



**REPUBLIC OF KENYA**

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

**SIAYA MISC. APPLICATION NO. E010 OF 2021**

**ORIGINATING FROM**

**BUSIA CIVIL MISC. APPLICATION NO. E28 OF 2021**

**Brig (RTD) FOUSTINE SIRERA ODUODI.....1<sup>ST</sup> EX-PARTE APPLICANT**

**ST. AUSTINS KINGANDOLE BOM.....2<sup>ND</sup> EX-PARTE APPLICANT**

**- VERSUS -**

**THE BUSIA COUNTY EDUCATION BOARD.....1<sup>ST</sup> RESPONDENT**

**THE SECRETARY/BOARD OF MANAGEMENT AND**

**PRINCIPAL, ST. AUSTIN'S KINGANDOLE HIGH SCHO..2<sup>ND</sup> RESPONDENT**

**AND**

**THE DIRECTOR OF EDUCATION**

**FOR BUSIA COUNTY.....1<sup>ST</sup> INTERESTED PARTY**

**CABINET SECRETARY FOR EDUCATION.....2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The Application of the exparte applicant **Brig. (Rtd) Foustine Sirera Oduodi** is dated 25/3/2021 under Certificate of Urgency seeks for orders to be heard during the recess and secondly, that leave be granted to the exparte applicant to apply for Judicial Review Orders of Certiorari to remove and bring before this court the decision of the Busia County Education Board issued vide their letter of 2<sup>nd</sup> December 2020 signed by Awuor T.A, the Secretary County Education Board, Busia and have it quashed.

2. The exparte applicant further seeks that the leave so granted do operate as stay and stop nomination of new persons to constitute the Board of Management of St. Austin's Kingandole High School as per the directions in the letter; and to allow the Board of Management of St. Austin's Kingandole High School as constituted before the impugned decision of the County Education Board of 2<sup>nd</sup> December 2020 to continue its operations and management of the school pending the hearing and determination of the main motion as intended.

3. This being a recess period, and having considered the application for leave to be heard during the recess, I hereby grant such leave.

4. On the main application for leave to apply for Judicial Review Orders of Certiorari; I note that the applicant claims that the Board of Management was disbanded without giving them an opportunity to be heard, upon their raising of issues touching on the Principal of the school.

5. In paragraph 12 of the statement of facts, the applicant asserts that:

***“The County Education Board and the Ministry of Education through the Minister of Education have upon my appeal completely failed to resolve the matter and the appeal has remained unacted upon since 7<sup>th</sup> December 2020 todate with intent to render the appeal irrelevant once a new board is constituted. All internal resolution mechanisms have been completely exhausted***

*prior to appeal and to this court action which now remains the only viable legal action.”*

6. However, there is no single annexure showing that any appeal or internal dispute resolution mechanisms have been resorted to and exhausted in the circumstances of this case.

7. It is also not clear why the applicant and Board of Management having been disbanded by the letter of 2/12/2020, he took all this time to approach the court for the remedy. Such delay can lead to a situation where this court could be asked to quash a decision which has already been overtaken by events as there is no prayer for prohibition or Mandamus to compel the Respondents to reinstate the applicant.

8. That notwithstanding, I observe that there is no evidence of exhaustion of or resort to internal dispute resolution mechanisms provided for in law before resort to this court for redress.

9. Section 93 of the Basic Education Act of 14 of 2013 stipulates:

***“93(1) There is established an Education Appeals Tribunal.***

***(2) Any person aggrieved by the decisions of the County Education Board may appeal to the Education Appeals Tribunal.***

***(3) The Cabinet Secretary in consultation with the National Education Board and relevant stakeholders shall prescribe regulations on the operation and structure of the education Appeals Tribunal.***

***(4) The Education Appeals Tribunal shall comprise: -***

***a) The Chairperson of the National Education Board;***

***b) The Director-General;***

***c) The Secretary to the Teachers Service Commission;***

***d) A representative of the Education Standards and Quality Assurance Council;***

***e) A representative of the Kenya Private Sector Alliance;***

***f) A representative of the Attorney General; and***

***g) The Chief Executive Officer of the National Council for Nomadic Education in Kenya.***

10. The applicant does not say that he lodged any appeal as required by Section 93 of the Basic Education Act.

11. More so, such appeal can only be made to the Education Appeals Tribunal and not to the County Education Board or Ministry of Education through the Ministry of Education as alleged in paragraph 12 of the statement of facts.

12. In addition, Section 9 of the Fair Administrative Action Act. No. 4 of 2015 provides for the procedure for Judicial Review and stipulates:

***“(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for Judicial Review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.***

***(c) The High Court or a subordinate under Subsection: -***

***(1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.***

***(3)The High court or a subordinate court shall, if it is not satisfied that the remedies referred to subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under subsection (1).***

***(4) Notwithstanding subsection (3), the High Court or a subordinate court may, in exceptional circumstances and on applicant by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice.***

***(5).....”***

13. From the above provisions of the law, it is clear that the applicant had an opportunity and was obligated by Section 93 of the Basic Education Act to first challenge the decision of the County Education Board, by appealing to the Education Appeals Tribunal upon which he could then approach this court if he was dissatisfied with the outcome thereof.

14. Further, the Fair Administrative Action Act No. 4 of 2015 mandates that a party must first exhaust internal mechanisms for appeal or review before approaching this court alleging that his right to fair Administrative action has been violated.
15. Section 9 of the Act provides for situations where the High Court can nonetheless exempt an applicant from resort to internal appeal or review mechanisms. Even then, before such exemption can be granted by this court, the applicant must make an application seeking for such exemption and in that application, he must demonstrate existence of exceptional circumstances.
16. I have perused the application for leave to apply for Judicial Review Orders of Certiorari and for leave if granted, to operate as stay.
17. However, I have not seen any application or prayer for exemption to resort to internal appeal mechanisms as provided for under Section 93 of the Basic Education Act.
18. In **Ndiara Enterprises Ltd Vs Nairobi City County Government**, Civil Appeal No. 274 of 2017 [2018] eKLR, the Court of Appeal upheld the decision of this court (**Aburili J**) on the question of exhaustion of internal appeal or review mechanisms and stated as follows:

*“Cognizant of the clear procedure for redress provided under the Act, the learned Judge refused to admit jurisdiction in determining the application on the basis that where a clear and specific procedure for redress of a grievance is provided, then that procedure should be strictly followed. The Judge cited the cases of The speaker of The National Assembly v Njenga Karume (2008) 1 KLR 425, Mutanga Tea & Coffee Company Ltd v Shikara Ltd & Anor (2015) eKLR for that proposition.*

.....

*“We see no reason to warrant interference with those findings as in our view they are based on sound law and evidence. The record does not reflect any attempt by the appellant to first resolve its grievances against the respondent under the procedure provided for redress under PPA or FAA. There is no evidence that the appellant made any complaints in the nature of the respondent’s refusal to approve its plans for construction of a perimeter wall to the liaison committee under section 13 of the PPA. It’s clear that the appellant could only approach the High Court on appeal against the decision of the National Liaison Committee. Though the High Court can exempt a party from following such clear laid procedures for redress of grievances before approaching it in the noble interests of justice, the learned Judge rightly found that the appellant had failed to prove there were exceptional circumstances in its case to warrant such exemption. Indeed, there are no apparent exceptional circumstances to justify such exception and which exception was also not sought. The High Court’s power to exercise its jurisdiction under Article 165 of the Constitution was therefore limited or restricted by statute in this instance as found by the Judge. The appellant had complained before this Court that the learned Judge erred in failing to appreciate that though there exists an alternative procedure for redress, the same was less convenient, beneficial and effective in its circumstances. However, that argument must be taken as an afterthought. The same was never raised or pursued before the High Court thus denying the respondent the opportunity for rebuttal and denying this Court the benefit of the reasoning of the High Court on the same issue.”*

19. This court is bound by the above Court of Appeal decision which upheld this very Court’s decision on matters jurisdiction where the law provides for a clear internal appeals or review mechanisms before resorting to judicial review remedies in the High Court.
20. Accordingly, I have no alternative but to find and hold that this application is premature and does not lie. The same is hereby struck out.
21. The prayers for leave to apply for Certiorari and all consequential prayers are hereby declined and dismissed for want of jurisdiction.
22. Proceedings and Ruling to be typed and remitted to Busia High Court for record purposes. File closed.
23. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT SIAYA, THIS 1ST DAY OF APRIL 2021**

**R.E. ABURILI**

**JUDGE**