REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 57 OF 2018

(FORMERLY KAKAMEGA JR MISC. CAUSE NO. 11 OF 2018)

(CONSOLIDATED WITH JR NO. 40 OF 2018)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

ORDERS OF CERTIORARI, MANDAMUS AND PROHIBITION

AND

IN THE MATTER OF: THE KENYA NATIONAL EXAMINATIONS COUNCIL ACT NO. 29 OF 2012

AND

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACT NO. 4 OF 2015

AND

IN THE MATTER OF: CIVIL PROCEDURE RULES, ORDER 53

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (2010) ARTICLES

2,10, 22, 23, 24,25,27, 28, 32,36,38,47(1)&(2), 48, 50,159,165, 258, 259 AND

260; AND ALL OTHER ENABLING PROVISIONS OF THE LAW

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

KENYA NATIONAL EXAMINATONS COUNCIL.....1ST RESPONDENT

MINISTRY OF EDUCATION.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

EX PARTE: 1. ECHESA ABUBAKAR BUSALIRE CHAIRMAN

PARENTS ASSOCIATION OF CHEBUYUSI HIGH SCHOOL (SUING

ON BEHALF OF PARENTS OF CHEBUYUSI HIGH SCHOOL)

2. S W K & 189 OTHERS (SUING ON BEHALF

OF PARENTS OF CHEBUYUSI HIGH SCHOOL)

JUDGEMENT

The Prayers

1. In this consolidated applications, the applicants herein seek the following orders:

1) An Order of *Certiorari* do issue to bring into this Honourable Court for the purpose of being quashed the Respondent's decision contained in the LETTER, Ref. KNEC/CONF/R&QA/SE/KCSE/IRR/2017/037 dated 16th January, 2018 on the subject: THE YEAR 2017 KCSE EXAMINATION RESULTS to the extent it cancelled the 2017 KCSE examination results for all the candidates who took the Biology and Chemistry examinations at Chebuyusi High School, which results had been released by the Respondent on 20/12/2017.

2) An Order of *Certiorari* do issue to bring into this Honourable Court for the purpose of being quashed the LETTER, Ref. KNEC/CONF/R&QA/SE/KCSE/IRR/2017/037 dated 16th January, 2018 on the subject: THE YEAR 2017 KCSE EXAMINATION RESULTS to the extent it purports to cancel, affects or impinges on the Applicant's school, Chebuyusi High School, 2017 KCSE examination results as released by the Respondent on 20/12/2017.

3) An Order of *Prohibition* do issue to prohibit the Respondent by itself, agents, employees or whomsoever from publishing the Ex Parte applicant's school, Chebuyusi High School, as one of the institutions whose 2017 KCSE results were cancelled over *allegations* of irregularities until such time that the Respondent would have conducted open, fair, transparent, inclusive investigations.

4) An Order of *Mandamus* do issue to direct that the Respondent provide to the Ex Parte Applicants the following Reports:

(i) Marking Reports in Biology and Chemistry;

(ii) Chief Invigilator's Report;

(iii) Chief Examiner's Report;

(iv) KNEC Investigation Reports for the Applicant's school;

5) An Order of *Mandamus* do issue compelling the 1st Respondent to certify the KCSE results released to the candidates, the school, the parents and the entire country on 20/12/2017 as the valid final results of the 2017 KCSE examinations for the 190 students at Chebuyusi High School.

6) An Order of *Prohibition* do issue to prohibit the Respondent by itself, agents, employees or whomsoever from publishing, announcing, declaring that the Applicant's 2017 KCSE examination results were cancelled for irregularities until such a time that they have provided the reports in Order number 5 above and this matter is heard and determined.

7) Such further and other Orders that the Honourable Court may deem just and expedient to grant.

8) THAT costs of this application be provided for.

The Parties

2. The first Applicant, **Parents Association of Chebuyusi High School,** is an association of parents of the public secondary school established by section 55 (Third Schedule) of the ***Basic Education Act*** No. 14 of 2013 and one of its statutory functions is to motivate the teachers and pupils to improve their performance in academic and co-curricular activities and advance the welfare of parents and students.

3. The second Applicant is the Chairman of the Class of 2017 Form Four Parents Association.

4. The 1st Respondent, **Kenya National Examinations Council,** (hereinafter referred to as "the Council") is a body corporate established in 1980 under the ***Kenya National Examinations Council Act*** Cap 225A of the Laws of Kenya which was repealed in 2012 and replaced with the ***Kenya National Examinations Council Act No. 29 of 2012***.

5. The 2nd Respondent, **Ministry of Education** (hereinafter referred to as "the Ministry") is the ministry in charge of matters of education in the Republic of Kenya while the 3rd Respondent, **the Attorney General of the Republic of Kenya**, is the legal advisor to the Republic of Kenya.

Applicants' Case

6. According to the applicants, under section 10(1)(a) of the ***Kenya National Examinations Council Act No. 29 of 2012***, the functions of the 1st Respondent shall be to set and maintain examination standards, conduct public academic, technical and other national examinations within Kenya at basic and tertiary levels.

7. It was averred that in October 2017, 190 students from Chebuyusi High School (hereinafter referred to as "the School") sat for the Kenya Certificate of Secondary Education (KCSE) examinations offered at the Chebuyusi High School examination centre and on 20th December, 2017 the results of the KCSE examinations were released by the 1st and 2nd Respondents in an event that received extensive coverage on national television and radio, and also in print media. According to the said results, Chebuyusi High School was ranked number 15 at national level and number 1 at the county level.

8. The applicants averred that an analysis of the KCSE results released on the 20th December, 2017 by the 1st and 2nd Respondents for Chebuyusi High School showed that the Mean Grade for 2017 was 8.911 with a 100% pass rate since all the 190 students who took the examination at Chebuyusi High School attained a grade of C+ and above. At the time of the release of the said results, it was averred that the 1st and 2nd Respondents did not mention that there was any irregularity, illegality or anomaly with the results of the School. Consequently, the celebrations that followed the release of the 2017 KCSE results was unrivalled as students, parents, relatives, political leaders and other well wishers all joined in celebrating the academic success of the school.

9. It was averred that in the period after the release of the results, the school's performance was extensively covered in the national newspapers, radios and television networks.

10. However, in a letter dated 20th December, 2017 signed by the Acting Chief Executive Officer of the 1st Respondent, the Head Teacher of Chebuyusi High School was notified that the KCSE examination results for centre number 37632101 had been withheld in the entire examination to enable the 1st Respondent to finalize investigation relating to the conduct of the examinations at the centre and the Head Teacher was to notified to bring this to the attention of the affected candidates.

11. According to the applicants, the students, parents and the school were all able to access the 2017 KCSE results via the SMS messaging system provided by the 1st Respondent, while the school was able to access the examination results on the 1st Respondent's web portal as provided by it. It was the applicants' case that whereas the 1st Respondent had released results which were accessible to parents, students and to the school administration through the provided web portal, it was pretending to have withheld those same results. However, the 1st Respondent never made any public announcement that it had withheld the results of the School which results were available to concerned parties who were able to access the results.

12. The applicants disclosed that in a letter dated 16th January, 2017 Ref. KNEC/CONF/R&QA/SE/KCSE/IRR/2017/037, the Acting Chief Executive Officer of the 1st Respondent informed the Head Teacher that investigations by the Council revealed that all the candidates at Chebuyusi High School were involved in an examination irregularity in contravention of the ***Kenya National Examinations Council Act*** No. 29 of 2012, Article 32.

13. It was averred that the Council identifies the nature of the irregularity as *"collusion"* yet section 32 of the Kenya National Examinations Council Act No. 29 of 2012 specifically addresses "Copying at an examination". It was the applicants' case that by identifying the nature of the irregularity as "collusion", the 1st Respondent introduced a new irregularity which is not expressly anticipated in the Act which was not expressly anticipated by the Act.

14. According to the applicants, the 1st Respondent based its draconian and dramatic decisions on an anonymous and undated letter received by the 1st Respondent on 27th December, 2017 which letter was unreliable and un-objective as it is spewing malice, venom, jealous and hatred for personalities that makes the 190 candidates mere collateral damage for the schemes of the authors who, if they were bold enough they would have provided their identity or identities. To the applicants, the theme in the letter is to settle personal scores against the school's administration with total disregard to the plight of the 190 students, parents, relatives and all the well-wishers.

15. It was averred that the 1st Respondent issued a Press Statement dated Wednesday January 17, 2018 entitled: *Investigations into Allegations of Irregularities in the 2017 KCSE Examination*, in which the 1st Respondent stated as follows:

> *(i) The* KNEC documented 64 examination centres that were reported to have engaged in examination malpractices.
>
> (ii) Investigations were concluded in 54 of the centres before the release of the examination results on December 20, 2017.
>
> (iii) More time was required to complete investigations into the remaining 10 examination centres prompting the Council to withhold their results.
>
> (iv) The 10 centres whose results were withheld were reported to have been involved in all, or some, of the following forms/types of examination irregularities: (c) collusion during the examination as detected through cases where candidates produced identical responses in eight centres.
>
> (v) In four schools, there was evidence of massive irregularities where all the candidates were found to have colluded. Results of 742 candidates in the four schools have been cancelled. Applicant has never been issued with a Provisional Licence as alleged by the Respondent.

(vi) Reports for each of the 10 schools have been sent to them through the respective Principals and County Directors of Education.

(vii) Candidates whose results have been cancelled have been offered an opportunity to register for the 2018 KCSE examination before the registration deadline ends on **February 28, 2*018.***

16. The applicants however insisted that the 2017 KCSE results for the School were released on 20th December, 2017 and were not withheld by the 1st Respondent unless "withheld" has gained a new meaning. Therefore Chebuyusi High School was not among the 10 centres whose results were withheld on 20th December, 2017.

17. According to the applicants, whereas the 1st Respondent alleged that *"Reports"* for each of the 10 schools had been sent to them through the respective Principals and County Directors of Education, neither the Applicant nor the Principal of Chebuyusi High School have received any such "Report" from the 1st Respondent, which report remains in the files and cabinets of the 1st Respondent and has never been shared with the relevant stakeholders contrary to the assertions of the 1st Respondent.

18. It was the applicant's case that judicial review is the court's way of enforcing the rule of law; ensuring that public authorities' functions are undertaken according to law and that they are accountable to the law. According to the applicants, the Respondent's decision contained in the letter dated16th January, 2018 with its draconian and dramatic effect was reached without proper investigation involving the students or school's administrators. To them, the 1st Respondent is operating in top secrecy and making far reaching pronouncements with arrogance and impunity which was not envisioned by the Constitution of Kenya (2010). At the minimum the 1st Respondent must is obligated to conduct credible investigations to include interviewing the concerned parties as opposed to unilateral chest thumping and declarations through press statements which are contrary to the will of the Constitution of Kenya (2010).

19. The applicants referred to the Preamble to the Constitution of Kenya (2010) which indicates that the Constitution was founded on "the aspiration of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law." The applicants also referred to Article 10 of the Constitution of Kenya (2010) in which the national values of principles of governance are emphasized and also provide the overarching values that bind all state organs, state offices, public officers and all persons, amongst which are the national values and principles of governance and the rule of law whose advancement is sprinkled throughout the Constitution of Kenya, for example in Articles 47(1), Article 47(2) and Article 259.

20. The applicants disclosed that the actions by the 1st Respondent as contained in the letter dated 16th January, 2017 are contrary to the rule of law hence the Constitution of Kenya (2010) and thereby subverting the will of the people of Kenya. The same decision, it was averred is pregnant with an impunity, bias and a heavy handedness that is contrary to the rule of law and the Constitution of Kenya. The 190 students, their parents, friends and relatives, the school, its administration, staff and students, the community have all lost a fundamental right, a right to due process of the law and a fair, impartial hearing that is being arbitrarily snatched by the 1st Respondent with impunity and without due process of the law.

21. The applicants lamented that the Respondent's actions to secretly and unilaterally undertake investigations and then act with a heavy hand in cancelling the results of 190 students denies the students, teachers, the school's administration the right to procedural due process that is procedurally fair and just as envisioned in Article 47(1) of the Constitution of Kenya and that 1st Respondent cannot take away a right of the students, teachers, the school's administration and the entire community in Kakamega County through unilateral boardroom decisions without according the applicants a fair, lawful, reasonable and procedurally fair hearing. To the applicants, the decision of the 1st Respondent as contained in the letter dated 16th January, 2017 is unlawful, unreasonable and procedurally unfair and denies the Applicants fundamental rights, substantial and procedural due process of the law and their rights as envisioned in the Constitution since the Applicants have not been accorded a free and fair hearing. They have not been heard yet been subjected to a unilateral, draconian, extreme and dramatic decision by the 1st Respondent.

22. In their submissions, the applicants relied on **Republic vs. Kenya National Examinations Council Ex parte Ian Mwamuli [2013] eKLR** in which the decision in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240.** The applicant salso relied on **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001, Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** the **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2,** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479.**

23. According to the applicants, the instant can be distinguished from the holding in **Kenya National Examinations Council vs. Republic ex parte Gathenji and Others [1997] eKLR**, where the results were withheld and then cancelled. In the case under trial the results were never withheld. The students, parents, guardians and the school were able to access the results released by the 1st Respondent. The national media captured those results as released on 20th December, 2017 in glaring headlines highlighting the top performing schools, including the applicants' school, Chebuyusi High School.

24. It was therefore submitted that under section 7 (2)(a)(i) and (ii) of the ***Fair Administrative Action Act***, a court or tribunal may review an administrative action or decision if the person who made the decision was not authorised to do so by the empowering provision and acted in excess of jurisdiction or power conferred under any written law or acted arbitrarily and unfairly in making that decision. In this case, the decision by the 1st Respondent to release, announce and cause to be published and publicised the 2017 KCSE results of the applicants school only to come up on 16th January 2018 in a letter to cancel those results is the ultimate abuse of powers bestowed on a government agency. This is against Article 47 and 50 of the Constitution of Kenya and the ***Fair Administrative Action Act*** and Such action as contained in the letter of 16th January 2018 is illegal and against the Constitution, is arbitrary, unfair and unjust and defies the rules of natural justice.

25. According to the applicant, that the 1st Respondent acted without proper investigation is clear from the chronology of events. The results were released on 20th December, 2017 without any qualms. Those results were released and announced by the 1st and 2nd Respondents

unleashing unrivalled fun fare and jubilation in the best performing schools, including the applicants' school. It was therefore submitted that it is an act of professional dishonesty to allege that results were released and simultaneously cancelled. This only leaves one logical conclusion that the results were appropriately and legitimately released on 20th December, 2017 and the cancellation was a boardroom decision after the fact and a letter inserted in the 1st Respondent's files to cover up.

26. It was submitted that the 1st Respondent is just now dispatching teams to investigate and write reports to support its decision to cancel the results. The first team went to the school on 1st February, 2018 and the second team on 14th February, 2018, yet the reports of their findings have not been furnished. It was however submitted that based on the interviews on the ground and with full knowledge of the circumstances, the Applicants firmly believe that a major decision was made without investigations hence this is act on the part of the 1st Respondent would squarely fit the requirements of the court that it is so unreasonable that it amounts to an abuse of power.

27. According to the applicants, the Press Statement dated letter dated 17th January, 2018 and signed by **Prof. George Magoha**, MBS, EBS, CBS, Chairman of the Kenya National Examinations Council it is mindboggling that no report has been received by the Applicants school as stated by the 1st Respondent who has sought to make it appear that it is a secret or so important that it must be kept as a closely guarded secret. Stating that they will release a report and then not availing it to the Principal or to the students is unreasonable.

28. It was contended that what triggered the investigations was an anonymous letter written to the 1st Respondent with incredulous allegations which was received on 27th December, 2017. This letter, it was submitted was forwarded to the 1st Respondent's Research Section "for action" on 28th December, 2017 and explains why no investigation was undertaken on the ground until 1st February, 2018, an action which the applicant contended was unreasonable.

29. Regarding the contention that what was released were not final examination results but were provisional results released under Rule 23 of Legal Notice No. 131, it was contended that this position begs the question that results released by the 1st Respondent are permanently provisional results that can be cancelled on the whim and call of the 1st Respondent. Even what they call final results "effectuated" by issuance of certificates can be cancelled by the 1st Respondent. Such powers in one government body is scary and a threat to the rights and freedoms of all who come before this government agency. Citizens cannot be at the mercy of a government agency that can in the guise of some regulations act as it pleases. That the 1st Respondent can cancel released results terming those provisional results and also cancel certificates is telling of a body gone berserk with its powers to the detriment of the citizens. That is unreasonable and disingenuous. The 1st Applicant is bereft of any plausible or real explanation he can hand to this court to explain his perverse and capricious behaviour. Like a drowning man he clutches at a straw hoping to remain afloat. He has boxed himself in because the law demands that he act in accordance to its dictates.

30. It was the applicants' case that the act of cancelling these students' results was arbitrary, whimsical and a cynical display of arrogance that must attract the sword of justice that only this court has possession of. The Constitution envisages a dignified future for all Kenyans and through its directive principles requires the state to act in realisation of the same. The effect of the action of the 1st Respondent is meant to be blight on the future of and to remain with these young minds for the rest of their lives. It's for this reason that the Applicants come to this Court seeking a redress of this callosity.

31. According to the applicants, based on the foregoing, it is clear that in arriving at the impugned decision on the 16th of January 2018, the Respondent acted in an unreasonable and irrational manner in that it did not take into account the views of the affected parties who were condemned unheard. The 1st Respondent should have interrogated the students and other stakeholder which was a relevant consideration. Furthermore it was unreasonable and irrational for 1st Respondent to act as it did in the face of other counter balancing evidence. In support of this position the applicants relied on **Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1KB 223**,**Kevin K. Mwiti & Others vs. Council of Legal Education & Others, Judicial Review Miscellaneous Application No. 377 of 2015 consolidated with Petition 395 of 2015** and **Judicial Review Miscellaneous Application No. 295 of 2015.**

32. It was submitted that the decision by the Respondent to release the 2017 KCSE results and to cause them to be accessed by the school and the students, and then to have those results published in the newspapers and on nationwide television networks that the Applicants school had performed so well and was number 16 nationwide and then to cancel the results one month later on 16th January, 2018 **was unlawful and unreasonable and constituted** a breach of the Applicants' right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

33. According to the applicants, in the 1st Respondent's Replying Affidavit of one **Andrew Francis Otieno** sworn on 23rd February, 2018 he avers at Paragraph 17 in the table at Serial No. 17.8 that the subjects affected were Biology (231/1) and Chemistry 233/2). The Report was authored and made by the Chief Examiners, Biology (231/1) & Chemistry (233/2), in which it was averred that the subject specialists brought in by KNEC discussed the outcome of their investigations based on their knowledge, experience and international best practices and came to the conclusion that Chebuyusi Boys High School were involved in examination irregularities in the 2017 KCSE examination by engaging in collusion and that the candidates colluded in Biology paper 1(231/1), Biology Paper 2(231/2) and Chemistry Paper 3(233/3). In so doing, a new paper, Biology Paper 2(231/2) and Chemistry Paper 3(233/3) were introduced.

34. According to the applicants, one has to conclude, rightly so, that the papers that the Chief Examiners briefed the investigation team on were the papers in Paragraph 17 in the table at Serial No. 17.8 that the subjects affected were Biology (231/1) and Chemistry 233/2). However, the introduction of new papers after the Chief Examiners had briefed the investigation team shows a bias and an injustice as those were not under consideration from the Chief Examiners. The Chief Examiners had in their report only alluded to observed irregularities in Biology (231/1) and Chemistry 233/2). It was submitted that the rules of fair play and natural justice dictate that the report on which this decision was based should be given to the stakeholders to inform them of the basis of the decision and that that report cannot be hidden under the guise of security of examinations. Furthermore, the reports of the Supervisors, Monitors, Chief Examiners are pertinent to this trial. The KNEC does not have a monopoly over education experts. The applicants could have subjected those reports to their own experts. To them, failure to provide even the most basic of reports under the guise of security of examinations is unfair and unreasonable under the

circumstances.

35. The applicants also relied on the principle of legitimate expectation which in their submissions seeks to hold the authority to its stated promise and ensure that the public does not suffer disappointment arising from changes effected by the policymakers to its stated stand. Thus where a public authority has represented- either by way of an express promise or implicitly by way past practice- that it will conduct itself in a particular way, the person to whom the representation was made may have a legitimate expectation that the public authority will act as it had represented.

36. It was submitted that whereas where the KNEC withholds the results it's prudent to appeal to it since it is still a KNEC internal process, where the results have been released to the public and the candidates have already taken steps pursuant to such a release, it ceases to be a KNEC process and now it takes on and becomes a public process. KNEC becomes a player with a vested interest and cannot nor should it be naively assumed that it would now be fair. In fact the principle of nemo judex sua cause kicks in and the matter as a matter of principle and judicious mind should be escalated to a more impartial process of the court.

37. It was therefore submitted that a legitimate expectation will arise where a decision maker has led someone affected or likely to be affected by his decision to believe that he or she will receive or retain a benefit or advantage. In the applicants' view, the release, ranking, allowing to access and the publication of the results created such an expectation not only in the students but in the stake holders of the applicants' school as well. Any attempt to reverse the same would be expected to follow a certain legally recognized procedure part of which would be to state reasons and adduce evidence to the applicants/complainants.

38. According to the applicants, this doctrine extends the duty to observe procedural fairness beyond the relatively narrow range of rights and interests to which the bare concept of natural justice had traditionally applied. In other words, the promise of a benefit creates a category of entitlement that courts will protect in the same way that they protect property, contractual and tortuous interests.

39. It was submitted that the Respondents are a public authority vested with broad powers that determine the very future of the applicants as set out in the Constitution and that will lead them to wholesome dignified existence as proud citizens of the Republic of Kenya. The considerations which determine whether their results have been validly acted upon go beyond mere arguments of unsubstantiated investigations, whose report is NOT available. This must be tested on proper arguments of the law and procedure governing the relationship of the contestant parties herein and the Applicant is entitled to his day in court to complain if, whether in procedure or in substance, essential requirements, appropriate to his situation under the respondents have not been observed and, in case of non observance to come to court for redress. The respondents' actions must be viewed through the special prism donated by the Constitution to the High for use in such instances.

40. The applicants submitted that every state action must be reasonable and in the public interest and infraction of that duty is amenable to judicial review. Where there is arbitrariness in state action with regard to administrative action, Article 47 of the Constitution springs in and judicial Review strikes such an action down. Every action of the executive authority must be subject to the rule of law and must be informed by reason and not be arbitrary since arbitrariness is the very negation of the Rule of law. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question whether an impugned act is arbitrary or not is ultimately to be answered on the facts and in the circumstances of a given case. Every state action must be informed by reason and it follows that an act uninformed by reason is arbitrary. Non application of the mind to individual cases before issuing an omnibus condemnation of all candidates is an eloquent example of arbitrariness. It's an extravagant display of whim and a wry sense of humour devoid of any understanding of what is meant by the rule of law. This is the height of cynical arrogance. In this respect the applicants relied on the case of **Council of Civil Service Unions v. Minister for Civil Service 1985 1 A.C. 374** and submitted that it has been held is to prevent the abuse of power by public authorities. Thus a legitimate expectation is breached when the reneging of a representation is so unfair as to amount to an abuse of power.

41. According to the applicants, the Respondents' decision declaring that the Applicants' 2017 KCSE results had been cancelled is in breach of the Applicant's legitimate expectation that:

a. The results announced on 20th December, 2017 were good and legitimate results which would not be arbitrarily cancelled by the 1st Respondent.

b. The 1st Respondent has always withheld results of any school or students where an irregularity was suspected pending investigation. There is no precedent where results were released and then somehow made "withheld". Released results are released results. They have been received by students, parents, the school and the public. The right thing is to withhold results pending investigation. The 1st Respondent should not on a whim be allowed to deviate from this time long practiced norm**.**

c. The Applicants' students in expecting to join the university in 2018 have not applied to retake the KCSE examination.

d. The 1st Respondent should put in place the procedures for cancellation of results before taking any adverse action.

42. In support of this position the applicants relied on **Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 Others [2014] eKLR.**

43. In this case it was submitted that the decision contained in the letter of 16th January 2018 is a manifest breach of the Applicant's legitimate expectation and ought to be quashed.

44. It was further submitted that the Respondent's decision contained in the letter dated 16th January 2018 to the effect that the Applicants' school's 2017 KCSE examination results were cancelled is a breach of the rules of natural justice and the constitutional right to a fair hearing. The decision, in effect, amounts to nullification or cancellation of the already released KCSE examination results of the Applicants' school as well as the KCSE results released by the 1st Respondent to the Applicants on 16th January 2018 hence is a denial of the Applicant's

right to a fair hearing as enshrined in Article 50 (1) of the Constitution. The Applicant was not accorded an opportunity to be heard before the decision was made.

45. It was submitted that the Respondent did not give the Applicants an opportunity to be heard before causing to be published in national newspapers the reports that the results had been cancelled. This has had adverse effects on the Applicants especially with respect to their standing in the community where they have been subjected to ridicule and scorn as well as the status of the students currently admitted in the school. In the applicants' view, the 1st Respondent's decision contained in the letter of 16th January 2018 to the effect that the 2017 KCSE results had been cancelled affects not just prospective students but over 1100 students who are already attending classes since the effect of that decision is that this school is not to be trusted with legitimate good performance. The Respondent's decision has caused unnecessary panic and apprehension to the students in the Applicants' School together with their parents and guardians and the community at large. According to the applicants, in arriving at the decision to declare that the Applicants' school's results had been cancelled, the Respondent should have taken the interests of the students who are already preparing to take the 2018 KCSE examination from this school.

46. Therefore, it was submitted, in failing to consider that its actions will affect third parties such as existing students, their parents and potential students, as it was obliged to, the 1st Respondent failed to meet the threshold set by the Constitution and the ***Fair Administrative Action Act***. It acted unlawfully since under section 4 (3) of the ***Fair Administrative Action Act 2015***, where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision a prior and adequate notice of the nature and reasons of the proposed administrative action and an opportunity to be heard and to make representations in that regard. This was not done in this case. In this respect the applicants relied on **Republic vs. Council of Legal Education ex parte Mount Kenya University, J.R Misc App No. 16 of 2016.**

47. The right to a fair hearing, it was submitted is one of the fundamental rights and freedoms that should not be limited in any instance. The actions of the Respondent ought to be rectified by granting the orders sought in the application. To the applicants, a public body may act within its legal powers, or use its discretion reasonably and according to the law, yet fail to act in accordance with the correct procedure. **Lord Diplock** in ***Council of Civil Service Unions v Minister for Civil Service (1985) 1 A.C. 374 (GCHQ).***

48. It was therefore the applicants' case that they demonstrated that the impugned, unilateral decision to cancel the 2017 KCSE examination results without any hearing or known investigation prior to the decision is unlawful, unfair and unjust and falls beneath the requirements of the Constitution.

49. The Applicants, it was contended had also demonstrated that the Respondent conducted itself in an unreasonable and irrational manner by declaring that the Applicants' school were involved in examination irregularities when such had not been investigated prior to the release of the examination results. Investigations carried out on 1st February, 2018 and 14th February, 2018 by the 1st Respondent confirm that indeed the 1st Respondent is merely trying to cover its tracks by the late investigations. Further, the Applicant had demonstrated that the Respondent breached the Applicant's legitimate expectation through the decision contained in the letter of 16th January 2018 which culminated to the cancellation of the KCSE results. It was therefore submitted that the 1st Respondent's decision is illegal, unfair and unjust as it denies the applicants a fundamental right of fairness and justice. As a public body the 1st Respondent failed to act reasonably within its legal powers, or to use its discretion reasonably and according to the law, and it failed to act according to normal investigatory procedures. The 1st Respondent failed to observe basic rules of natural justice by essentially keeping the applicants and other stake holders in the dark and marking arbitrary, unilateral decisions that astronomically and tremendously affect the applicants. Breach of the rules of fair play and natural justice cannot be waved away in light of the fundamental rights now safeguarded by legislation and the Constitution.

50. The applicants opined that the orders sought should issue against Respondent to prevent the injustice that will otherwise be occasioned if the Applicants are forced to waste one more year and retake this examination. Furthermore the damage caused by the decision to cancel the results is too tremendous on the past students, present students, parents and guardians, the administration and the community.

51. Dealing with the preliminary objection, it was submitted that the Notice of Preliminary Objection dated 23rd February, 2018 is vague as it fails to specify what law it is grounded upon. The applicants however took it that the objection was premised on section 40H of the ***Kenya National Examinations Council Act (2012).***

52. To the applicants, it is clear that the appeals of decisions of the council are couched in permissive terms ("MAY") and therefore not compulsory or mandatory. The Act speaks in flexible terms which allow for one to decide, for whatever reason, not to lodge an appeal with the tribunal. In the instant case it is clear that the Ex Parte applicants chose not to take the appeal to the tribunal route because no law compels them to lodge such an appeal. The word "MAY" as used in the Act cannot under any circumstances be taken to mean "shall" or "must".

53. It was further contended that section 40G of the ***Kenya National Examinations Council Act (2012)*** envisions that there will be appeals taken to the High Court. That means that parties aggrieved by KNEC who are dissatisfied with the tribunal's decision may appeal to the High Court. That decision to move to the High Court is one to be made by the aggrieved party and not the tribunal.

54. In the applicants' view, they**,** in their application have raised heavy constitutional issues which cannot be addressed by the tribunal. Some of the Constitutional issues raised in the application are:

(1) Under Article 47(1) of the Constitution of Kenya (2010) whether the Ex parte applicants received a fair hearing as envisioned by the Constitution in Article 47 that entitles every citizen of Kenya a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Significantly, the 1st Respondent acted in a draconian and dramatic manner in cancelling the KCSE examination results of the applicants' school without according them any hearing, let alone a fair hearing.

(2) Under Article 47(2) of the Constitution of Kenya (2010) whether the Ex parte applicants whose fundamental rights were

infringed and adversely affected by the decision of the 1st Respondent to cancel the KCSE examination results were given written reasons for the action.

(3) Under Articles 19, 20, 21, 22,23 and 24 of the Constitution of Kenya (2010) whether the Ex parte applicants' fundamental rights as protected in the Bill of Rights were infringed by the arbitrary, unjust, unfair, draconian and dramatic decision of the 1st Respondent to unilaterally cancel the results of the applicants' school without a hearing.

(4) Under Article 27 and 28 of the Constitution of Kenya (2010) whether the Ex parte applicants were discriminated against and treated with indignity and disrespect.

(5) Under Article 48 of the Constitution of Kenya (2010) whether the Ex parte applicants' road to access justice was being impeded by a lengthy, appeals process that would curtail or deny them justice under the law.

(6) Under Article 165 of the Constitution of Kenya (2010) whether the Ex parte applicants have a right to move directly to the High Court by bypassing an internal appeals mechanism which is not mandatory but only discretionary under the law.

(7) Under Article 258(1) and (2) of the Constitution of Kenya (2010) whether the Ex parte applicants right to institute court proceedings, claiming that the Constitution has been contravened can be curtailed or circumvented by an appeal process to a tribunal.

(8) Under Article 260 of the Constitution of Kenya (2010) whether denying the Ex parte applicants their day in court through technicalities and frivolous, meritless applications promotes the purposes, values and principles of the Constitution, advances the rule of law, permits the development of law and contributes to good governance.

55. In their view, they raised serious and weighty issues touching on the Constitution and the rights that emanate from it in their interest which cannot be decided by some tribunal but only by a court of law, the High Court. To allow the objection, it was submitted would be contrary to the law and the spirit of the Constitution. It was submitted that judicial review still plays a significant role in society. Therefore, the court when faced with such a situation, must deploy balancing technicalities between what appears to be the ouster clause and the challenged decision so as to ensure that access to justice is not impeded. It must apply the principle of proportionality, for, a court of law does not exists to do an injustice. It was submitted that where a stature is framed in a manner that ousts the jurisdiction of the court, such provisions should be construed strictly and narrowly as was held in **Smith vs. East Elloe Rural District Council [1965] AC 736, Anisminic vs. Foreign Compensation [1969] 1 ALL ER 208.**

56. Thus it is imprudent for the court to abdicate its core role on the direction of legislation which is not even mandatory in its language and direction. The court retains a solemn role and duty given it under the Constitution that cannot be abrogated nor shunned to meet an injustice on citizens. As regards the efficacy of preliminary objections the applicants relied on **Martin Njuhigu & 11 Others versus The Sacco Societies Regulatory Authority & 2 Others (Misc. Civil Application No. 248 of 2016)**, **Mukisa Biscuits Manufacturing limited vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696** and **Oraro vs. Mbaja [2005] 1 KLR 141** and submitted that a preliminary objection cannot be just an empty vessel conjured up to deny justice to some citizens. In this case, the pleadings show that there are many facts in dispute which ought to be decided at trial. Two, the parent legislation is couched in permissive terms that cannot be used to extinguish a live case where an injustice is likely to occur if it ended at the pre-trial stage.

57. It was the applicants' case that the courts have certain powers to grant certain orders or reliefs, powers that are not donated by legislation. This is the inherent jurisdiction of the court and reference was made to **Republic vs. Director of Public Prosecutions & another Ex Parte Patrick Onyango Ogola [2016] eKLR, The Matter of The Estate of George M'mboroki Meru HCSC No. 357 of 2004, Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** and **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** and the Court was urged to invoke its inherent jurisdiction and affirm itself as a court of justice so that there is no perception or miscarriage of justice since to terminate these proceedings at this stage is manifest injustice and would paint the court as callous to the rule of law in the face of an injustice.

Respondent's Case

58. The application was opposed by the Respondents.

59. According to them, the 1st Respondent is established under the ***Kenya National Examinations Council Act No.29 of 2012*** (hereinafter referred to as the "*Act*") with its function as *inter alia* to:

(a) Set and maintain examination standards, conduct public academic technical and other national examinations within Kenya at basic and tertiary levels.

(b) Award certificates or diplomas to candidates in such examinations.

60. In the performance of its functions, it was averred that the 1st Respondent besides being guided by the provisions of the Act is also regulated by several subsidiary legislations addressing specific aspects of its role and of relevance to these proceedings and the following subsidiary legislations are noteworthy:

(a) The ***Kenya National Examinations Council (Marking of Examinations, Release of Results and Certification) Rules – Legal Notice No.131 of 2015*** (hereinafter referred to as "*Legal Notice No.131*").

(b) ***The Kenya National Examinations (Irregularities) Rules – Legal Notice No.132 of 2015*** (hereinafter referred to as "*Legal Notice No.132*").

61. It was averred that during the administration and processing of the 2017 Kenya Certificate of Secondary Education (KCSE) examination, the 1st Respondent received a number of reports of alleged malpractices in some 64 examination centres which malpractices were not limited to incidences referred to at section 32 of the Act, which the Applicants have quoted extensively in support of the application but included incidences also referred to under section 28 of the same Act, which are that:

(a) Before or during examination the giving of an examination paper or material to a candidate or another person without lawful authority.

(b) Disclosing the contents of an examination paper or material to a candidate or another person without lawful authority.

(c) Making a change in the original answer script of a candidate without lawful authority.

62. Upon receipt of allegations of malpractices in the 64 centres the 1st Respondent commenced investigations to establish the veracity of those allegations and managed to conclude investigation, covering 54 centres by the time the provisional examination results were being released on 20th December 2017. More time was however required to complete investigations into the remaining 10 examination centres one of which was Chebuyusi High School. A letter dated 20th December 2017 was written to the School informing the School that the results were being withheld to allow for investigations.

63. It was the Respondents' case that the results released on 20th December 2017 were not final examination results but were provisional results released under Rule 23 of Legal Notice No.131 and that the final result is effectuated with the issuance of certificates to qualified person within twelve months of the release of the provisional examination results notwithstanding the fact that provisional results had already been released. In the Respondents' view, under Rule 25 of Legal Notice No.131 the 1st Respondent can still withdraw and or cancel examination results or a certificate if the 1st Respondent is satisfied that an examination irregularity was committed before or during the time the candidate sat the examination or before release of the examination results.

64. It was further contended that under Rule 8 of Legal Notice 132 the 1st Respondent also has the power to withhold examination results and conduct investigations into illegal irregularities pursuant to the provisions of Rule 7 of the same Rules. Upon conducting investigations if the 1st Respondent is satisfied that a candidate has been involved in an examination irregularity or malpractice, the 1st Respondent has power under section 32 of the Act read together with Rule 9 of Legal Notice No.132 to:

(a) Expel the candidate;

(b) Cancel any of the candidates papers already done;

(c) Cancel any of the candidates results.

65. It was further averred that where the 1st Respondent is satisfied that there has been widespread examination irregularities at an examination centre; or that circumstances in which an examination is conducted at an examination centre are unsatisfactory, the 1st Respondent can cancel the entire examination conducted at the examination centre or any one or more papers or the results thereof in relation to the candidates at the examination centre. Any candidate whose results are cancelled shall according to Rules receive a result designated as "Y" in the subject cancelled and an overall result designated "Y" and any candidate who receives a result designated as "Y" shall not be awarded a certificate.

66. It was explained that the 10 examination centres where the results were withheld; the number of candidates involved; the subjects affected; and the source of report on irregularities were as follows:

S/No.	Sub County Code & Name	School Code & Name	Number Sat	Subject Affected	Report made by
17.1	15327 Tigania West Sub-County	15327106 Kibuline Sec Sch	67	English P 2 (101/2)	Chief Examiner, English (101/2)
17.2	16320 Chalbi South Sub-county	16320302 Chalbi Boys High	70	English P 2 (101/2)	Chief Examiner, English (101/2)
17.3	18324 Nzaui Sub-county	18324206 Barazani Girls	97	Chemistry P 3(233/3)	Chief Examiner, Chemistry (233/3)
17.4	24504 Kipkomo Sub-county	24504101 St. Cecilia Girls' Sec- Chepararia	162	English paper 2 (101/2)	Chief Examiner, English (101/2)
17.5	24504 Kipkomo Sub-	24504201 Ortum	320	English P2 (101/2), Biology P2	Chief Examiners, English (101/2),

	county	Secondary School		(231/2) & Physics P1 (232/1)	Bilogy (231/2) & Physics (232/1)
17.6	27570 Gilgil Sub-county	27570201 Koelel Secondary School	321	English Paper 2 (101/2), Biology P 2 (231/2) & Physics P 1 (232/1)	CDE, Nakuru DCIO, Gilgil
17.7	33517 Baringo Central Sub-county	33517101 Tenges Sec. Sch	149	History & Government P 2 (311/2)	Supervisor
17.8	37632 Navakholo Sub-county	37632101 Chebuyusi Boys High School	190	Biology (231/1) and Chemistry (233/2)	Chief Examiners, Biology (231/1) & Chemistry (233/2)
17.9	40727 Kenyanya Sub-county	40727105 Mokubo Sec. Sch	205	English Paper 2 (101/2) & Chemistry (233/3)	Chief Examiners English P 2 (101/2) & Chemistry (233/3)
17.10	45815 Dadaab Sub-county	45815103 Towfig Sec. Sch	146	Biology P 1 (231/1)	Chief Examiner Biology P 1 (231/1)

67. With particular reference to Chebuyusi Boys High School the Chief Examiners of Biology Paper 231/1 and the Chemistry Paper 233/2, it was reported to the 1st Respondent that there was a high possibility of collusion by a group of candidates which was demonstrated by the fact that the group produced identical responses in the examination and that the report was not by an anonymous letter produced by the Applicants**".** At any rate the letter is alleged to have been written on 27th December 2017 while the results were withheld on 20th December 2017.

68. According to the Respondents, to conduct the investigation process the 1st Respondent constituted a special team of thirty six (36) subject specialists to scrutinize the candidates answer scripts in the affected papers. The investigating team was divided in five groups each of seven (7) subject specialists which means that the allegations of collusion in Biology examination was investigated by seven specialists in that subject and equal number for the Chemistry paper in so far as Chebuyusi High School was concerned. This investigation, it was disclosed, was conducted between Monday 8th to Thursday 11th January 2018 and the subject specialist, for each paper scrutinizing the Chebuyusi papers were led by academically distinguished subject specialist from Kenya Institute of Curriculum Development (KIDC) and the following process was followed:

(a) The Chief Examiner briefed the team on the marking process and explained the reasons why the centres were suspected to have colluded in examination;

(b) Scrutinizing of the candidates' scripts were done through conveyor belt system. Each candidate answer script was scrutinized by each member of the group;

(c) Each response was exhaustively discussed by the technical team and an objective determination arrived at through consensus. In case of any dissent of opinion from the panelist, the candidate was given benefit of doubt and the item discharged;

(d) Checking and cross-checking of charged items were done at the end of scrutinizing the entire centre candidates' answer scripts.

69. It was averred that the investigation process involved subject specialists scrutinizing the candidates' answer scripts to identify collusion by candidates by using *inter alia* the following criteria:-

(a) Identical errors in calculations;

(b) Correct responses after incorrect working;

(c) Identical wording, often with identical unusual grammar or vocabulary;

(d) Numerous identical corrections by a group of candidates;

(e) A group of candidates having identical readings to those of their teacher in science practical;

(f) A group of candidates having identical readings in science practical;

(g) Evidence of cases where answers are copied from textbooks/ notes or shades in response to one or more questions, irrelevant answers, superior standards of English and very neat and accurate diagrams which could not possibly have been done in the examination room.

70. In addition, it was averred that for collusion to be said to have occurred, a certain threshold in regard to questions in which candidates had presented similar/identical responses was considered. The expected threshold for collusion to be confirmed to have occurred is summarized as follows for the different types of questions in essay and structured questions:-

(a) Essay Type of Questions:-

(i) Candidates were said to have colluded if they presented at least one paragraph that has identical correct and incorrect responses, with identical words, phrases, sentences and punctuation;

(ii) Identically misspelt words are a further confirmation of collusions;

(b) One Word Response Type of Questions:- Candidates were said to have colluded if they presented identical incorrect responses to at least five (05) questions which require a "*one*" word response.

(c) Short Answer Structured Type of Questions:- Candidates were said to have colluded if they presented identical incorrect responses to at least two (02) questions which require short responses involving a sentence or two;

(d) Questions Requiring Filling of Tables: - Candidates were said to have colluded if they presented identical readings/responses to one (01) or more tables in paper.

71. According to the Respondents, the subject specialists discussed the outcome of their investigations based on their knowledge, experience and international best practices and came to the conclusion that Chebuyusi Boys High School were involved in examination irregularities in the 2017 KCSE examination by engaging in collusion as more particularly described above and that the candidates colluded in Biology Paper 1(231/1), Biology Paper 2(231/2) and Chemistry Paper 3(233/3).

72. It was disclosed that the Investigation report on Chebuyusi together with reports on other Examination Centres were presented to the Examination Management Committee on 12th January 2018 in line with Legal Notice No.132 and the Committee approved the recommendations of the Investigation Committee and actions to be taken with respect to the schools involved including Chebuyusi High School and by a letter dated 16th January 2018 the results of the investigations was communicated to the Head Teacher Chebuyusi High School in accordance with Rule 11 of Legal Notice No.132.

73. The Respondents' position was therefore that in the light of massive irregularities established with respect to the candidates of Chebuyusi High School the results of 190 candidates were cancelled pursuant to the provisions of section 28 and 32 of the Act as read together with Rules 9 and 14 of Legal Notice No.132 of 2015.

74. According to the Respondents, upon cancellation of examination results under Rule 15(1) (2) and (3) of Legal Notice No.132 the candidates whose results are cancelled are entitled to an appeal within Thirty (30) days of the cancellation for a review of 1st Respondent's decision by applying formally to the 1st Respondent in writing and the 1st Respondent has an obligation to respond within 30 days. To date the 1st Respondent has not received any appeal from the affected candidates, their parents or the school.

75. It was further contended that upon release of provisional examination results on 20th December 2017 and upon receipt of a letter dated the same date by the Head Teacher of Chebuyusi High School as admitted by the Applicants at paragraph 10 of the Statutory Statement in support of the application it was the duty of the Head Teacher to inform the parents and the students that the results were provisional and were withheld since they were the subject of investigations due to suspected irregularities committed by the candidates.

76. The Respondents maintained that collusion by candidates amongst themselves or with third parties to defeat the fair and credible administration of examination by the 1st Respondent as envisaged under the Act would amount to an examination malpractice under section 28 of the Act and that such collusion can be perpetuated by incidences referred to under section 32 of the same Act. The Respondents referred to ***Chambers Concise Dictionary*** which defines "collusion" as:

"secret and illegal co-operation for the purpose of fraud or other criminal activity."

77. It was reiterated that the subject specialists came to the conclusion that the patterns of answers in the examination scripts from Chebuyusi demonstrated an element of secret and illegal co-operation by students amongst themselves and or with the help of third parties to defeat the administration of a credible examination process. It was therefore denied that the 1st Respondent's decision to cancel the examination results of Chebuyusi was draconian, unjust and unfair. To the contrary condoning collusion which would in turn defeat the administration of credible examination process as witnessed in Chebuyusi would have been unfair to candidates who participated in the process with honesty.

78. It was the Respondents' case that the law insulates the 1st Respondent against giving out information which in the 1st Respondent's opinion would:

(a) Compromise the integrity of any examination administered.

(b) Compromise the examination process.

(c) Compromise the right to privacy of any individual.

79. In the opinion of the 1st Respondent the information required falls within the insulated information. In the Respondents'' view, the burden of proving their case falls squarely with the Applicants and not with the help of the 1st Respondent.

80. In their submissions, which were highlighted by their learned counsel **Mr Obura**, the Respondents relied on the case of **Mukisa Biscuits Co. vs. West End Distributors [1969] EA. 696** and Rules 15, 16 and 17 of the Legal Notice No.132 of 2015 – ***The Kenya National Examinations Council (Handling of Examination Irregularities) Rules*** hereinafter referred to as "***Legal Notice No. 132***".

81. It was explained that the foregoing rules are made under section 48 of the Act which provides *inter alia* that the Council may make rules with respect to the nature and extent of examinations irregularities and the penalty thereof. In addition to the above provisions which deal with the appeal process within the 1st Respondent's establishment in the event of examination irregularities, section 40b of the Act establishes the National Examination Appeals Tribunal with its jurisdiction provided at section 40h of the same Act to consider appeals made against the decision of the 1st Respondent to withhold, nullify or cancel examinations prepared and administered by the 1st Respondent. The KCSE is one examination.

82. In the present proceedings the Applicants are seeking a judicial review of the 1st Respondent's decision to cancel the 2017 KCSE examination results for 190 candidates of Chebuyusi High School. The application is fundamentally brought under Article 47 of the Constitution read together with ***Fair Administration Action Act, 2015*** being a statute enacted to give effect to the Constitution. In this respect reference was made to section 9 of the said Act and it was submitted that there is no evidence that the Applicants exhausted the "*mechanisms including internal mechanisms for appeal or review*" available to them under Rule 15 and 16 of Legal Notice No.132 of 2015. It is upon exhausting such mechanisms and other additional remedies available under other written law like section 40J of the Act by appealing to the National Examination Appeals Tribunal only then can the Applicants apply for judicial review in the High Court. It was submitted that while the 1st Respondent is aware of section 9(4) of the ***Fair Administration Act*** which allows the High Court to entertain a judicial review application even when the applicant has not abided by subsection (2) of the same section, the Respondents contended that evidence must however be adduced by the applicant to show the exceptional circumstances and there must be an application to be exempted from the available internal mechanisms of settling the dispute. In the present circumstance no such evidence has been produced nor was there a prior application for exemption before the judicial review application was filed.

83. It was submitted that the issue in dispute being the rationale of cancellation of KCSE examination results of 190 candidates and the said examination having been set by the 1st Respondent which is a statutory body recognized in law to have expertise of conducting such examinations, and there being statutory provisions to be observed by persons dissatisfied with the conduct of the examinations by appealing to the 1st Respondent, it is the 1st Respondent which would be better placed to invoke their expertise in revisiting the Applicant's complaints and establishing whether there is merit in them. Courts cannot substitute the 1st Respondent in that exercise but should only intervene if the 1st Respondent fails to observe the processes set out in the subsidiary legislations while addressing the complaints. The Applicants have ignored the existence of statutory rules to address the complaints they have raised. They have also not explained why they cannot follow them. In this respect the Respondents relied on **Cortek Mining Kenya Limited vs. The Cabinet Secretary Ministry of Mining and The Attorney General [2017] eKLR** where the Court of Appeal held that where Parliament had provided statutory procedure under section 93 of the ***Mining Act*** for challenging revocation of a licence issued to a miner and a party brings a judicial review application challenging the revocation of the licence the party must disclose the alternative remedy available and explain why it was not efficacious thus resorting to judicial review. The Court observed that alternative appeal process provided in statute unlike judicial review would afford the parties an opportunity to explore the merits of the decision. They also relied on **Republic vs. Sacco Societies Regulatory Authority, Ex Parte Joseph Kiprono Maiyo and Others [2017] eKLR** and **Republic Versus The Ministry Of Interior and Coordination of National Government [2014] eKLR.**

84. As regards the merits of the application it was submitted that judicial review being largely concerned with the legality of the process as opposed to the merit of the 1st Respondent's actions, for the Applicants to succeed they should be able to show that the 1st Respondent acted contrary to legislative provisions establishing it and the rules regulating the conduct of examinations.

85. According to the Respondents, the Order of Certiorari is sought to quash the letter dated 16th January 2018 cancelling the KCSE examination results for Chebuyusi High School. The justification for quashing the cancellation is given by the applicants to include:

(a) The fact that on 20th December 2017 the affected candidates, their parents and teachers and other interested members of the public had accessed the results of the school released through the SMS portal.

(b) There was an extensive coverage of the school's "*excellent*" performance in the print media immediately after 20th December 2017.

(c) The 1st Respondent could not by its letter dated 10th December 2017 allege that it was withholding the release of exam results while the results could be accessed by the candidate's parents and teachers.

(d) "*Collusion*" as an irregularity is not covered by Section 32 of the Act pursuant to which results were cancelled.

(e) The 1st Respondent acted on an anonymous and undated letter to have the results cancelled.

(f) The 1st Respondent's letter dated 16th January 2018 was draconian and written without proper investigation involving students or administrators. The 1st Respondent operates in secrecy contrary to the Constitution.

(g) The 1st Respondent violated both Article 47 of the Constitution and ***Fair Administration Actions Act***.

(h) The 1st Respondent acted in bad faith, illegally and abused their powers.

(i) The 1st Respondent's action went against the Applicants expectations.

86. The Respondents however took the view that the 1st Respondent had on the other hand shown by way of the Replying Affidavit that their decision to cancel the results was preceded by first receiving reports of suspected irregularities; investigation of the alleged irregularities as provided under the law; taking precautionary measures in accordance with international standards of administering exams before reaching the decision to cancel the examination; and informing the Applicants of what was being done. It was explained that allegations of irregularities in the Chebuyusi High School's results were received not from an anonymous letter as alleged by the Applicants but from the Chief Examiners of Biology Paper 231/1 and the Chemistry Paper 233/2. It was submitted that under Rule 8 Legal Notice No. 131 a Chief Examiner has a legal duty *inter alia* to*:*

a) report to the 1st Respondent on all aspects of marking.

b) take the overall leadership of the examination marking exercise for that paper or papers he is in charge of.

87. Reporting suspected irregularities in KCSE 2017 Biology and Chemistry papers, it was submitted was therefore an obligation of the Chief Examiner and upon receipt of reports alleging irregularities it was a statutory duty of the 1st Respondent to invoke its powers under Legal Notice No. 132. Rule 3(2) of the Legal Notice gives the 1st Respondent the power to take appropriate action against any candidate, person or any examination centre that is involved in an examination irregularity or malpractice.

88. At paragraph 19 of the Replying Affidavit the 1st Respondent's witness deposes that an investigation team of subject specialists was constituted to investigate the alleged irregularities. Once again the 1st Respondent was within its legal mandate to constitute the team pursuant to Rule 7 of Legal Notice No. 132.

89. According to the Respondents, section 32 of the Act gives the 1st Respondent the general power to cancel a paper already taken and does not exempt a paper which has been marked and the results announced by the 1st Respondent. In addition, Section 48 of the Act gives the 1st Respondent the power to make rules *inter alia* dealing with "*the nature and extent of the examination irregularity and the penalty thereof*". Pursuant to that provision, Rule 8 of Legal Notice No. 132 was made. It gives the 1st Respondent the power to withhold examination results. The subsequent Rule 9 (b) and (c) not only allows the 1st Respondent to cancel the paper but the entire results. The argument that the candidates, parents and teachers could access the 1st Respondent's portals and view their disputed exam results cannot therefore bar the 1st Respondent's from cancelling the examinations results.

90. The 1st Respondent further submitted that if as was established the candidates of Chebuyusi were guilty of examination malpractice under Section 28 and 32 of the Act then the results which the candidates, parents and teachers had access to were null and void as they were achieved illegally. The honourable court cannot be called upon to legitimize a null and void report just because the candidates were allegedly made to believe that it was genuine.

91. It was submitted that there is no evidence in Court to challenge the investigations conducted by the 1st Respondent that the conduct of such investigations were unprocedural. In fact the entire Applicants' pleadings show that they are not aware of the processes of exams marking and investigation of irregularities and that is why they have not referred to any specific procedure which has been flouted. This position is confirmed by the fact that by an application dated 19th February 2018 the Applicants asked the Court to compel the 1st Respondent to surrender various exams records to them to help them "*inform their position and make necessary decisions*". They argue that failure to give them the reports would jeopardize their strategy in prosecuting the case against the 1st Respondent. Thus they wanted the 1st Respondent to assist them in prosecuting the case against itself. It is the Respondent's submissions that he who alleges must prove its case and if the Appellants have no documentary or any other factual evidence to prove their case then they merely came to Court to engage in a fishing expedition.

92. According to the Respondents, Rule 13 of Legal Notice No. 132 requires that upon receipt of a report on examination irregularity the 1st Respondent's management should submit the Report to Examinations Management Committee. That was done and the minutes evidencing discussions in the Committee are produced. Rule 14 of the same rules provide that where Examination Management Committee is satisfied that the report presents satisfactory evidence of an examination irregularity, the results for the affected candidate shall be cancelled and such candidate should be informed. The letter dated 16th January 2018 was written pursuant to a statutory provision to inform the affected candidates of the cancellation of their results.

93. It was the Respondents' submissions that a Court of Law cannot be asked to quash what has been done pursuant to a statutory obligation arrived at after an established statutory process and they relied on the case of **Kenya National Examination Council and Republic Exparte Kemunto Regina Ouru [2009] eKLR** and **Republic vs. Kenya National Examinations Council Ex-Parte the Principal St. Pius X Seminary School.**

94. It was submitted that one of the grounds heavily relied upon by the Applicant in challenging the cancellation of exams in this case is that the exams were cancelled on the basis of collusion yet there is no irregularity known as collusion under section 32 of the Act. To that the Respondent submitted that in both ***Ex-Parte Ouru*** case and ***Ex-Parte Principal St. Pius X Seminary School*** case where the cancellation were also under section 32 of the Act, the offence identified by both the Court of Appeal and the High Court respectively was that the malpractice which had been committed was collusion.

95. According to the Respondents, the legislation regulating the conduct of examinations by the 1st Respondents does not require it to give a hearing to the candidates before cancelling examinations. To do so, as was held by the Court of Appeal in the ***Ex-Parte Ouru*** case would be against public policy. Much as Article 47(2) require that if a right or a fundamental freedom of a person is likely to be adversely affected by administrative action, the person has a right to be given written reasons for that action that requirement must be viewed against Article 24 of

the same Constitution which allows for the limitation of a right or fundamental freedom where it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors which include the importance of the purpose of the limitation. If the Court were to order that the 1st Respondent should have explained to the Appellants the reason for cancelling their exams assuming that cancellation is an adverse action what would prevent candidates from demanding that before they are marked as failures in the course of the normal examination marking process they should be informed of reasons why they are being marked as failures.

96. The Respondents urged the Court not to promote what could be viewed as an individual fundamental right at the expense of maintaining a civilized order of managing public examination and that arising from the foregoing an order of certiorari should not issue.

97. As regards the prayer for prohibition, the Respondents similarly relied on the case of **Kenya National Examination Council, Exparte Geoffrey Gathenji and Others** and submitted that in the present case the Applicants want the 1st Respondent prohibited from *"publishing the Ex-parte applicants school as one of the institutions whose 2017 KCSE results were cancelled ……"* yet the applicants are in Court because the publication of the cancellation was done by a letter dated 16th January 2018. What the Applicants want prohibited is *a fait accompli* and cannot be prohibited.

98. As for the second prayer for prohibition the Applicant want the 1st Respondent prohibited from publishing, announcing, declaring that the Applicant's 2017 KCSE examination results were cancelled because of irregularities until such a time the 1st Respondent has complied with the Applicant's prayer of certifying the ***"KCSE results released to the candidates the school, the parents and entire country on 20th December 2017 as the valid final results of the 2017 KCSE examination for the 190 students at Chebuyusi High School".*** It was the 1st Respondent's submission that the prayer is not available to the Appellant since the 1st Respondent having cancelled the examination results on the basis of irregularity it cannot again certify them to be correct. In this respect the Respondents relied on the holding in **Republic vs. Kenya National Examination Council, Exparte RMD. J and Others.**

99. It was the submission of the 1st Respondent that Prohibition cannot issue under Prayer No. 6 of the Notice of Motion dated 15th February 2018.

100. As regards the prayer for the orders of *mandamus*, it was submitted based on the Court of Appeal decision of ***Ex Parte Geoffrey Gathenji*** (*supra*) that *mandamus* cannot be used to compel the 1st Respondent to do what it is not authorized in law to do or what it can do on its sole discretion.

101. As regards the right to access information, the Respondents relied on section 42 of the Act which limits the rights to access to information held by the 1st Respondent.

102. In this case, it was the 1st Respondent's case that the information required by the Applicants to be released under Prayer No. 4 of the Notice of Motion should not be released because it is such information which is insulated by Section 42 of the Act. Further, the Court's attention was drawn to the fact that part of the information the Appellant's want to be produced to them are the Chief Investigators Report; the Chief Examiner's Report; and the 1st Respondents Investigation Report. These Reports were prepared pursuant to section 37 of the Act. However under section 38 the 1st Respondent is mandated to keep such information confidential "and shall disclose such information only to the extent it considers necessary for the proper performance of its duties." With respect to the production of 2017 KCSE scripts in Biology and Chemistry the 1st Respondent drew the Court's attention to Rule 19 of Legal Notice No. 131.

103. While declining to issue an order for the production of similar documents in a similar case, it was submitted that **Ogola, J** in **CO and 87 Others vs. Kenya National Examination Council and Okiya Omtatah Okoiti** held that Article 35 read together with Article 24 of the Constitution and Section 42 of the Act confirms that the right to information guaranteed under Article 35 of the Constitution is not absolute and the documents required in that case could not be availed.

104. Regarding the prayer for an order of *mandamus* to compel the 1st Respondent to certify the validity of the 2017 exams results the 1st Respondent reiterated that the honourable Court has no such powers.

105. The Respondents however distinguished the case of **Republic vs. Kenya National Examination Council, Ex Parte: Ian Mwamuli [2003] eKLR** and noted that:

(a) The **MWAMULI** case was concerned with withholding of examination results of a candidate because of the mixing up in names caused by the fact that his mother had been married twice leading to the change in his names. He was asked by the 1st Respondent to declare the correct name through a Deed Poll and even after doing that the 1st Respondent still failed to release his exams results and offered no explanations.

(b) The present case is concerned with the withholding of examination results and subsequent cancellation on account of irregularities caused by collusion.

(c) In the **MWAMULI** case the 1st Respondent despite being served with the judicial review application did not oppose the application and the Court held that the applicants averments were uncontroverted.

(d) The arguments relied on by the Appellants with reference to **MWAMULI's** case are were merely statements of the law with respect to the right of the Court to interfere with the discretion of the 1st Respondent under the prevailing circumstances in that case and does not affect the 1st Respondent arguments in the present case.

106. It was the Respondents' case that, while the Appellants also alluded to the fact that the withholding of the examination results and their subsequent cancellation impinged on their legitimate expectations. It is however the 1st Respondent's submissions that legitimate expectation cannot be achieved through illegitimate means. Engaging in illegal and unfair tactics involving collusion to pass exams cannot be considered as legitimate. Reliance was placed on the case of **Republic vs. Kenya National Examination Council Ex-Parte Martin Phiri**.

107. It was therefore submitted that neither the prayers for order of Certiorari nor Order of Prohibition nor that of Mandamus are available to the Appellants and the suit should be dismissed with costs to the 1st Respondent.

Determinations

108. I have considered the issues raised in this application.

109. The first issue for determination is the competency of this application considering the availability of alternative dispute resolution mechanisms.

110. According to the 1st Respondent, though the Applicant was entitled pursuant to Rule 15(1), (2) and (3) of Legal Notice No.132, upon cancellation of examination results to within Thirty (30) days of the cancellation to apply for a review of 1st Respondent's decision by applying formally to the 1st Respondent in writing and the 1st Respondent has an obligation to respond within 30 days, to date the 1st Respondent has not received any appeal from the affected candidates, their parents or the school.

111. Rule 15 of the Legal Notice No.132 of 2015 – ***The Kenya National Examinations Council (Handling of Examination Irregularities) Rules*** hereinafter referred to as "***Legal Notice No. 132***" states as follows:

> **(1) A candidate whose examination results have been cancelled may apply to the Council thirty days after release of the results for a review of the Council's decision.**
>
> **(2) An application for a review of cancelled results shall be made in writing and shall indicate clearly the grounds for requesting the review.**
>
> **(3) The Council shall upon receiving an application consider the application and respond in writing, to the applicant within thirty days.**
>
> ***(4)*** **Where** ***the Council declines an application for review, the Council shall specify the reasons for declining the application for review of cancelled results.***

112. Rules 16 and 17 of the same Legal Notice on the other hand state as follows:

> 16. **(1) Where the Council considers that the grounds raised by the applicant warrant a review, the Council shall-**
>
> **(a) Communicate the decision in writing to the applicant; and**
>
> **(b) May require the applicant to appear for a hearing of the application within ninety days of receipt of the council's communication.**
>
> **(c) Where the Council is satisfied that the candidate has not been involved in any examination irregularity, the Council shall release the results to the candidate.**
>
> **17. Any examination results cancelled by the Council under these Rules shall not be re-assessed.**

113. It was explained that the foregoing rules are made under section 48 of the Act which provides *inter alia* that the Council may make rules with respect to the nature and extent of examinations irregularities and the penalty thereof. In addition to the above provisions which deal with the appeal process within the 1st Respondent's establishment in the event of examination irregularities, section 40b of the Act establishes the National Examination Appeals Tribunal with its jurisdiction provided at section 40h of the same Act to consider appeals made against the decision of the 1st Respondent to withhold, nullify or cancel examinations prepared and administered by the 1st Respondent. The KCSE is one such examination.

114. Sections 40H and 40J of the ***Kenya National Examinations Council Act*** (2012) states:

> **40H. The Tribunal shall consider all appeals made against a decision of the Council to withhold, nullify or cancel examinations prepared and administered by the Council.**
>
> ***40J. (1) A person who is aggrieved by a decision of the Council to withhold or cancel the results of a candidate may lodge an appeal to the Tribunal in the prescribed form.***
>
> ***(2) An institution that is aggrieved by the decision of the Council to withhold or cancel the results of the candidates in that institution may lodge an appeal to the tribunal in the prescribed form.***

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

115. The applicant was however of the view that the appeals from decisions of the council are couched in permissive terms ("MAY") and therefore not compulsory or mandatory. The Act speaks in flexible terms which allow for one to decide, for whatever reason, not to lodge an appeal with the tribunal and that in the instant case it is clear that the Ex Parte applicants chose not to take the appeal to the tribunal route because no law compels them to lodge such an appeal. In their view, the word "MAY" as used in the Act cannot under any circumstances be taken to mean "shall" or "must".

116. This argument brings me to a determination the manner in which the word "may" is employed in the said provision. As was appreciated by the Court of Appeal in **Kimutai vs. Lenyongopeta & 2 Others Civil Appeal No. 273 of 2003 [2005] 2 KLR 317; [2008] 3 KLR (EP) 72** while citing with approval ***The Discipline of Law*** 1979 *London Butterworth* at page 12 by **Lord Denning:**

> **"The grammatical meaning of the words alone, however is a strict construction which no longer finds favour with true construction of statutes. The literal method is now completely out of date and has been replaced by the approach described as the "purposive approach". In all cases now in the interpretation of statutes such a construction as will "promote the general legislative purpose" underlying the provision is to be adopted. It is nolonger necessary for the judges to wring their hands and say, "There is nothing we can do about it". Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind."**

117. In this case, did the Legislature intend that a person aggrieved by the decision of the Council could at his own volition decide to bypass the alternative dispute resolution mechanisms to invoke the Court's jurisdiction? I respectfully disagree with this interpretation since to do so would render the alternative dispute resolution mechanism a *dodo*. To my mind the word "may" only connotes the fact that a person aggrieved by a decision of the Council is not obliged to challenge the same but may do so at his own volition. However if he decides to challenge the decision, a procedure for doing so is thereby prescribed.

118. Even if it were accepted that the provision is not mandatory, section 9(2), (3) and (4) of the ***Fair Administrative Action Act***, No. 4 of 2015 provides:

> **(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.**
>
> **(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).**
>
> **(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.**

119. In my view where alternative dispute resolution mechanisms are provided by statute, whether expressed in mandatory terms or whether *prima facie* directory only, they must be resorted to unless the applicant is exempted from doing so pursuant to section 9(4) of the ***Fair Administrative Action Act***. That is not only a statutory requirement but is also a constitutional requirement pursuant to Article 159(2)(c) of the Constitution.

120. Whereas the availability of an alternative remedy is a factor to be taken into consideration, the Court ought not, in its decision to sanitise a patently illegal action just because there is a right of appeal provided by the statute especially where such a right is less convenient, effective and beneficial. Therefore where a remedy provided under the Act is made illusory with the result that it is practically a mirage, the Court will not shirk from its Constitutional mandate to ensure that the provisions of Article 50(1) of the Constitution are attained with respect to ensuring that a person's right to have any dispute that can be resolved by the application of law is decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body is achieved. In other words, if there is no dispute resolution mechanism covering the circumstances of the case, to send the interested parties to resort to such non-existent mechanism would be absurd.

121. The applicant has in this case contended that their application have raised heavy constitutional issues which cannot be addressed by the tribunal. Some of the Constitutional issues raised in the application are:

> (1) Under Article 47(1) of the Constitution of Kenya (2010) whether the Ex parte applicants received a fair hearing as envisioned by the Constitution in Article 47 that entitles every citizen of Kenya a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Significantly, the 1st Respondent acted in a draconian and dramatic manner in cancelling the KCSE examination results of the applicants' school without according them any hearing, let alone a fair hearing.
>
> (2) Under Article 47(2) of the Constitution of Kenya (2010) whether the Ex parte applicants whose fundamental rights were infringed and adversely affected by the decision of the 1st Respondent to cancel the KCSE examination results were given written reasons for the action.
>
> (3) Under Articles 19, 20, 21, 22,23 and 24 of the Constitution of Kenya (2010) whether the Ex parte applicants' fundamental rights as protected in the Bill of Rights were infringed by the arbitrary, unjust, unfair, draconian and dramatic decision of the 1st

Respondent to unilaterally cancel the results of the applicants' school without a hearing.

(4) Under Article 27 and 28 of the Constitution of Kenya (2010) whether the Ex parte applicants were discriminated against and treated with indignity and disrespect.

(5) Under Article 48 of the Constitution of Kenya (2010) whether the Ex parte applicants road to access justice was being impeded by a lengthy, appeals process that would curtail or deny them justice under the law.

(6) Under Article 165 of the Constitution of Kenya (2010) whether the Ex parte applicants have a right to move directly to the High Court by bypassing an internal appeals mechanism which is not mandatory but only discretionary under the law.

(7) Under Article 258(1) and (2) of the Constitution of Kenya (2010) whether the Ex parte applicants right to institute court proceedings, claiming that the Constitution has been contravened can be curtailed or circumvented by an appeal process to a tribunal.

(8) Under Article 260 of the Constitution of Kenya (2010) whether denying the Ex parte applicants their day in court through technicalities and frivolous, meritless applications promotes the purposes, values and principles of the Constitution, advances the rule of law, permits the development of law and contributes to good governance.

122. In their view, they raised serious and weighty issues touching on the Constitution and the rights that emanate from it in their interest which cannot be decided by some tribunal but only by a court of law, the High Court. To allow the objection, it was submitted would be contrary to the law and the spirit of the Constitution.

123. With due respect to the applicants, the substance of the dispute was administrative in nature and were not constitutional as the applicant wishes this Court to believe. It must always be noted that even a simple application for adjournment may improperly be elevated to a constitutional issue. However as was held in **John Harun Mwau vs. Peter Gastrow & 3 Others [2014] e KLR** the Constitution ought only to be invoked when there is no other recourse for disposing of the matter. In the said case it was held that:-

> **"Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights…It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so."**

124. In **N M & Others vs. Smith and Others (REEDOM OF Expression Institute as Amicus Curiae) 200(5) S.A 250 (CC)** the Constitutional Court of South Africa stated:

> "**It is important to recognise that even if a case does raise a constitutional matter, the assessment of whether the case should be heard by this Court rests instead on the additional requirements that access to this court must be in the interests of justice and not every matter will raise a constitutional issue worthy of attention.**"

125. Similarly in **Minister of Home Affairs vs. Bickle & Others (1985) L.R.C. Cost.755,Georges, CJ** held as follows:

> **"It is an established practice that where a matter can be disposed off without recourse to the Constitution, the Constitution should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (Wahid Munwar Khan vs. The State AIR (1956) Hyd.22)."**

126. The judge went on to add that:

> **"Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights."**

127. In **Uhuru Muigai Kenyatta vs. Nairobi Star Publications Limited [2013] eKLR, Lenaola, J** held that:

> **"Where there is a remedy in Civil Law, a party should pursue that remedy and I say so well aware of the decision in Haco Industries (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a constitutional sanction and as stated in AG vs S.K. Dutambala Cr. Appeal No.37 of 1991 (Tanzanian Court of Appeal), such sanctions should be reserved for appropriate and really serious occasions."**

128. In my view the facts of this case fall short of what is required for the dispute to be deemed to be a constitutional one meriting the bypassing of the Tribunal. In my view despite the arguments hinged on the Constitution nothing bars the Tribunal from dealing with the same.

129. However, Rule 15 of the Legal Notice No.132 of 2015 – ***The Kenya National Examinations Council (Handling of Examination Irregularities) Rules*** provides that a candidate whose examination results have been cancelled may apply to the Council thirty days after release of the results for a review of the Council's decision. When then are the results released for the purposes of this Rule? In this case it is

not in doubt that an analysis of the KCSE results were released on the 20th December, 2017 by the 1st and 2nd Respondents for Chebuyusi High School. Whereas the Respondents contend that these were provisional results, it is not contended that had the same been unfavourable to the applicant, the applicant would not have challenged them. In my view an applicant's cause of action accrues upon the initial release of the results whether termed provisional or not. As the said results were favourable to the applicants, there was no reason why they should have challenged the same. However upon being informed that the results had been cancelled, the applicants were at liberty to challenge the same. That the results were released at that time is clearly appreciated in the 1st Respondent's vide its Press Statement dated Wednesday January 17, 2018 entitled: *Investigations into Allegations of Irregularities in the 2017 KCSE Examination*, in which it was expressly stated that the 1st Respondent documented 64 examination centres that were reported to have engaged in examination malpractices and that investigations were concluded in 54 of the centres before the ***release*** of the examination results on December 20, 2017.

130. According to the Respondents, Rule 13 of Legal Notice No. 132 requires that upon receipt of a report on examination irregularity the 1st Respondent's management should submit the Report to Examinations Management Committee. That was done and the minutes evidencing discussions in the Committee are produced. Rule 14 of the same rules provide that where Examination Management Committee is satisfied that the report presents satisfactory evidence of an examination irregularity, the results for the affected candidate shall be cancelled and such candidate should be informed. The letter dated 16th January 2018 was written pursuant to a statutory provision to inform the affected candidates of the cancellation of their results.

131. It is therefore clear that the Rules themselves require that where the results are cancelled the candidate concerned must be informed accordingly. In this case the Applicants contended that whereas the 1st Respondent alleged that *"Reports"* for each of the 10 schools had been sent to them through the respective Principals and County Directors of Education, neither the Applicant nor the Principal of Chebuyusi High School have received any such "Report" from the 1st Respondent, which report remains in the files and cabinets of the 1st Respondent and has never been shared with the relevant stakeholders contrary to the assertions of the 1st Respondent. In other words the applicants' position is that they have never received any communication transmitting to them the decision cancelling the results. No evidence has been adduced by the Respondents to the contrary. In those circumstances, the applicants cannot be faulted to not having invoked the alternative dispute resolution mechanisms as the conditions precedent for doing so had not matured. In my view where the Court is in doubt as to whether the alternative dispute resolution mechanism is available or viable it should lean towards sustaining the proceedings before it.

132. It follows that the preliminary objection raised herein cannot be sustained and the same is hereby disallowed.

133. In this case the applicants are aggrieved by the 1st Respondent's decision to cancel the School's results. The prayers sought herein necessarily give rise to the efficacy of granting the said prayers. In **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) the Court while relying on ***The Concise Oxford Dictionary of Current English, 7th Edition*** found that the word "cancel" means "obliterate, cross-out; annul, make void, abolish, countermand, revoke order or arrangement for…..". Based on that definition the Court was of the view that "if the respondents were contending that the cancellation was wrong because it was done contrary to the rules of natural justice, the obvious thing for them to do was firstly to apply to the High Court for an order of *certiorari* to quash the cancellation and thereafter for an order of *mandamus* to compel the release of results." In other words the Court of Appeal was of the view that in the circumstances of that case to seek orders of *mandamus* and prohibition without quashing the decision was an exercise in futility.

134. In this case, the applicants seeks *inter alia* an order to quash the decision of the Council on the ground that the cancellation was done without the applicants being afforded an opportunity of being heard contrary to the provisions of Article 47 of the Constitution. That provision provides:

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

135. The Supreme Court of India in **Maharashtra State Board of Secondary and Higher Secondary Education & Anor vs. Kurmasheth and others [1985] CLR 1083** at pg 104 was however of the view that:

> **"Viewed against this background, we do not find it possible to agree with the views expressed by the High Court that the denial of the right to demand a revaluation constitutes a denial of fairplay and is unreasonable. The Board is a very responsible body. The candidates have taken the examination with full awareness of the provisions contained in Regulations and in the declaration made in the form of application for admission to the examination they have solemnly stated that they fully agree to abide by the regulations issued by the Board. In the circumstances, when we find that all safeguards against errors and malpractices have been provided for, there cannot be said to be any denial of fair play to the examinees by reason of the prohibition against revaluation".**

136. At page 1105, the Court in ***Maharashtra Case*** stated:

> **"…the test of reasonableness is not applied in a vacuum but in the context of life's realities;…If the principle laid down by the High Court is to be considered as correct, its applicability cannot be restricted to examinations conducted by the Schools Educational Boards alone but would extend even to all competitive examinations conducted by the Union and State Public Service Commissions. The inevitable consequence would be that there will be no certainty at all regarding the results of competitive examinations for an indefinite period of time until such requests have been complied with and the results of verification and revaluation have been brought into account. Far from advancing public interest and fair play to the other candidates, in general, such interpretation of the legal position would be wholly defeasive of the same. As has been repeatedly pointed out by this court, the court should 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 formulated by professional men possessing**

technical expertise and rich experience of actual day to day working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the court should also as far as possible, avoid any decision or interpretation of a statutory provision, rule or byelaw which would bring about the result of rendering the system unworkable in practice".

137. Further support for the said submission was sought from **R vs. Council of Legal Education [2007] eKLR** at pg. 9, where the Judge stated thus;

"The other reason why this court has declined to intervene is one of principle in that academic matters involving issues of policy the courts are not sufficiently equipped to handle and such matters are better handled by the Boards entrusted by statute or regulations. Except where such bodies fail to directly and properly address the applicable law or are guilty of an illegality or a serious procedural impropriety the field of academia should be largely non-justiciable. I see no reason why in a democratically elected government any detected defects in such areas including defects in policy should not be corrected by the legislature".

138. However, as this Court held in **Republic vs. Kenya National Examinations Council Ex-Parte Martin Phiri & Another** (supra):

"The cancelation of the candidates' results was obviously an administrative action which was required to be expeditious, efficient, lawful, reasonable and procedurally fair. The 1st respondent was or ought to have been aware that the cancellation of the candidates' results was likely to adversely affect the candidates' rights under Article 43(1)(f) of the Constitution hence the candidates were entitled to the reasons for the action...where the applicant seeks an order of certiorari to quash cancellation, the Council might well be required to justify to the Court the reason(s) why it thought the respondents had cheated. In this case therefore the 1st respondent was expected to justify to the Court why it thought there was collusion amongst the candidates. The 1st Respondent informed the Court the methods which it used to detect collusion. That method, it was averred, was used uniformly and not arbitrarily or selectively. The applicants have not shown that the method employed by the 1st Respondent was faulty. The Respondents however contended that the Council may not give clearer details of how the IDP Programme works as doing so may compromise the management and conduct of the examinations in future though the programme is tested, unbiased and a fool proof tool in the detection of the irregularity of collusion. In the said case the Court of Appeal appreciated that the marking of examinations must remain confidential as opposed to secretive and that no amount of liberalisation, transparency and accountability would ever convince the Courts that the marking of examinations should be conducted at the Moi International Sports Centre, Kasarani, so that the candidates and anybody else who feels inclined to do so can attend and see that the marking is fair and open. According to the court, in life, there are certain things which must be taken on trust and that when an examiner decides that a particular candidate has failed there cannot be any doubt but that the examiner is deciding on a matter touching on the very future of the candidate and yet, no one in his proper senses would contend that before such a candidate is declared to have failed, the examiner ought to give him a hearing. The Court however appreciated that when it comes to the question whether or not the Council is justified in cancelling particular results, different considerations may well apply."

139. In that case, the court appreciated that cancellation of results being an act which has nothing to do with the merits of the results and whereas the decision whether or not a candidate has failed may not call for reasons for the failure, where an allegation of impropriety or irregularity is made against a candidate, the candidate ought to be furnished with the reasons why such a decision was made and be afforded an opportunity of being heard on that cancellation. Where the Council does not furnish the applicant with the reasons for the decision, the Court may well be entitled to quash the decision.

140. Whereas it is true that the 1st respondent must of necessity have a measure of discretion in undertaking its responsibilities under the Act, that discretion ought not to be exercised arbitrarily or capriciously. It is now trite that the Court can intervene in the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

141. That this Court has the power to reverse the 1st Respondent's decision was also appreciated in **Kenya National Examination Council vs. Republic Exparte Kemunto Regina Ouru [2009] eKLR,** where he held that:

"In cases of this nature, the Court can only interfere where it is satisfied, either that the procedure adopted was unfair to an applicant or that the decision under challenge is unreasonable."

142. Therefore as was held in **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090,** where the Court expressed itself as follows:

"In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good reasons. The Minister has given no reasons while the applicants have shown that there was no inadequate management or supervision and that, in the circumstances prevailing in Nyanza, the holding is fully developed. The conclusion is therefore that the Minister misdirected himself on the facts…The courts would be no rubber stamp of the executive and if Parliament gives great powers to the Minister, the courts must allow them to him:

but, at the same time, they must be vigilant to see that he exercises them in accordance with the law. He must act within his lawful authority…An act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The Minister must act in good faith; extraneous considerations ought not influence him; and he must not misdirect himself in fact or law… It is clear that both sections 187(1) and (4) require the Minister to be "satisfied". It gives him a discretion; and it is his discretion to act upon the facts before him, and not for the court to sit on appeal so as to impose its judgement on the facts upon the Minister. There is no doubt that the Minister acted in good faith. But the Minister had to have certain facts before him…It is clear that the reasons given in the order for sale illustrate that the Minister had asked himself the wrong question; it being a question not enjoined upon him by the Act. He had therefore misdirected himself in law and that order is null and void."

143. Similarly, whereas it is true that there are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal and that the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth, the position taken in **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** in my view holds supreme. In that case the Court of Appeal held:

"In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. *Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing*. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made." [Emphasis mine].

144. It is therefore clear that whatever method adopted, the same must meet minimum degree of fairness.

145. In this case it is not in doubt the cancellation of the results was undertaken without the applicants being afforded an opportunity of being heard. The respondents have not cited any legal provision which justified such an action which, in the face of it is a violation of Article 47 of the Constitution, being taken. It has however contended that the only requirement for such a course is the satisfaction of the Council and sought to rely on **University of Ceylon vs. Fernando [1960] 1 All ER 631** cited with approval in **R vs. Kenya National Examinations & Anor Exp. Busara Forest View Academy & 94 others Nbi. HC Misc. 4 of 2009** where it was held at pg. 638 para. G and H that:

"The clause is silent as to the procedure to be followed by the Vice Chancellor in satisfying himself of the truth or falsity of a given allegation. If the clause contained any special directions in regard to the steps to be taken by the Vice Chancellor in the process of satisfying himself he would, of course, be bound to follow those directions. But as no special form of procedure is prescribed, it is for him to determine the procedure to be followed as he thinks best, but to adapt to the present case the language of the Board in De Verteiul v Knaggs (9), subject to the obvious implication that *some form of inquiry must be made, such as will enable him to fairly determine whether he should hold himself satisfied that the charge in question has been made out*." [Emphasis mine].

146. However, even in that case, the Court was clear that an inquiry ought to be made in order to enable the authority tasked with the decision making power to fairly determine the matter before it. For a body entrusted with the powers to determine the rights of subjects such as the rights to fair administrative action, to be said to have been satisfied, it must have considered all the relevant factors. The word "consider" was defined in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** in which the Court of Appeal expressed itself as follows:

"To consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided."

147. Therefore ordinarily before the authority can be said to have been satisfied it ought to consider all relevant material including affording an opportunity to those who stand to be adversely affected by its decision to give their version before an adverse action is taken against them.

148. However, even if the Court were to agree with the applicants that their right to fair administrative action was violated and were to proceed to quash the respondent's decision, it would not be for the Court to direct the Council as to the manner of proceeding. In **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572** the Court doubted whether the university could be prohibited from instituting further disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law. Therefore where the Court has quashed a decision, it not for the Court to direct the Respondent on how to proceed where the Respondent has a discretion to decide on the manner of proceeding. Therefore if the Court finds that the Respondents failed in their duty to furnish the reasons or that the reasons given were unreasonable or irrational, the Court would only be entitled to quash the decision and leave it for the Respondents to take the next legal course available.

149. Where however the Respondent fails to release the results without any lawful or justifiable cause the Court would be perfectly entitled to compel them to do so after a demand is made by the applicant. As was held by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra):

"Again as an incident of conducting the examinations, the Act imposes on the Council an obligation to mark the papers of the candidates. If the Council refuses or neglects to mark the examinations within a reasonable time, or having marked them, to declare the results within a reasonable time, the High Court would be within its rights to compel the Council to mark the

papers or to declare the results as the case may be. The same goes for awarding diplomas and certificates to the successful candidates. That is a duty specifically imposed on it by section 10(b).”

150. In this case reasons were given for the cancellation of results. The Respondent has explained though not in details the method which was applied across board. Whether or not that method was efficient is a matter which would call for a hearing. However, as the Court of Appeal in **Kenya National Examinations Council vs. Republic ex parte Kemunto Regina Ouru Civil Appeal No. 127 of 2009** recognised:

> **“….we are not experts in that field. To come to a decision one way or the other evidence will need to be adduced, witnesses be examined and be cross-examined. The procedure of judicial review is not appropriate for that purpose.”**

151. It must however be appreciated that Article 10 of the Constitution provides for the national values and principles of governance. Under this Article transparency and accountability are constitutional edicts mandated as some of the values and principles of governance and they bind State organs, State officers, public officers and all persons whenever any of them makes or implements public policy decisions which in my view is what the respondent was doing.

152. As was held in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** the Court expressed itself as follows:

> **“So long as the orders by way of judicial review remain the only legally practicable remedies for the control of administrative decisions, and in view of the changing concepts of good governance which demand transparency by any body of persons having legal authority to determine questions affecting the rights of subjects under the obligation for such a body to act judicially, the limits of judicial review shall continue extending so as to meet the changing conditions and demands affecting administrative decisions...This therefore implies that the limits of judicial review should not be curtailed, but rather should be nurtured and extended in order to meet the changing conditions and demands affecting the decision-making process in the contemporary society. The law must develop to cover similar or new situations and the application for judicial review should not be stifled by old decisions and concepts, but must be expansive, innovative and appropriate to cover new areas where they fit. The intrusion of judicial review remedies in criminal proceedings would have the effect of requiring a much broader approach, than envisaged in civil law.”**

153. The 1st respondent is therefore expected to be transparent in its actions and must adopt such methods as would promote transparency and accountability. Transparency cannot be said to have been achieved when the method or criteria applied in implementing a policy is only known to the authority and its operation is shrouded in a mysterious secrecy.

154. Accordingly, I associate myself with **Lenaola, J** (as he then was) in **Independent Policing Oversight Authority and Another vs. The A G and 2 Others and 658 Interested Parties Petition No. 390 of 2014** that:

> **“In the absence of such regulations and guideline, the evidence before me shows that the NPSC was using a criteria known to itself alone. That being the case, it is not surprising that the recruitment was not uniform across the country and was largely left to the discretion of the sub-county recruitment committees.”**

155. Therefore if the 1st respondent had adopted a criteria for determination of irregularities known to itself alone which was not applied uniformly this Court would have had no hesitation in finding that such a criteria could not pass the test of transparency and accountability.

156. Should the applicants have been afforded an opportunity of being heard before the impugned decision was made by the respondent in the circumstances of this case? Dealing with that issue the Court of Appeal, though *obiter*, expressed itself in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) as follows:

> **“The question of whether the Council is in law bound to hear a candidate before it cancels the result must remain for consideration on another occasion, though if we were forced to decide it in this matter, we would ourselves be inclined to take the view that it might place an unnecessarily heavy burden on the shoulders of the Council to insist on a hearing before cancellation. That mode of procedure may also destroy the confidentiality necessary to the marking of examinations”.**

157. Although that view, being *obiter*, is not binding on this Court, as was held in **Kenya National Examinations Council vs. Republic ex parte Kemunto Regina Ouru** (supra):

> **“The right to hearing is fundamental and is entrenched both in the old and the current constitution. It is universally accepted in any process in which the rights of an individual or group of individuals are being adjudicated upon. Yet, in the conduct of public examinations there is, as was stated in the Indian case of *Maharatshtra State Board vs. Kurmarsheth & Others [1985] CLR 1083* a need for the court: ‘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 the departments controlling them.’….Considering the way the rules and regulations are couched, the intention is to ensure there is equal treatment of all candidates involved for purposes of fairly identifying academic and professional ability. The rules and regulations are also intended to assist the examiners identify those candidates who, through improper conduct, want to attain a grade they do not deserve. The rules are also intended to ensure overall integrity of the entire examinations and fairness to the general body of the candidates as a whole…..To afford a hearing it will mean each candidate may need to be called upon to explain an alleged irregularity….By opening room for challenge of the intended decision to cancel an examination result, it will be difficult to deny other candidates like opportunity to question the decisions of the Council which they may be aggrieved about. Will it be in the public interest to allow individual candidates to make representations?……Considering the foregoing we come to the**

conclusion that balancing one thing against the other the balance tilts in favour of the public interest of ensuring that national examinations results enjoy public confidence and integrity by letting the experts handle them as they deem best provided what they do is applied equally to all candidates with similar complaints against them."

158. The method adopted by the respondent in this case was clearly a restriction on the right to hearing under Article 47 of the Constitution. In order to meet the constitutional threshold such a restriction, if enacted after the promulgation of the new constitution is required to specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation.

159. In this case the applicants' contended that the 1st Respondent having released the results it could not turn around and purport that it had withheld the same. With respect the applicant is correct. The 1st Respondent vide its Press Statement dated Wednesday January 17, 2018 entitled: *Investigations into Allegations of Irregularities in the 2017 KCSE Examination*, stated that it documented 64 examination centres that were reported to have engaged in examination malpractices and that investigations were concluded in 54 of the centres before the release of the examination results on December 20, 2017. However, more time was required to complete investigations into the remaining 10 examination centres prompting the Council to withhold their results.

160. In this case it is clear that the results of Chebuyusi High School were released. Clearly therefore the School was not one of the centres that were under investigation and whose results had been withheld. While I admit that the 1st Respondent could nonetheless cancel the said results if it later discovered that there were irregularities the subsequent cancellation had to be in compliance with the Constitution and the law and in particular Article 47 of the Constitution which provides that:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

161. That was this Court's position in **Republic vs. Kenya Revenue Authority & Another ex parte Tradewise Agencies [2013] eKLR** where it expressed itself as hereunder:

"Although the respondent contends that a person who complies with the provisions of the Seventh Schedule paragraph 7 is eligible for a Tax Compliance Certificate because the said person has filed tax returns and paid what he has assessed himself as due to the Commissioner and that a Tax Compliance Certificate does not mean that a person's accounts are perfect or beyond reproach and only an audit conducted by the First Respondent can certify accounts to be beyond reproach for tax purposes the same certificates indicate that the authority reserves the right to withdraw the certificate if new evidence materially alters the tax compliance status of the recipient. Why would the certificate be withdrawn if it is not evidence of compliance? If it is only evidence of submission of remission of taxes in which event it is not binding on the authority there would be reason for it to be withdrawn by the authority. The only conclusion one would draw is that the certificate is prima facie evidence of compliance and until withdrawn the same is proof of fulfilment of the obligation to pay taxes...Whereas this Court cannot hold that the applicant was not obliged to pay any taxes, the 1st respondent was expected to notify the applicant of any discovery of new evidence which was likely to materially alter the applicant's tax compliance status and hear the applicant's side of the story before taking an action which was contrary to its earlier conduct."

162. In my view upon the release of the results, the applicants legitimately expected that in the event of any change in their status, they would be afforded an opportunity of being heard before a decision adverse to them was taken. This case must be distinguished from one in which a decision to cancel the results is made before the results are released to the schools, the students and the public at large. In that case no decision has been made that would give the candidates legitimate expectation that their scripts would be marked favourably. That was this Court's position in **Republic vs. Kenya National Examination Council Ex-Parte Martin Phiri** where this Honourable Court held as follows on the issue of legitimate expectations by exam candidates:

"47. With respect to legitimate expectation, it is my view that the Candidates legitimate expectation was that they would be treated fairly. There cannot be a legitimate expectation that a candidate will pass examination and move to the next stage. As was held in Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others, (supra) simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way. I am unable to find from the record that the Respondent had promised the Candidates that they would pass the examination in question."

163. I must point out that even the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra), recognised that where the applicant seeks an order of certiorari to quash cancellation, the Council might well be required to justify to the Court the reason(s) why it thought the respondents had cheated. In the said case the Court of Appeal appreciated that the marking of examinations must remain confidential as opposed to secretive. The Court however appreciated that when it comes to the question whether or not the Council is justified in cancelling particular results, different considerations may well apply.

164. However as stated by **De Smith, Woolf & Jowell,*"Judicial Review of Administrative Action"*** 6thEdn. Sweet & Maxwell at page 609:

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

165. Hence in **R (Bibi) vs. Newham London Borough Council 2001 EWCA CIV 607**, it was held:

"Unless there are reasons recognised by law for not giving effect to those legitimate expectations then effect should be given to them. In circumstances as the present where the conduct of the Authority has given rise to a legitimate expectation then fairness requires that, if the Authority decides not to give effect to that expectation, the Authority articulates its reasons so that their propriety may be tested by the court if that is what the disappointed person requires."

166. Similarly, in **Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280**, it was held:

"The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognised and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine."

167. In **R vs. Devon County Council ex parte P Baker [1955] 1 All ER**, it was held that:

"...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognises that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision."

168. In the 8th Edition of ***Garner's Administrative Law***, **B. L. Jones and K. Thompson** observed at page 259 that:

"We may turn next to the operation of *audi alteram partem* in relation to decisions as to privileges, or 'licences'. It is first necessary to note various different kinds of decisions that may be taken in relation to privileges. For example, the decision may be to revoke an existing 'licence', to refuse to review an existing 'licence', or to refuse the initial grant of a 'licence'. In relation to each of these types of decision the expectations of the person affected is of much significance. Did the citizen have legitimate expectation of success, or was he simply 'hoping against hope' of obtaining, retaining, or being granted renewal of, a 'licence'? How do these factors influence the manner of operation of the audi alteram partem rule? The revocation of a privilege may generally be regarded as comparable to the act of taking away 'property'. It will usually defeat the privilege-holder's legitimate expectation that it will continue for its initially granted time-span, and accordingly the *audi alteram partem* rule will normally apply with some vigour. Such has, for example, been shown in cases where members have been expelled from clubs without the substantial procedural rights which the courts have been prepared to imply into their contracts of membership. Conversely, one who had no more than a mere hope of favour and failed to obtain it has lost nothing, save an advantage to which he had no legitimate expectation. The demands of procedural justice will in such a case be significantly less great."

169. It is therefore my view and I hold that in acting as it did, the 1st Respondent thwarted the applicants' legitimate expectations and acted unfairly. Whereas the 1st Respondent could still lawfully cancel the applicants' results, it had to be done in a fair and lawful manner. In my view a situation where the 1st Respondent releases the results first and then afterwards purports to conduct investigations thereon and proceeds to cancel the same without affording the affected parties an opportunity of challenging the intended decision cannot pass the test of reasonableness. Such a decision in my view amounts to irrationality. The 1st Respondent is expected to carry out the verification and investigations of the irregularities and complete them before releasing the results. It cannot release half-baked results and purport to have withdrawn them at the same time pending further investigations, particularly where there is no compelling reason for such a hurry and here no reason has been given why the 1st Respondent was in a hurry to release the results before fully verifying the same. Whereas there is no conclusive evidence that the 1st Respondent's decision was informed by the alleged anonymous letter, the manner in which the 1st Respondent conducted itself may well have justified the ex parte applicant's that the 1st Respondent's decision was in fact informed by the said letter.

170. It is therefore my view and I find that by cancelling the applicants' results after their release in these circumstances did not meet the basic tenets of fairness and that decision cannot stand. I associate myself with the position taken in **The Indian Borough of Newham vs. Khatun-Zeb and Iqbal [2004] EWCA Civ. 55** where it was held that:

"Clearly a public body may choose to deploy powers it enjoys under Statute in so draconian a fashion that the hardship suffered by the affected individuals in consequence will justify the court in condemning the exercise as irrational or perverse...At all events it is plain those oppressive decisions may be held to repugnant to compulsory public law standards."

171. Apart from the orders of certiorari, the applicants however seek orders an Order of *Prohibition* prohibiting the Respondents from publishing the Ex Parte applicant's school as one of the institutions whose 2017 KCSE results were cancelled. That such a publication had already been done is not in question. It is not contended that the Respondents intend to make further publication on the same. Accordingly, that order would be speculative.

172. The applicants also seek an Order of *mandamus* do issue to direct that the Respondent provide to the Ex Parte Applicants with marking

Reports in Biology and Chemistry, Chief Invigilator's Report, Chief Examiner's Report and KNEC Investigation Reports for the Applicant's school. On their part the Respondents relied on section 42 of the Act which, according to them, limits the rights to access to information held by the 1st Respondent by stating that:

> **"42. (1) The Right to access to information guaranteed under Article 35 of the Constitution is hereby limited under Article 24 of Constitution to the nature and extent contemplated under subsection (2).**
>
> **(2) The Council being a public entirety shall be under no obligation contemplated under Article 35 of the Constitution give such information as would, in the opinion of the Council**
>
> **(a) Compromise the integrity of any examination administered by the Council.**
>
> **(b) Compromise the examination process; or**
>
> **(c) Compromise the right to privacy of any individual."**

173. In this case, it was the 1st Respondent's case that the information required by the Applicants to be released is insulated by section 42 of the Act as read with sections 37 and 38 which mandates the 1st Respondent to keep such information confidential "and shall disclose such information only to the extent it considers necessary for the proper performance of its duties." In this case I am not informed the purpose for which the applicants require the said information. I however find that Rule 19 of Legal Notice No. 131 is of no use to the Respondents. The same provides that:

> **An examination script shall not be accessible to any candidate, institution, teacher or any other third party representing the interest of the candidate once the script has been marked.**

174. In this case the applicants are not seeking examination scripts. Pursuant to Article 47 of the Constitution the applicants are entitled to the investigation reports containing the reason for arriving at the decision to cancel the results. Since the advent of the Constitution of Kenya 2010 which brought with it Article 10, all public policy makers and implementers thereof as well as those who implement any legal provisions must to alive to the need for transparency and accountability. Whereas certain material may justifiably be kept confidential for the purposes of the integrity of national examinations, the confidentiality ought not to be elevated to the level of secrecy otherwise it may well defeat the spirit of Article 47 rights. As is provided in Article 24(2)(c) of the Constitution, a provision in legislation limiting a right or fundamental freedom shall not limit the right or fundamental freedom so far as to derogate from its core or essential content. To interpret restriction of access to examination material on ground of confidentiality to the level where not only the twin values and principles of transparency and accountability is rendered a dead letter of the law but also in a manner that completely obliterates the right to fair administrative action under Article 47 of the Constitution would amount to defiling the Constitution contrary to Article 20(3) and (4) of the Constitution which provides that:

> **(3) In applying a provision of the Bill of Rights, a court shall—**
>
> **(a) develop the law to the extent that it does not give effect to a righ*t or fundamental freedom; and***
>
> **(b) adopt the interpretation that most favours the enforcement *of a right or fundamental freedom.***
>
> **(4) In interpreting the Bill of Rights, a court, tribunal or other *authority shall promote—***
>
> **(a) the values that underlie an open and democratic society *based on human dignity, equality, equity and freedom; and***
>
> **(b) the spirit, purport and objects of the Bill of Rights.**

175. To permit the 1st Respondent to make decisions as to the conduct of examinations without answering to anybody by concealing all the material relied on in its decision would amount to arbitrariness which is the antithesis to transparency and accountability. As was appreciated by **Emukule, J** in in **Muslims for Human Rights (MUHURI) & Another vs. Inspector-General of Police & 5 Others [2015] eKLR** at para 140 that:

> **"The principles of constitutionalism and the rule of law lie at the root of our system of government. It is a fundamental postulate of our constitutional architecture. The expression the rule of law conveys a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. At its very basic level, the rule of law vouchsafes to the citizens and residents of Kenya, a stable, predictable and ordered society in which to conduct its affairs. Like our National Anthem says it is our shield and defender for individuals from arbitrary state action.**

176. In on **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** reliance was sought from the learned work of **Prof Sir William Wade** in his book **Administrative Law** which summarized the position as follows:

> **"The powers of public authorities are --- essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of**

revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…Certainty of law is an important pillar in the concept of the rule of law. As is no doubt clear in the findings in this case, it is an essential prerequisite of business planning and survival as well. Yes, the rule of law is a lifeline of the economy as is illustrated in the emerging and thriving economies of the world. The courts in my view have a responsibility to uphold the rule of law for this reason. The ability of businesses to plan stems from the bedrock of the rule of law."

177. The applicants also seek an order of *mandamus* compelling the 1st Respondent to certify the KCSE results released to the candidates, the school, the parents and the entire country on 20th December, 2017 as the valid final results of the 2017 KCSE examinations for the 190 students at Chebuyusi High School. In this case the Court is not concerned with the merits of the 1st Respondent's decision but the process by which it arrived at the same. I have found that the said process was clearly inimical to the fair administrative action. I however cannot place myself in the shoes of the 1st Respondent to determine that the conduct of the candidates in the said examinations was beyond reproach. That is the legal position propounded in **Hangsraz Mahatma Ganahi Institute & 2 Others [2008] MR 127** where it was stated that:

"Judicial Review is not a fishing expedition in unchartered seas. The course had been laid down in numerous case laws. It is that this court is concerned only with reviewing, not the merits of the decision reached, but of the decision making process of the authority concerned. It would scrutinize the procedure adopted to arrive at the decisions to ascertain that it is in uniformity with all elements of fairness, reasonableness and most of all its legality. It must be borne in mind and which had been repeated many times by this court that it is not its role to substitute itself for the opinion of the authorities concerned. This court on a judicial review application does not act as a court of appeal of the decision of the body concerned and it will not interfere in any way in the exercise of the discretionary power which the statute had granted to the body concerned. However it will intervene when the body concerned had acted ultra vires its powers, reached a decision which is manifestly unreasonable in the Wednesbury sense; had acted in an unfairly manner and the applicant was not given a fair treatment."

178. Similarly in In **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 Others [2016] KLR,** the Court of Appeal held at para 58:

"The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act*, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e)* and *(h)* of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts."

179. Conversely the 1st Respondent must make a lawful decision within a reasonable time. Therefore unless the 1st Respondent commences the process of cancellation of the applicants' results in accordance with the law, there is no valid reason why the applicant's results as released cannot be certified as correct.

Order

180. In the final analysis, I make the following orders:

(1) A declaration that the manner in which the results of the 2017 examinations for Chebuyusi High School were cancelled did not meet the threshold of fair administrative action.

(2) An Order of *Certiorari* bringing into this Honourable Court for the purpose of being quashed and quashing the Respondent's decision contained in the LETTER, Ref. KNEC/CONF/R&QA/SE/KCSE/IRR/2017/037 dated 16th January, 2018 on the subject: THE YEAR 2017 KCSE EXAMINATION RESULTS to the extent it cancelled the 2017 KCSE examination results for all the candidates who took the Biology and Chemistry examinations at Chebuyusi High School as released by the 1st Respondent on 20/12/2017.

(3) An Order of *Certiorari* do issue to bringing into this Honourable Court for the purpose of being quashed and quashing the LETTER, Ref. KNEC/CONF/R&QA/SE/KCSE/IRR/2017/037 dated 16th January, 2018 on the subject: THE YEAR 2017 KCSE EXAMINATION RESULTS to the extent it purports to cancel, affects or impinges on the Applicant's school, Chebuyusi High School, 2017 KCSE examination results as released by the Respondent on 20/12/2017.

(4) An order that unless the 1st Respondent initiates a lawful process of cancellation of the applicants' results within 14 days from the date of service of this decision on the, *mandamus* shall issue compelling the 1st Respondent to certify the KCSE

results released to the candidates, the school, the parents and the entire country on 20/12/2017 as the valid final results of the 2017 KCSE examinations for the 190 students at Chebuyusi High School.

(5) The costs of this application are awarded to the applicants to be borne by the 1st Respondent.

181. It is so ordered.

Dated at Nairobi this 21st day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Makhandia for Mr Agonga for the Applicants

Miss Oloo for Mr Obura for the 1st Respondent

CA Ooko