REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

JUDICIAL REVIEW NO. 7 OF 2018

IN THE MATTER OF APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLE 53, 50, 47, 48, 25, 23, 20 OF THE CONSTITUTION

AND

IN THE MATTER OF BASIC EDUCATION REGULATIONS 2014

AND

IN THE MATTER OF BASIC EDUCATION REGULATIONS 2014

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT 2015

AND

IN THE MATTER OF CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC.....APPLICANT

AND

BOARD OF MANAGEMENT

ST. JOSEPH'S SCHOOL RAPOGI.....RESPONDENT

JUDGMENT

1. **JOO** and **TAO** were minors and the respective First and Second *Exparte* Applicants herein. They instituted these proceedings through their parents as their next friends and were granted leave to apply for orders of Certiorari and Prohibition which leave was to operate as a stay to the implementation of a decision of the Respondent contained in like letters dated 31/08/2018 which required the *Exparte* Applicants to stay away from St. Joseph's School, Rapogi (hereinafter referred to as '**the School'**) pending the hearing and determination of **Migori Chief Magistrate's Court Criminal Case No. 521 of 2018** (hereinafter referred to as '**the Case'**).

2. The Applicants were Form Four students in the School when the impugned letters were issued. The letters followed a fire incident in the School which destroyed property worth over Kshs. 14 million and police investigations which led to the arrest and arraignment of the Applicants before court. The Applicants were charged and therefore the accused in the criminal case.

3. The Applicants challenged the letters and faulted the propriety of and the process of making the decision contained in the letters. They referred this Court to *inter alia* the **Constitution,** the **Basic Education Act No. 14 of 2013** (hereinafter referred to as '**the Act'**) and the **Basic Education Regulations 2014** (hereinafter referred to as '**the Regulations'**) in urging the Court to grant an order of Certiorari to quash the letters and a Prohibition against excluding the Applicants from the School.

4. The Respondent opposed the application. Through a Replying Affidavit sworn by the Principal of the School who also served as the Secretary to the Board of Management **Mr. Maurice Otunga**, (hereinafter referred to as '**the Principal'**) the Principal contended that he acted within the confines of the law and that the exclusion of the Applicants from the School was justified and was reached at for the safety and wider interests of over 1,800 students in the School.

5. The matter was heard by way of written submissions where both parties complied and filed substantive submissions. The Applicants mainly challenged the letters to the extent that they did not have a return date where the Applicants were to appear before the School's Board of Management (hereinafter referred to as '**the Board'**) for disciplinary hearings. They further contended that the letters were done with impunity and in finality given that the Principal did not have the legal authority to indefinitely exclude the Applicants from the School. The Applicants also outlined the various processes towards final exclusion of students from Schools as provided in the **Regulations** and submitted that the Principal grossly faulted them.

6. The Respondent submitted in support of the decision contained in the impugned letters and contended that the Principal acted within **Regulation 38(b)** which allowed him to exclude any student from the School if the student engaged in acts of indiscipline likely to threaten the safety of the other students. The decision in **Cortec Mining Kenya Limited vs Cabinet Secretary Ministry of Mining & 9 others (2017) eKLR** was referred to in urging this Court to dismiss the matter.

7. I have certainly perused and understood the contents of the substantive Motion, the parties' submissions and the decision referred thereto. It is therefore for this Court to determine whether the Motion is merited but first the province of Judicial Review.

8. Judicial review has over time been a subject of litigation and the Court of Appeal in **Municipal Council of Mombasa –vs- Republic & Umoja Construction Ltd** in **Civil Appeal No 185 Of 2001** stated its parameters as follows: -

> ***"Judicial Review is concerned with the decision-making process not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision makers took into account relevant matters or did take into account irrelevant matters. The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decisions."*** (emphasis added).

9. The above position was restated in **Republic –vs- Kenya Revenue Authority exparte Yaya Towera Ltd (2008) eKLR** with the holding that the remedy of judicial review is concerned with reviewing not the merits of the decisions of which the application of judicial review is made but the decision-making process itself.

10. **The Halsbury's Laws of England 4th Edition Vol. (1)(1) at paragraph 60** gives a caution that it must always be remembered that in every case the purpose of Judicial Review is to ensure that an individual is given a fair treatment by the authority in which he has been subjected to and that it is no part of that purpose to substitute the opinion of the Judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question and unless the restriction on the power of the Court is observed, the Court, will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power.

11. Be that as it may, the grounds on which the Court exercises its judicial review jurisdiction have also been a subject of consideration by Courts. In the Ugandan case of **Pastoli vs Kabale District Local Government Council & Others (2008) 2 EA 300,** the Court citing with approval the cases of **Council of Civil Unions vs Minister for the Civil Service (1985) AC 2** and **An application by Bukoba Gymkhana Club (1963) EA 478** held as follows: -

> ***"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety……Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example , illegality, where a Chief Administrator Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the power to do so are vested by law in the District Service Commission….Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision is usually in defiance of logic and acceptable moral standards….. Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural favour towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision."*** (emphasis added).

12. This Court is alive to the truism that the grounds upon which it exercises its judicial review jurisdiction are incapable of exhaustive listing due to the developing jurisprudence and as so stated by the Court of Appeal in the case of **David Mugo -vs- The Republic , Civil Appeal No. 265 of 1997(unreported)** that as long as orders by way of judicial review remain the only legally practical 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 orders shall continue to extend so as to meet the changing conditions and demands affecting administrative decisions.

13. The above analysis is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) (2005) & EA 43** where the development of judicial review was equated to the Biblical mustard seed which a man took and sow in his field and despite being the smaller of all seeds, it grew to become the bigger shrub of all and became a tree so that the birds of the air came and sheltered in its branches.

14. Judicial review therefore stems from the doctrine of *ultra-vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality or impropriety of procedure (the three "I's") and has become the most powerful enforcement of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. It is said that the grounds of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of **Donoglue vs Stephenson** in the last century.

15. The above position was also captured by **Nyamu, J** (as he then was) in **Republic vs Commissioner of Lands exparte Lake Flowers Limited Nairobi HC Misc Application No. 1235 of 1998** (unreported) when he held as follows: -

> ***"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief….. The High Court has the same power as the High Court in England upto 1977 and much more because it has the exceptional heritage of another constitution and the doctrines of the common law and equity in so far as they are applicable and the courts must resist the temptation to try and contain judicial review in a straight jacket…Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality.. The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectation… Even on the important principle of establishing standing for the purposes of judicial review the courts must resist being rigid chained to the past defined situations of standing and look at the nature of the matter before them….. Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis…The court envisions a future growth of judicial review in human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."***

16. I believe I have said enough on the jurisdiction of this Court on judicial review. It is hence on the foregone that further discussions shall follow. I will now begin with a consideration as to whether the contents of the Respondent's letters dated 31/08/2018 (hereinafter referred to as '**the impugned letters'**) ought to be impugned.

17. The genesis of the impugned letters is by now well settled. The letters were issued at a time when the whole country underwent a spate of burning of Schools leading to colossal loss of property worth millions of shillings. In some instances there were loss of lives. The School was not an exception. In the night of 16/07/2018 the School was torched and property worth over Kshs. 14 Million destroyed. Police investigations were initiated and subsequently the Applicants were implicated in the arson and they were charged in the Case.

18. Following the said events and for fear of further acts of arson since they were other people who were suspected to have taken part in the arson but were still at large, the Principal decided to, and excluded the Applicants from the School vide the impugned letters. The Principal explained further that his decision was also made in the wider interests and safety of the other over 1800 students.

19. The impugned letters were brief. In three lines they stated thus: -

> ***This is to inform you that your son is a suspect awaiting trial in court. In view of that he is not allowed back in school until the court process is over. Kindly take note.***
>
> ***With many thanks.***

20. The impugned letters had the effect of excluding the Applicants from the School until after the conclusion of the Kenya Secondary Schools Examinations which examinations were scheduled to run from October to November 2018. That is because the Case was fixed for hearing on 21/11/2018, a time after the completion of the examinations. In essence, the Applicants were to stay out of School until after the completion of their examinations. How the Applicants were to sit for their examinations while they were out of the School remain unclear.

21. The parties herein through their pleadings and submissions captured the various provisions of the law that guaranteed the right to free and compulsory education and how cases of indiscipline among students were to be handled. They ranged from **Article 53** of the **Constitution, Sections 4, 30, 34** and **35** of the **Act** to **Regulations 30** to **84** inclusive.

22. **Regulations 38** provides as follows: -

> ***'"f the head of the institution is of the opinion that_***
>
> ***(a) the acts of indiscipline have persisted in spite of the warnings or corrective measures taken under these regulations; and***
>
> ***(b) if the act of indiscipline is likely to threaten the safety of the other learners in the institution,***
>
> ***The head of the institution shall issue the learner, with a suspension letter addressed to the parent or guardian indicating the nature of the indiscipline and specifying the date the learner, accompanied by the parent or guardian is required to appear before the Board of Management of the institution."***

23. The procedure for the disciplinary hearing after the issuance of the letter under **Regulations 38** is provided for in **Regulations 39 and 40**. Under **Regulation 41** any party aggrieved by the resultant decision of the disciplinary process may appeal to the Education Appeals Tribunal.

24. A letter issued pursuant to **Regulations 38** must contain the following details: -

(i) Be addressed to a Parent or Guardian;

(ii) State the nature of the act of indiscipline;

(iii) Specify the date the student, accompanied by the Parent or Guardian, is required to appear before the Board for a disciplinary hearing.

25. The impugned letters were addressed to the Applicants' parents and they contained the nature of the act of indiscipline. However, the letters did not have any return date before the Board but the Applicants were to stay out of the School since they were suspects until the finalization of the Case. It is that third limb of the impugned letters that ignited these proceedings.

26. There is no dispute that **Regulations 38** empowered the Principal to suspend the Applicants from the School. On why the letters did not specify the return date before the Board the Principal deponed that the law did not specify the time within which the Applicants were to appear before the Board. The reason why the impugned letters did not have any return dates before the Board is simple. Since the Applicants were to stay out of the School until the finalization of the Case (which hearing of the Case was to begin after the KCSE examinations were fully administered) then by that time the Applicants would no longer be students and there would be no need for them to appear before the Board.

27. Could it be that **Regulations 38** in not specifying the period within which the student is to appear before the Board gave an open cheque to the head of an institution to determine whether a student excluded from that institution would ever appear before the Board? I do not think so for two reasons. First, it would not have been the intention of the **Regulations** to create room where a student is indefinitely excluded from school under **Regulations 38** whereas in gravier circumstances under **Regulations 35** where an institution is closed due to mass students' indiscipline the institution must be opened and the students recalled within 14 days. Second, the right to free and compulsory basic education under **Article 53** of the **Constitution** must always be promoted and only curtailed in the most deserving cases. Even in such cases alternative ways to attaining that right must be considered in light of the constitutional requirement that a child's best interests are of paramount importance in every matter concerning that child. The right is however subject to the rights and interests of other children.

28. In line with the foregone I must find and hold, which I hereby do, that the most favourable interpretation of **Regulation 38** is that once a student is excluded from an institution the letter excluding the student must contain a date where the student while in the company of the parent or guardian must appear before the Board of Management of that institution and that the date should not be later than 14 days of the date of the letter.

29. In this case the impugned letters fell short of that compliance. The Principal acted without regard to due process and erred in not requiring the Applicants to appear before the Board within 14 days of the impugned letters. By so doing the Principal acted irrationally and *ultra vires* his legal mandate. He further illegally usurped the powers of the other organs charged with the responsibilities of dealing with cases of indiscipline in the School including the Board and the County Education Board. The Principal also curtailed the Applicants' right to appeal to the Education Appeals Tribunal in the event they were aggrieved by the decision the County Education Board. Although the Principal (and by extension the Respondent herein) was fully vested with the legal powers to exclude the Applicants from the School under **Regulation 38**, the decisions to indefinitely exclude the Applicants from the School and as contained in the impugned letters fell short of fully complying with the law. To that end the impugned letter cannot stand are hereby removed to this Court and quashed by an Order of Certiorari.

30. On the prayer for an order of Prohibition I note that the law mandates the Principal and/or the Respondent to exclude any student from the School in appropriate instances and by following due process. Further, since the Applicants sat for their KCSE examinations in October/November 2018 they are no longer students in the School and the exclusion process cannot apply to them. The order of Prohibition cannot therefore issue in the circumstances of this case. Courts must guard against issuing orders in vain so as to guard the rule of law.

31. As I come to the end of this judgment I must apologize to the parties for the late delivery of this judgment which was caused by several challenges beyond my control and my involvement in a Multi-Judge Bench matter at the High Court in Mombasa.

32. That said, based on the foregone consideration, the following final orders do hereby issue: -

(a) An Order of *Certiorari* be and is hereby issued and the impugned letters are hereby removed to this Court and quashed accordingly.

(b) The Order of Prohibition is hereby declined.

(c) Since the matter has partly succeeded each party shall bear its own costs.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 14th day of February 2019.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Omonde Kisera Counsel instructed by the firm of Messrs. Omonde Kisera & Company Advocates for the Exparte Applicants.

Mr. Odongo Owino Counsel instructed by the firm of Odongo, Okal & Company Advocates for the Respondent.

Evelyn Nyauke – Court Assistant