REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NUMBER 630 OF 2017

IN THE MATTER OF APPLICATION FOR THE ORDERS OF *CERTIORARI, MANDAMUS* AND *PROHIBITION*

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT, CIVIL PROCEDURE RULES, 2010, THE LAW REFORM ACT, AND THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA 2010, ARTICLES 47 AND 232

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

CABINET SECRETARY, MINISTRY OF

EDUCATION, SCIENCE & TECHNOLOGY.....1ST RESPONDENT

DIRECTOR OF EDUCATION,

KAMUKUNJI SUB-COUNTY.....2ND RESPONDENT

KENYA NATIONAL EXAMINATIONS

COUNCIL (KNEC).....3RD RESPONDENT

BRIGHTSTAR SECONDARY SCHOOL.....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

AND

FLOPPPEEZE SECONDARY SCHOOL.....*EX PARTE* APPLICANT

JUDGMENT

The Parties

1. The *ex parte* applicant, **Flopppeeze Secondary School**, is a learning institution duly registered under the Ministry of Education, Science and Technology pursuant to the provisions of the Basic Education Act[1] (herein after referred to as the Act).

2. The first Respondent is the Cabinet Secretary responsible for education appointed under Article 152(2) of the Constitution.

3. The second Respondent is the Director of Education, Kamukunji Sub-County appointed under section 52 of the Act.

4. The third Respondent, the Kenya National Examinations Council (KNEC) is a body corporate established under section 3 of the Kenya National Examinations Council Act.[2] It has perpetual succession and a common seal. In its corporate name, it is capable of suing and being sued; taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property. It is also capable of borrowing money or making investments; entering into contracts; and performing all other acts or things for the proper performance of its functions under the Act which may lawfully be done or performed by a body corporate. It is the successor to the Council known as the Kenya National Examinations Council existing immediately before the commencement of the Act.

5. The fourth Respondent Brightstar Secondary School, is a learning institution duly registered under the Ministry of Education, Science and Technology.

6. The fifth Respondent is the Hon. Attorney General. Under Article **156 (4)** of the Constitution, the Attorney General is the principal legal adviser to the Government. He represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. He performs any other functions conferred on the office by an Act of Parliament or by the President.

Factual matrix

7. The *ex parte* applicant states that on 13thMarch 2017, it received the following documents through the County District Education Officer:-

> *a. Letter dated 22nd February 2017 from the third Respondent deregistering it as an Examination Centre for the Kenya Certificate of Secondary Education (KSCE);*
>
> *b. Letter dated 10th March 2017 from the Director of Education, Kamukunji Sub-County directing the applicant to identify a convenient centre for candidates to sit for the Kenya Certificate of Secondary Education (KSCE) Examinations by 13th March 2017;*
>
> *c. Letter dated 13thMarch 2017 from District Education, Kamukunji District directing Director of Education, Makadara Sub-County to assess the applicant and give recommendation to the Ministry of Education on the applicant's status.*

8. The *ex parte* applicant states that prior to receiving the above letters, it had forwarded registration documents of its 2017 KCSE candidates in both soft and hard copies to the second Respondent's office, and, that, it paid the requisite fees and it was advised to await communication. It also states that it had entered into an agreement with the fourth Respondent, pursuant to which the fourth Respondent was to allow the *ex parte* applicant's candidates to use its laboratory for all practical examination papers for the national examinations.

9. The *ex parte* applicant further states that it learnt that the fourth Respondent's registered candidates for the KCSE included the names of 17 candidates it sent to the second and third Respondents offices for registration of the KCSE examinations but without the index numbers as required.

10. In addition, the *ex parte* applicant states it did not receive any communication from the Respondents as to why the institution was de-registered as an examination Centre. It further states that the impugned decision will affect both its candidates and the *ex parte* applicant who will not be rated with other schools in the country. It also states that there is no justification for the deregistration, and, that, the decision is an attempt by the second and fourth Respondents to use *ex parte* applicant's candidates who are well prepared to help the fourth Respondent to be highly ranked as well performing. Further, it states that its candidates were not registered for the 2018 exam.

11. Additionally, the *ex parte* applicant states that neither it nor the students were notified of the intention to de-register the school. Further, it states that it was not afforded a hearing prior to the decision, nor, was it asked to show cause why the school should not be de-registered. Lastly, it states that the third Respondent acted unfairly, violated the right to a fair hearing and to a fair administrative action.

The reliefs sought

12. As a consequence of the foregoing, the *ex parte* applicant prays for the following orders:-

> *a. An Order of Certiorari to quash the decision of the Respondents jointly and severally to deregister the applicant as an exam centre for the Kenya Certificate of Secondary Education National Examinations*
>
> *b. An order of certiorari to quash the decision of the Respondents jointly and severally registering the applicant's form four KCSE students as students of the fourth Respondent.*
>
> *c. That an order of Mandamus do issue to compel the second and third Respondents to register the applicant's form four students as KCSE candidates to sit for 2018 exams at their school centre forthwith*
>
> *d. That the costs of this application be provided for.*

First, second, third and fifth Respondent's grounds of opposition

13. The Hon. Attorney General filed grounds of opposition dated 22nd June 2018 stating *inter alia* that the application is unmerited and an

abuse of the court process, and, that, it is aimed at curtailing the Respondent's statutory obligation and duties.

14. He also stated that the applicant was notified of the impugned decision vide letters dated 22nd February 2017 and 10th March 2017 annexed to the applicant's application. In addition, it stated that the impugned decision is in conformity with the section 50(2) (2) of the Act. Lastly, the Honorable Attorney General stated that the applicant is challenging the merit of the decision as opposed to the procedure.

First, second, third and fifth respondent's Replying Affidavit

15. Befly Jemurgor Bisem, the third Respondent's Corporation Secretary swore the Replying Affidavit dated December 2018. He averred that the applicant had been registered as an Examination Centre under Kamukunji Sub County and that it was keyed in the KNEC, KCSE database to enable the registration of 2016 candidates. He deposed that its registration was allowed despite the fact that the school had many administrative problems.

16. He averred that the Sub County Director of Education, Kamukunji wrote to the Kenya National Examinations Council informing it that the Centre is not in Kamukunji Sub County. He further averred that KNEC's response was that, since the school's registration documents indicated Kamukunji, the school would remain in operation as per the registration certificate until it seeks re-registration by the Ministry of Education.

17. Mr. Bisem deposed that KNEC wrote to the applicant through the Sub County Director informing it of the decision to de-register it and the reasons for the same vide its letter dated 22nd February 2017. In addition, he averred that on 10th March 2017, the school was inspected by two KNEC officials, the Kamukunji Sub County Director of Education and a Sub County Quality Assurance and Standards Officer and their findings were:-

i. That the state of the school buildings was poor and unsafe for the students;

ii. There were no storage facilities for examination materials in the Centre;

iii. The school was located in Makadara Sub County and not Kamukunji Sub County where it had been registered;

iv. The school lacked credibility to conduct the examinations;

v. The School did not have a science laboratory for teaching practical subjects and the apparatus and chemicals for teaching were also not available;

vi. The attendance register had 32 form four students indicated but only 15 were present during the day of inspection.

18. He deposed that the re-inspection of the school was necessitated by an appeal made by the school management against de-registration of its school as an examination Centre.

19. He further averred the Quality Assurance and Standards recommended that the school be de-registered to enable it to comply with the minimum facilities required for registration of an examination Centre. In addition, he deposed that under the Kenya National Examinations Council Act,[3] the Council has powers to determine the minimum facilities required for an examination Centre, and to inspect schools to ensure compliance with the minimum facility requirements. Further, he deposed that under the Act, the council has power to de-register schools that have not complied with the same as provided in the KNEC User Guide for Management of examinations KCSE 2017 edition, which is availed to all schools. He averred that paragraph 2.1.6 of the guide provides:-

"KNEC reserves the right to de-register an examination Centre if it is satisfied that the Centre does not comply with the regulations…this may be on account of the following:-

i. Inadequate facilities.

ii. Continuous cases of mass malpractice.

iii. Unsuitable location of the institution.

iv. Change of physical location without request for re-registration as an examination Centre.

v. Recommendation for de-registration of a Centre by the County Director of Education for contravention of Basic Education Act.

20. He further averred that the Act gives the quality Assurance and Standards Officers-KNEC powers to enter any basic education and training institution at any time, with or without notice to ensure compliance with the Education Standards and Regulations. He added that if the court compels the Respondents to register the school, it will be usurping the powers of the Respondents and the requirements to be met before the school is registered. He also stated that the school has no option but to comply with the facilities required for every school to comply, and, that, the Respondents are ready to re-inspect the school to ensure that it has complied with the recommendations in the report regarding the facilities and then register it.

The *ex parte* applicant's further Affidavit

21. Florence Musimbi Pessa, the *ex parte* applicant's director swore the further affidavit dated 22nd March 2019 in reply to Mr. Bisem's Replying Affidavit. She averred that the administrative problems alluded to had no effect on the students and that the school had all the required equipment and apparatus, hence, the de-registration was for ulterior purposes.

22. She also deposed that the school comprises of a primary and a secondary school both on the same parcel of land, and it would not be possible have the primary in Kamunkunji and the Secondary at Makadara. She added that she only learnt of the letter dated 22nd February 2017 after visiting KNEC to find out why the school had been deregistered when she was asked to appeal against the decision.

23. She further averred that the inspection was a sham because it comprised of a biased team which included her competitors and that the panel never visited the school for evaluation and assessment but sat in the fourth Respondents offices. She also averred that even though her school was closed, ironically, she still teaches forms one to four only for them to sit for examinations at the fourth Respondents school.

The fourth Respondent

24. The fourth Respondent did not file any response to the application nor did it participate in the proceedings.

Issues for determination

25. Upon considering the diametrically facts presented by the parties, I find that the following issues fall for determination:-

a. Whether the impugned decision is tainted with illegality.

b. Whether the impugned decision offends sections 4(2), (4), 7(2) (a) (c) (f) (n) of the FAA Act and Article 47 (1) of the Constitution

c. Whether the ex parte applicant has established any grounds for the court to grant the orders sought.

a. Whether the impugned decision is tainted with illegality.

26. The applicant's position as I understand it is that it is challenges the legality of the decision to de-register the school as a KCSE Examination Centre. To buttress his case, the applicant's counsel relied on *Republic v Independent Electoral and Boundaries Commission (IEBC) ex parte National Super Alliance (NASA) Kenya and 6 Others.*[4] In this case the court stated that an order or certiorari can issue if the decision is without jurisdiction or in excess of jurisdiction or where the rules of natural justice are not complied with.

27. The first, second, third and fifth respondents' counsel submitted that an assessment found the school to be ill equipped and lacking credibility to conduct examinations. He argued that the school appealed against the decision and officers from the quality assurance and standards office made further investigations. Their report was that the school buildings were poor, had big cracks and therefore unsafe for students. It also revealed that there were no storage facilities for the examination materials, that the school lacked credibility to conduct examinations and it had no apparatus and chemicals among others, hence, it recommended that the school be deregistered.

28. Citing *Kenya National Examination Council v Republic*, counsel argued that *certiorari* and *mandamus* issues where the decision maker acts in excess of jurisdiction or on grounds of procedural impropriety. He also cited *Associated Provincial Pictutre House Limited v Wednesbury Corporation*[5] that described the elements of unreasonableness.

29. Lastly, the counsel cited section 50 (1) (2) of the Act and the KNEC Act and the Quality Assurance Regulations and argued that the Respondents have the power to make the decision in question.

30. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies and public officers to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker, the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[6]One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

31. Safeguarding legality is the most important purpose for the judicial review of administrative actions. Thus, a person seeking judicial review of an administrative decision must be able to persuade the court that there are grounds for review in order for the legality of the administrative decision to be invalidated. In one sense, there must always be the premise of "want of legality." It is useful to state that an administrative decision is flawed if it is illegal. A decision is illegal if it: - ***(a)*** *contravenes or exceeds the terms of the power which authorizes the making of the decision;* ***(b)*** *pursues an objective other than that for which the power to make the decision was conferred;* ***(c)*** *is not authorized by any power;* ***(d)*** *contravenes or fails to implement a public duty.*

32. In response to a challenge to the legality of administrative action, courts generally need to consider the compliance of administrators or government functionaries with both substantive and procedural legal rules. This is because any administrative decision-making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures.

33. The most basic rules of administrative law are first that decision makers may exercise only those powers conferred on them by law. Second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as administrators or government functionaries comply with these two rules, their decisions are safe. From the perspective of administrators and statutory bodies,

this fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision or decisions rendered by statutory bodies can be judicially challenged on grounds that the administrative decision does not comply with the above-mentioned basic requirements of legality.

34. The most obvious example of illegality is where a body acts beyond the powers prescribed for it. In other words, it acts *ultra vires*. Decisions taken for improper purposes may also be illegal. Illegality also extends to circumstances where the decision-maker misdirects itself in law. When exercising a discretionary power, a decision-maker may take into account a range of lawful considerations. If the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court will normally find that the power had been exercised illegally.

35. The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second issue that can be argued under illegality is fettering discretion. This heading for judicial review entails considering whether an administrative body actually exercised the power it has, or whether because of some policy it has adopted, it has in effect failed to exercise its powers as required. In general, terms the courts accept that it is legitimate for public authorities to formulate policies that are 'legally relevant to their powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust. An illegality can also occur where a body exercised a power, which was within its functions but exceeded the scope of power that is legally conferred to it.

36. When legislation, policy, decision or an act or omission of a government official is challenged, the court's duty is first to determine whether, through "the application of all legitimate interpretive aids,"[7] the impugned legislation, policy, decision, act or omission is capable of being read in a manner that complies with the constitution or the enabling statute. Differently put, whether a law, act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution[8] or the relevant statutory provisions.

37. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[9]Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.[10] If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute. One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

38. Now, I find it convenient to examine the provisions of the law upon which this contest revolves. Section 50 (2) (c) of the Act in so far as it is relevant to the issue under consideration stipulates that no private school shall be registered if— **(c) the school premises, or any part of those premises, are unsuitable for a school.** This provision settles the position regarding the requirement for suitability of school premises.

39. Section 52 (1) of the Act provides *inter alia* that a private school shall– *(d) maintain premises that meet the requirements of the occupational health, safety regulations and building standards and (e) maintain necessary teaching and learning materials.*

40. In addition, sub-section (2) of the above section confers power upon the County Education Board in consultation with the Teachers Service Commission to assess a private school's, educational programmes and the school instructional materials, and to inspect the school's facilities and to perform such other appropriate functions with respect to the private school as the Cabinet Secretary may require.

41. Section 64 of the Act establishes the Education Standards and Quality Assurance Council and stipulates its functions. These are ensuring standards and maintaining quality in institutions of basic education, administering policies and guidelines set for basic education, supervising and overseeing curriculum implementation and delivery. In addition, in cooperation with county education, it monitors the conduct of assessments and examinations in institutions of basic education, monitors, and evaluates standards and quality in basic education.

42. Section 66 of the Act provides for the powers of the Quality Assurance and Standards Officers which include the power to at any time enter any basic education and training institution with or without notice to ensure compliance with education standards and regulations and the power to recommend temporary suspension of operations of the institutions to the County Education Board for a specific period until the basic standards are met.

43. In addition, section 67 of the Act, obligates the Cabinet Secretary, Teachers Service Commission, Standards and Quality Assurance Council, National Education Board, national quality assurance bodies, and the County Education Boards to ensure the maintenance of standards, quality and relevance of education and training as provided for under the Act or any other written law.

44. The question that follows is whether the impugned decision offends the above provisions. Judicial oversight is necessary to ensure that decisions are taken in a manner, which is lawful, reasonable, rational and procedurally fair.[11] In *Council of Civil Service Unions v. Minister for the Civil Service*[12] Lord Diplock enumerated a threefold classification of grounds for the court to intervene, any one of which would render an administrative decision *ultra vires*. These grounds are; *illegality, irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; *proportionality*.[13]What Lord Diplock meant by *"Illegality"* as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term *"Irrationality"* by succinctly referring it as*"unreasonableness"* in *Wednesbury* Case.[14] By *"Procedural Impropriety"* His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

45. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. If the agency was within its assigned area then it was *prima facie* performing the tasks entrusted to it by the legislature, hence not contravening the will of Parliament. In such a case, a court will not interfere with the decision. A decision, which falls outside that area, can therefore be described, interchangeably, as: - a decision to which no reasonable decision-maker could have come; or a decision, which was not reasonably open in the circumstances.

46. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple *ultra vires* and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category.

47. The *ultra vires* principle is based on the assumption that court intervention is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense, it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense, the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and established its limits.

48. The proper approach for this court in reviewing the impugned decision is to establish, factually, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground for the court to intervene. This legal evaluation must, where appropriate, take into account the materiality of any deviance from legal requirements, by linking the question of compliance to the purpose of the provision, before concluding that a ground for the court to intervene has been established.

49. It is axiomatic that the exercise of public power is only legitimate when lawful.[15]A body exercising public power has to act within the powers lawfully conferred upon it. The principle of legality also requires that the exercise of public power should not be arbitrary or irrational.[16]Decision-makers should not pursue ends which are outside the ''objects and purposes of the statute.'' It is said that power should not be ''exceeded'' or that the purposes pursued by the decision-maker should not be ''improper,'' ''ulterior,'' or ''extraneous'' to those required by the statute in question. It is also said that ''irrelevant considerations'' should not be taken into account in reaching at a decision.

50. In order to give meaning to the enabling provisions of the statute, regard must be had to its wording, read in context, and having regard to the purpose of the entire statute as discerned from the preamble to the Act and the dictates of the Rule of Law. The preamble to the Act provides:- *"An Act of Parliament to give effect to Article 53 of the Constitution and other enabling provisions; to promote and regulate free and compulsory basic education; to provide for accreditation, registration, governance and management of institutions of basic education; to provide for the establishment of the National Education Board, the Education Standards and Quality Assurance Commission, and the County Education Board and for connected purposes*."

51. The Respondents mandate has not been challenged. The requirement to maintain standards is not in dispute. The school was inspected as the law provides and it was found to be wanting. Indeed, there is a clear admission by the applicant that she transferred her candidates to write the exam in another school. Why did the applicant transfer its candidates to the fourth Respondent if at all her school met the quality standards. In addition, the appellant appealed and upon re-inspection , the school was found not compliant.

52. The role of the court in cases of this nature was well explained in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [17]as follows:-

> "*[95] Where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, courts may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric."*

53. In other word, so long as statutory body remained within the powers conferred upon it by the government, a Judicial Review court will not intervene. My reading of the above provisions and the Regulations and the grounds cited by the applicant leaves me with no doubt the impugned decision was undertaken pursuant to the legal mandate of the first, second and third Respondent. I find no illegality in the said decision. The law as I understand it is that once a Judicial Review court fails to sniff an illegality, it will not invalidate a decision. I decline the invitation to interfere with the impugned decision on grounds that there is no basis to warrant such intrusion.

b. Whether the impugned decision offends sections 4(2), (4), 7(2) (a) (c) (f) (n) of the FAA Act and Article 47 (1) of the Constitution

54. The applicant's counsel cited section 4 of the Fair Administrative Action Act[18] and submitted that the letter dated 22nd February 2017 was never served upon the applicant. He also argued that the impugned decision is based on a report not known to the applicant, and, that, the applicant was not invited to attend any proceedings nor was it asked to show cause why the decision should be taken. He also argued that no written reasons were supplied and that the applicant was not heard before the decision was made. He relied on *Republic v Minister for Local Government and Another ex parte Mwahima*[19]for the holding that the purpose of the order of *certiorari* is to ensure that an individual is given a fair treatment by the authority.

55. The Respondents counsel submitted that the school was notified about the decision and that the applicant appealed against the decision.

56. The constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional

terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.[20]

57. Section **4** of the Fair Administrative Act[21] re-echoes Article **47** of the Constitution and reiterates the entitlement of every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

58. Subsection **4** further obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing. As **Sedley J** put it[22]:- *"Public law is not about rights, even though abuse of power may and often do invade private rights; it is about wrongs-that is to say misuse of public power."*

59. However, whether or not a person was given a fair hearing of his case will depend on the circumstances and the type of the decision to be made. In the most recent edition of De Smith's Judicial Review of Administrative Action, it is asserted:- "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."[23]

60. The standards of fairness are not immutable. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependant on the context of the decision, and this is to be taken into account in all its aspects.[24]Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[25] In addition, the foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others. Courts have also used “fairness” as an explanation of other grounds of review. This is apparent, for example, in relation to judicial review for breach of substantive legitimate expectations. The courts have also used fairness as the explanatory basis for reviewing mistakes of fact. Courts also use fairness to rationalize judicial review of decisions based on “wrongful” or “mistaken” assessments of evidence. However, in all of the above contexts, fairness has operated as a conclusion or explanatory norm of the main ground for judicial review (for example, illegality or substantive legitimate expectations) rather than as the primary norm *per se* by which the relevant administrative decision was judged.

61. As for the alleged violation of the right to be heard and violation of natural justice, it is useful to recall the Court of Appeal decision in *J.S.C. vs Mbalu Mutava**[26]*** which succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article **47** is a distinct right from the right to a fair hearing under Article **50(1) (2)** of the Constitution. It proceeded to state that fair administrative action broadly refers to administrative justice in public administration, and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations. It added that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.**[27]** Lastly, it held that fair hearing under Article **50 (1)** applies in proceedings before a court of law or independent and impartial tribunals or bodies.

62. This is a case where the law permits the Quality Assurance Officers authority to enter into a school and inspect it without notice. This is a claimant who admits having transferred its 17 candidates to another school to sit for their exams. This is a school which was found not to have the necessary facilities to administer examinations. I pose the question why the school transferred its candidates if at all it was compliant as alleged. It common ground that it appealed against the decision. This raises questions whether it could appeal against a decision it was not aware of. The contention that the decision was communicated orally leaves a lot to be desired. There is evidence that a re-assessment was done following the appeal and a report was submitted recommending de-registration of the school.

63. The Respondents have a statutory mandate to visit and inspect the premises without notice and to make a recommendation. The allegation of denial of the right to be heard cannot be sustained in the circumstances of this case. Similarly, the alleged violation of the right to a fair Administrative action have not been proved at all.

c. Whether the ex parte applicant has established any grounds for the court to grant the orders sought.

64. The *ex parte* applicant’s counsel relied on *Republic v Cabinet Secretary for Internal Security ex parte Gregory Oriaro Nyauchi & 4 Others*[28] for the holding that a person seeking an order of *mandamus* must satisfy the court that the action he seeks to compel the Respondent to perform is a duty which the Respondent is under a duty whether at common law or by statute to perform.

65. The first, Second, third and fifth Respondents’ counsel argued that *mandamus* is issued to compel the performance of a public duty where a person or body has failed to perform the duty to the detriment of the party who has a legal right to expect the duty to be performed. Citing *Republic v Judicial Service Commission ex parte Pareno*,[29] counsel argued that the applicant cites contested issues of facts, which are outside the scope of judicial review jurisdiction.

66. It is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.[30] *Mandamus* is a judicial command requiring the performance of a specified duty, which has **not been** performed. Originally, a common law writ, *Mandamus* has been used by courts to review administrative action.[31]

67. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either.[32]

68. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. vs. Canada* (*Attorney General*),[33] and, was also discussed in *Dragan vs. Canada* (*Minister of Citizenship and Immigration*).[34] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. *The Applicants have satisfied all conditions precedent; and*

b. There must have been:

I. A prior demand for performance;

II. A reasonable time to comply with the demand, unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv*) No other adequate remedy is available to the Applicants;*

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

69. In the instant case, I find that the applicant has not demonstrated that the above tests have been satisfied in the circumstances of this case. First, the applicants school was found to be lacking then required facilities. Second, the council is on record stating that the applicant can apply for re-assessment once it complies. There is nothing to demonstrate that there has been "an express refusal, or an implied refusal through unreasonable delay." *Mandamus* can only issue where it is clear that there is *wilful* or *implied* refusal and or *unreasonable* delay. It cannot be said that the applicant has a legal right when its premises were found to be wanting. Consequently, I find and hold that the applicant has not satisfied the conditions for grant of order of *Mandamus*.

70. As for the prayer for *certiorari*, it is common ground that *certiorari* issues to quash an illegal decision. As stated above, the applicant has not demonstrated that the impugned decision is illegal. It follows that an order of *certiorari* cannot lie.

71. The grant of the orders of *Certiorari*, *Mandamus* and *Prohibition* is discretionary. The court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that a serious issue arises, namely, whether or not the *ex parte* applicant is using court processes to avoid the statutory laid down process.

72. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, or, where the applicant has acted in bad faith, or, where a remedy would impede the authority's ability to deliver fair administration, or where the judge considers that an alternative remedy could have been pursued. In this case, the *ex parte* applicant ought first to put its house in order by addressing the concerns cited in the report instead of invoking the Judicial Review jurisdiction of this court. This is because an academic institution must comply with all the statutory requirements, and satisfy the set quality standards.

73. Truly academic decisions are to be distinguished from the administrative decisions of the academic bodies. This is because administrative decisions are subject to judicial review. Purely academic decisions are treated as beyond the courts reach though, on facts, in several cases the courts can interfere. The guiding principle and the proposition of law in so far as judicial review of academic decisions is concerned which stands as at to-day undisturbed is that the court should be slow to interfere and should only seldom interfere in academic decisions of academic bodies. The reluctance for interference was well explained in the Indian case of *Maharashtra State Board -VS- Kurmarsheth & Others*[35] as follows:-

> *"So long as the body entrusted with the task of framing the rules and regulations acts within the scope of the authority conferred on it in the sense that the rules or regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom or efficaciousness of such rules or regulations...."(Emphasis added)*

74. The court emphasized the need to be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formatted by professional men possessing technical expertise and rich experience of actual day-to-day working of educational institutions and departments controlling them. Thus, when quality assurance officers inspect an educational institution, as they did in this case, and return a verdict that the school is unsuitable to administer examinations; this court should be slow to interfere with such a decision. When such officers who are mandate by law to undertake such inspections return a verdict that the school

lacks a laboratory, chemicals and other essential examination materials, this court should be cautious before overturning such a decision. When such officers say the walls have gaping cracks and are unsafe for students, and the applicant brushes such serious issues aside without countering the findings, then, the court should be careful not to substitute its decision with that of the quality assurance officers.

75. No court of law, properly directing its mind to the facts presented in this case and the law would interfere with such a decision, which is made for the academic good and personal safety of the students. Differently put, even the court were to fault the manner in which the decision was undertaken, this court would be inclined to uphold public interest instead of the applicant's private interests and decline to exercise its discretion in favour of the applicant.

76. In view of my analysis herein above, I find and hold that the applicant's application dated 2nd July 2018 lacks merit. It follows that the applicant has failed to establish any grounds for this court to grant the Judicial Review Orders of *Certiorari* and *Mandamus*. The upshot is that the *ex parte* applicant's application dated **2nd** July 2018 is hereby dismissed with costs to the first, second, third and fifth Respondents.

Orders accordingly

Signed, Delivered and Dated at Nairobi this 23rd day of September 2019.

John M. Mativo

Judge.

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[1] Act No. 14 of 2013.

[2] Act No. 29 of 2012.

[3] Act No. 29 of 2012.

[4] {2017} e KLR.

[5] {1972} 2 ALL ER 680.

[6] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, Statute Law in New Zealand, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[7] *National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 24.

[8] *Ferreira vs Levin NO and Others; Vryenhoek and Others vs Powell NO and Others* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26.

[9]Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, *"A guide to reading, interpreting and applying statutes"* https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf.

[10] Plain meaning should not be confused with the "literal meaning" of a statute or the "strict construction" of a statute both of which imply a "narrow" understanding of the words used as opposed to their common, everyday meaning. Supra note 1.

[11] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others* {2011} JOL 28061 (ECG) para 11

[12] {1985} AC 374.

[13] See, *R v Secretary of State for Home Department ex. p. Brind* {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[14] *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 KB 223.

[15] See *Fedsure Life 11 Assurance Ltd vs Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) para 56).

[16] *Albutt vs Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC).

[17] 2012(4) SA 618 (CC).

[18] Act No. 4 of 2015.

[19] {2002} e KLR.

[20] *Kioa v West* (1985), Mason J.

[21] Act No. 4 of 2015.

[22]in *R vs Somerset CC Ex parte Dixon(COD)*{1997} Q.B.D. 323.

[23] See S. De Smith, *Judicial Review ofAdministrativeAction*,4th ed. J. Evans (1980), 352- 4.

[24] See R v. Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 at 560.

[25] See also *McInnes v. Onslow*-Fane [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

[26] {2015}eKLR

[27] Ibid.

[28] {2017} e KLR.

[29] {2007} 1 KLR.

[30] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[31]W. G. & C. Byse, Administrative & Review Law, Cases and comments 119-20 (5th ed. 1970). Originally, mandamus was a writ issued by judges of the King's Bench in England. American courts, as inheritors of the judicial power of the King's Bench, adopted the use of the writ.

[32] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review, 53 GEO. IJ. 19, 25-26 (1964).

[33] 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

[34] 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233).

[35] **{1985} CLR 1083.**