



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. APPLICATION NO 328 OF 2015**

**IN THE MATTER OF AN APPLICATION BY CHARLES MAINA WANJIHIA AND EUPA JOHN OSAMONG' FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA, ARTICLES 3(1); 50(1), 47(1), 47(2), 73(1) (a) & (b), 159(2) (e) AND 165(6) & (7)**

**AND**

**IN THE MATTER OF THE KENYA NATIONAL EXAMINATIONS COUNCIL (CAP 255A), SECTIONS 10(1)(b), 10(2)€, 48(2)(b);**

**AND**

**IN THE MATTER OF THE STATUTORY INSTRUMENTS ACT NO. 23 OF 2013, SECTIONS 6, 11, 22 AND 25;**

**AND**

**IN THE MATTER OF THE TECHNICAL AND VOCATIONAL EDUCATION AND TRAINING ACT NO 29 OF 2013, SECTIONS 17, 18, 19 AND 58;**

**AND**

**IN THE MATTER OF THE ARBITRARY DECISION OF THE KENYA NATIONAL EXAMINATIONS COUNCIL TO NOT ONLY ILLEGALLY WITHHOLD CERTIFICATES AND DIPLOMAS OF STUDENTS OF THE FOUNDATION INSTITUTE OF AFRICA, BUT ALSO TO CANCEL AND PERMANENTLY REMOVE FROM ITS RECORD, EXAMINATION RESULTS OF THE SAID STUDENTS**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**KENYA NATIONAL EXAMINATIONS COUNCIL.....RESPONDENT**

**AND**

CHARLES MAINA WANJIHIA.....1<sup>ST</sup> EX-PARTE APPLICANT

EUPA JOHN OSAMONG’.....2<sup>ND</sup> EX-PARTE APPLICANT

## JUDGEMENT

### Introduction

1. By a Notice of Motion dated 6<sup>th</sup> October, 2015, the *ex parte* applicants herein, **Charles Maina Wanjihia** and **Eupa John Osamong’** seek the following orders:
  - a. **An Order of *Certiorari* do issue to remove into this Honourable Court for purpose of it being quashed, the decision of the Kenya National Examinations Council contained in their letter reference number KNEC/CONF/RS/EM/TE/ECDE/2015 dated 20<sup>th</sup> August 2015 to cancel the entire results of 489 Candidates who sat for 2014 Early Childhood Development Examinations at the Foundation Institute of Africa, Maara Campus;**
  - b. **An Order of *Certiorari* do issue to remove into this Honourable Court for purpose of it being quashed, the decision of the Kenya National Examinations Council contained in their letter reference number KNEC/CONF/RS/EM/TE/ECDE/2015/030 dated 26<sup>th</sup> August 2015 to cancel the entire results of 513 Candidates who sat for 2014 Early Childhood Development Examinations at the Foundation Institute of Africa, Kitale Campus;**
  - c. **An Order of *Certiorari* do issue to remove into this Honourable Court for purpose of it being quashed, any decision of the Kenya National Examinations Council to cancel the results of any Candidate who sat for 2014 Early Childhood Development Examinations at the Foundation Institute of Africa or its campuses;**
  - d. **An Order of *Prohibition* do issue to stop and/or restrain the Kenya National Examinations Council from cancelling, deleting or in any manner whatsoever losing record of results of the Candidates who sat for 2014 Early Childhood Development Examinations at the Foundation Institute of Africa or its campuses;**
  - e. **An Order of *Mandamus* do issue directed upon the Kenya National Examinations Council to compel it to declare examination results of the Candidates who sat for 2014 Early Childhood Development Examinations at the Foundation Institute of Africa;**
  - f. **An Order of *Mandamus* do issue directed upon the Kenya National Examinations Council to compel it to release to the Candidates who sat for 2014 Early Childhood Development Examinations at the Foundation Institute of Africa, their Certificates and Diplomas earned in the examinations;**
  - g. **Costs of this Application be provided for; and**
  - h. **Such further or other relief as the Honourable Court may deem just and expedient to grant.**

### Ex Parte Applicants’ Case

2. According to the Applicants, the Foundation Institute of Africa (hereinafter, “the Institute”) is a not for profit organization that runs Early Childhood Development and Education (ECDE) programmes, geared towards improving teachers’ professional skills and its mandate is supported by all government agencies, including the Teachers Service Commission. In order to subsidise the cost of its programmes, and cognizant of the high poverty levels in Kenya, the Institute management sources for sponsorship of its programmes from accredited sponsors, thereby making it one of the most affordable institutions offering the ECDE programmes in Kenya.
3. The applicant contended that it is a mandatory requirement under the provisions of section 17 of the ***Technical and Vocational Education and Training Act No. 29 of 2013*** (“the Act”) for any institution intending to offer, inter alia, ECDE training programmes, to be registered with the Ministry of Education, through the Board of the Technical and Vocational Education and Training Authority (hereinafter, “the Board”). Pursuant thereto, sometime in early 2014, the Institute applied to be registered by the Ministry of Education, through the Board to offer ECDE training programmes to teachers including the applicants. It was contended by the applicants that under the

- provisions of section 19 of the Act, the Board had three months from early 2014 when it received the Application by the Institute for registration and licensing to examine the documents submitted to it for registration and licensing and to inspect and assess the facilities of the Institute for their suitability to provide ECDE training programmes.
4. It was averred that sometime in late 2013, the Respondent, Kenya National Examinations Council (hereinafter referred to as “KNEC”) sent out a Circular to the public, prescribing Examinations registration deadline as being the 31<sup>st</sup> day of April 2014 and setting out ECDE Examinations Registration fees as being Kshs. 12,680.00 per diploma Candidate and Kshs. 8,650.00 per Certificate Candidate and further that the total number of students that the Institute would be required to register with the Respondent for the ECDE Examinations were 4,007 candidates. However, as at 23<sup>rd</sup> April 2014, the Ministry of Education had not registered the Institute’s examination centres and being apprehensive that the delay by the Ministry of Education to register the Institute’s examination centres would render it impractical for the Institute to register its candidates in the examination centres in time, the Institute sought for extension of the registration date deadline from the KNEC vide a letter dated 23<sup>rd</sup> April 2014 and on 25<sup>th</sup> April 2014, KNEC granted the Institute an unconditional and open ended extension of the examination registration deadline for its candidates. However, it was until late September 2014 when the Ministry of Education eventually registered the Institute’s examination centres, a whole five months from the date of the application for registration by the Institute. Immediately on receiving the registration certificates for its examination centres, the Institute forthwith completed the registration process of its ECDE candidates for the 2014 examinations and paid the entire examination fees for all the 4007 candidates in terms of the KNEC’s circular receipt of which KNEC acknowledged. Having been duly registered by KNEC, all the Institute’s 4007 ECDE candidates for the 2014 Examinations administered by the Respondent and KNEC sent invigilators and supervisors to administer the 2014 ECDE Examinations in all the Campuses of the Institute pursuant to the Institute’s compliance with the examinations registration requirements as previously published by KNEC.
  5. However, on 28<sup>th</sup> September 2015, the applicants learnt, by sheer chance, that KNEC unilaterally, without notice and without hearing them or any of the Institute’s 4007 ECDE candidates for the 2014 Examinations, intended to cancel their 2014 ECDE Examination Results on any day after the 30<sup>th</sup> day of September 2015. To the applicants, the cancellation of their 2014 ECDE Examination Results will permanently erase their examination results from the record of KNEC to their irretrievable detriment. It was further averred that despite having sat for the 2014 ECDE Examinations way back in December 2014, KNEC has without any legitimate basis and unreasonably failed, refused and declined to declare the applicants’ results of the examinations and release to them their Diplomas and Certificates of the said examinations.
  6. It was the applicants’ case that all the Institute’s 4,007 ECDE Examinations candidates duly paid for their examinations fees as prescribed by KNEC to KNEC by the Institute as a precondition for administration of the examinations by KNEC on the Candidates.
  7. Based on legal advice, they contended that section 10(1)(b) of the **KNEC Act** prohibits withholding of certificates or diplomas by any person or institution from the candidates hence the continued refusal by the Respondent to release the Applicants’ 2014 ECDE Examination Results is patently illegal and offensive. To them, under the provisions of Section 10(2)(e) of the **Kenya National Examinations Council Act, Cap 255A** (hereinafter referred to as the “**KNEC Act**”), KNEC is only empowered to withhold results of candidates involved in examination irregularities or malpractices.
  8. It was further averred that under section 48(2)(b) of the **KNEC Act**, KNEC is empowered to make rules, to describe what constitutes an examinations irregularity and the penalty payable for examinations irregularity. However at no point has KNEC ever notified them or any of the Institute’s 2014 ECDE Examinations Candidates that they engaged in examination irregularities or malpractices to warrant refusal to declare their examinations results or to withhold their Diplomas and Certificates under section 10(2)(e) of the **KNEC Act**, or to warrant imposition of a penalty by KNEC.
  9. It was averred that at no material time has KNEC ever published, through a Gazette Notice, what it terms “penalty fees for late registration” as is required under the provisions of sections 6, 11, 22 and 25 of the **Statutory Instruments Act No. 23 of 2013** for such a levy by KNEC, a public body,

- against the Institute's 2014 ECDE Examinations Candidates to be valid.
10. The applicants were therefore apprehensive that unless this Court granted stay, the Respondent would proceed to unilaterally, arbitrarily, illegally and unreasonably cancel their 2014 ECDE Examination Results and those of the other 4,006 Institute's 2014 ECDE Candidates, and permanently lose record of their examination results to their gross and irretrievable detriment.

### **Respondent's Case**

11. In response to the application, the Respondent contended that from the documents filed that the Applicants have no authority or mandate of other candidates who registered to sit for the Early Childhood Development and Education (ECDE) examination of December 2014 at any of the examination centres run by the Institute to file or institute this suit on their behalf and hence bring this suit only on the Applicants own behalf. It was further contended that to the extent that the Applicants bring this Application and depose to facts in the verifying affidavits as student leaders in the Kiriaini (Meru) and St. Brigid's (Kitale) campuses, they have no firsthand knowledge of the information contained in the Affidavits and as such the information they have deposed to in the Verifying Affidavits amounts to hearsay evidence.
12. According to the Respondent, it had not cancelled the ECDE results of the 4003 candidates who registered to take the examinations in the 6 campuses of the Institute, being Kwale, Makueni, Meru, Kitale, Nakuru East, Nakuru North hence the prayers Nos. (a), (b) and (c) of the Notice of Motion do not lie. Instead it explained that though the Applicants sat for ECDE examinations in December 2014, they have not been assessed and awarded final marks for Teaching practice which is a pre-requisite for an award of a Diploma or Certificate in ECDE hence they are not entitled to the declaration/release of their results until their performance in the Teaching practice module is graded and marks awarded and received by the Council.
13. It was however conceded that KNEC received partial payment of fees for 4003 candidates who registered to take the Diploma and Certificate ECDE examinations of December 2014 in the six campuses run by the Institute. However KNEC has no record of who paid as the requirement is that institutions register candidates taking the Diploma or Certificate courses in their institutions and collect the fees and make payments to specific bank accounts held by the Council in a number of banks and submit the bank deposit slips to the Council.
14. It was averred that amongst other functions of the Council set out in s.10 (1) of the **KNEC Act** are to set and maintain examination standards, conduct public academic, technical and other national examinations within Kenya at basic and tertiary levels; and to award certificates or diplomas to candidates in such examinations, such certificates or diplomas, shall not be withheld from the candidates by any person or institution. In December 2014, the Council offered Certificate and Diploma examinations in ECDE to 15773 and 17677 candidates respectively registered to sit for the examinations in 537 and 560 centres respectively within Kenya. It was disclosed that KNEC registers a centre as an examination centre once the Ministry of Education Science & Technology (MOEST) has approved an institution as being fit to offer instruction in various courses/curricula of which ECDE is one such course/curriculum and that institutions mandated to offer instruction in various curricula can be funded publicly or privately by individuals, legal entities, for profit and not-for-profit organizations including church organizations. However, KNEC does not concern itself with how institutions registered as centres of instruction and offering its examinations sustain themselves and/or how those institutions source examination fees for their candidates. The Council's sole mandate being to conduct the various public, academic, technical and other national examinations and other activities appurtenant thereto financed partly by government grants and through fees levied for the various services offered by the Council as provided for in s.21 of the **KNEC Act**.
15. It was further conceded that as is usual, the KNEC did on the 3<sup>rd</sup> September 2013 send out a circular setting out the "Instructions for the registration of candidates for the 2014 teacher education examinations" ("the Instructions"), which examinations included the ECDE Proficiency Certificate, Certificate and Diploma examinations which were scheduled to be held in December 2014. The circular provided that there would be no late registration and set registration dates for the ECDE examination to be between 1<sup>st</sup> and 31<sup>st</sup> April 2014. However the Institute was not able to meet this deadline and owing to the requirement that centres for instruction of ECDE be

registered with MOEST before they can be granted examination centre status, the Council extended the deadline for registration of candidates wishing to sit the ECDE 2014 examinations to the 16<sup>th</sup> May 2014; which deadline the Institute was again unable to meet. As late as July 2014, the candidates that intended to sit for the 2014 ECDE examination at the Institute centres had not been registered and the KNEC fearing that they would be cut off from sitting the examinations advised the Institute to register the candidates through County Directors of Education (CDEs) or Sub-County Education Officers (Sub-CDEs) for the candidates to be registered to take the examinations at the District Centre for Early Childhood Education (DICECE) centres. To KNEC, it is usual for the it to recommend to institutions that are not registered as examination centres to register their candidates to take examinations at DICECE centres through the CDEs or Sub-County CDEs as agents of the Council mandated to register candidates whose institutions are not registered as examination centres so that such candidates are not left out of the exercise.

16. KNEC contended that it was not until by the letter of 3<sup>rd</sup> September 2015 by the Institute to the KNEC that the KNEC was advised that the Institute's 6 ECDE campuses had been registered by MOEST where after between the 14<sup>th</sup> and 19<sup>th</sup> September 2014 the KNEC as is its usual practice inspected the examination centres and issued them with centre code numbers and requested the Institute to submit both in soft and hard copy form details of the candidates who expected to sit for the 2014 ECDE examinations at the institute. The Institute submitted the candidates' details on 6<sup>th</sup> October 2014 and once the Council validated the candidates' qualifications, it generated a list of candidates who qualified to be registered to sit for the 2014 ECDE examinations and thereafter generated an invoice for 50,961,820/- being examination fees and penalties for late registration which invoice was forwarded to the Institute through recorded. However, the Institute did not pay any money or at all as was requested by the KNEC but wrote letters explaining that their donors had delayed in disbursing funds to them and made promises to settle the outstanding examination and penalty fees as they sought an extension for payment of the outstanding fees to the 20<sup>th</sup> December 2014 a request which the KNEC declined and insisted that the Institute makes payment by 4<sup>th</sup> December, 2015. Though the ECDE examinations were scheduled to take place on the 9<sup>th</sup> – 11<sup>th</sup> December 2014, the Institute did not make the payment required and through trickery caused the Council to believe that payment had been made into the Council's accounts and it is not until after examinations had been done that the Council established that no such payment had been made.
17. It was further averred that in addition to non-payment of examination and penalty fees the Institute did not submit the Continuous Assessment Test (CAT) marks nor did they submit Teaching Practice Marks as was required under paragraph 6.4 and 6.5 of the Instructions with the result that without these 2 components the candidates who registered to sit for the 2014 ECDE examinations at the FIA centres could not be graded or have their results released when examination results for other candidates were released on 3<sup>rd</sup> March 2015. However, the KNEC averred that the Institute partly paid the outstanding sums between the 4<sup>th</sup> March 2015 and 12<sup>th</sup> March 2015 amounting to 23,926,870/= leaving a balance of 34,867,010/= which the KNEC required the Institute to pay. However, the Institute has not come out clean on the issue of the outstanding payment and has kept its student body in the dark with regard to the fact that a substantial amount of money is due from it to the Council to enable the Council process the examinations including facilitating MOEST officials as external assessors to assess the candidates during the final teaching practice which should have been done between the 6<sup>th</sup> and 17<sup>th</sup> October 2014. It was however averred that the Institute administration did acknowledge that it owes the KNEC examination registration fees and penalties (late registration and late submission of CAT marks) and by its letter of 9<sup>th</sup> February 2015 sought a waiver of the penalty fees to the tune of Kshs 16 million as indeed they had done for the previous year's candidates vide their letter of the 23<sup>rd</sup> April 2014. Whereas the Institute submitted the CAT marks on the 16<sup>th</sup> February 2015 (they should have been submitted between 1<sup>st</sup> and 15<sup>th</sup> November 2014 as per the requirements set out in the Instructions, it has as yet have not submitted the final teaching practice marks without which the 2014 ECDE candidates who sat the examination at the FIA centres cannot be graded (all except for repeaters who the Council may not be able to confirm as having paid the requisite fees and penalties since FIA pays fees in lump sums to the Council's bank account(s)). KNEC's

- position was that as is clearly set out in the Instructions at paragraph 6.0 and 7.0 thereof the requirement that a candidate be awarded marks for teaching practice cannot be waived. It however disclosed that the 2014 ECDE candidates who sat for the examination in various ECDE campuses have sought intervention from various sources including the teachers' unions, parliament and have also paid KNEC a visit where the KNEC explained to them the Council's side of the story.
18. KNEC, however, found it curious that communication from the candidates registered to sit for examinations at the Institute's campuses show that they paid examination fees to the Institute's account while the Institute in its communication insists that it sources money from sponsors to settle candidates' fees.
19. The KNEC however disclosed that ECDE examinations results of candidates who paid for and sat for the 2014 ECDE examinations were released on 3<sup>rd</sup> March 2015 but the results of the 4003 candidates who sat for their ECDE examination at the subject Institute's campuses were withheld pending payment of the outstanding fees (including penalties) and assessment and grading of the candidates for teaching practice.
20. The KNEC reiterated that it had not cancelled the 2014 ECDE examination results hence an order for certiorari does not lie. According to it, in withholding the results of the 2014 ECDE candidates who sat for the examination in the Institute's campus is not acting unlawfully or illegally and as such an order for prohibition or mandamus does not lie against it.

### **The Institute's Case**

21. The Institute put forward its case vide an affidavit sworn by **Elizabeth Kavuu Kyalo**, its examinations officer.
22. According to her, on the 16<sup>th</sup> day of February, 2015, she duly delivered to the KNEC, Continuous Assessment Test (CAT) marks and internal assessment marks for all the Institute's 2014 ECDE examinations candidates, which marks, the KNEC duly received through one **Farida Bandari** on behalf of KNEC.
23. In her view, at no point has KNEC ever disproved that she did not deliver to it the CAT marks and internal assessment marks of the Institute's 2014 ECDE examinations candidates.

### **Applicants' Submissions**

24. It was submitted on behalf of the applicants that the right to administrative action that is lawful, reasonable and procedurally fair draws its legitimacy as a fundamental right in Article 47(1) of the Constitution of Kenya, 2010, which states as follows: '*Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair*'. Judicial review orders are therefore no longer exclusively common law remedies as evident in Article 23(3)(f) of the Constitution of Kenya. Indeed, the recently enacted **Fair Administrative Action Act** No.4 of 2015, section 4(3) thereof, enumerates prerequisite conditions that must be availed by public body for its administrative action to be fair, as including:
- a. ***Prior and adequate notice of nature and reasons for a proposed administrative action;***
  - b. ***An opportunity to be heard;***
  - c. ***Right of review or internal appeal process against the administrative action;***
  - d. ***Information, materials and evidence to be relied upon in making the administrative decision;***
  - e. ***Right to legal representation; and***
  - f. ***Statement of reasons for the administrative action.***
25. It was submitted that the scope and efficacy of Judicial Review Orders of *Certiorari*, *Prohibition* and *Mandamus* were restated by the Court of Appeal in the case of **Kenya National Examination Council vs. Republic, Ex Parte Geoffrey Gathenji Njoro & 9 Others, Nairobi CA No. 266 of 1996 [1997] eKLR** in which the Court of Appeal held that an order of *Prohibition* lies to challenge the legality of a decision or a departure from rules of natural justice by a public body; an order of *Mandamus* Commands the performance of an act which a public body is bound to perform; and an order of *Certiorari* quashes a decision already made, if the decision is so made in excess of jurisdiction or in disregard of the rules of natural justice.

26. The Applicant further relied on Republic versus Nairobi City County Ex Parte Pius Omollo Nairobi HC JR No. 113 of 2014 (Consolidated with JR No. 109 & 119 of 2014 and Petition No. 274 of 2014 [2015] eKLR, where it was held:

**“where the decision is in the process of being made, and the only decision that was taken was that the action in question be undertaken, I do not see why the Court cannot, in those circumstance, prohibit the decision from being concluded even without quashing the decision that the same be undertaken...”**

27. It was submitted that the gist of the Applicants’ claim is that vide letters dated 20<sup>th</sup> August 2015 and 26<sup>th</sup> August 2015, the respondent decided to cancel 2014 ECDE Examinations results of the Applicants and of other students of the Foundation Institute of Africa, as from 30<sup>th</sup> September, 2015, without any notice to or hearing the students.

28. It was submitted that based on an unconditional and open ended extension of the examination registration deadline of the Institute’s candidates given by KNEC, the Institute, upon being fully registered as an ECDE examinations centre by the Ministry of Education in September 2014, remitted to the Respondent, the entire examinations registration fees required of the Institute’s 4,007 students, whereupon KNEC proceeded to send invigilators and supervisors to administer ECDE examination on all the Institute’s 4,007 students.

29. It was therefore submitted that in deciding to cancel their and other students of the Institute’s 2014 ECDE examinations results, without notice or hearing, the Respondent breached their right to be heard on a decision that adversely affects them and relied on Republic versus Kenya School of Law & 2 Others Ex Parte Juliet Wanjiru Njoroge & 5 Others, Nairobi HC JR No. 58 of 2014 [2014] eKLR, where this Court while citing with approval Republic versus The Honourable The Chief Justice of Kenya & Others Ex Parte Moiwo Mataiya Ole Keiwua, Nairobi HCMCA No. 1298 of 2004 held as follows:

**“The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all proceedings is that persons who are likely to be affected by the proposed/ likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence...”**

30. In the same foregoing case of Ex Parte Juliet Wanjiru Njoroge & 5 Others (supra), Msagha versus Chief Justice & 7 Others, Nairobi HCMCA No. 1062 of 2004 [2006] 2 KLR 553 was cited at the following holding:

**“... the Court observes firstly that the rules of natural justice “*audi alteram partem*” hear the other party, and no man/woman may be condemned unheard are deep rooted in the English common law and have been transplanted by reason colonialisation of the globe during the hey-days of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the view of the person who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared to be no decision...”**

31. It was therefore submitted that the decision of the Respondent contained in its letter reference number **KNEC/ CONF/ RS/ EM/ TE/ ECDE/2015** dated 20<sup>th</sup> August 2015 and any decision of the Respondent to cancel examination results of any Candidate who sat for 2014 Early Childhood Development Examination at the Foundation Institute of Africa or its campuses made without notice or hearing the students, breached the students' right to be heard, un-procedural and unfair.
32. The Applicants further submitted that by the Respondent Granting the Institute open ended examination registration deadline; receiving from the Institute examination fees paid by the Institute's 4,007 students; invigilating and supervising the 2014 ECDE examinations on the Institute's 4,007 students, the students legitimately expected that the Respondent would declare their results of the examinations and release to them their Certificates and Diplomas earned in the examinations.
33. It was submitted that where a public body, such as the Respondent herein, promises or acts in a particular manner thereby making a party to arrange its affairs in a particular fashion, the public officer will be estopped from backtracking on its promises or action that occasioned the party to arrange its affairs as it did. Since statutory power must be exercised fairly, it was submitted based on **Keroche Industries Limited vs Kenya Revenue Authority & 5 Others, HCMA No. 743 of 2006 [2007] KLR 240** that an abrupt, arbitrary, capricious, oppressive and unilateral exercise of statutory power is the very antithesis of certainty and regularity of law.
34. The Applicants further relied on the holding by the Court of Appeal in **Royal Media Services Limited versus Attorney General & 8 Others, Nairobi CA No. 4 of 2014 [2014] eKLR** that:
- “for a legitimate expectation to arise, the decisions of the administrative authority must affects the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do and until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.”**
35. Based on **Pastoli versus Kabale Distrist Local Government Council and Others [2008] 2 EA 300** as cited in the case of **Republic versus Kenya National Examinations Council, Ex Parte Ian Mwamuli, Nairobi HCMA No. 183 of 2013 [2013] eKLR**, it was submitted that illegality occurs when a decision making authority commits an error of law in the process of taking or making the decision complained of; or act without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles.
36. It was contended that in its letter reference No. **KNEC/CONF/RS/EM/TE/ECDE/2015** dated 20<sup>th</sup> August 2015 and letter reference No. **KNEC/CONF/RS/EM/TE/ECDE/2015/030** dated 26<sup>th</sup> August 2015, the Respondent declined to declare the 2014 ECDE examination results for students of the Institute; instead, the examinations results would be cancelled altogether as from 30<sup>th</sup> September 2015. The Respondent withheld certificates and diplomas that the students earned in the examinations. It was contended that the students of the Institute fulfilled all the requirements for the 2014 ECDE examinations as communicated to them by the Respondent prior to sitting for the examinations. They paid examinations registration fees set by the Respondent and the Respondent eventually administered the examinations on the students of the Institute. It was submitted that section 10(1)(b) of the **KNEC Act**, prohibits any person from withholding certificates or diplomas earned by a candidate in an examination and provides that *“the functions of the Council shall be to award certificates or diplomas to candidates in such examinations; such certificates or diplomas, shall not be withheld from the candidate by any such person or institution”*. To the Applicants, there is only one incidence under the **KNEC Act** when the Respondent can legitimately withhold students' examinations results pursuant to the provisions of section 10(2) where the candidates involved in examination irregularities or malpractices. Here however, as the Respondent has neither alleged nor notified the Applicant and students of the Foundation Institute of Africa that the students engaged in examination irregularities or malpractices in the 2014 ECDE examinations, nothing therefore warrants withholding or cancellation of the students' results by the Respondent. In support of this submission the

Applicants relied on **Republic versus Kenya National Examination Council Ex Parte Ian Mwamuli, Nairobi HCMA No. 183 of 2013 [2013] eKLR.**

37. The Court was therefore urged to find and hold, that the Respondent's failure to declare the 2014 ECDE examination results of the students of Foundation Institute of Africa, and its failure to release certificates and diplomas to the students was illegal.
38. It was further submitted that the KNEC having unconditionally approved late registration of the students at the Institute, the Respondent's demand for the purported "penalties for late registration for examinations" after the student already did their examinations administered by the Respondent, without notice, and without any legitimate authority, had no legal basis as KNEC never notified the students of the Institute that they engaged in examinations irregularities against.
39. According to the Applicants, even if the Respondent has the power to impose "penalties for late examinations registration" under section 48 of the ***KNEC Act***, the provision requires the Respondent to impose such a penalty pursuant to rules of the Respondent duly made for that purpose. Rule making power by public bodies is currently regulated by ***Statutory Instruments Act No. 23 of 2013*** under which section 6 enjoins rule making body to prepare a regulatory impact assessment in respect of a rule that imposes significant costs on a community or part of a community. Under section 11 of the Act, a rule making body is enjoined to lay the rules before Parliament for approval, for them to be valid. Lastly, section 22 of the Act enjoins rule making body to publish rules in issue in the Kenya Gazette for the rules to be valid. It was contended that the KNEC has never complied with the statutory requirements under the provisions of the ***Statutory Instruments Act*** in purporting to impose the "late examination penalties." In the premises this Court was urged to find and hold that "late examinations registration penalties" that the Applicant imposed against students of the Foundation Institute of Africa are illegal.
40. The Applicants therefore prayed that this Court grants the prayers sought in the Motion dated 6<sup>th</sup> October 2015, with costs.

**Respondent's Submissions**

41. On behalf of the Respondent it was reiterated that that the Applicants have no firsthand knowledge of the information contained in the Affidavits and as such the information they have deposed to in the verifying affidavits amounts to hearsay evidence. Further as the KNEC has not cancelled the ECDE results of the 4003 candidates who registered to take the examinations in the 6 campuses of Foundation Institute of Africa the prayers Nos. (a), (b) and (c) of the Notice of Motion (seeking orders of certiorari) do not lie. It was contended that in pending the results of the 2014 ECDE candidates who sat for the examination in the Institute's campus, that is not acting unlawfully or illegally and as such an order for prohibition or mandamus does not lie against it.
42. According to the KNEC, it dealt with this case in utmost fairness and in due regard to rules of natural justice of giving due notice and fair hearing to the students as explained in the replying affidavit sworn in response herein, ensure that the candidates were not locked out of the registration and sitting for the examinations. However, the Institute management has not dealt with the Respondent in good faith since despite making promises to clear the outstanding fee balance claiming that the delay was caused by failure by its sponsors, the Institute management reneged on its promise and claims that the Respondent was not entitled to charge penalties on late registration of exams.
43. While reiterating the contents of the replying affidavit, it was submitted that it did not give an unconditional and open ended extension to the registration deadline as alleged by the ex parte applicants as the KNEC was emphatic on the payment of fees. It was therefore submitted that there was no legitimate expectation to receive results without full assessment. It was therefore submitted that it was insincere for the applicants to claim that the Respondent unconditionally offered and invigilated the examinations thus giving them a legitimate expectation that they would receive results. Indeed, the school management sabotaged the examination process as the students did not even complete the practical assessment due to the unpaid fees. ECDE examinations results of candidates who paid for and sat for the 2014 ECDE examinations were released on 3rd March 2015 but the results of the 4003 candidates who sat for their ECDE examination at the subject FIA campuses were withheld pending payment of the outstanding fees (including penalties) and assessment and grading of the candidates for teaching practice. It was therefore submitted that the

- candidates' legitimate expectation was that they would be treated fairly, which was done as there was no bias in the way the Respondent dealt with the Institute. In support of this position the Respondent relied on **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others HCMA No. 743 of 2006 [2007] KLR 240** that 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. It was however submitted that the applicants herein were subjected to a process which all candidates countrywide were subjected to and which process was uniform and not arbitrary or done selectively. Had the school paid off the examination fees in full and facilitated the practical assessment as required, then the Respondent would have been duty bound to deliver its promise of releasing the results. They failed to do their part hence legitimate expectation does not arise.
44. According to the Respondent, section 10(a) of the ***KNEC Act*** sets out the function of the Council as to conduct such academic, technical & other examinations within Kenya as it may consider desirable in the public interest. Section 10(e) goes further and empowers the Council to make rules regulating the conduct of examinations and for all purposes incidental thereto. It was submitted that the late registration by the Institute's management attracted costs in form of personnel and other logistics which had to be paid for hence the penalty fee which the Institute management was well aware of since they had done the same thing in 2013 and actually sought a waiver without challenging its legality. It was therefore submitted there was no error of law in the way the Respondent dealt with this case and it did not act *ultra vires*.
45. Regarding the alleged withholding of results, it was submitted that since the said candidates have not been assessed and awarded final marks for Teaching practice which is a pre-requisite for an award of a Diploma or Certificate in ECDE, they are not entitled to the declaration/release of their results until their performance in the Teaching practice module is graded and marks awarded and received by the KNEC.
46. It was submitted that the right to Fair administrative action is underscored in Article 47 of the Constitution and the newly enacted ***Fair Administrative Action Act, 2015*** provides further that where an administrative action is likely to adversely affect the rights and fundamental freedoms of any person, reasons for the adverse decision must be in writing. Here, though the decision to cancel the results is yet to be effected, the Respondent did give notice in writing to the applicants in form of the various letters to the management of the Institute, as well as the communication to the various stakeholders who intervened. The Respondent relied on **Republic vs Kenya National Examinations Council Ex-Parte Afrah Farid Maree & 48 Others Suing as Officials of Abuhureira Education Board [2011] eKLR**, where it was held that where progressive principles of the general law and of the Constitution are expressed in broad terms, it is for the Court to interpret them and to apply them judiciously to the facts and circumstances of the particular case. It was submitted that in the same case it was held that the management of examinations is not defined in detail by legislation, or by any published rules, and the Respondent has well-established practices which guide it, in maintaining the standards, in the public interest. The court went ahead to hold that the case made by the respondent in this respect, clearly showed that a margin of discretion must be entrusted to the Respondent, and the exercise thereof is not to be regarded as arbitrary or *ultra vires* any law.
47. To the Respondent, since this case touches on the rights, interests and expectations of parties such as the applicants on one hand and the public interest in the proper management of examinations by the respondent on the other hand, a balance must be struck between the two. In its view, the tested rules and procedures of examination management should be upheld, so long as better systems have not been conceived; and so the Respondent, which holds itself out as the custodian of the best professional practices for examination management, should be allowed a certain measure of discretion in the discharge of its functions. It was contended the Respondent's mandate being to conduct examinations in the public interest, it is its conviction that all candidates should register for examinations within the time allowed and penalties charged to discourage noncompliance which would throw the administration of examinations by the Respondent into chaos. This is in the public interest and within the mandate of the Respondent as defined in s.10 of the ***KNEC Act***. The Court was therefore urged to find that the Respondent did not act unfairly, arbitrarily or capriciously in dealing with the applicants and that the Respondent observed and upheld the rules of natural justice and the applicant's right to fair administration and therefore the Applicants are

- not deserving of the orders sought herein.
48. According to the Respondent, section 48 of the **KNEC Act** does empower the Respondent to impose penalties for late registration of examinations.
49. As to the question of compliance with the **Statutory Instruments Act** No. 23 of 2013, the Respondent relied on the decision of **Majanja, J** in **Richard Dickson Ogendo & 2 others v Attorney General & 5 Others [2014] eKLR** where while ruling on whether the **Traffic Breathalyser Rules** conformed with the **Act** held that section 27 of the **Statutory Instruments Act** which requires subsidiary legislation to be laid before Parliament preserves existing subsidiary legislation which may not be compliant with section 11 of the **Act** as such the **Rules** are not invalid. The **Rules**, being of a technical nature, were subjected to one aspect of public participation, that is, consultation with experts however there is no evidence of wider consultations. However, taking into account the facts and circumstances of the case, the court declined to invalidate the **Rules**. Based in the said decision, the Court was urged to so hold regarding the Respondent's rules allowing charging of penalties for late registration of examinations.
50. It was reiterated that since the KNEC has not cancelled any results of the Institute's candidates certiorari cannot lie. Further, in pending the results of the 2014 ECDE candidates who sat for the examination in Institute's campus is not acting unlawfully or illegally and as such an order for prohibition or mandamus does not lie against it.
51. It was therefore submitted that the Applicants' case herein lacks merit and should be dismissed with costs to the Respondent.
52. In conclusion, it was submitted that the activities of the Institute are questionable and ought to be investigated by the Court.

### **Determinations**

53. The first issue for determination is the Applicants' locus to institute these proceedings. It was contended by the KNEC that from the documents filed that the Applicants have no authority or mandate of other candidates who registered to sit for the Early Childhood Development and Education (ECDE) examination of December 2014 at any of the examination centres run by the Institute to file or institute this suit on their behalf and hence bring this suit only on the Applicants own behalf. That argument may have been persuasive before the enactment of the current Constitution where there was a demarcation between judicial review and constitutional matters. Under Article 23 of the current Constitution that demarcation has been blurred and in granting remedies in judicial review applications constitutional principles clearly play a crucial part therein. Judicial review remedies presently have a constitutional basis in Kenya by virtue of Articles 10, 25, 27, 47 and 50 of the Constitution. In my view since the Constitution is incremental in its language, what the current constitutional dispensation requires is that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity. It is within those prescriptions that judicial review is seen in our context.
54. Under our Constitution the issue of locus has been expanded and under Article 258(1)(b) of the Constitution, every person has the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention and such proceedings can be brought inter alia by a person acting as a member of, or in the interest of, a group or class of persons. Similarly under Article 22(2)(b) of the Constitution, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened in these proceedings, the Applicants contend that their rights under the Constitution have been violated and such proceedings can be instituted by a person acting as a member of, or in the interest of, a group or class of persons. The Applicants contend that they are students and therefore fall with a particular class of students of the Institute who undertook exams for ECDE in 2014. They contend that their fundamental rights have been or are threatened with violation. As was held in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998**,

**“Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.”**

55. Therefore based both on authority and the Constitution, the Applicants clearly have standing to agitate the prayers sought in these proceedings.

56. According to the Applicants, what triggered these proceedings were letters reference number KNEC/CONF/RS/EM/TE/ECDE/2015 dated 20<sup>th</sup> August 2015 to cancel the entire results of 489 Candidates who sat for 2014 Early Childhood Development Examinations at the Foundation Institute of Africa, Maara and reference number KNEC/CONF/RS/EM/TE/ECDE/2015/030 dated 26<sup>th</sup> August 2015 to cancel the entire results of 513 Candidates who sat for 2014 Early Childhood Development Examinations at the Foundation Institute of Africa, Kitale Campus.

57. In both letters the KNEC informed the Foundation Institute of Africa inter alia as follows:

***“You are expected to submit your bank deposit slips to Finance Division, NHC Building 3rd Floor along Aga Khan Walk for verification and there after present them to the Examination Management Division (SE&TE), Mitihani House, Dennis Pritt Road, Caledonia for clearance.***

***You are aware that the candidates were not assessed for their external teaching practice and the Council will only put modalities in place for the external assessment of the candidates for centres that have cleared the expected fees.***

***Any centre that will not have its candidates’ examination results released by 30th September, 2015 will have the entire examinations results cancelled.”***

58. It is therefore clear that the KNEC had intimated its intention to cancel the examinations results for the candidates who had undertaken their Early Childhood Development Examinations at the Foundation Institute of Africa in Maara and Kitale Campuses unless the outstanding examination fees was settled by 30<sup>th</sup> September, 2015.

59. This Court has had occasion to deal with the powers of the KNEC to cancel examinations results. In **Republic versus Kenya National Examination Council Ex Parte Ian Mwamuli, Nairobi HCMA No. 183 of 2013 [2013] eKLR**, this Court expressed itself inter alia as follows:

**“One of the functions of the Respondent under section 10 of the Act is to “award certificates or diplomas to candidates in such examinations; such certificates or diplomas, shall not be withheld from the candidate by any person or institution”. In so doing, the Respondent, however, has the power to “withhold or cancel the results of candidates involved in examination irregularities or malpractices. Therefore, for the Respondent to withhold the results of a candidate, the candidate must have been involved in examination irregularities or malpractices... In this case the Respondent has neither released to the applicant his results nor has it given any reasons why the said results are being withheld. In effect that the Respondent has failed to carry out its statutory duty under both the Constitution and the Act despite demand from the applicant. It is therefore my view and I so hold that this is a case in which judicial review orders ought to issue.”**

60. In holding thus, this Court relied on the decision in **Kenya National Examinations Council vs. Republic ex parte Gathenji and Others [1997] eKLR** where it was held:

**“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 right to compel the Council to mark the papers or to declare the results at the case may be...The same goes for awarding diplomas or certificates to the successful candidates...The same goes for awarding diplomas or certificates to the successful candidates. That is a duty specifically imposed on it by section 10(b). But the**

**High Court would not be entitled to order the Council, when carrying out the process of marking the examination papers, to award any particular mark to any.”**

61. In this case the KNEC has given reasons for declining to release the results and the reason is that the applicants did not complete payment of full examination fees. The Applicants contend that non-payment of full examination fees is not one of the lawful grounds for cancellation of results. That the Court can interfere where there is improper exercise of discretion is now trite. As was held by **Warsame, J** (as he then was) in **Re: Kisumu Muslim Association Kisumu HCMISC. Application No. 280 of 2003**, where an officer is exercising statutory power he must direct himself properly in law and procedure and must consider all matters which are relevant and avoid extraneous matters. The learned Judge further held that the High Court has powers to keep the administrative excess on check and supervise public bodies through the control and restrain abuse of powers. Concerning irrelevant considerations, where a body takes account of irrelevant considerations, any decision arrived at becomes unlawful. Unlawful behaviour might be constituted by (i) an outright refusal to consider the relevant matter; (ii) a misdirection on a point of law; (iii) taking into account some wholly irrelevant or extraneous consideration; and (iv) wholly omitting to take into account a relevant consideration. See **Padfield vs. Minister of Agriculture and Fisheries [1968] HL**.
62. In **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090**, the Court expressed itself as follows:

**“The Minister for agriculture has the duty to ensure that all arable land is properly utilised for the public benefit in the production of foodstuffs to feed the population and earn foreign exchange required for the development of the country. Section 187 of the Agriculture Act is designed to empower the Minister to take steps for preventing or delaying the deterioration of a holding due to mismanagement. Such steps are in the words of section 75 of the Constitution “in the interests of the development or utilisation of any property in such manner as to promote the public benefit. The necessity of such provision is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property...The court can therefore interfere with the decision of a Minister if the Minister does not act in good faith, or if he acts on extraneous considerations which ought not to influence him, or if he plainly misdirects himself in fact or in law...The management order is based on mismanagement and correctly follows the wording of section 187(1) of the Agriculture Act. In order of sale, however, the reason given is inability to develop the holding. It is an extraneous consideration, which ought not to have influenced the Minister, and it amounts to a misdirection in law. The facts, which induced the Minister to find that the holding was mismanaged and that the applicants were unable to develop it, were disclosed neither to the applicants nor later to the court. 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 provisions of section 187 of the Act, being aimed at depriving the owner of his holding (even for good reason), should be construed strictly. Orders made must comply with the Act, and if they do not so comply in important aspects, they will be null and void...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 to influence him; and he must not direct 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. The farms had to be managed and supervised; that had to be done so inadequately that the result was necessity to prevent or delay deterioration. The Minister did not give evidence but he swore an affidavit. From it the minister was concerned with development and referred to his national concern relating to sugar production. In his order for sale he said that the owners were not able to develop the farm. The true test is whether the farm should be leased or sold to save it from deteriorating; the purpose of showing the cause is to allow the Minister to decide whether, in view of the deterioration, the farm had better be leased or sold. In either case, the owners are not going to be considered able to develop the farm or to continue as they have been. They are indeed, no longer in occupation. 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.”

63. It is therefore clear that if the authority gives reasons for its decision and from the reasons given it is clear that the authority asked itself a wrong question with the result that it got a wrong answer; it being a question not enjoined upon him by the law, the Court would have no difficulty in finding that it misdirected itself in law and that its order was null and void.

64. Section 10(1)(b) of the **KNEC Act**, prohibits any person from withholding certificates or diplomas earned by a candidate in an examination by providing that *“the functions of the Council shall be...to award certificates or diplomas to candidates in such examinations; such certificates or diplomas, shall not be withheld from the candidate by any such person or institution”*. The only provision dealing with the cancellation of examinations results is section 10(2)(e) which empowers the KNEC to *withhold or cancel the results of candidates involved in examination irregularities or malpractices*. .

65. This leads to the question whether the payment of less examination fees amounts to an irregularity or malpractice for the purposes of section 10(2)(e) in order to justify the cancellation of examinations results. The **KNEC Act** clearly does not define what these two terms connote. However, section 47 of the Act gives an insight as to how the KNEC ought to go about dealing with cases of irregularities. That provision provides:

*(1) Where the Council is satisfied that there has been an irregularity in the course of any examination, the Council shall suspend or nullify such examination or any part thereof.*

*(2) Where the Council is satisfied that there is reasonable cause to believe that the examination results of any candidate have been obtained by irregular means, the Council shall nullify the examination results of such candidate.*

*(3) In the exercise of its powers under this section, the Council may conduct such investigations as it may deem necessary, and during such investigations, the Council shall withhold the examination results of any candidate pending conclusion of the investigations.*

*(4) In the course of investigations under this section, the Council may call for such information or the production of such documents as the Council may require, and within such period, in such place and from such person as the Council may determine, to assist in the investigations.*

66. It is therefore clear that before the KNEC can nullify the results of a candidate based on irregularity in procuring the same, it has to be “satisfied”. How then is the KNEC supposed to be “satisfied”? In my view, for it to be said to have been satisfied, it must have considered all the relevant factors. For one to be said to have been “satisfied”, it is my view that he must have some relevant material before him on the basis of which he can form an opinion on the matter. The word “consider” however has been the subject of judicial determination in **Onyango Oloo vs. Attorney**

**General [1986-1989] EA 456** where it was held 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.”**

67. In my view a proper consideration of a matter requires that the Tribunal considers all aspects of the case and all aspects of the case cannot be said to have been considered when the person against whom the complaint is preferred has not been called upon to give his or her version of the issues in question.

68. Article 47 of the same Constitution 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.***

69. Pursuant to Article 47(3) Parliament has enacted the *Fair Administrative Action Act*. Section 4(1), (2) and (3) thereof provides:

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

***(2) Every person has the right to be given written reasons for any administrative action that is taken against him.***

***(3) 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 for the proposed administrative action;***

***(b) an opportunity to be heard and to make representations in that regard;***

***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***

***(d) a statement of reasons pursuant to section 6;***

***(e) notice of the right to legal representation, where applicable;***

***(f) notice of the right to cross-examine or where applicable; or***

***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

70. Under section 2 of the said Act “administrative action” is expressed to include:

*(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or*

*(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.*

71. That the cancellation of the examination results affected the applicant's right to education cannot be doubted. This Court in **Republic versus Kenya National Examination Council Ex Parte Ian Mwamuli** (supra) has had occasion to deal with the issue in which it expressed itself inter alia as follows:

**“Article 43(1)(f) of the Constitution provides that every person has the right to education. The right to education would make no sense if a person were to sit for examination and fail for no fault of his to know the results of his examination. Where therefore the authorities concerned for any reason are of the view that a candidate's results ought not to be released to him and a certificate issued where ordinarily a certificate would issue, the authority is under a Constitutional duty to furnish the person with written reasons for making such a decision.”**

72. Similarly, this Court in **Republic vs. Commission for Higher Education Ex-Parte Peter Soita Shitanda [2013]eKLR** expressed itself as hereunder:

**“Article 43(1)(f) of the Constitution provides that every person has the right to education. The right to education would make no sense if a person's academic qualification is not recognised by the State on unreasonable grounds. Where therefore the authorities concerned hold the view that a particular person's educational qualification is not recognised, the authority is under a Constitutional duty to furnish the person with written reasons for non-recognition.”**

73. Accordingly the KNEC's intended decision to cancel the Applicant's examination results is clearly an administrative action as contemplated under the said Act. It is therefore under a Constitutional and Statutory duty to ensure that its actions are expeditious, efficient, lawful, reasonable and procedurally fair. Procedural fairness necessarily requires that persons who were likely to be affected by its decision such as the Applicants be afforded an opportunity of being heard before the decision adverse to their interest was taken. Further, it is a Constitutional and Statutory requirement that they be given written reasons for the action.

74. Whereas it is true that the KNEC treated the Applicants' case fairly before the conduct of the examinations by giving them every opportunity to undertake the examinations it is their actions thereafter that has failed to meet the threshold of fairness. The KNEC contends, based on **Republic vs Kenya National Examinations Council Ex-Parte Afrah Farid Maree & 48 Others Suing as Officials of Abuhureira Education Board [2011] eKLR**, that since the management of examinations is not defined in detail by legislation, or by any published rules, and the Respondent has well-established practices which guide it, in maintaining the standards, in the public interest, a margin of discretion must be entrusted to the Respondent, and the exercise thereof is not to be regarded as arbitrary, or ultra vires any law. That may be true. However as was held in **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300:**

**“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...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.”**

75. In this case the legislative instrument by which the KNEC exercises jurisdiction to make its

decisions is the *KNEC Act*. That Act, as stated above requires the KNEC to exercise both substantive and procedural fairness. It cannot therefore resort to its own practices to justify actions which are contrary to the parent legislation. It is therefore my finding that any practice that goes contrary to the provisions of Article 47 as read with section 4 of the *Fair Administrative Action Act* cannot be sustained.

76. In *Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996* the Court of Appeal expressed itself as follows:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice...Prohibition 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.”**

77. The Applicants contended that the decision to impose penalties for late payment of the examination fees is not justified by the law for the failure to comply with the mandatory provisions of the *Statutory Instruments Act*. It is however the Applicants’ case that they did pay the examinations fees hence the issue of payment of penalties does not arise as far as they are concerned. In any case the Applicants have not sought an order to quash of the decision to impose penalties for late payments of the examination fees. This Court is barred by Order 53 rule 4(1) of the *Civil Procedure Rules* from granting orders which are not sought.

78. It was contended that the decision by the KNEC violated the Applicants’ legitimate expectation. **De Smith, Woolf & Jowell**, in *“Judicial Review of Administrative Action”* 6<sup>th</sup>Edn. Sweet & Maxwell page 609 states that:

**“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.”**

79. 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.”**

80. Similarly in *R vs. Devon County Council ex parte P Baker [1955] 1 All ER* it was held:

**“...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.”**

81. In my view there is a legitimate expectation that public authorities will comply with the Constitution and the law. When the Applicants were permitted to undertake the ECDE Examinations, it was no doubt their expectations that the KNEC would after marking their examinations release the results thereof. The KNEC is under a statutory obligation pursuant to section 10(1)(a), (b) and (i) of the *KNEC Act* to set and maintain examination standards, conduct public academic, technical and other national examinations within Kenya at basic and tertiary levels; award certificates or diplomas to candidates in such examinations which such certificates or diplomas are not to be withheld from the candidate by any person or institution; and do anything incidental or conducive to the performance of any of the preceding functions. It goes without saying that the said certificates and diplomas can only be awarded after the examinations have been marked. Accordingly the marking of the examinations is an incidental obligation on the part of KNEC. It would follow that the Applicants had legitimate expectation that the KNEC would carry out its statutory mandate of marking the said examinations and undertake any incidentals required to do so including facilitating MOEST officials as external assessors to assess the candidates during the final teaching practice.

82. The KNEC however contends that it cannot perform its statutory obligations due to the fact that the Institute has not cleared the payment of the exam fees. This brings me to the issue whether that decision meets the principles of proportionality. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998:**

**“Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality....The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations...Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis...The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”**

52. Like all legal remedies, judicial review continues to enlarge the categories of its sphere of influence. In my view the issue of proportionality ought to be seen in the context of rationality. This position is the one prevailing in England as was highlighted by **Lord Steyn** in **R (Daly) vs. Secretary of State For Home Department (2001) 2 AC 532** where it was held that: (1) Proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely to see whether it is within the range of rational or reasonable decisions; (2) Proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; and (3) Even the heightened scrutiny test is not necessarily appropriate to the protection of human rights.

53. A further illuminating discourse on heightened judicial scrutiny in the human rights arena is found in **Republic vs. The Commissioner of Lands Ex parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998.**

83. However, it is my view that the common law and practice by the High Court of England on judicial review still recognize and apply the conventional grounds for judicial review except within enlarged categories of intervention by the Court. In Kenya such expansion on a case to case basis is permitted by the Constitution as a way of ensuring a complete remedy is availed by the Court as a Court of law. Matters of fair trial and administrative action under Articles 47 and 50

of the Constitution are proper grounds for judicial review and are a codification of what is generally known as principles of natural justice. In my view Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

84. I agree that in deciding on what action to take an authority ought to apply the principle of proportionality. Accordingly 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.”**

85. In this case I associate myself with the position of **H.W.R. Wade** in his book ***Administrative Law*** (10<sup>th</sup> Edition) at pages 306 and 307, that the KNEC breached the principle of proportionality by failing to maintain an appropriate balance between the adverse effects which its intended decision to cancel the examination results of the Applicants may have on the rights, liberties or interests of the Applicants and other candidates concerned and the purpose which the KNEC is seeking to achieve, that is the recovery of the fees due to it. The intended action is evidently way out of proportion with the intended purpose of trying to recover its fees. In my view there are other better options available to enable the KNEC recover its fees from the Institute rather than to hold the Applicants at ransom for the sins which may well not be of their making. Under section 3 of the ***KNEC Act***, the KNEC is a body corporate with perpetual succession and a common seal and capable, in its corporate name, of *inter alia* suing and being sued. Accordingly, I do not see any difficulty that it may have in recovering any sums due to it by way of legal proceedings instead of turning a normal debt into a non-existent examination irregularity or malpractice.

86. Having considered the application herein it is my view that the same is merited. I however agree with the KNEC that as no decision cancelling the said results has been made, an order of certiorari is not the efficacious remedy since that is an order that quashes a decision which has already been made.

87. This Court however cannot overlook or turn a blind eye to the alleged acts or omissions of the Institute. Such acts or omissions ought to be dealt with to avoid future occurrences which may be detrimental to the interests of the students and the KNEC.

### **Order**

88. In the premises the orders which commend themselves to me and which I hereby make are as follows:

- a. **An Order of Prohibition** restraining the Kenya National Examinations Council from cancelling, deleting or in any manner whatsoever losing record of results of the Candidates who sat for 2014 Early Childhood Development Examinations at the Foundation Institute of Africa or its campuses.
- b. **An Order of Mandamus** directed upon the Kenya National Examinations Council compelling

it to examine the examination of the Candidates who sat for 2014 Early Childhood Development Examinations at the Foundation Institute of Africa or its campuses and release the results therefor after taking the necessary steps including the facilitating Ministry of Education Science & Technology officials as external assessors to assess the Applicants.

- c. An order directing the Director of Public Prosecutions to take the necessary steps to commence investigations into the Affairs of the Foundation Institute of Africa with respect to the complaints by the Applicants and the KNEC in order to determine if any criminal offence may have been committed in the process and take the necessary legal action. Towards this end the Deputy Registrar of this Court is directed to facilitate the service of this Judgement on the Office of the Director of Public Prosecutions.
- d. In the premises there will be no order as to costs.

Dated at Nairobi this 20<sup>th</sup> day of January, 2016

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Okoth for the Applicants***

***Miss Kagiri for Miss Njenga for the Respondent***

***Cc Patricia***