribed dispute resolution mechanism was a mere technicality curable under **Article 159 (2) (d)** of the Constitution, the Court of Appeal held that where the constitutional principle under which the dispute resolution mechanisms provided by the relevant statutes like Physical Planning Act and the Environment Management Coordination Act are underpinned, it cannot be claimed that lack of compliance with those mechanisms is a mere technicality.

82. In ***RAILA ODINGA & 5 OTHERS v IEBC & 3 OTHERS, PETITION NO. 5 OF 2013,*** the Supreme Court stated that in interpreting the Constitution, it must be read as one whole and that Article 159(2)(d) cannot be read or applied in a manner that ousts the provisions of other clear Articles of the Constitution.

83. Further in ***LEMANKEN ARAMAT v HARUN MAITAMEI LEMPAKA, Petition No. 5 of 2014,*** the same Court, while considering the provisions of Article 159(2) (d) of the Constitution, noted that where the issue at hand is one of mere procedural lapse which has no bearing on jurisdiction, the court can cure the same under Article 159(2)(d). ***However, that where the Constitution links certain vital conditions to the power of the court to adjudicate a matter, Article 159(2)(d) has no application.[emphasis added].***

84. Furthermore, the applicants heavily placed reliance on a more relevant and similar case of ***Christopher Mogambi Omonyana & another v Attorney General & another [2015]e KLR*** wherein Hon R.N Sitati J granted conservatory orders where the County Education Board of Kisii had dissolved the Board of Management of Nyariacho Mixed Secondary School in circumstances which were considered to be improper, illegal and unconstitutional hence null and void ad the learned Judge held that the County Education Board had no mandate under the Basic Education Act to do so. However, this court observes that the said decision was a ruling in an interlocutory application for conservatory orders. What the applicants' counsel has not told this court is that the above position changed at the hearing of the main petition whose decision was rendered by Karanja J after the transfer of R.N. Sitati J and on 17th November, 2015 the learned judge in rendering a full judgment in the matter held:

"So, it must herein be deemed that the appointment of the subject board by the then Minister for Education was effected by the current appointing authority i.e the County Education Board. Therefore, the action taken by the second respondent in dissolving the entire board of management of Nyariacho Mixed Secondary School to pave way for the appointment of new board members was proper and lawful.

Being the current appointing and/or nominating authority, the second respondent has the power or mandate to revoke the previous appointment of the board of management undertaken by the then Minister for Education.

Consequently, this petition is lacking in merit and is hereby dismissed with costs to the respondents. It is intriguing that the petitioners filed this petition yet none of them was even a member of the dissolved board of management. In any event, their first port of call should have been the Education Appeals Tribunal by dint of Section 93 (2) of the Basic Education Act No. 14 of 2013. Coming to this court was rather ill advised, premature and a misconception."

85. This petition and application is on all fours with the above case and decision wherein at the interlocutory stage, the court found that the petitioner had established a prima facie case for grant of a conservatory order but after the full hearing, the learned judge found against the petitioner.

86. Under Article 23(1) and (3) of the Constitution, this Court has jurisdiction to hear and determine applications for redress of denial, violation or infringement of or threat to a right or fundamental freedoms in the Bill of Rights and under Article 19(2), the purpose of recognizing and protecting human Rights and fundamental Freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings. Among the remedies that this court may grant in such applications whether initiated by way of judicial review or constitutional petitions are declaration of rights, injunction, conservatory order, declaration of invalidity of any law, an order for compensation and an order of judicial Review.

87. The Fair Administrative Action Act, 2015 also provides for several remedies for violation of the right to Fair Administrative Action as guaranteed in Article 47 of the Constitution. Judicial review, a declaration or injunction are some of the remedies that the court may grant.

88. In view of the above observations, I do not find it necessary to address the question of the prevailing status quo on the ground, which the respondents submitted, has rendered this application academic in that the Caretaker Committee having been fully operationalized, this court can only order that they vacate the office if they are made parties to this petition and at the conclusion of the hearing of the petition, lest it fall afoul Article 47 of the Constitution on the right to fair administrative action and the right not to be condemned before being heard.

89. In the premises, I find and hold that the applicants/petitioners have not demonstrated that they have a prima facie case before this court and or that should the court decline to grant the orders sought, then they will be rendered pious explorers in the judicial process. Accordingly, this application for conservatory orders pending hearing and determination of the substantive petition herein is declined and dismissed.

90. Costs shall be in the main petition should the petitioner fail to take guidance from the court on the issue of pursuit of alternative dispute resolution mechanisms stipulated in Article 159(2) (c) of the Constitution, section 93 of the Basic Education Act and section 9 of the Fair Administrative Action Act, 2015, which then hinges on the jurisdiction of this court, and pursue the petition to its logical conclusion.

91. The petitioners, nonetheless, have an opportunity to file an appeal against the decision of the County Education Board to the Education Appeals Tribunal as stipulated in section 93 of the Basic Education Act, subject to any law relating to limitation.

Dated, signed and Delivered at Siaya this 24th Day of July, 2019

R.E. ABURILI

JUDGE

In the presence of:

Mr Arika Advocate for the Petitioners/applicants

Mr Mutai Counsel for the Respondents

CA: Brenda and Modestar