**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. APPL. NO. 128 OF 2011**

**IN THE MATTER OF AN APPLICATION BY GEOFFREY MAHINDA, ADAN M AHMED, GABRIEL J S WAKASYAKA, MARY C NGENY, FRANCIS AREMO ODERO, THOMAS BILLY BOR, ABDI D DULAE, JULIUS C KORING'URA, JACINTA WASIKE (DR) AND JOHN BABU KAURA, THE FORMER MEMBERS OF THE NATIONAL STANDARD COUNCIL OF THE KENYA BUREAU OF STANDARDS FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS**

**AND**

**IN THE MATTER OF STANDARD ACT UNDER THE CAP 496 OF THE LAWS OF KENYA**

**BETWEEN**

**REPUBLIC .....APPLICANT**

**VERSUS**

**THE MINISTER FOR INDUSTRIALIZATION.....1ST RESPONDENT**

**THE ATTORNEY GENERAL.....2ND RESPONDENT**

**KENYA BUREAU OF STANDARDS.....3RD RESPONDENT**

**AND**

**BRIGID BOYANI MONDA (DR) .....1ST INTERESTED PARTY**

**EMILY JEPTANUI (DR).....2ND INTERESTED PARTY**

**SALIM CHINGABWI .....3RD INTERESTED PARTY**

**NENE NZYUKO.....4TH INTERESTED PARTY**

**YASIN HAJI HUSSEIN.....5TH INTERESTED PARTY**

**JOSHUA LONYAMAN ANGELEI.....6TH INTERESTED PARTY**

**NYWWIRA O NJERU (MS).....7TH INTERESTED PARTY**

**ANDREW MURIUKI.....8TH INTERESTED PARTY**

**KENNEDY ODERA OBAR.....9TH INTERESTED PARTY**

**NAZIR GULAM YUSUF.....10TH INTERESTED PARTY**

**EXPARTE**

**GEORFFREY MAHINDA.....1ST APPLICANT**

**ADAN M AHMED.....2ND APPLICANT**

**GABRIEL. J S WAKASYAKA.....3RD APPLICANT**

**MARY C NGENY.....4TH APPLICANT**

**FRANCIS AREMO ODERO.....5TH APPLICANT**

**THOMAS BILLY BOR.....6TH APPLICANT**

**ABDI D DUALE.....7TH APPLICANT**

**JULIUS C KORINGIURA .....8TH APPLICANT**

**JACINTA WASIKE (DR.).....9TH APPLICANT**

**JOHN BABU KAURA.....10TH APPLICANT**

**JUDGEMENT**

Geoffrey Mahinda, Adan M Ahmed, Gabriel J.S. Wakasyaka, Mary C. Ngeny, Francis Aremo Odero, Thomas Billy Bor, Abdi D. Duale, Julius C Koring'ura, Jacinta Wasike (Dr.) and John Babu Kaura who are the 1st to 10th ex-parte applicants in the order in which they are named were through notices in the Kenya Gazette appointed by the Minister of Industrialisation (hereinafter simply referred to as the Minister) to be members of the National Standard Council (hereinafter simply referred to as the Council) of the Kenya Bureau of Standards(KEBS). Each member was to serve for a period of three years from the date of appointment. The ex-parte applicants happily and enthusiastically went about executing their mandate in the Council.

Through Gazette Notice No.3265 dated 1st April, 2011 the Minister revoked the appointment of the ex-parte applicants and appointed other persons to be members of the Council. The ex-parte applicants were aggrieved by the Minister's action and they came to court and obtained leave to commence judicial review proceedings.

By way of a notice of motion dated 2nd June, 2011 and filed in court on 3rd June, 2011 the ex-parte applicants pray for orders as follows:-

**1. THAT this Honourable court be pleased to issue an Order of Certiorari to remove into the High Court and quash the decision of the 1st Respondent contained in the Gazette Notice No.3265 of 2011 published on 1st April, 2011 as Volume CXIII-No.3 revoking the appointment of the ex-parte applicants as the members of the National Standards Council of the Kenya Bureau of Standards.**

**2. THAT this Honourable Court be pleased to issue an order of Mandamus to compel the 1st Respondent to reinstate the ex-parte applicants as members of the National Standards Council of the Kenya Bureau of Standards.**

**3. THAT this Honourable Court makes such further orders as it deems fit in the interest of justice.**

4. **THAT cost of this application be provided for."**

In the application the Minister, the Attorney General and KEBS are named as the 1st, 2nd and 3rd respondents respectively. The persons appointed in place of the ex-parte applicants are the interested parties.

The application is supported by grounds on its face, a verifying affidavit sworn by Adan Mohamed Ahmed (the 2nd applicant) on 23rd May, 2011, a statutory statement and a further affidavit sworn by the 2nd applicant on 4th July, 2011. The main grounds in support of the application are:-

**1. THAT the 1st respondent contravened the provisions of the Standards Act by revoking the appointment of the ex-parte applicants; and**

**2. THAT the 1st respondent removed the ex-parte applicants without giving them a hearing thereby violating the rules of natural justice.**

The 1st and 2nd respondents and the interested parties opposed the application through a notice of preliminary objection filed on 20th June, 2011, a replying affidavit sworn on 21st June,2011, and an affidavit sworn on behalf of the interested parties on 13th July, 2011 by Jeridah K Sinange who is one of the interested parties. The notice of preliminary objection clearly brings out the case of these parties. The main three grounds in the notice of preliminary objection are:-

**1. The notice of motion dated 2nd June, 2011 is incurably defective for violating the provisions of Section 9(1) of the Law Reform Act, Cap 26;**

**2. The grounds set out in the statutory statement are an unlawful attempt to circumvent the provisions of Section 8(5) of the Law Reform Act; and**

**3. The motion dated 2nd June, 2011 seeks to unlawfully proscribe a lawful statutory discretion conferred on the 1st Respondent.**

The grounds of opposition are further amplified by the replying affidavit of the Minister who sworn in paragraph three as follows:-

**"THAT counsel on record has also drawn my attention to the following incurable procedural lapses contained in the pleadings filed by the ex-parte applicants:**

**(i) The orders sought in the notice of motion dated 2nd June, 2011 are not similar to the orders sought in the statutory statement as required by Section 9(1)(c) of the Law Reform Act cap, 26 of the Laws of Kenya.**

**(ii) The statutory statement sets out facts to be relied upon whereas rules of procedure require the statement to be confined to grounds while facts should be set out in an affidavit.**

**(iii) The notice of motion dated 2nd June, 2011 introduces new grounds that are not set out in the statutory statement including allegations that I acted unreasonably and in violation of the rules of natural justice.**

**(iv) The notice of motion dated 2nd June, 2011 seeks an omuibus order, numbered 3, for which no leave was granted.**

**(v) One of the grounds upon which the reliefs set out in the statutory statement are sought is that this Honourable Court, in striking out Misc. Civil Application No. 75 of 2011, did not heed the provisions of the Constitution and section 1A and 1B of the Civil procedure Rules. In fact Section 8(5) of the Law Reform Act requires the ex-parte applicants to file an appeal if aggrieved by an order made by this Honourable Court in the exercise of its judicial review jurisdiction."**

The Minister also averred that he removed the ex-parte applicants on the ground of incapacity and mishebaviour. The particulars of incapacity and misbehavior are found in paragraph 6 of his affidavit in the following words:-

**"THAT during the recruitment exercise of the respondent's Managing Director, the misbehaviour and/or incapacity of the applicants became clear to the extent that a recommendation was made to dissolve the entire board. I proceed to highlight a few milestones in that exercise as follows;**

**(a) The applicants publicly differed and provided conflicting advice to the ten Minister for Industrialization on the recruitment of the Managing Director. A number of the applicants disowned a report made at a Council meeting which had been prepared and signed by them.**

**(b) The applicants expended a sum of kshs.15,990,410/= in allowances during the recruitment of a Managing Director of the 3rd respondent in an exercise which was frustrated by the applicants. The entire exercise ended in futility.**

**(c) That Parliament's Committee on Equal Opportunity interrogated the foregoing exercise in detail and recommended that;**

**"Due to irredeemable disagreements among the board members, the Minister and Permanent Secretary on the process and outcome, the board to be dissolved with immediate effect and the Minister takes a fresh recruitment process for the post of Managing Director, KEBS."**

Jeridah K Sinange in her affidavit averred that she was aware that her membership of the Council can be terminated by the Minister under Rule 1 (4) of the First Schedule of the Standards Act in accordance with the grounds provided therein. She also averred that no salary is payable to a Council member and the appointment does not constitute an employment and/or an irreversible act.

The 3rd respondent fought the application through a replying affidavit sworn on 23rd November, 2011 by its Acting Managing Director Mrs. Eva Oduor. Through the said affidavit the 3rd respondent avers that the mandate to appoint Council members lies elsewhere and the issue of appointment of Council member should not be used to destabilize its operations.

At the conclusion of the hearing it was agreed by the advocates on record that the issues for the determination of the court are as follows:-

1. Was the appointment of the applicants for a period of three years amenable to termination?

2. Was the 1st respondent entitled to terminate the appointment of the applicants under the Standards Act, State Corporations Act and or Interpretation and General Provisions Act in the manner he did?

3. Are the orders of certiorari and mandamus available to quash the revocation of the applicants' appointment and reinstate them to the Standards Council?

4. In the alternative to 3 above what would be the most efficacious remedy in the circumstances of the matter?

5. Did the dismissal of High Court Judicial Review No. 75 of 2011 result in a final order which would be the subject of an appeal and if so was the commencement of this suit allowable in law?

6. Should this suit be rejected on the additional grounds advanced by the 1st and 2nd respondents; and

7. Whether costs are awardable and, if so, who shall pay the costs of the suit?

I have already clearly brought out the positions taken by the parties. I am in agreement that the issues for the determination by this court are the issues framed by the advocates for the parties. Some of the issues can be combined and that is what I will do in this case. I now move to address the issues raised.

1. DOES THE APPLICATION CONFORMS WITH JUDICIAL REVIEW RULES?

Mr. Ngatia for the 1st and 2nd respondents and the interested parties argued that since the ex-parte applicants did not file a substantive notice of motion within 21 days in J.R No. 75/2011 they should not have been granted leave through this application to commence judicial review proceedings for a second time. He submitted that the only way the ex-parte applicants could have addressed the issue was by taking up an appeal in the Court of Appeal.

Mr. Athuok for the ex-parte applicants on his part submitted that the striking out of J.R. No. 75/2011 did not in any way deny the ex-parte applicants an opportunity of filing a fresh application for leave. He argued that the dismissal was a preliminary issue and Gacheche J was aware of J.R. No. 75/2011 at the time she granted leave to the ex-parte applicants to commence these proceedings.

I have looked at J.R. No.75/2011 and I have also looked at the proceedings of 24th May, 2011 in this file (JR 128/2011) and find that this particular issue has never been addressed by the court. I therefore believe that I can have my say on the same.

Mr. Athuok referred me to page 8 of the judgment of Wendoh, J in **NAIROBI H.C. CONSTITUTIONAL APPLICATION NO. 680 OF 2007 DANIEL MIGICHA NJOROGE VS. THE LAND DISPUTES TRIBUNAL GITHUNGURI DIVISION AND 2 OTHERS** where she stated that:-

**"I have seen the decision of this court dated 26th January, 2007. The Judicial review application was struck out for two reasons, that after leave to commence judicial review proceedings was granted, the applicant did not file the notice of motion within 21 days allowed under Order 53 Civil procedure Rules but filed it out of time. Secondly, the notice of motion was not properly instituted and was not brought in the name of the Republic as required. In my considered view, because the notice of motion was struck out due to want of form, the Applicant had the right to move the court afresh and file the Judicial Review application in accordance with the law and the same would have been considered on its merit."**

Counsel also referred me to the decision of Nyamu, J (as he then was) in **REPUBLIC VS. PERMANENT SECRETARY MINISTRY OF HOUSING EX-PARTE FOUNTAIN ENTERPRISES (2007) eKLR** where he held that a dismissal of a notice of motion for want of prosecution can always be set aside by way of an application to the High court. The learned Judge stated that :-

**"On the other hand Section 8(3) and (5) of the Law Reform Act, only applies to final orders made on merit and default and ex-parte orders are not contemplated or embraced by the provisions. The challenge to final orders if any is by way of an appeal under the Law Reform Act. As a result this court's inherent jurisdiction can successfully be invoked by a party."**

I have considered the decisions cited. In my view the ex-parte applicants never had their day in court in J.R.No. 75/2011. Parties like the ex-parte applicants should be frowned upon when they come to court and obtain orders and fail to follow up those orders. In J.R. No 75/2011 the ex-parte applicants failed to file the substantive notice of motion within the 21 days provided by Order 53 of the Civil Procedure Rules. The net result of their failure is that they ended up wasting valuable judicial time by bringing this application again. This court should not be seen to side with indolent parties. The court however considers the fact that accepting the submission by Mr. Ngatia would amount to turning away the applicants from the fountain of justice without hearing their grievances. The Constitution (Article 159 (2) (d)) enjoins this court to do justice without undue regard to procedural technicalities. In the interest of justice therefore, I find the objection raised by Mr. Ngatia untenable. That means the ex-parte applicants' case is properly before this court.

Another argument raised against the ex-parte applicants' case is that the same is defective in that the statement contains facts and such facts should be contained in the verifying affidavit. Mr. Athuok argued that his clients' case cannot be sacrificed at the altar of technicalities . Mr. Ngatia countered this argument by saying that the new Constitution did not come to sweep away the rules of procedure found in statutes. He cited the decision of the COURT OF APPEAL IN **RAMJI DEVJI VERKARIA VS. JOSEPH OYULA (2011) eKLR** and the decision of ASIKE MAKANDIA, Jin **PETER OHCARA & 3 OTHERS VS. CONSTITUENCIES DEVELOPMENT FUND BOARD & 3 OTHERS (2011) eKLR** to support his argument.

In the **RAMJI DEVJI VEKARIA** case, the respondent had filed an appeal out of time and without the leave of the court. The applicant moved the court by way of a notice of motion seeking to have the notice of appeal together with the record of appeal struck out. The respondent invoked the overriding principle/"$O_2$ principle" in an attempt to save his appeal but the applicant's application was allowed and the notice of appeal and record of appeal struck out. The court of Appeal commenting on the "$O_2$ principle" stated that :-

**"Mr. Kitiwa urges us to exercise our discretion pursuant to the provisions of sections 3A and 3B of the Appellate Jurisdiction Act. With respect, this is not a matter in which those provisions can be invoked. This is an omission that goes to the root of the Rules i.e. whether or not a party can file an appeal out of time and without leave of the court. To invoke the provisions of Section 3A and 3B would result in a serious precedent being set which will mean utter confusion in the court corridors as there will no longer be any reasons for following the rules of the court, even when they have been violated with impunity."**

The Court of Appeal delivered its ruling on 25th March, 2011 and the learned judges must have been alive to the provisions of Article 159(2)(d) of the Constitution. In the **PETER OCHARA ANAM** case ASIKE MAKANDIA, Jaddressed this issue in the following words:-

**"Yes, the Constitution has provided that justice shall be administered without undue regard to procedural technicalities. However I do not understand this provision as ousting all the rules of engagement as we know them in the Civil and Criminal proceedings. These proceedings may be special but like every proceeding, it must have rules by which it should be canvassed. One cannot play football without rules otherwise it will cease to be football and perhaps become another game**

**all together. If we do not have basic rules of engagement, of what use will be Constitutional petitions or references if they are turned into panacea for all legal problems that the citizens of the country may have or imagine? I do not think that the Constitution was meant to replace statutes that provide remedies to those concerned."**

From the above quoted decisions, it is clear that the parties who come to court must adhere to the rules that have been put in place by the laws of this country. I think when the makers of the Constitution provided that justice shall be done without undue regard to procedural technicalities they had in mind minor procedures which do not add value to a case. An outlandish example would be if a rule provides that a party should come to court riding a bicycle. If such a party came to court riding a donkey, the court cannot turn him away in obedience of such a rule. Such a rule will neither add value to a party's case and neither would it be prejudicial to the opposite party. In my view, justice should be dispensed without allowing technicalities to clog the paths leading to the troughs of justice. A party to a case cannot however be allowed to ignore the rules and claim that any attempt, to strike out his case amounts to scarificing the case at the altar of technicalities. If a party does not prepare his case in accordance with the rules provided by the law, then such a party should not be surprised if the case is struck out for non compliance with the rules. The Constitution is meant to make life better for Kenyans and not to make Kenya a lawless country.

Having said the above, I will now scrutinize the ex-parte applicants' statement of facts to see if it complies with the rules provided by Order 53 of the Civil Procedure Rules. Mr. Ngatia's argument is based on Rule 1(2) of order 53 of the Civil Procedure Rules which provides that:-

**"An application for such leave as aforesaid shall be made ex-parte to a judge in chambers and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on."**

I have looked at the statutory statement dated 23rd May, 2011 filed together with the application for leave to commence judicial review proceedings. The statement contains the names and description of the applicants; grounds upon which reliefs are sought; facts relied upon; and reliefs sought. There is also a verifying affidavit sworn on the same date by Adan M Ahmed the 2nd ex-parte applicant. It is clear that the statutory statement complies with Rule 1(2) save for the fact that the facts to be relied upon have also been included in the statement. In my view Rule 1(2) provides what should be included in a statement . If a party includes move that what is provided for, I do not see any harm being done to the opposing party by such inclusion. In fact there is an affidavit verifying the facts to be relied upon. In essence Rule 1(2) has been complied with by the applicants. With utmost respect to Mr. Ngatia I think accepting his argument would amount to nitpicking and the interest of justice may not be served by taking such an approach. I therefore find the ex-parte applicants application not wanting in form. In fact the ex-parte applicants commence their application for leave by way of a notice of motion (ex-parte) instead of chamber summons as required by the rules. The court which granted leave must have noted this error but nevertheless granted leave. Such a mistake is too minor to derail the train of justice.

2. DID THE MINISTER BREACH THE LAW BY REVOKING THE APPOINTMENT OF THE APPLICANTS?

The issue that generated a lot of heat is whether the Minister breached the law in terminating the terms of the ex-parte applicants. Mr. Athuok argued that the Minister broke the law by revoking the appointment of the ex-parte applicants to the council for no apparent reason. He argued that the action of the Minister points to bad faith and this court should step in and firmly guide the errant Minister back the path of the law.

On his part Mr. Ngatia submitted that since the ex-parte applicants were appointed without a hearing, there was no need to hear them when the time came for them to exit. He urged the court to find that the Minister acted within the powers vested in him by the law at the time he revoked the appointment of the ex-parte applicants. He also submitted that the ex-parte applicants were removed for misbehaviour as deponed to by the Minister in his replying affidavit.

I will start by looking at the law governing the removal of the ex-parte applicants. According to the Standards Act, Cap 496 the Council was to operate in accordance with the Schedule. The schedule provides the tenure of office for the members of the council in rule 1 as follows:-

**"Tenure of office**

**(1) Each member of the Council appointed by the Minister under paragraph (a), (c) or (d) of section 6 (2) shall hold office for such a period as may be specified in his instrument of appointment, and shall be eligible for reappointment.**

**(2) Each additional member of the Council appointed by the Minister under Section 6(3) shall hold office for such period as the Minister, on the advice of the Council, may at any time specify.**

**(3) A member or additional member may at any time resign his office by notice in writing addressed to the chairman of the Council.**

**(4) The Minister may cancel the appointment of a member or additional member on the ground of his infirmity, incapacity or misbehaviour, or if a member is absent from three consecutive meetings of the council without the leave of the chairman"**

Rule 1(4) therefore provides the grounds for cancellation of appointment as infirmity, incapacity, misbehaviour or absence from three consecutive meetings without the leave of the chairman.

KEBS being a state corporation, counsel for the ex-parte applicants also urged me to consider the provisions for removal of members of a board of a state corporation. The provisions are found in Section 6(2) of the State Corporations Act, Cap. 446 which states as follows:-

**"Every appointment under Sun-section 1(a) and (e) shall be by name and by notice in the Gazette and shall be for a renewable period of three years or for such shorter period as may be specified in the notice, but shall cease if the appointee –**

**(a) serves the Minister with written notice of resignation; or**

**(b) is absent, without the permission of the Minister notified to the Board, from three consecutive meetings; or**

**(c) is convicted of an offence and sentenced to imprisonment for a term exceeding six months or to a fine exceeding two thousand shillings; or**

**(d) is incapacitated by prolonged physical or mental illness from performing his duties as a member of the Board; or**

**(e) conducts himself in a manner deemed by the Minister in consultation with the Committee, to be inconsistent with membership of the Board**

According to Section 2 of the Act the Committee referred to in Section 6(2) (e) means **"the State Corporations Advisory Committee established by Section 27".**

If it appears to the President that a Board has failed to carry out its functions in the national interest he may under Section 7(3) of the State Corporations Act revoke the appointment of any member of the Board.

Mr. Athuok in his submissions appeared to imply that once a member was appointed to the Council, such a member was to serve for three years without interruption. This line of argument cannot be bought. As already shown, the Minister and even the President can revoke the appointment of a member to a Board on certain grounds. That the ex-parte applicants' appointment to the council was revoked is not an

illegality by itself. The question is whether the procedure for their removal was complied with.

Counsel for the ex-parte applicants did not point to the court the procedure for removal of a Council member. The law only provides the grounds for removal. There being no procedure for removal of a Council member the court will have to look elsewhere to find a solution to this case. It is not possible that Parliament intended to leave the removal of a Council member at the whims of the Minister. The Kenyan Constitution in Article 10 provides the national values and principles of governance in the following words:-

**"10(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them-**

**(a) applies or interprets this Constitution.**

**(b) enacts, applies or interprets any law; or**

**(c) makes or implements public policy decisions.**

**(2) The national values and principles of governance include-**

**(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;**

**(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;**

**(c) good governance, integrity, transparency and accountability; and**

**(d) sustainable development."**

**Good governance, integrity, transparency and accountability**

as found in Article 10(2) (c) are very relevant to this case. In performing his duties the Minister at all times should be guided by these principles. Those who are affected by his decisions have to be told in an open and transparent manner why the decisions affecting them have been made. It is no longer fashionable for a citizen of this great country to wake up one morning and read about a decision affecting him in the newspapers. It is imperative that before a decision is taken the citizen is informed about the anticipated decision and reasons given for such a decision. The person need not be given a hearing depending on the circumstances of the case – see the Court of Appeal decision in **THE KENYA NATIONAL EXAMINATIONS COUNCIL VS. REPUBLIC EXPARTE KEMUNTO REGINA OURU & 128 OTHERS,** Civil Appeal No. 127 of 2009.

It is no longer a matter of discretion for public officers to embrace the principles of good governance. The Constitution now demands that those who have opted to serve the public should embrace these principles. Writing about the principles of good administration, **B.L. Jones & K Thompson in Garner's Administrative Law, 8th edition at Pages 57 & 58** stated that:-

**"Obviously every administrator should observe any procedural rules laid down for him in any relevant statutes or regulations and he must keep to the common law rules of natural justice; equally, where a reasonable expectation that a certain line of conduct will be followed, this should not be departed from without very good reason .....**

**However, the formalized requirements enforceable in the courts are not alone sufficient to guarantee good administration. A member of the executive in his relations with the public should strive to ensure that his decisions are fair, even handed and logical; even though the courts may only intervene in cases of substantial departures from these objectives. He should be prepared to**

**give reasons for and justify his decisions when called upon, and in many circumstances he should give reasons before he is asked to do so".**

When one considers the manner in which the ex-parte applicants were removed from the Council, one can see that at the time of their removal there was no justification. It is immaterial whether the applicants had misbehaved as alleged by the Minister. It is also immaterial that a Parliamentary Committee had recommended the removal of the ex-parte applicants. Any innocent bystander who was not privy to the information the Minister had could have seen and smelled bias and bad faith. Judicial review comes in to quash biased decisions like that of the Minister. The ex-parte applicants ought to have been told the reasons for their removal. This case is not about the allowances the ex-parte applicants used to be paid in the Council. This case is about the human dignity of the ex-parte applicants. It is about receiving fair treatment from the honchos entrusted with the running of this country.

What then I am saying? I am saying that the removal of the ex-parte applicants was not in conformity with the requirements of the rules of natural justice. They ought to have been informed in advance about the reasons for their removal. They need not to have been heard but the principles of good governance demanded that they be given reasons for their removal.

3. ARE JUDICIAL REVIEW REMEDIES AVAILABLE TO THE APPLICANTS?

The answer to this question is in the affirmative. Where a public officer has made a decision without taking the principles of natural justice into account, the court upon the request of the applicant can call for that decision and quash it.

I think the only issue for the decision of this court is whether judicial review remedies are efficacious in the circumstances of this case. One of the prayers placed before the court by the ex-parte applicants is for the quashing of the Gazette Notice revoking their appointments. The ex-parte applicants did not pray for the quashing of the appointments of the interested parties. If the revocation of the appointment of the ex-parte applicants is quashed and the appointment of the interested parties is left to stand the result would be two councils for KEBS. That would not augur well for the operations of KEBS.

It is also clear from the papers filed in court that the terms of the ex-parte applicants are about to come to an end. Issuing an order of mandamus may not be of much use to the applicants at this stage. It is imperative to note that the Minister, the management of KEBS and the council must work with unity of purpose so that the operations of KEBS can run smoothly.

Issuance of judicial review orders is at the discretion of the court. Of course the court has to exercise the discretion judiciously. The court has to consider various factors before issuing such orders. In the case before me I think and believe the public interest will be better served if the stability currently in place at KEBS is maintained. Writing on discretion of the court to issue orders of mandamus, Paul Craig at Paragraph 25-018 in the **6th edition of Administrative Law** observed that:-

**"It is generally accepted that mandamus is a discretionary remedy. A variety of factors have influenced the court in deciding how the discretion should be exercised .....**

**The court will not normally order a respondent to undertake the impossible, nor will it make orders that cannot be fulfilled for other practical or legal reasons."**

Looking at the material placed before the court, I find that the orders the ex-parte applicants seek are not efficacious in the circumstances of this case. I therefore decline to grants the reliefs sought by the ex-parte applicants.

4. THE COSTS

Considering the outcome of this case, the only logical order on costs is that there will be no orders as to costs. It is so ordered.

Dated and signed at Nairobi this 15th day of February, 2012.

**W. K. KORIR**
**JUDGE**