



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 539 OF 2016

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT

COUNTY SECRETARY,

COUNTY GOVERNMENT OF NAIROBI.....2ND RESPONDENT

DIRECTOR OF LICENSING,

COUNTY GOVERNMENT OF NAIROBI.....3RD RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....4TH RESPONDENT

EX PARTE: COMPLIMENTARY SCHOOLS ASSOCIATION

OF KENYA (DAGORETTI SUB-COUNTY BRANCH)

JUDGEMENT

Introduction

1. By a Notice of Motion dated 18th November, 2016, the ex parte applicant herein, **Complimentary Schools Association of Kenya (Dagoretti Sub-County Branch)**, seeks the following orders:

1. **Orders of Prohibition to prohibit the 1st, 2nd and 3rd respondents, their agents and assigns, from levying and or from purporting to levy any taxes in form of Single Business Permits against the applicants' members who are Alternative Providers of Basic Education and Training (APBET) Schools, and further from harassing them or interfering with the said members' schools and officials under the purport of enforcing such taxes or levies.**

2. **Costs and interest.**

Ex Parte Applicant's Case

2. According to the applicant, it is a duly registered organisation under the **Societies Act** with members at

Dagoretti Branch (hereinafter referred to as “the Branch”) comprising of over 200 schools.

3. It was averred that the applicant’s members complement the efforts of Private Schools and the Government of Kenya to provide basic education under Articles 43 and 53(b) of the Constitution and the **Basic Education Regulations, 2015**, and are recognised by the Government under its **Alternative Providers of Basic Education and Training Policy 2009** (APBET) and Registration Guidelines.

4. According to the applicant APBET Schools provide basic education to the needy children in the informal settlements and rural areas of Kenya which has been made possible by the Ministry’s Education’s setting up minimum standard for their establishment as otherwise needy children may not have had access to basic education for want of registration of education service providers. They are therefore registered with the Ministry of Education, which has the mandate to regulate them, and under the Ministry of Gender, Children and Social Development, which has issued them with certificates of registration.

5. Based on the various provisions of the **Public Benefits Organisations Act, 2013, (PBO Act)** and the **Basic Education Regulations, 2015**, it was averred that APBET Schools under paragraph 74 thereof charges only levies approved by the Cabinet Secretary in consultation with the County Education Board and as such the APBET Schools, are not businesses liable to pay taxes but are otherwise exempted.

6. However from the year 2013, the 1st to 3rd Respondents decided to tax and render levies against the applicant’s members and specifically in the issuance of its annual Single Business Licence, and continued to do so to date, by assigning the applicant’s members a code 695 “Other Professional and Technical Services”. In addition they have decided to reassign the applicant’s members a new code 795 “Other Education, Health and Entertainment” which they have demanded the applicant’s members to comply with.

7. It was averred that the **Nairobi City County Finance Act, 2013**, which empowers the Nairobi City County Assembly to provide for various taxes, fees and charges for services, does not mandate the 1st Respondent to levy any taxes, and specifically the Single Business Licence, against APBET Schools, the applicant’s members; rather, the target are private schools. To the applicant, even the codes under which the 1st respondent has purported to tax the applicant’s members apply only to private schools and not to Community Based Organisations of which the applicant’s members comprise.

8. It was therefore the applicant’s case that the decision to levy taxes and demand to issue a single business permit was made without any statutory mandate and without any gazettelement whatsoever, and is thus made without mandate, in excess of authority and ultra vires the mandate of the 1st to 3rd Respondents, the **PBO Act, 2013**, the Constitution, the **Basic Education Regulations, 2015** and the **Alternative Providers of Basic Education and Training Policy 2009**.

9. The applicant further complained that the said Respondents have visited on the applicants acts of harassment in purporting to enforce compliance with the said decision, amounting to destruction of property, persecution, illegal arrests and arraignment in Court and interference with the members’ free management of their schools, to the detriment of the service beneficiaries and the school children. It was further averred that the said Respondents disowned licences that they gave four of the applicant’s members claiming that the licences for the year 2016 that they paid for are forgeries.

10. The applicant reiterated that the decision and actions of the said Respondents were inconsistent with the provisions of the **PBO Act, 2013** in so far as they are hindering much needed services to the public despite the requirement that all state officials further the ends and objectives of PBOs and of that Act; as such, the decision and actions are similarly ultra vires and without any lawful mandate.

11. It was further contended by the applicant that whereas the 1st to 3rd Respondents have levied taxes, charges and levies upon the applicant’s member schools from 2013 to 2016, in those years there has been no legal framework authorising them to do so at the rate of Kshs 10,000/= or more. It was the applicant’s

case that the **Nairobi City County Provisional Collection of Revenue Act, 2013** which brought into operation the **Nairobi City County Finance Act 2013** w.e.f from 20th September 2013, never provided for the taxing or levying of any duties upon the APBET Schools. It was averred that the **Finance Act, 2013** only levied Kshs 1,000/= for income generating activities and Kshs 500/= for non income generating ones. However there were no specific enactments for the years 2014 and 2015.

12. According to the applicants, the 1st, 2nd and 3rd Respondents have levied taxes, charges and levies upon the ex parte applicant's member schools from the year 2013, 2014, 2015 and now 2016 yet in those years there was no legal framework, and or valid legal framework, authorizing the respondents to levy the charges of Kshs. 10, 000/= or more upon the ex parte applicant's members. Based on their counsel's advice the applicants contended:

a. That **Nairobi City County Provisional Collection of Revenue Act 2013** brought into operation the **Nairobi City County Finance Act 2013** w.e.f the 20th September 2013. Even so, it never provided for the taxing or levying of any duties upon the APBET Schools. The **Finance Act 2013**, under the heading "Community Development Services" at pp. 82 and 83, levied only Kshs. 1, 000/= for income generating activities and Kshs. 500/= for non income generating activities.

b. That there were no specific enactments for the years 2014 and 2015.

c. That the **Finance Act 2015** was assented to on the 20th November 2015 and came into force on the 1st March 2016. That Act similarly levied only Kshs. 1, 000/= for income generating activities and Kshs. 500/= for non income generating activities upon community development services, and further provided for a tax or levy waiver of 50% for charitable organisations.

13. As such, there is no lawful authority why the 1st respondent should charge Kshs. 1, 000/= or Kshs. 500/= as the case may be, with a 50% waiver on the same, on the material times. The applicants therefore insisted that the respondents acted *ultra vires* the 1st respondent's finance statutes by levying fees as it did without authority; that they therefore acted without constitutional fiat and contrary to Articles 209 and 210 of the Constitution 2010 by levying taxes without authority and in a manner prejudicial to the provision of basic education, which therefore violated the children rights to basic education under the Constitution 2010; and that there is no denial that the ex parte applicant's members are Community Based Organisation, not for profit organisations, duly registered and offering charitable services under the Ministry of Education. As such, their revenue is exempt from tax under the **NGO Co-ordination Act** Cap 134. Insofar therefore as the respondents insist on taxing our members, their action is *ultra vires* those Acts.

14. It was the applicant's case that their members complement private and public schools in providing education services, which are recognized by the pertinent Ministry which has in turn made pertinent policies regarding the same.

15. It was submitted by the applicants that whereas the County Government is permitted by Article 209(3) and (4) Constitution 2010 to impose taxes, Article 210(1) thereunder, provides that taxes can only be imposed by legislation, which in this case refers to Finance Statutes enacted by the 1st respondent. According to them, the ex parte applicant's members are complementary schools, community based organizations, who complement the National Government's efforts to provide basic education, a constitutional right, under the Ministry of Education's Alternative Providers of Basic Education and Training (APBET) Policy 2009 yet the respondents has been levying and collecting taxes against them as private income generating schools. It was contended that firstly, the Respondents have ignored the status of the ex parte applicant's members as Community Based Organizations, who are not business and who cannot be taxed as businesses under their Single Business Annual License and secondly, that the respondents' action to levy Kshs. 10, 000/= annually against the ex parte applicant's members, and to seek to increase it to Kshs 20,000/= annually under a different code, is not supported by the 1st respondent's finance legislation, is therefore *ultra vires* its own Financial Acts and is also therefore inconsistent with Article 210(1) Constitution 2010. Since the applicants are community based

organization known as complementary schools, and their status is known to the respondents who have time and again levied taxes against them as such, it was submitted that the respondents are estopped from asserting the converse regarding the ex parte applicant's members' status.

16. According to the applicants, from the year 2013, the 1st respondent imposed the taxes above, of Kshs. 10,000/= annually, by disregarding the ex parte applicant's members' status as CBO's, non-profit making organizations, without statutory backing. In 2013 and 2014, as seen from the Single Business Licenses annexed to the verifying affidavit, the respondents changed and collected Kshs. 10,000/= annually under Code 695 (Other Professional and Technical Services), and now threatened to charge Kshs. 20, 000/= annually under Code 795 (Other Education, Health and Entertainment) yet these two codes apply to professional persons/ institutions, or private schools as the case may be, and not to the ex parte applicant's members, APBET schools. In 2013, the 1st respondent enacted the **Nairobi City County Finance Act 2013**. taxes on professional, Technical and Financial Services referred to above are levied under Clause 2.6 of that Act, which provided for various professional services and not APBET schools / CBO's. Taxes on Private Education, Health and Entertainment were levied under Clause 2.7 and applied to private schools, not APBET Schools. Accordingly, there was no specific provision for APBET Schools/ CBO's under that Act. However, **the Nairobi City County Provisions Collection of Revenues Act 2013** which came into operation on 20th September 2013, brought into operation the Nairobi City County Finance Act 2013 which now provided for CBO's under its Clause 8.4, against whom only Kshs. 1,500/= was to be levied. It was submitted that since no status for revenue collection were enacted for the years 2014 and 2015 by the 1st respondent as such, either the 2013 Act still applied, or there was no authority to levy those taxes against the ex parte applicant's members. In 2016, **The Finance Act 2015** came into operation on 1st March 2016, and imposed Kshs. 1,000/= for income generating CBO's and Kshs. 500/= for non-income generating CBO's. It was therefore submitted that there is thus no justification for the imposition of, and collection of, Kshs. 10, 000/= from the ex parte applicant's members, or the threatened increase to Kshs. 20, 000/= under a different code and in fact, the respondent has been collecting that amount unlawfully.

17. It was contended that since no remedy other than judicial review remedies are available for the ex parte applicants who sought a response from the respondents without success, the applicants are entitled to judgment as prayed for.

18. The applicants therefore prayed that the substantive application be allowed with costs, and further in the exercise of discretion, this Court grants remedial measures to the effect that the excess revenue collected by the respondents be refunded and or be applied to future years, as the case may be.

Respondent's Case

19. The application was opposed by the Respondent.

20. According to the Respondent, the gist of the Applicants' Application is that they seek Prohibitory Orders from this court as against the 1st, 2nd and 3rd Respondents from levying of taxes in form of Single Business Permits on Alternative Providers of Basic Education and Training (APBET) Schools. It was however contended that for a Non-profit Organization to be exempt from tax, the organization must have been established solely to relieve poverty or distress of the Public or to advance religion or education. For an Organization to be exempted from paying tax the Commissioner of Income Tax must conclude that the income is expended within Kenya or in ways that benefit the residents of Kenya. In this respect the Respondent relied on Article 210 of the Constitution.

21. It was however the Respondent's case that if indeed the Applicants are exempt from paying tax the Respondent does not have any such record showing that the Applicants are exempted from paying taxes and duties. The Respondent however averred that for one to be a provider of Basic Education in Kenya one has to be accredited and registered as such under section 76 of the **Basic Education Act**. It was therefore contended that the Applicants are under an obligation to ensure that they are accredited and registered under the **Basic Education Act No. 14 of 2013** and that they should pay the requisite fees

required for licensing, registration and accreditation to the relevant agencies under the Act; in this case the licensing body is Nairobi City County Government. The **Basic Education Act 2013**, it was contended states that the Cabinet Secretary may, upon consultation with National Education Board prescribe regulations on how schools shall be classified, and make different provisions with respect to different classes or kinds of schools, impose conditions and make exemptions. Accordingly, the exemption to pay tax is not automatic and that the Applicants as per the **Basic Education Act** are to be exempted by the Cabinet Secretary on paying taxes and duties. In this respect the Respondent relied on section 95 3(j) of the same Act.

22. The Respondent's case was therefore that the Applicants ought to be exempted from paying taxes and duties by making an Application to the Cabinet Secretary to be exempted from paying taxes and duties and that it is on the basis of section 95 (3)(i) and (j) of the **Basic Education Act**, that the Ministry of Education, Science and Technology has developed guidelines to provide registration and regulation of APBET. It was emphasised that any grant of tax exemption is on the discretion of the Cabinet Secretary based on the recommendation of the County Education Board.

23. In this case it was contended that there is no form of proof that the said organization has indeed been registered under the **Basic Education Act** which is a requirement under that Act, meaning that they are registered with Ministry of Education Science and Technology. The Respondent explained that for a Non-profit Organization to be exempted from tax under the Income Tax Act the process is as follows:

a. Inspection of the Organization by Kenya Revenue Authority field offices

b. PAYE and withholding Income tax audit;

c. Application is received by Senior Deputy Commissioner and put on a register and the same is analyzed;

d. The Application can either be approved or rejected;

e. If the Application is approved and exemption certificate will be issued in the system and sent to the tax payer;

24. The Respondent therefore averred that the Applicants' notion that being registered under the **Societies Act** means automatic exemption from paying tax and duties is misguided and that they should at least have some form of proof of such exemption; in this case a tax exemption certificate from the taxing master. It was contended that the Applicants have not shown any documentation that proves they have indeed been exempted to pay taxes and duties, all they are showing to this Court are certificates of the various Ministries they are registered under, these being for example Ministry of Gender, Children and Social Development.

25. It was the Respondent's case that the applicants had not proved that the Respondent acted *ultra vires* in charging tax on the licensing single business permit and that the charging of tax on the business permit is infringing the Children's right to free basic education under Article 43 and 53(2) of the Constitution of Kenya. The Respondent however denied that they had harassed the Applicants' members in an effort to enforce compliance and averred that there is no proof of destruction of the Applicants' members' property, persecution, illegal arrest and interfering with the members free management of their schools. Similarly they contended that the claim that the Respondents have disowned licenses of some Applicants' members which are said to be forgeries, was not supported by any evidence.

26. To the Respondent they advocate for every person or organization not exempted to pay tax to do so as it is the duty of all to do the same to ensure maintenance such as provision for clean water, public lighting e.t.c and relied on **Dileep Manubhai Patel & 3 Others vs. Municipal Council of Nakuru & Another [2014] eKLR**, as cited in **Republic vs. Kwale County Government Ex parte Kenya Airports Authority [2016] eKLR**.

27. It was submitted on behalf of the Respondents that the Public ***Benefits Organization Act, 2013*** creates a legal, regulatory and institutional framework for non-profit organizations doing public benefit work in Kenya. The Public Benefits Organization is defined as a voluntary membership or non-membership grouping of individuals or organizations, which is autonomous, non-partisan and non-profit. They are essentially organizations that engage in public benefit activities. The ***Public Benefits Organization Act*** emphasizes that the said organization must be registered as such by the Authority.

28. In this case it was submitted that the Ex-parte Applicants have not shown anything to this court that they are indeed registered under the Public Benefits Organization Act but have instead shown to the court that they are registered under section 10 of the ***Societies Act***. The Respondents believed that if the ***Public Benefits Organization Act*** were to apply to the Ex-parte Applicant they ought to have been registered under the said Act as section 5(2) of the ***Public Benefit Organization Act*** provides for the various organizations and bodies that are not covered by the ***Public Benefits Organization Act, 2013***.

29. By dint of the Ex-parte Applicant being registered under the ***Societies Act*** it was contended that the Public ***Benefits Organization Act, 2013*** does not apply to the Ex-parte Applicant since section 6(2) of the ***Public Benefits Organization Act*** provides that if an organization is registered under any other law it shall not be registered under the ***Public Benefits Organization Act, 2013***. Therefore, the benefits that are to be enjoyed by organizations registered under the ***Public Benefits Organization Act*** such as tax exemption as provided under schedule 2 thereof do not apply to the Ex-parte Applicant.

30. It was submitted that the schools whose certificates are exhibited by the applicant as being majorly affected by the taxes and levies are also registered as Community Based Organizations and others as a Self Help Group organization and there is no member that has shown to be registered under the ***Public Benefits Organization Act, 2013***.

31. While appreciating that ***Public Benefits Organization Act*** permits an organization to register under any of variety of legal forms, it was contended that if an organization registers as a Public Benefit Organization in order to receive tax exemptions and other benefits derived from its status, it will cease to be registered under any other law. However the Ex-parte Applicant as it is clearly evident are still registered under the ***Societies Act*** and a number of its schools are registered under various legal forms.

32. The Court was therefore urged not to issue any order prohibiting the 1st, 2nd and 3rd Respondents from collecting revenue because as we have shown above the Ex-parte Applicants are not exempted from paying taxes and rates as they are not covered by the ***Public Benefits Organization Act, 2013***.

33. According to the Respondents, the Government has developed guidelines to provide basis for establishment of Alternative Provision of Basic Education and Training, the guideline operates as the APBET policy frame work, guide regulation and facilitates the establishment, registration and provision of quality education. These guidelines define minimum standards and procedures for the registration of APBET institutions. To the Respondents, the policy defines an Alternative Provision of Basic Education and Training (APBET) schools as “an institution that resembles a formal school in that it aims at transmitting a formulated curriculum leading to formal school examinations” thereby showing the need to be registered under the Basic Education Act. The policy, in the Respondents’ understanding makes it mandatory for all non-formal schools to register with the Ministry of Education as Alternative Provision of Basic Education and Training. It was submitted that the ***Basic Education Act, 2013*** provides that a person who will want to offer Basic education in Kenya must be accredited and registered as provided for under the law as per section 76 of the ***Basic Education Act***. In this case however, the Ex-parte Applicants have not shown to this court that they are indeed registered and accredited as providers of the said Alternative Basic Education as per the requirements of the ***Basic Education Act***.

34. It was submitted that since a reading of the ***Basic Education Act, 2013*** does not reveal any provision of the law that states that the Alternative Basic Education providers are exempted from paying levies and taxes, the Ex-parte Applicants are required to pay taxes as provided by the law. According to the Respondents, the ***Basic education Act, 2013*** in under section 95 3(j) states that the Cabinet Secretary may, upon consultation with the National Education Board prescribe regulations on how schools shall be

classified, and make different provisions with respect to different classes or kinds of schools, impose conditions and make exemptions.

35. According to the Respondents, for the Ex-parte Applicant to be exempted from paying taxes they must be exempted by the Cabinet Secretary based on the recommendation of the County Education Board. However there is no form of proof on record that the said organization is indeed registered under the **Basic Education Act** to be exempted from paying any levies and taxes and that is why the 1st, 2nd and 3rd Respondents have classified them as other Professional and Technical Services as well as Other Education, Health and Entertainment.

36. It was contended that as the **Nairobi City County Finance Act, 2013** has rightfully empowered the Nairobi City County to collect taxes and levies from organizations that have not been exempted from paying taxes by any government body, the court should not prohibit the 1st, 2nd and 3rd Respondents from fulfilling their rightful mandate under the Act. The Respondents relied on the decision of **Lenaola, J** (as he then was) in **Pharmaceutical Manufacturing (K) Co. Ltd & Others vs. Commissioner General of the Kenya Revenue Authority & 2 Others [2014] eKLR.**

37. On the authority of **Robert N. Gakuru and Others vs Governor Kiambu County and 3 Others, Petition No 532 of 2013,** it was submitted that the County Government of Nairobi is rightfully mandated by the **Nairobi City County Finance Act, 2013** to collect levies and taxes on any business permit and in this case there is no evidence that the Ex-parte Applicants have been exempted from paying any taxes and levies and therefore they should comply with the laws of the land.

38. The Respondents argued that an Order of Prohibition should not issue as the Ex-parte Applicants are liable to pay charges, levies and taxes to the 1st Respondent and that if such an order is issued it will prejudice the Nairobi City County as they will not be able to perform their mandated functions under the law.

39. In support of their submissions the Respondents relied on **Kenya National Examination vs The Republic, Ex Parte Geoffrey Gathenji Njoroge & 9 Others, CA No. 266 of 1996 [1997] eKLR** and prayed that the Application dated

Determination

40. I have considered the foregoing.

41. The grounds upon which the application was based were as follows:

1. That the applicant is a registered organization under the Societies Act with member schools registered as not for profit community based organisations under the Public Benefits organisations Act 2013 who provide basic education that complements the private sector and the Government of Kenya under the auspices of the Alternative Providers or Basic Education and Training Policy 2009 and the Basic Education Regulations 2015.

2. That as such, the applicant's members are not business and are not liable to pay taxes or duties, for they are indeed exempted.

3. That the applicant's members are similarly regulated by the Ministry of Education, Science and Technology, which recognized their importance and provided minimum requirements to set up and manage schools as APBET Schools.

4. That the 1st, 2nd and 3rd respondent have, however, from the year 2013 onwards, levied Single Business Permit taxes and forced compliance, including arrest and arraignment in court, and preventing the members from carrying out their functions, all without and lawful or constitutional mandate.

5. That the 1st, 2nd and 3rd respondents have therefore acted *ultra vires* the public Benefits Organisations, the Kenya Basic Education Regulations 2015, and Articles 43 and 53(b) of the constitution 2010 on the childrens' right to free basic education, is unlawful and unconstitutional.

6. That it is therefore imperative that this application be allowed in order to allow for the challenge of the decision in question.

42. It is therefore clear that the issue of there being no regulatory framework in place permitting the Respondents to charge Kshs 10,000.00 or any other amount was not one of the grounds specified in the body of the statement. Order 53 rule 4(1) of the *Civil Procedure Rules* provides as hereunder:

(1) Copies of the statement accompanying the application for leave shall be served with the notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and relief set out in the said statement.

(2) The High Court may on the hearing of the motion allow the said statement to be amended, and may allow further affidavits to be used if they deal with new matter arising out of the affidavits of any other party to the application, and where the applicant intends to ask to be allowed to amend his statement or use further affidavits, he shall give notice of his intention and of any proposed amendment of his statement, and shall supply on demand copies of any such further affidavits.

(3) Every party to the proceedings shall supply to any other party, on demand, copies of the affidavits which he proposes to use at the hearing.

43. Therefore a party is not entitled to rely on any ground or seek any relief and the Court is barred from granting relief other than those sought in the statement and based on any ground other than those stated in the statement. See **Republic vs. Land Disputes Tribunal Court Central Division and Another Ex parte Nzioka [2006] 1 EA 321.**

44. The rationale for this is that in granting leave to apply for judicial review, the Court looks at the material before it and a party having obtained leave based on particular grounds ought not to change his case midstream by abandoning the grounds upon which leave was granted and in effect change the nature of his case by relying on totally different state of affairs. Again where leave is granted to apply for a particular relief, it is that relief that the applicant is entitled to seek in the substantive Motion and he cannot be allowed to seek a relief for which leave was neither sought nor granted. This is so because an application for judicial review can only be granted where leave of the court has been sought to apply for a particular relief. Accordingly, a relief for which leave to apply therefor was not sought cannot be granted. I will therefore not consider the ground of failure to enact the enabling legislation as one of the grounds upon which the reliefs sought herein may be granted.

45. In this case therefore the ex parte applicant's case is hinged upon the allegation that its members are exempted from the payment of taxes. It was averred that the ***Nairobi City County Finance Act, 2013***, which empowers the Nairobi City County Assembly to provide for various taxes, fees and charges for services, does not mandate the 1st Respondent to levy any taxes, and specifically the Single Business Licence, against APBET Schools, the applicant's members; rather, the target are private schools. To the applicant, even the codes under which the 1st respondent has purported to tax the applicant's members apply only to private schools and not to Community Based Organisations of which the applicant's members comprise.

46. When it comes to issues relating to taxation, the first port of call is Article 210 of the Constitution which states as follows:

(1) No tax or licensing fee may be imposed, waived or varied except as provided by legislation.

(2) If legislation permits the waiver of any tax or licensing fee—

(a) a public record of each waiver shall be maintained together with the reason for the waiver; and

(b) each waiver, and the reason for it, shall be reported to the Auditor-General.

47. In this case the applicants relied on the Second Schedule to the **PBO Act** as the provision setting out the benefits of registration of a PBO which includes tax exemptions. It is true that the said schedule deals with such benefits. However section 6 of the **PBO Act** provides as hereunder:

6. (1) A public benefit organization shall be registered under this Act for it to enjoy the benefits that accrue under this Act.

(2) No organization that is registered under any other law in Kenya shall be registered under this Act while its registration under that other law subsists.

(3) Without prejudice to subsection (1), registration of an organization under this Act supersedes any prior registration of that organization under any other law in Kenya.

(4) Where an organization is registered under this Act and under any other law, that organization shall be deemed registered under this Act and that other registration shall be deemed invalid.

(5) Organizations shall be deemed to be similar under this section if the name, objects and the officials, taken together, are similar whether wholly or partially.

48. It is therefore clear that for an organisation to enjoy the benefits conferred under the **PBO Act**, it must be registered under the said Act. In this case the only certificate exhibited by the ex parte applicant shows that it is registered under section 10 of the **Societies Act**. Section 5(2) of the **PBO Act** provides that for greater certainty, a public benefit organization does not include-

a) A trade Union within the meaning of the Labour Relations Act, 2007 (Cap. 233)

b) A public body established by or under any written law

c) A political party within the meaning of the Political Parties Act, 2007 (Cap. 7B)

d) A religious organization which is primarily devoted to religious teaching or worship

e) A society within the meaning of the Societies Act (Cap. 108)

f) A co-operative Society within the meaning of the Co-operative Societies Act (Cap. 469)

g) A Sacco Society within the meaning of the Sacco Societies Act (Cap.490 B)

h) A Micro-finance institution within the meaning of the Micro-Finance Institutions Act, 2006 (No. 19 of 2006)

i) A Community Based Organization whose objective include the direct benefit of its members.

49. Accordingly an organisation registered under different legal regime cannot claim to be a PBO and to be specific a society registered under the **Societies Act** is expressly excluded from claiming to be a PBO. Where however for some reason an organisation is registered under another legal regime as well as under

the **PBO Act**, and this is not permissible, the provisions of the **PBO Act** by virtue of section 6 of the Act takes precedence. The applicant cannot therefore claim tax exemptions by virtue of the provisions of the **PBO Act**.

50. The applicants have however sought to rely on the provisions of the **Basic Education Act**. However section 95(3)(j) of the same Act states that:

The Cabinet Secretary may make regulations with respect to the conduct and management of schools and such regulations may—

(j) make different provisions with respect to different classes or kinds of schools, impose conditions and make exemptions;

51. It is therefore clear that exemptions under the said Act can only apply where the Cabinet Secretary has promulgated regulations under which there exist provisions relating to exemptions and the conditions attached thereto. In this case it was contended which contention was not seriously disputed that that the Ministry of Education, Science and Technology has in fact developed guidelines to provide for registration and regulation of APBET under which any grant of tax exemption is at the discretion of the Cabinet Secretary based on the recommendation of the County Education Board. Again from the record of the proceedings there is no evidence that the applicant or any of the educational institutions mentioned is registered under the **Basic Education Act** and in particular section 76 thereof and hence entitled to enjoy the benefits thereunder. Instead there are certificates issued under the Ministry of Gender, Children and Social Development.

52. This does not mean at the applicants are not entitled to tax exemptions. As was appreciated by **Lenaola, J** (as he then was) in **Pharmaceutical Manufacturing (K) Co. Ltd & Others vs. Commissioner General of the Kenya Revenue Authority & 2 Others [2014] eKLR**, exemption from paying taxes may well be there but the same has to be from proper approvals being obtained and it is upon the applicant to show that it has been exempted from payment of taxes since as held in **Dileep Manubhai Patel & 3 Others vs. Municipal Council of Nakuru & Another [2014] eKLR**, as cited in **Republic vs. Kwale County Government Ex parte Kenya Airports Authority [2016] eKLR**:

“it is the duty and obligation of every person liable to pay tax, to pay that respective tax, for that is the price of modern civilization, and in particular of living in planned urban areas, townships and cities. It is the price of collective benefits of the provision of clean water, public lighting, roads and ancillary facilities and maintenance thereof...”

53. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**. In that case the Court cited with approval **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** and held:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”

54. The Court of Appeal set out the grounds upon which the judicial review reliefs of certiorari, prohibition and mandamus may be granted in Kenya National Examination Council vs. Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996 [1997] eKLR when it stated:

“That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY’S LAW OF ENGLAND, 4th Edition, Vol. 1 at pg.37 paragraph 128...The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY’S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed...Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”

55. In East African Community vs. Railways African Union (Kenya) And Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist grounds which justify the grant of the said orders.

56. I associate myself with the holding in Republic vs. Kenya Power & Lighting Company Limited &

Another [2013] eKLR to the effect that:

“It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted.”

57. In this case I cannot find any basis upon which the Respondents’ actions can be faulted. In the premises there is no merit in the Notice of Motion dated 18th November, 2016.

Order

58. Consequently, the order which commends itself to me and which I hereby grant is that the Motion fails and is dismissed but taking into consideration the fact that the applicants are no doubt making efforts to afford education to the less fortunate children in the society, there will be no order as to costs.

59. It is so ordered.

Dated at Nairobi this 16th day of October, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ombwao for the ex parte applicant

Miss Otieno for the Respondents

CA Ooko