REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JR. CIVIL APPLICATION NO. 7 OF 2015

BETWEEN

REPUBLIC ……..…..…….APPLICANT

VERSUS

KENYA NATIONAL EXAMINATION COUNCIL.1ST RESPONDENT

**THE PRECIOUS GIFTS SCHOOLS-KOMAROCK……..……
INTERESTED PARTY**

EX-PARTE

1. K M D. J *Suing Through Father and*

Next Friend B K. K...**……1ST APPLICANT**

2. O B P *Suing Through Father and*

Next Friend C O…..……..…….**2ND APPLICANT**

3. O O *Suing Through Mother and*

Next Friend P A O……..…..**3RD APPLICANT**

4. M E A *Suing Through Father and*

Next Friend A M…..……..…**4THAPPLICANT**

5. K G M *Suing Through Mother and*

Next Friend N J N...……..…….**5TH APPLICANT**

6. M M M *Suing Through Father and*

Next Friend E M. M..……..…….**6TH APPLICANT**

7. G C D *Suing Through Mother and*

Next Friend R O A…….……..….**7TH APPLICANT**

8. C E N *Suing Through Mother and*

Next Friend J M. K..…….……..……**8TH APPLICANT**

9. O A A *Suing Through Mother and*

Next Friend P A O ……..……..…..**9TH APPLICANT**

10. M T O *Suing Through Mother and*

Next Friend R O …...…...……..….**10TH APPLICANT**

11. K A M *Suing Through Father and*

Next Friend M K A.…**……1TH APPLICANT**

12. O W A *Suing Through Father and*

Next Friend J F. O……..…….…….**12TH APPLICANT**

13. O E H A *Suing Through Mother and*

Next Friend M A…….…….…….**13TH APPLICANT**

14. W E N *Suing Through Father and*

Next Friend L M ….……..……**14TH APPLICANT**

15. N S W, *Suing Through Mother and*

Next Friend J M. M…….**15TH APPLICANT**

16. O A V, *Suing Through Mother and*

Next Friend M A. O…….…….…**16TH APPLICANT**

17. R P A, *Suing Through Guardian and*

Next Friend R A T….…….……**17TH APPLICANT**

18. M C M, *Suing Through Father and*

Next Friend F M. M……..……..**18TH APPLICANT**

19. M I N, *Suing Through Father and*

Next Friend M N…….…….……**19TH APPLICANT**

20. M N W, *Suing Through Father and*

Next Friend D N…….……..**20TH APPLICANT**

21. O D O, *Suing Through Father and*

Next Friend JOHN N……..……..……..**21ST APPLICANT**

22. D P K, *Suing Through Guardian and*

Next Friend A B D……..**22ND APPLICANT**

23. O PS, *Suing Through Mother and*

Next Friend L N. I.…..……..…….**23RD APPLICANT**

24. D M D, *Suing Through Mother and*

Next Friend A D K A...……..……..**24RD APPLICANT**

25. W B N, *Suing Through Mother and*

Next Friend P W……..……..……**25TH APPLICANT**

26. O L A, *Suing Through Mother and*

Next Friend R A. D……..……..……..**26TH APPLICANT**

27. O J O, *Suing Through Father and*

Next Friend H O. O ……..**27TH APPLICANT**

28. A C O, *Suing Through Father and*

Next Friend J W …….....**28TH APPLICANT**

29. J C O, *Suing Through Mother and*

Next Friend J M ……..…**29TH APPLICANT**

30. A N M, *Suing Through Mother and*

Next Friend V N. A……..…...**30TH APPLICANT**

31. O F F R, *Suing Through Mother and*

Next Friend F A R ……**31ST APPLICANT**

32. N Y N, *Suing Through Mother and*

Next Friend G BO……....**32ND APPLICANT**

33. L B E, *Suing Through Mother and .*

Next Friend A L…….……...**33RD APPLICANT**

34. G HA, *Suing Through*

Guardian

and Next Friend N J N……..…....**34TH APPLICANT**

35 O E O, *Suing Through Father and*

Next Friend P R **…..……..……..35TH APPLICANT**

JUDGEMENT

Introduction

1. By a Notice of Motion dated 20th January, 2015, the *ex parte* applicants seek the following orders:
    a. **AN ORDER OF CERTIORARI to remove into the High Court for the purposes of being quashed forthwith the decision of the Kenya National Examinations Council as contained in its letter to the Head Teacher of the Interested Party dated 22/12/2014 cancelling the examination results of 49 Kenya Certificate of Primary Examination candidates for the year 2014 on the ground of an alleged irregularity referred to as collusion in the Kiswahili Subject and coded (KIS) without any evidence whatsoever to that effect and without giving the affected candidates and the school a hearing.**
    b. **AN ORDER OF MANDAMUS directed at the Respondent to compel the Respondent to reverse its decision to cancel the Kiswahili (KIS) examination results of the 49 Kenya Certificate of Primary Examination candidates for the year 2014 within 21 days of the Order and to release the entire results to the aforesaid candidates.**
    c. **AN ORDER OF MANDAMUS directed at the Respondent to compel the Respondent to produce before the Honourable Court all the Kiswahili (KIS) answer booklets for all the 49 affected candidates particularly Kiswahili (KIS) for the court's inspection.**
    d. **THE COSTS of the application.**

Ex Parte Applicants' Case

2. The application was supported by an affidavit sworn by **Benjamin Kipkurui Kobete**t, one of the parents for candidates who sat for Kenya Certificate of Primary Education in the year 2014 at The Precious Gift Schools- Komarock, (Centre 20408045) (hereinafter referred to as the School).
3. According to the deponent, the Kenya National Examinations Council, the respondent herein (hereinafter referred to as the Council) by its decision communicated through its letter dated 22/12/2014 cancelled the examination results of Forty Nine (49) candidates who sat for the Kenya Certificate of Primary Education in the year 2014 at the School.
4. It was deposed that the alleged irregularity of collusion in Kiswahili paper was made without explaining the same and/or giving the school and the candidates a hearing. According to the deponent, the said children have always excelled in their exams and it was their legitimate expectation that the Respondent would release their results in the absence of proof of malpractice and or irregularities. However, the applicants' efforts to get a logical, rational and/or reasonable explanation from the school and the Respondent has not elicited any plausible reasons hence as parents they have been left to speculate and seek for answers on behalf of their young children who are traumatized and unfairly discriminated. Despite visiting the School several times and the Respondents offices on 5th January 2015 no assistance was been forthcoming.
5. According to the deponent, the failure to release the results, which decision was arrived at without any justifiable or legal basis but based on assumptions, has and continues to violate the Applicants constitutional right to be provided with information held by the state including results of the children.
6. According to the deponent, as the circular in which allegations were made lacked particulars, the said decision is premature, irrational, unfounded, misplaced and based on mere speculation, biased, discriminatory, *ultra vires,* illegal and unlawful and in contravention of the Constitution, Act, Circulars and Regulations governing the Respondent. Further, the said decision to withhold the said results was without any tangible reasons and in violation of the individual rights and legitimate expectation of 49 out of 59 children to receive their KCPE results. As parents, it was

contended that they were not given prior notice or an opportunity to present their case or any intention by the Respondent to cancel the said results.

7. It was the deponent's position based on legal advice that Article 32 of the ***Kenya National Examination Act, 2012*** (hereinafter referred to as the Act) does not envisage an offence of "collusion" and/or define the said offence and that the purported cancellation is *ultra vires* because the Respondent were under no obligation to mark examination and grade once the alleged offence of collusion (if any) was reported at the examination centre. It was therefore contended that the action by the Respondent is illegal and in breach of the fundamental principles of natural justice of the right to be heard and fair administrative action as espoused in the Constitution.
8. The deponent further averred that they had been summoned, questioned, interrogated and or recorded any statements under the said pending matter and the selective cancellation of the results done on the same day with other subjects was in bad faith, malicious and unfair as the applicants had not been availed reasons for the purported cancellation and believed that the Respondents decision is ill advised or as a result of irrelevant considerations unknown to the children and/or their respective parents. Further the said action would deprive the children the right to join national and/or prestigious schools as per their first choices and hence violate their constitutional rights to equal opportunities apart from occasioning great mental, emotional anguish and anxiety to them.
9. The applicants therefore sought that in the interest of justice and fairness the said decision be overturned by this Honourable court.
10. It was submitted on behalf of the applicants that the Respondent's decision to cancel the said results rendered itself impeachable by way of judicial review principally on three broad considerations, namely: that the process by which the decision was arrived at was flawed, *ultra vires* and unfair; that the decision itself is irrational, unreasonable and disproportionate; and on failure to consider the legitimate expectation of the Ex-Parte Applicants. Based on ***Judicial Review*** (1997) by **Michael Supperstone** and **James Goudie** at pages 3.2 – 3.3, 3.20, it was submitted that:

    "…**judicial review is concerned with reviewing <u>not</u> the merits of the decision in respect of which the application for judicial review is made, but the decision making process itself…..The purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected….where any person or body supervisions a power conferred by statute which affects the rights or legitimate expectations of citizens and is of a kind which the law requires to be supervision in accordance with the rules of natural justice, the court has jurisdiction to review the supervision of that power…..for a decision to be susceptible to judicial review the decision maker must be empowered by public law to make decisions that, if validly made, will lead to administrative action or abstention from action by an authority endowed by law with executive powers and that the decision must affect the private rights of some person or deprive another of some benefit which he had been allowed to enjoy in the future or which he has a legitimate expectation of acquiring or enjoying.'**

11. It was submitted that since Section 10(e) read with Section 14 of the Act imposes upon the Respondent the duty to act in a judicious and reasonable/rational manner, in utmost good faith, with fairness and without any bias towards any party allegedly involved in any act of misconduct or irregularity from the supervision, if any. The rules, it was contended, developed and relied upon by the respondent being anchored upon a repealed Statute do not confer any power to the Respondent and a such the decision to cancel is null and void *ab initio*.
12. According to the applicants, the Respondent usurped powers granted in the Act in cancelling results for Kiswahili subject without determining that there was actual exam irregularity. Its decision was not above board since all the forty nine (49) candidates were spread across four (4) classrooms and thus its decision of absolving ten (10) out of Fifty Nine (59) candidates must be informed by facts and NOT speculation. To the applicants, the council served as the complainant, the jury and the Judge in its own cause. In the instant case, the Respondent cancelled the Kiswahili results of the ex Parte Applicants when no report, and/ or complaint of any irregularity was made against the Ex-parte Applicants or the Supervisors and Invigilators who undertook the supervision,

and if any such report was made, none of the Ex-Parte Applicants was summoned to explain the circumstances they were found to have committed any exam irregularity in order to countercheck the facts with the complaints raised.

13. It was submitted that The Respondent acted *ultra vires* its powers under the Constitution and the Act, reached a wholly unreasonable, irrational and illogical decision, did not give a hearing to the affected candidates, acted maliciously and capriciously and failed to follow the correct procedure. Being a public institution created under statute, it was contended that the Respondent ought to work and act within the law since its activities are amenable to the jurisdiction of the honourable court.
14. To the applicants, based on the definition of **"collusion"** in the Circular Ref: KNEC/EA/EM/KCPE/AE/14/002 by the Respondent that it is ***"whereby candidates are assisted by third party eg. Teachers, Supervisors, Invigilators and other students or fellow candidates",*** this definition presupposes that there were either unauthorized persons in the examination room and/or 49 out of 59 candidates were assisted by any of the listed third parties. To them, this section read with paragraph 6-11 of the Ex Parte Applicants Statutory Statement points a discriminatory way of dealing with examination results.
15. It was submitted, based on **H.W.R. Wade** in his book ***Administrative Law*** (10th Edition) at pages 306 and 307, that the Respondent breached the principle of proportionality by failing to maintain an appropriate balance between the adverse effects which its decision may have on the rights, liberties or interests of the candidates concerned and the purpose which the Respondent is seeking to pursue. The decision to cancel examination results for 49 out of 59 candidates in the Interested Party's school on the basis of "collusion" without specifying external interference with candidates while doing their examination is evidently way out of proportion with the intended purpose of trying to avoid similar situations in the future.
16. It was submitted that the Respondent acted with bias and treated the Applicants unfairly by failing to take into account the absence of any adverse report from the Supervisors and invigilators at the examination Centre as per the various circulars issued and/or from the teachers who felt the supervision was above-board.
17. The Respondent was further accused of Respondent failing to adhere to the provisions of Article 47 of the Constitution and statutory requirements. It was submitted that the Council had an obligation upon realizing any exam irregularity (if any), to provide particulars to the affected candidates and not wait until the official release of the examination when ex parte applicants had acquired rights not to have their results reversed without any lawful cause. They were entitled to be given notice of the intended cancellation of their examination results and the reasons for the said action. The Applicants would then have been required to respond to the allegations against them and getting their part of the story. No such opportunity was given.
18. On justiciability of the decision it was submitted based on ***Administrative Law*** (6th Edition) (1988) by **H. W. R. Wade** that:

"…judicial review is designed to prevent the excess and abuse of power by public authorities. The powers of public authorities are conferred by statute….The courts are evidently determined not to allow any powerful quasi-governmental body to contract out of the legal system, even where there may be good reasons for avoiding the law's delays and uncertainties. ……the only essential elements are what can be described as a public element, which can take many forms, and the exclusion from jurisdiction of bodies whose sole source of power is a consensual submission to their jurisdiction. ….The primary object of certiorari and prohibition is to make the machinery of government operate properly in the public interest, rather than to protect private rights'…judicial review...is the supervision of the court's inherent power to determine whether action is lawful or not and award suitable relief. For this no statutory authority is necessary: the court is simply performing its ordinary functions in order to uphold the rule of law. The basis of judicial review, therefore, is common law…Judicial review is thus a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not…… Judicial control, therefore, primarily means review, and

is based on a fundamental principle, inherent throughout the legal system, that powers can be validly supervisioned only within their true limits. …..The ultra vires doctrine is therefore not confined to cases of plain excess of power; it also governs abuse of power, as where something is done unjustifiably, for the wrong reasons or by the wrong procedure. In law the consequences are exactly the same: improper motive, or a false step in procedure, makes an administrative act as illegal as does a flagrant excess of authority. ……..It is a cardinal axiom, accordingly, that every power has legal limits, however wide the language the empowering Act. If the court finds that the power has been supervisioned oppressively or unreasonably, or if there has been some procedural failing, such as not allowing a person affected to put forward his case, the act may be condemned as unlawful."

19. It was submitted that in ***Applications for Judicial Review*** (2nd Edition) by **G. Aldous** and **J. Alder** irrationality includes:

"…cases where a decision is perverse, lacks logic or violates fundamental values of the community……Decisions have been set aside for irrationality where the court has taken the view that they were without any conceivable justification but irrationality has also included decisions which violated basic judicial values by imposing excessive burdens upon individuals or by using administrative powers for purposes of punishment. The standard *Wednesbury* formula, 'so unreasonable that no reasonable body would have made the decision' is helpful….."

Respondent's Case

20. In opposition to the application, the Respondent filed a replying affidavit sworn by **Diana Makau**, the acting Deputy Secretary, Research and Quality Assurance Division of the respondent on 30th January, 2015.
21. According to the deponent, the Council admits that it cancelled the results of the Kiswahili paper for 49 candidates (hereinafter 'the Candidates") who registered to sit for the Kenya Certificate of Primary Education (KCPE) 2014 at the Precious Gift Schools-Komarock Centre Number 20408045 and gave the reason for cancellation thereof as **collusion;** a term that is used to describe a situation when a candidate answers examination questions with assistance from a third party; which can be (but not limited to) another candidate(s), a subject teacher, head teacher, supervisor or invigilator.
22. It was deposed that the KCPE examination was administered on the 4th to 6th November 2014 to 880,486 candidates in 24,260 examination centres (including 2 examination centres in Sudan) and that the Council established examination irregularities and cancelled the results of the subject paper where irregularity was established in the results of 1,702 candidates from 93 examination centres. According to the deponent, out of several forms of examination irregularities like impersonation, possession of prohibited materials in the examination room, among other forms examination malpractices as shown in Part IV of the Act; collusion is usually the most common form of examination irregularity and in 2014 affected 99.9% of the total number of candidates found to have engaged in examination malpractices and mostly so in Kiswahili which had 1,193 cases followed by the English paper with 677 cases.
23. It was deposed that after the conduct of the examinations all candidates' scripts were collected and forwarded to Council officials who arranged for their marking. It was added that the Kiswahili paper has 2 components of Insha and Kiswahili objective with the Insha being marked by examiners and the Kiswahili objective paper being marked through scanning of candidates' answer sheets by optical mark readers. In the Kiswahili objective paper candidates choose a correct answer from a choice of 4 answers in which only one choice is correct. These are normally referred to as multiple choice questions. In these types of questions, detection of collusion is done by use of a computer programme known as the Item Difficulty Profile (IDP) which programme detects a typical response pattern, giving a standard performance profile which is then used as a criterion for identifying deviating and unusual performance patterns.
24. According to the deponent, the performance profile of a school using the IDP programme shows deviations positive or negative. An exceptional report is produced if 10% or more of the questions in a paper are flagged i.e. if they deviate significantly from the normal expected performance

behaviour. A negative flag is registered if 80% or more of the candidates give one wrong response out of three wrong responses given in a typical multiple choice questions which has one correct response and three wrong responses. Candidates in a centre are said to have been involved in collusion in a subject paper if 80% or more of the candidates choose the identical wrong responses in at least 10% of the questions in a paper. For example in an English paper which has 50 questions, if 80% of the candidates in a centre have 5 negative flags then the candidates are considered to have colluded.

25. It was averred that in the case of Precious Gift Schools-Komarock Centre Number 20408045, the IDP programme negatively flagged 6 out of 50 questions (12%) for 49 out of 59 candidates (83%); a performance behavior that is abnormal.
26. This form of detection, it was contended, has been in use for as long as before 1985 when the Kenya Certificate of Primary Education was introduced and has been used over the years to detect collusion in multiple choice questions. The programme, according to her is itself objective and is applied to data uniformly and is thus blind to the centre or candidates identity.
27. Once a deviation from the normal is flagged negative in the subject paper of a particular centre, the Research and Quality Assurance division of the Council, a division charged with the responsibility of statistical analysis of performance patterns for all examination results vets the scripts of the candidates of the particular centre that has been flagged, script by script and on confirming the collusion presents its findings to the Management meeting of the Council which also sits and satisfies itself as to the commission of the collusion as reported by the Research and Quality Assurance Division. The Management Team after confirming that collusion did indeed occur then recommends its findings to the Examinations Management Committee of the Council (formerly the Security Committee) which then after consideration of the recommendations of the Management team on a case by case basis approves the cancellation of the results of the candidates shown to have committed examination irregularities (in this case collusion) or any other course recommended to it by the Management team.
28. It was averred that once the IDP flagged the Kiswahili objective paper scripts of the Centre Number 20408045 (The Precious Gifts Schools- Komarock), the Research and Quality Assurance team embarked on a verification process of whether the candidates at the centre had colluded and established that 49 out of 59 candidates (83%) at the centre had chosen identical incorrect answers to 6 questions out of 50 questions (12%) which is not possible without there being collusion. Thereafter Research and Quality Assurance team in its meeting held on the 4th December 2014 recommended a cancellation of the affected candidates results for the Kiswahili objective paper which recommendations were considered in the Management Team's meeting held on the 15th December 2014 which again considered the evidence of collusion on a script per script basis and was satisfied that the 49 candidates in the centre No 20408045 had colluded in the Kiswahili objective paper and proceeded to refer for final approval to cancel the results for the Kiswahili Objective paper of the said candidates to the Examinations Management Committee in its 215th meeting held on the 16th December 2014.The Examinations Management Committee after giving due consideration to the findings and recommendations of the Research and Management teams of the Council approved cancellation of results of 1,702 candidates found to have been involved in examination irregularities. Out of the 1702, 49 were from the Precious Gift Schools- Komarock 35 on whose behalf the application has been brought.
29. Consequent upon the approval to cancel the results of the candidates who colluded in the examinations the Council issued letters cancelling results of all the affected candidates and thus the letter of 22nd December 2014 addressed to the Head Teacher, Precious Gift School.
30. It was asserted that the Council always sends out circulars to schools for circulation to all parties involved in examinations including candidates cautioning against involvement in cheating in examinations. The Council also issues stringent instructions on the conduct by each participant in the examination process and also issues to each candidate an examinations timetable which warns candidates against engaging in examination irregularities and brings to the candidates attention the consequences of examination malpractice as stipulated in the Act.
31. It was contended that the Council may not give clearer details of how the IDP programme works as doing so may compromise the management and conduct of examinations in future but asserts that the programme is tested, unbiased and a fool proof tool in the detection of the irregularity of collusion and hence the cancellation of the candidates' Kiswahili paper results is not ambiguous,

discriminatory, biased or arbitrary as is alleged by the deponent. Further, the IDP programme has no application to the past results of a centre and is used or flags results of centres on real time basis.

32. It was contended that section 10(2)(e) of the Act empowers the Council to withhold or cancel the results of candidates involved in examination irregularities or malpractices and that an essential factor of conducting examinations, that of certifying candidates based on their ability and of awarding marks or grades based on a candidates own intellectual ability and performance will be lost if candidates who cheat receive marks for subjects they cheated in.
33. The deponent noted that in this instance, it is important to note that only 35 out of 49 candidates have had their next friend move the court for release of their Kiswahili objective results. Further there are a further 1651 candidates countrywide whose results were cancelled and regard has to be had to them as well when the application herein is being heard and what the effect of a grant of the orders being sought would be on the whole examination process, past present and the future. To her, this may result in erosion of public confidence in the examining body and by extension the entire education system of the country once objective assessment and certification in education is in doubt. Morale and values of honest candidates will be undermined and left unchecked these factors will lead to lack of consideration by local and global institutions of higher learning of certificates issued by the Council and by prospective employers both local and international.
34. The Council, it was emphasised, by the very nature of its functions carries out its duties in a climate of confidentiality in order to ensure that the examinations it offers are marked and graded fairly without undue influence and pressure from any quarter. It was therefore the Council's position that an order for production of the candidates' script and a report on the process of verification would undermine the confidential nature of the Council's functions/duties. It added that it is in the interest of the wider Kenyan Society that cases of cheating in examinations be dealt with firmly and that in the peculiar nature of the Council's duties and functions it be held that the results of the 35 candidates represented herein were cancelled fairly and without bias.
35. The deponent was of the view that the Council had not in any way interfered with the right to education of the candidates as it released their results in relation to the other 4 subjects unaffected by irregularity and on the basis of the said results the candidates can be admitted to such secondary schools as their marks invite.The selection process for candidates to take up Form One places was done as follows: National schools on the 20th and 21st January 2015; County schools on the 26th and 27th January 2015 and District schools on the 29th and today the 30th January 2015. The ex parte Applicants' choice of schools based on total marks attained has been considered and admission letters issued for their attendance to the schools the candidates' marks qualify them to attend. It was averred that contrary to the ex parte Applicants averments the Council vide its letter of the 14th January 2015 did respond to the ex parte Applicants' counsel's letter of demand advising them that the candidates whose Kiswahili results were cancelled were still eligible for selection to Form One places in accordance with their scores.
36. It was submitted that Section 32 of the Act provides for the penalties where one is found to have engaged in examination irregularities which include cancellation of the paper. The action taken by the Respondent was therefore not *ultra vires* its statutory powers. While admitting that Council's management of examinations is not defined in detail by legislation or by any published rules, it was submitted that the Respondent has well established practices which guide it in maintaining the standards in the public interest. The Respondent therefore did exercise due care in conducting the investigations and processes leading to cancellation of the results and therefore its action is not ultra vires and/or null and void.
37. Regarding the allegation that the Respondent was unfair, irrational and in breach of the principles of Natural Justice, it was the Respondent's view that it was entitled to effect the cancellation once it is satisfied that widespread irregularities occurred and in support of this submission it relied on **University of Ceylon vs. Fernando [1960] 1 ALL ER 631** cited with approval in **R vs. Kenya National Examinations & Anor Exp. Busara Forest View Academy & 94 others Nbi. HC Misc. 4 of 2009.**
38. Based on Lord Shaw of Dunfermline in Local Government Board v Airlidge, it was submitted that the authority:

"… must do its best to act justly, and to reach just ends by just means. If a statute

prescribes the means it must employ them. If it is left without express guidance it must still act honestly and by honest means".

39. It was submitted that the Respondent carried out its mandate by honest means and through its agents observed glaring irregularities in the taking of examinations by some of the candidates in The Precious Gift Schools-Komarock who included the Applicants herein. To achieve justice for the other over 400,000 candidates sitting the same examinations and to fulfil its mandate; it could not turn a blind eye to the blatant cheating and thus acted justly in order to reach just ends by cancelling the results of the affected candidates.
40. Further reference was made to **University of Ceylon vs. Fernando [1960] 1 All ER 631** (cited in the above case) at pg 637 para. E where the Court stated while citing **Tucker L.J.** in **Russel v Duke of Norfolk (1)** that:

"Their Lordships do not propose to review these authorities but would observe that the question whether the requirements of natural justice have been met by the procedure adopted in any given case must depend to a great extent on the facts and circumstances of the case in point…There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth".

41. The respondent relied in **Pearlberg vs. Varty [1972] IWLR 534** at pg 547 para. E, F ton the effect that:

"A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply those principles in performing those functions unless there is a provision to the contrary. But where some person or body is entrusted by parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required, although as "Parliament is not presumed to act unfairly", the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness. Fairness however, does not necessarily require a plurality of hearings or representations and counter-representations. If there were too much elaboration of procedural safeguards, nothing could be done simply and quickly and cheaply. Administrative or executive efficiency and economy should not be too readily sacrificed".

42. The respondent also relied on **Kenya National Examinations Council vs. R Exp. Geoffrey Gathenji Njoroge & 9 others CA 266/96 in which** where the Court cited the Supreme Court of India Case of **Maharashtra State Board of Secondary and Higher Secondary Education & Anor vs. Kurmasheth and others [1985] CLR 1083** at pg 104 as well as the decision in **R vs. Council of Legal Education [2007] eKLR.**
43. It was therefore the Respondent's submission that it was satisfied by the evidence before it together with scanning and scrutinizing of the scripts of the candidates by its Research Team, Management and Security Committee that collusion had occurred in Precious Gift Schools-Komarock enough to warrant its cancelling the 2014 KCPE results of the Kiswahili paper for 49 candidates.
44. In respect the contention of breach of the right to fair administrative action, 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** and submitted that that such progressive principles of the general law and of the Constitution are expressed in broad terms but it is for this Court to interpret them (Constitution of Kenya, 2010, Article 165 (3) (d)), and to apply them judiciously to the facts and circumstances of the particular case. It was of the view that respondent was entrusted with a margin of discretion whose exercise is not to be regarded as arbitrary, or ultra vires any law.
45. It was the respondent's view that 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 hence the need to balance the two. The

academic integrity of school examinations, it was submitted is crucial, as a basis for access to the entire learning process in tertiary institutions, as well as to the finite job opportunities which facilitate the running of the of the society's private and public governance institutions. It follows that 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. In support of this position the respondent relied on **Republic vs. Kenya National Examinations Council Ex-Parte Afrah Farid Maree & 48 Others Suing as Officials of Abuhureira Education Board** (supra).

46. On the principle of legitimate expectation, it was submitted based on **Republic vs. Kenya National Examinations Council Ex-Parte Martin Phiri & Another** (supra) and **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others HCMA No. 743 of 2006 [2007] KLR 240** that the candidates' legitimate expectation was that they would be treated fairly and that there cannot be a legitimate expectation that a candidate will pass examination and move to the next stage.
47. Finally, it was submitted based on **R vs. Speaker of the National Assembly & Anor Exp. Aboubakar [2002] 2 KLR 225** at 238 para. 25-35 that were the Honourable Court to find that the Respondent acted unfairly in cancelling the results of the Applicants, it should not go ahead to order release of the results as this would be to command the Respondent to carry out its duty in a specific way, which is unacceptable under the principles governing the granting of an order for mandamus.

Interested Party's Case

48. The interested party supported the application vide an affidavit dubbed "replying affidavit" sworn by **Collins Omondi Okumu**, its Managing Director on 29th January, 2015.
49. In his said affidavit the deponent reinforced the applicant's case that there were no irregularities at the school and that the decision was taken in breach of the applicants' rights to fair administrative action.
50. This position was reiterated in the submission where it was contended that the decision was unreasonable.
51. It was further submitted that the applicant's legitimate expectation that their results would be released at the completion of the examinations was thwarted by the respondent and on this issue reliance was placed on

Determinations

52. In this case the applicants seek inter alia mandamus directed at the Respondent to compel the Respondent to reverse its decision to cancel the Kiswahili (KIS) examination results of the 49 Kenya Certificate of Primary Examination candidates for the year 2014 and to release the entire results to the aforesaid candidates. It is further sought that this Court compels the Respondent to produce before the Honourable Court all the Kiswahili (KIS) answer booklets for all the 49 affected candidates particularly Kiswahili (KIS) for the court's inspection.
53. These prayers necessarily give rise to the efficacy of granting the said prayers. In **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) the Court while relying on ***The Concise Oxford Dictionary of Current English, 7th Edition*** found that the word "cancel" means "obliterate, cross-out; annul, make void, abolish, countermand, revoke order or arrangement for…..". Based on that definition the Court was of the view that "if the respondents were contending that the cancellation was wrong because it was done contrary to the rules of natural justice, the obvious thing for them to do was firstly to apply to the High Court for an order of certiorari to quash the cancellation and thereafter for an order of mandamus to compel the release of results." In other words the Court of Appeal was of the view that in the circumstances of that case to seek orders of mandamus and prohibition without quashing the decision was an exercise in futility.
54. In this case, the applicants seeks *inter alia* an order to quash the decision of the Council on the ground that the cancellation was done without the applicants being afforded an opportunity of

being heard contrary to the provisions of Article 47 of the Constitution. That provision provides:

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

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

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

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

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

"…… the test of reasonableness is not applied in a vacuum but in the context of life's realities;…….. If the principle laid down by the High Court is to be considered as correct, its applicability cannot be restricted to examinations conducted by the Schools Educational Boards alone but would extend even to all competitive examinations conducted by the Union and State Public Service Commissions. The inevitable consequence would be that there will be no certainty at all regarding the results of competitive examinations for an indefinite period of time until such requests have been complied with and the results of verification and revaluation have been brought into account. Far from advancing public interest and fair play to the other candidates, in general, such interpretation of the legal position would be wholly defeasive of the same. As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formulated by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and the departments controlling them. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to the problems of this nature, isolated from the actual realities and grass root problems involved in the working of the system and unmindful of the consequences which would emanate if a purely idealistic view as opposed to a pragmatic one were to be propounded. It is equally important that the court should also as far as possible, avoid any decision or interpretation of a statutory provision, rule or byelaw which would bring about the result of rendering the system unworkable in practice".

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

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

legislature".

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

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

59. In that case, the court appreciated that cancellation of results being an act which has nothing to do with the merits of the results and whereas the decision whether or not a candidate has failed may not call for reasons for the failure, where an allegation of impropriety or irregularity is made against a candidate, the candidate ought to be furnished with the reasons why such a decision was made and be afforded an opportunity of being heard on that cancellation. Where the Council does not furnish the applicant with the reasons for the decision, the Court may well be entitled to quash the decision.
60. Whereas it is true that the respondent must of necessity have a measure of discretion in undertaking its responsibilities under the Act, that discretion ought not to be exercised arbitrarily or capriciously. It is now trite that the Court can intervene in the exercise of discretion in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**
61. Therefore as was held in **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090,** where the Court expressed itself as follows:

"In the ordinary way and particularly in cases, which affect life, liberty or property, a Minister should give reasons and if he gives none the court may infer that he had no good

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

62. Similarly, whereas it is true that there are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal and that the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with and so forth, the position taken in **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** in my view holds supreme. In that case the Court of Appeal held:
63. **"In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. *Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing*. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made."** [Emphasis mine].
64. It is therefore clear that whatever method adopted, the same must meet minimum degree of fairness.
65. In this case it is not in doubt the cancellation of the results was undertaken without the applicants being afforded an opportunity of being heard. The respondents have not cited any legal provision which justified such an action which, in the face of it is a violation of Article 47 of the Constitution, being taken. It has however contended that the only requirement for such a course is the satisfaction of the Council and sought to rely on **University of Ceylon vs. Fernando [1960] 1 All ER 631** cited with approval in **R vs. Kenya National Examinations & Anor Exp. Busara Forest View Academy & 94 others Nbi. HC Misc. 4 of 2009** where it was held at pg. 638 para. G and H that:

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

66. However, even in that case, the Court was clear that an inquiry ought to be made in order to enable the authority tasked with the decision making power to fairly determine the matter before

it. For a body entrusted with the powers to determine the rights of subjects such as the rights to fair administrative action, to be said to have been satisfied, it must have considered all the relevant factors. The word "consider" was defined in **Onyango Oloo vs. Attorney General [1986-1989] EA 456** in which the Court of Appeal expressed itself as follows:

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

67. Therefore ordinarily before the authority can be said to have been satisfied it ought to consider all relevant material including affording an opportunity to those who stand to be adversely affected by its decision to give their version before an adverse action is taken against them.
68. However, even if the Court were to agree with the applicants that their right to fair administrative action was violated and were to proceed to quash the respondent's decision, it would not be for the Court to direct the Council as to the manner of proceeding. In **Republic vs. University of Nairobi Civil Application No. Nai. 73 of 2001 [2002] 2 EA 572** the Court doubted whether the university could be prohibited from instituting further disciplinary proceedings after the earlier ones had been quashed unless, of course it was shown that the proposed further proceedings would be contrary to law. Therefore where the Court has quashed a decision, it not for the Court to direct the Respondent on how to proceed where the Respondent has a discretion to decide on the manner of proceeding. Therefore if the Court finds that the Respondents failed in their duty to furnish the reasons or that the reasons given were unreasonable or irrational, the Court would only be entitled to quash the decision and leave it for the Respondents to take the next legal course available.
69. Where however the Respondent fail to release the results without any lawful or justifiable cause the Court would be perfectly entitled to compel them to do so after a demand is made by the applicant. As was held by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra):

"Again as an incident of conducting the examinations, the Act imposes on the Council an obligation to mark the papers of the candidates. If the Council refuses or neglects to mark the examinations within a reasonable time, or having marked them, to declare the results within a reasonable time, the High Court would be within its rights to compel the Council to mark the papers or to declare the results as the case may be. The same goes for awarding diplomas and certificates to the successful candidates. That is a duty specifically imposed on it by section 10(b)."

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

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

71. It must however be appreciated that Article 10 of the Constitution provides for the national values and principles of governance. Under this Article transparency and accountability are constitutional edicts mandated as some of the values and principles of governance and they bind State organs, State officers, public officers and all persons whenever any of them makes or implements public policy decisions which in my view is what the respondent was doing.
72. As was held in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69** the Court expressed

itself as follows:

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

73. The respondent is therefore expected to be transparent in its actions and must adopt such methods as would promote transparency and accountability. Transparency cannot be said to have been achieved when the method or criteria applied in implementing a policy is only known to the authority and its operation is shrouded in a mysterious secrecy.
74. Accordingly, I associate myself with **Lenaola, J** in **Independent Policing Oversight Authority and Another vs. The A G and 2 Others and 658 Interested Parties Petition No. 390 of 2014** that:

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

75. Therefore if the respondent had adopted a criteria for determination of irregularities known to itself alone which was not applied uniformly this Court would have had no hesitation in finding that such a criteria could not pass the test of transparency and accountability.
76. Should the applicants have been afforded an opportunity of being heard before the impugned decision was made by the respondent in the circumstances of this case? Dealing with that issue the Court of Appeal, though *obiter*, expressed itself in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others** (supra) as follows:

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

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

"The right to hearing is fundamental and is entrenched both in the old and the current constitution. It is universally accepted in any process in which the rights of an individual or group of individuals are being adjudicated upon. Yet, in the conduct of public examinations there is, as was stated in the Indian case of *Maharatshtra State Board vs. Kurmarsheth & Others [1985] CLR 1083* a need for the court: 'to be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to academic matters in preference to those formatted by professional men possessing technical expertise and rich experience of actual day to day working of educational institutions and the departments controlling them.'….Considering the way the rules and regulations are couched, the intention is to

ensure there is equal treatment of all candidates involved for purposes of fairly identifying academic and professional ability. The rules and regulations are also intended to assist the examiners identify those candidates who, through improper conduct, want to attain a grade they do not deserve. The rules are also intended to ensure overall integrity of the entire examinations and fairness to the general body of the candidates as a whole…..To afford a hearing it will mean each candidate may need to be called upon to explain an alleged irregularity….By opening room for challenge of the intended decision to cancel an examination result, it will be difficult to deny other candidates like opportunity to question the decisions of the Council which they may be aggrieved about. Will it be in the public interest to allow individual candidates to make representations?……Considering the foregoing we come to the conclusion that balancing one thing against the other the balance tilts in favour of the public interest of ensuring that national examinations results enjoy public confidence and integrity by letting the experts handle them as they deem best provided what they do is applied equally to all candidates with similar complaints against them."

78. The method adopted by the respondent in this case was clearly a restriction on the right to hearing under Article 47. In order to meet the constitutional threshold such a restriction, if enacted after the promulgation of the new constitution is required to specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation. However, in this case it is conceded by the respondent that the Council's management of examinations is not defined in detail by legislation or by any published rules. Even if that were so, under section 7(1) to the Sixth Schedule to the Constitution, all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
79. In this case, it is clear that the respondent's, practice of management of examinations is not in compliance with the current constitutional framework.
80. The next issue for determination is whether the decision by the Council to cancel the results was unfair, irrational or unreasonable. It is however not contended that the Candidates herein were subject to a different method of detecting collusion from the other candidates who took part in the said examination. To compel the Respondents to subject the Candidates herein to a different mode of examination of the papers would in my view not only be discriminatory but would open room for challenge of the decisions made by the Respondents in respect of other candidates a process which will bring the whole process of conduct of examinations into disrepute. As was held by the Court of Appeal in **Kenya National Examinations Council vs. Republic ex parte Kemunto Regina Ouru** (supra):

"The elaborate procedures and safeguards incorporated in the rules and regulations made by the Council which create structures for addressing the various aspects raised by the respondents are adequate. In our view this constituted a fair procedure which guards against arbitrariness."

81. Dealing with the issue of setting different standards for candidates taking the same course or training the Court of Appeal in **Eunice Cecilia Mwikali Maema vs. Council of Legal Education & 2 others [2013] eKLR** expressed itself as follows:

"All applications for admission to the School must be considered against the same standards set by the Council. In *Butime Tom V Muhumuza David and Another Election Petition Appeal No. 11 of 2011* to which we were referred by counsel for the appellant, it was held that when regulating a profession the same standards should apply to all persons seeking to enter into the profession..... To exclude the appellant from complying with the fulfillment of the requirement of core subjects would in our view be to propagate the very discrimination the appellant complained about..... We are also of the view that the learned judge correctly applied the principle in the decision in *Susan Mungai V The Council for Legal Education Petition No. 152/2011* to the effect that the Council has the power to set standards to ensure that the highest professional standards are maintained in the profession and it is not for the

Court to be concerned with the efficaciousness of the decision made pursuant to the Regulations."

82. Apart from that it is stated in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."

83. With respect to legitimate expectation, it is my view that the Candidates legitimate expectation was that they would be treated fairly. As was held in **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others,** (supra) simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way.
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 however, the applicants have not convinced the Court that there were other appropriate remedies which ought to have been resorted to apart from the cancellation of the results if that irregularity had been found to have been committed.
86. I agree that though the applicants have shown that the criterion adopted by the respondent does not entirely comply with the constitutional dictates, to grant the orders sought herein would engender chaos and bring the very process of examination into disrepute. It would have the effect of conceiving and giving birth to administrative chaos and public inconvenience and have serious adverse effect on third parties who dealt with the respondent and who had nothing to do with the respondent's actions. It would breed despondency and dent public confidence in the conduct of examinations in this country.
87. Therefore whereas I find that the manner in which the respondent determines the existence of irregularities in this country is not above board, in the exercise of my undoubted discretion taking into account the likely ramifications of granting the orders sought herein, I decline to grant the same.
88. Accordingly I disallow the Notice of Motion dated 20th January, 2015 but direct the respondent to bear the costs of the application.

Dated at Nairobi this day 16th of February 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Mengich for the Applicants

Miss Kagiri for Miss Njenga for the Respondent

Mr Angwenyi for the Interested Party

Cc Patricia