REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CONSTITUTIONAL PETITION NO. 17 OF 2020

IN THE MATTER OF ARTILCES 10 (2), 20 (2), 21(1), 22(1) & (2), 23(1), 27(1), 47,48,50(1), 159, 165& 258 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF THE BASIC EDUCATION ACT, 2015

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF DISOLUTION OF BOARD OF MANAGEMENT

AND

IN THE MATTER OF KENYORO SECONDARY SCHOOL

AND

IN THE MATTER OF VIOLATION AND/ OR INFRINGEMENT OF THE FUNDAMENTAL RIGHTS OF THE PETITIONERS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOM) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

1) JAMES OMARIBA NYAOGA

2) JAMES ARIGA ORINA

3) JOHN MATUNDA OMWENGA

4) REV. ZACHARY N. ORINA

5) MARGARET MOMANYI

6) DAMARIS NYACHIRO

7) DORCAS MOMANYI

8) BERINA K. ONDIEK

9) THE BOM, KENYORO SECONDARY SCHOOL

VERSUS

1. COUNTY EDUCATION BOARD-KISII COUNTY

2. NATIONAL EDUCATION BOARD.....RESPONDENTS/ APPLICANTS

3. COUNTY DIRECTOR OF EDUCATION – KISII COUNTY

AND

1. THE PRINCIPAL, KENYORO SECONDARY SCHOOL

2. THE TEACHERS SERVICE COMMISSION

3. THE CABINET SECRETARY, MINISTRY OF EDUCATION

4. THE HON. ATTORNEY GENERAL.....INTERESTED PARTIES

RULING

1. The subject of this ruling is an application dated 6th April 2021, brought by the respondent/applicants pursuant to Section 80 of the Civil Procedure Act for the following orders;

a. A stay of execution on the ruling of the Hon. Judge delivered on 25th March 2021 be stayed pending hearing and determination of the petition dated 10th November 2020;

b. A temporary injunction be issued against the respondents / petitioners and or its agents or employees herein restraining them from interfering with the affairs of the Kenyoro Secondary School, pending the full hearing and determination of this application;

c. The orders given by the Hon. Judge on 25th March 2021 be reviewed.

d. A temporary injunction be issued against the respondents /petitioners and or its agents or employees herein restraining them from interfering with the affairs of the Kenyoro Secondary School pending the full hearing and determination of the petition dated 10th November 2020.

2. The 3rd applicant, Paul Odhiambo, swore an affidavit in support of the application on 6th April, 2021. He averred that he had read and understood this court's ruling delivered on 25th March 2021 and was of the view that it needed to reviewed. The 3rd applicant stated that there was a new Board of Management for Kenyororo Secondary School which had been inaugurated on 23rd November 2020, as shown in appointment letters annexed to his affidavit. He claimed that the new Board of Management was installed after the petitioners failed to perform their duties and in particular failing to manage the school in collaboration with the school's principal. He accused the petitioners of attending meetings in the absence of the principal and forcing him to pay them allowances. He also claimed that they had misused the school's funds as seen in an audit report annexed to his affidavit.

3. The 3rd applicant explained that the actions of the petitioners had prompted them to call for an urgent meeting to discuss their conduct. He annexed a copy of the letter inviting the petitioners to attend a County Education Board meeting and copies of WhatsApp correspondences showing that the letter had been circulated through a WhatsApp group in which the school's principal and the petitioners were members.

4. On 2nd November 2020, the petitioners attended the meeting where accusations of their inappropriate conduct were raised. The 3rd applicant claimed that the petitioners had been given a chance to explain how they had managed the school's affairs but they did not give sufficient responses. He claimed that the meeting had been rescheduled and the petitioners were aware of the date. The 3rd applicant further deposed that the petitioners had been accorded a fair hearing before they were disbanded and allowing them back to the school would be very detrimental. It was the 3rd applicant's position that there was an apparent mistake on the face of the judgment and there had been a discovery of new evidence which called for a review of the court's orders. The 3rd applicant also claimed that the application had also been made in the best interest of Kenyoro Secondary School students.

5. On behalf of the petitioners, the 1st petitioner, in his affidavit sworn on 8th April 2021, stated that they were duly appointed as members of the Board of Management of the 9th petitioner and had been executing their responsibilities lawfully. In the course of undertaking their mandate, they discovered that the 1st interested party had misappropriated funds belonging to the 9th petitioner. The 1st interested party sought indulgence to repay the money and proceeded to repay some of it. However, the 1st interested party later colluded with the 3rd applicant to start harassing the 1st to 8th petitioners with a view to having them drop the demand for repayment of the monies.

6. The petitioner averred that the 3rd applicant called for a board meeting that was to be held on 30th October 2020 by disseminating a letter dated 29th October 2020. The letter came to the 1st petitioner's attention on the evening of 29th October 2020 upon which he requested the 1st

interested party who had circulated the letter from the 3rd applicant to seek a reschedule. On 31st October 2020, the 1st interested party sent a Short Text message communicating that the 3rd applicant had now ordered that the meeting be convened on 2nd November 2020. The 1st petitioner deposed that the communication was sent from the office of the 1st interested party and was not received by most of the Board Members until the day the meeting was to take place. That notwithstanding, the petitioners attended the meeting which had no agenda. The meeting which was characterized by abuse and belittlement culminated in the announcement by the 3rd applicant that the 9th petitioner stood dissolved. The petitioner averred that they were not given a chance to address the Chairman of the 1st applicant and the 3rd applicant during the meeting. He also averred that there had been no official communication pertaining to the termination of the petitioners' tenure. He therefore questioned the appointment of a new Board in the absence of a formal dissolution of the previous Board of Management.

7. The petitioner asserted that the court properly addressed itself to the issues that had been raised and the salient issues that govern the issuance of conservatory orders when it issued the orders sought to be reviewed. He averred that there was no error apparent on the face of the record to warrant a review of the orders as sought by the applicants. He added that if the applicants were aggrieved by the grant of conservatory orders, they could only apply to the appellate court for intervention.

8. Simultaneously with the affidavit, the petitioners filed grounds of opposition in which they contested the jurisdiction of this court to grant the orders sought. They also opposed the application on the ground that the court was *functus officio* and stated that the application was a disguised attempt by the applicants to invite the court to sit on appeal of its own decision. The petitioners were of the view that the parameters for an application for review had not been met. The applicants were also accused of generating fictitious documents that were previously unavailable and were inadmissible in terms of Section 106 A and 106B of the Evidence Act.

9. The application was disposed by way of oral submissions by the parties' learned counsel.

10. Ms. Chepkirui for the applicants argued that there were sufficient reasons for review of the orders of the court. She referred to new documents that had been placed before the court including WhatsApp messages and the letters of appointment of the new Board of Members. Counsel submitted that the WhatsApp messages clearly showed that the agenda for the meeting had been communicated. She submitted that the petitioners were the ones who had suggested the dates as the initial date for the meeting was not convenient for them. She further submitted that Section 106 of the Evidence Act did not give timelines for the filing of a certificate and since the application was at the interlocutory stage, counsel was of the view that there was still time to comply with Section 106 of the Evidence Act. To buttress this position, counsel cited the case of ***Dry Associates Co Ltd & 3 others v Timothy Karungu Karanja & 7 others [2019] eKLR.***

11. She submitted that the WhatsApp messages demonstrated that the petitioners had not been called into an *impromptu* meeting. She submitted that the agenda was an open forum and the verdict was given to the petitioners in their presence.

12. It was her further submissions that the interests of the students of Kenyoro Secondary School would be affected if the orders were left in place, since the petitioners had violated the Education Act as shown in the 3rd applicant's affidavit. In support of this submissions, counsel cited the case of ***Platinum Distillers Limited v Kenya Revenue Authority Petition No. 83 of 2019 [2019] eKLR***.

13. In opposing the application, Mr. Oguttu, learned counsel for the petitioners emphasized that what was before the court was a constitutional petition and the reliance on the Civil Procedure Rules was therefore erroneous. He submitted that the court had found in favour of the petitioners pursuant to the Mutunga Rules 2013 and had since become *functus officio*. Counsel also submitted that the application was incompetent as the affidavit was not signed by the deponent in violation of section 5 of the Oaths and Statutory Declarations Act. He also argued that no litigant could seek a positive order of an injunction without a substantive suit and the court was therefore being asked to act in a vacuum.

14. In the event that order 45 and Section 80 were applicable, counsel submitted that the applicants could not state they had new documents unless they could show that the documents could not be availed before and that they did not know of the documents. Concerning public policy and public interest, counsel argued that there had been no invocation of the public policy interest in the applicants' pleadings and the issue ought to be disregarded. He referred to the case of ***National Bank of Kenya Limited v Ndungu Njau [1997] eKLR*** in support of his submissions.

15. Ms. Chepkirui's rejoinder was that Order 45 gave the court jurisdiction to review its orders. She strongly urged the court to grant the application in the best interest of the students of the school. She submitted that the petitioners could not continue being Board Members because there was a new Board and the petitioners had been heard.

ANALYSIS AND DETERMINATION

16. From the application, the parties' affidavits and the submissions summarized above, there are two main issues arising for determination in this application. The first is whether the application before this court is competent and the second is whether this court should review the orders granted on 25th March 2021.

17. The petitioners have argued that the application for consideration is not properly before this court as it has been brought under the provisions of the Civil Procedure Rules as opposed to the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

18. Faced with a similar argument, the court in ***Gabriel Otiende & 4 others v County Commissioner – Siaya County & 2 others; John Nyapola Okuku & 3 others (Interested Parties) [2021] eKLR*** held as follows;

> "*19. It is thus evident that the Mutunga Rules do not specifically provide for the form in which a conservatory order may be set aside or reviewed. However, the Civil Procedure Rules still remain the parent rules in civil matters, and where there is a lacuna in a*

procedure under the Mutunga Rules, the Civil Procedure Rules apply. Accordingly, it is my finding that the instant application is properly before court."

19. Similarly, the court in ***Abdisalam Hassan Ismail & 2 others v Kenya Railways Corporation & 3 others Constitutional Petition No. 77 of 2014 [2015] eKLR*** held;

> *"The Petitioners argue that the application is incompetent because the same is brought under Section 80 of Civil Procedure Rules and Order 45 of the Civil Procedure Rules. According to the petitioners, the provisions of the Civil Procedure Act and the rules made thereunder do not apply to constitutional matters and therefore the application should fail.*
>
> *I reject the Petitioner's submission that the application is incompetent for having been brought under the provisions of the Civil Procedure Act. I hold the view, that technicalities of procedure should not be entertained in matters of enforcement of constitutional rights."*

20. The Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules does not specifically provide for review. However, as held in the above persuasive decisions of the courts, where there is a lacuna in the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules, the Civil Procedure Act and the Civil Procedure Rules will apply. Moreover, the invocation of the wrong provision of the law will not of itself be fatal to an application. Courts are charged to do substantive justice to parties and will not pay undue regard to procedural technicalities. The reliance on the Civil Procedure Act and the Civil Procedure Rules is therefore not fatal to the application. This position finds support in the case of ***Karl Wehner Claasen v Commissioner of Lands & 4 others [2019] eKLR*** where the Court of Appeal held thus;

> *"There is no cross-appeal against the finding of the trial judge that in the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable Civil Procedure Rules. However, we add that Rule 3(8) of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that Article 159(2) (d) and (e) respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of the Constitution."*

21. The petitioners have also challenged this court's jurisdiction to review its orders on the ground that it is *functus officio*. The doctrine of *functus officio* prevents the re-opening of a matter before a court that has made a final decision on a matter. The court in ***Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR*** cited with approval the Canadian case of *CHANDLER vs ALBERTA ASSOCIATION OF ARCHITECTS [1989] 2 S.C.R.* 848 where the court discussed the doctrine as follows;

> *"The general rule that a final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal In re St. Nazaire Co., (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the Judicature Acts to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions:*
>
> *a. Where there had been a slip in drawing it up, and,*
>
> b. *Where there was an error in expressing the manifest intention of the court. See Paper Machinery Ltd. vs. J.O. Rose Engineering Corp., [1934] S.C.R. 186"*

22. The Court of Appeal further held;

> *"The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued."*

23. An applicant is therefore not barred from making an application for review for the reason that the court is *functus officio*. Where there are sufficient grounds to do so, the court will exercise its discretion to review its orders.

24. The petitioners' contention that the application is incompetent for the reason that the affidavit in support of the application was not signed is also rejected. **Rule 19** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules** provides the procedure for filing applications in constitutional petitions. It states;

*19. A formal application under these rules shall be by Notice of Motion set out in Form D in the schedule and **may** be supported by an affidavit. **[Emphasis added]***

25. A reading of the above provision demonstrates that one can move the court for interlocutory orders as would be necessary to meet the ends of justice. It is not a mandatory requirement that such an application be supported by an affidavit. However, and contrary to the petitioners' assertion, the application filed by the applicants was supported by an affidavit duly sworn before a Commissioner for Oaths in Kisii on 6th April 2021, pursuant to the provisions of the Oaths and Statutory Declarations Act. The application for review is therefore competent and properly filed before the court.

26. However, the orders sought for stay of execution of the orders of this court have no bearing as there is no pending appeal. (See ***Involllate Wasike Siboe v Kenya Railways Corporation & another SC APPLICATION NO. 9 OF 2017 [2019] eKLR***)

27. The second issue for determination is whether this court should review the orders granted on 25th March 2021. Review applications are governed by **Section 80** of the **Civil Procedure Act** and **Order 45** of the Civil Procedure Rules which provide;

> *"80. Any person who considers himself aggrieved—*
>
> *(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or*
>
> *(b) by a decree or order from which no appeal is allowed by this Act may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."*

28. **Order 45, Rule 1** of the **Civil Procedure Rules** states;

> *"45 (1) Any person considering himself aggrieved—*
>
> *(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
>
> *(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.*

29. The foregoing provisions state that a party seeking the review of orders must establish that he has discovered new and relevant evidence which he did not know about after due diligence or that there is an error apparent on the face of the record or for other sufficient reason.

30. The applicants are aggrieved by this court's orders issued on 25th March 2021. The ruling was made on an application filed by the petitioners for conservatory orders and a temporary injunction to stop the applicants herein from dissolving the Board of Management or implementing their decision made on 2nd November 2020 to disband the Board of Management. The petitioners sought orders conserving their status as duly appointed members of the Board of Management of Kenyororo Secondary School pending the hearing and determination of the Petition. They claimed that the applicants herein had convened a meeting on 2nd November 2020 without issuing the requisite notice and had proceeded to disband the Board of Management in the impromptu meeting.

31. In response, the 3rd applicant swore an affidavit stating that the impromptu meeting had been necessitated by the actions of the petitioners whom he acused of mismanaging the school.

32. This court considered the parties' rival positions and held as follows in its ruling dated 25th March 2021;

> *"The 3rd respondent acknowledged that the meeting held on 2nd November 2020 was an impromptu meeting which he claimed was necessitated by the gross misconduct of the petitioners. He also deposed that the petitioners had been given ample time to defend themselves* ***but did not indicate when such notice had been given or attach the notice to his affidavit****.*
>
> *What is evident from the material before this court at this point, is that there was no prior notice of the meeting held on 2nd November 2020. There is also no evidence that the petitioners were informed of the accusations facing them before they attended that meeting. The petitioners have established that the manner in which their appointments were revoked by the respondents was questionable. The parties traded accusations on the mismanagement of the secondary school which I will not delve into at interlocutory stage. Nevertheless, I find that the petitioners have established a prima facie case against the respondents with a likelihood of success.*
>
> *Another issue that arose in the course of the proceedings was the claim that the application is overtaken by events for the reason that a new board has been inaugurated by the respondents. The 3rd respondent averred that the new board had been inaugurated on 23rd November 2020 and claimed to have attached copies of appointment letters to his affidavit which were marked as "PM-8." However, the annexure marked as "PM-8" in the 3rd respondent's affidavit is a copy of the minutes of the meeting held on 2nd November 2020.* ***A thorough examination of all annexures attached to the 3rd respondent's affidavit indicates that there is no proof of the inauguration of a new Board of Management as submitted by the petitioners' counsel.*** *I note the intricate process for the constitution of a Board of Management in the Basic Education Regulations, 2015. It could well be that the respondents are in the process of constituting a new Board of Management.*
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> .....
>
> *I have already found that the petitioners have established a prima facie case against the respondents. There is high likelihood that the respondents may conclude the process of constituting another board before this petition is heard and determined. If at all such a board was appointed on 23rd November 2020, which has not been proved, it would have been appointed after the filing of the petition on 18th November 2020. Keeping in mind the public interest demands for fair hearing, good effective administration of justice and the need to preserve the substratum of a suit before its determination by the court, I find that there is need to grant conservatory orders pending the determination of the petition."* ***Emphasis added***

33. The applicants have placed before this court copies of WhatsApp correspondences to show that the petitioners were informed beforehand of the meeting that was held on 2nd November 2020, where the petitioners were removed from the Board of Management of Kenyororo Secondary School. They have also annexed copies of appointment letters to show that a new Board of Management was appointed after the petitioners were removed from that position.

34. On applications for review on the basis of the discovery of new evidence, the Court of Appeal in ***D. J. Lowe & Company Ltd vs Bonquo Indosuez, CA NRB Civil Application No. 217 of 1998 [1998] eKLR*** held;

> *"Where such a review application is based on fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing."*

35. Similarly, in ***Rose Kaiza vs Angelo Mpanju Kaiza [2009] eKLR*** the Court of Appeal considered an application for review on the ground of new evidence and held that;

> *"Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."*

36. The Court of Appeal in ***Otieno, Ragot & Company Advocates v National Bank of Kenya Limited Civil Appeal No. 60 & 62 of 2017 [2020] eKLR*** further held;

> *"Order 45 rule 1 does not excuse every error or mistake, even if inadvertent. It excuses those mistakes and allows a party to introduce documents which it could not lay its hands on even after the exercise of due diligence. There was no response to the replying affidavit in so far as it accused the respondent of lack of diligence. The discretion of the law to grant an order of review cannot be used to help a party who has shown lack of diligence. It is also in instructive to note that the respondent actually misled the High Court about when and how it realised it was mistaken. Mr. Mundia disposed in an affidavit in support of the application that he noted that there was a problem when he read the sentiments of the court at paragraph 9 of the ruling in which the Judge found that there was no agreement signed by client in accordance with section 45(1) of the Advocates Act. It was quite clear therefore that the respondent having found out why the Judge decided against it went back to the drawing board and fished out evidence that would bolster its case. This was too late in the day as the horse had already bolted from the stable. The respondent's explanation about how it realised there was a problem was therefore designed to mislead the court and the learned Judge failed to see through this trick. Had he considered this fact, I have no doubt at all, that he would not have allowed the application."*

37. The recurring principle to be deducted from the above binding authorities is that an applicant seeking to have the orders of a court reviewed on the basis of a discovery of new and important matter must demonstrate that they acted diligently in adducing all possible evidence and that the new evidence was not within the knowledge of the applicant.

38. The applicants in this case had a chance to present evidence to counter the petitioners' claim that they were not given prior notice or informed of the agenda of the meeting held on 2nd November 2020 before the court made the ruling dated 25th March 2021 but failed to do so. They have now annexed WhatsApp correspondences to their current application to show that the petitioners had prior notice of the meeting before it was convened. The applicants have not demonstrated that the WhatsApp correspondences were not within their knowledge or could not be produced at the time when the impugned orders were made.

39. They have also failed to prove that with due diligence, they could not procure the letters of appointment of the new Board of Management which they have attached to their application. In the ruling dated 25th March 2021 this court noted that although the applicants had claimed that they had inaugurated a new board, there was no proof of to support the claim. The installation of a new Board of Management was a live issue before the court. The parties made averrments and canvassed the issue in their submissions. The applicants have not demonstrated that the letters of appointment were not within their knowledge when the initial application was made. The application for review on the basis of discovery of new evidence is therefore without basis.

40. This court also finds that the applicants have also not shown the mistake or error apparent on the face of the record that would warrant a review of the orders issued on 25th March 2021. For a court to allow an application for review on the ground, that there was a mistake or error apparent on the face of the record, the error must be self-evident and should not require an elaborate argument to be established. An erroneous view of evidence is not good ground for review although it may be taken up on appeal. (See ***National Bank of Kenya Limited v Ndungu Njau (supra) & Abasi Belinda vs Fredrick Kangwamu and another (1963) E.A 557)***

41. Further Review may also be granted for other sufficient cause to be demonstrated by the applicant. On what constitutes *"sufficient cause"* the Court of Appeal in ***Pancras T. Swai v Kenya Breweries Limited CIVIL APPEAL NO. 275 OF 2010 [2014] eKLR*** held;

> *"As repeatedly pointed out in various decisions of this Court, the words, "for any sufficient reason" must be viewed in the context firstly of Section 80 of the Civil Procedure Act, Cap 21, which confers an unfettered right to apply for review and secondly on the current jurisprudential thinking that the words need not be analogous with the other grounds specified in the order. In Sarder Mohamed v. Charan Singh Nand Sing and Another (1959) EA 793, the High Court correctly held that Section 80 of the Civil*

Procedure Act conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate. In Shanzu Investments Limited v. Commissioner for Lands (Civil Appeal No. 100 of 1993) this Court with respect, correctly invoked and applied its earlier decision in WANGECHI KIMATA & ANOTHER VS. CHARAN SINGH (C.A. No. 80 of 1985) (unreported) wherein this Court held that

"any other sufficient reason need not be analogous with the other grounds set out in the rule because such restriction would be a clog on the unfettered right given to the Court by Section 80 of the Civil Procedure Act; and that the other grounds set out in the rule did not in themselves form a genus or class of things which the third general head could be said to be analogous."

42. The court's discretion to review its orders for other sufficient cause is therefore wide and not limited to the other grounds of review being an error apparent on the face of the record and the discovery of new and important matter.

43. The applicants contend that public interest demands that this court should review its orders issued on 25th March 2021 for the best interest of the students of the school. Public interest is one of the considerations that a court ought to take into acount in determining whether to grant conservatory reliefs as held by the Supreme court in the case ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others Application No. 5 of 2014 [2014] eKLR***. The court stated;

"Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."

44. The Black's Law Dictionary, 9th Edition at page 1350 defines *"public interest"* as "*the general welfare of the public that warrants recognition and protection. Something in which the public as a whole has a stake; especially an interest that justifies governmental regulation."*

45. At the time this court issued the conservatory orders sought to be reviewed, the applicants had intimated to the court that there was a new Board of Management in place but did not prove this claim. They have now brought copies of appointment letters for the new Board of Management which they claim was installed after the petitioners were removed from that position. The letters indicate that the new board was appointed on 23rd November 2020 before this court issued the conservatory orders.

46. It is apparent that the danger that the petitioners sought to forestall when they sought the conservatory orders has already taken place. The applicants have disbanded the petitioners as the Board of Management for Kenyororo Secondary School and replaced them with new members. This court takes cognizance of the fact that allowing the conservatory orders to remain in place may affect the smooth running of the secondary school as the two warring sides tussle to manage the affairs of the school. Such a scenario would be contrary to public interest and the mandate of the Board of Management under Section 59 of the Basic Education Act, to promote the best interest of the institution. Not to mention the detrimental effect that a stalemate between the petitioners and the new board would have on learning at the school. The applicants have therefore demonstrated that there is sufficient cause to review the earlier orders of this court.

47. This court notes that the substratum of the petition will not be rendered nugatory if the orders for review are granted. The petitioners may still pursue most of the orders sought in their petition. The matter is also still at the interlocutory stage and the parties will have occasion to advance their arguments on the merits and demerits of the constitutional petition at the full hearing.

48. In the end, I find that the application for review is merited. The orders of this court dated 25th March 2021 are hereby set aside.

49. The costs of the application shall be in the cause.

Dated, signed and **delivered** at **KISII** this **7th** day of **July 2021**.

R.E OUGO

JUDGE

Mr. Kipngetich For the Petitioner

Miss Chepkirui For the Respondent

Mr. Orwasa Court Assistant