



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW NO. 35 OF 2018**

**IN THE MATTER OF: AN APPLICATION BY NANCY NYAGUTHII GACHEWA FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF AND PROHIBITION**

**AND CERTIORARI**

**IN THE MATTER OF: THE DECISION MADE BY THE KENYA NATIONAL EXAMINATIONS COUNCIL DATED 18<sup>TH</sup> JANUARY, 2018 TO DEREGISTER GREMON EDUCATION CENTRE CODE NUMBER 0312125 AS AN EXAMINATION CENTRE**

**AND**

**IN THE MATTER OF: THE NON-ADHERENCE BY THE KENYA NATIONAL EXAMINATIONS COUNCIL TO THE PRINCIPLES OF PROCEDURAL FAIRNESS, TRANSPARENCY, ACCOUNTABILITY AND CREDIBILITY AS REQUIRED BY ARTICLES 10, 47, 201 AND 227 OF THE CONSTITUTION OF KENYA, 2010 AND SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF: GREMON EDUCATION CENTRE aka GREMON SECONDARY SCHOOL**

**AND**

**IN THE MATTER OF: ARTICLES 22, 23, 43, 47 AND 165(2) (B) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: THE KENYA NATIONAL EXAMINATION COUNCIL ACT NO. 29 OF 2012**

**AND**

**IN THE MATTER OF: THE STATE DEPARTMENT FOR BASIC EDUCATION**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF SECTIONS 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**BETWEEN**

**NANCY NYAGUTHII GACHEWA.....APPLICANT**

**AND**

- 1. THE KENYA NATIONAL EXAMINATIONS COUNCIL**
- 2. THE COUNTY DIRECTOR OF EDUCATION, MOMBASA**

### 3. THE SUB-COUNTY DIRECTOR OF EDUCATION, MOMBASA

### 4. THE PRINCIPAL SECRETARY, MINISTRY OF EDUCATION.....RESPONDENTS

#### RULING

#### The Application

1. The Judicial Review jurisdiction of this court has been invoked by the Notice of Motion here dated 6<sup>th</sup> June, 2018 and filed herein on 7<sup>th</sup> June, 2018 by the Ex parte Applicant, who prays for the following orders:

(a) An order of Certiorari be issued to bring to this court the decision of the 3<sup>rd</sup> Respondent vide the letter dated 18<sup>th</sup> January 2018, the same having been replicated in a letter dated 3<sup>rd</sup> April, 2018 and quash the said decisions to deregister Gremon Education Centre as an examination Centre.

(b) An order of Mandamus be hereby issued to the 3<sup>rd</sup> Respondent directing them to reinstate the school as an examination Centre.

(c) Grant of leave to apply for the Judicial Review Orders sought herein do operate as a **stay** against the Respondents' decision vide the letter dated **18<sup>th</sup> January 2018** to deregister Gremon Education Centre as an examination centre, through their agents and servants.

(d) Costs of this application are awarded to the Ex parte Applicant.

2. The application is premised on the grounds set out therein and on the Supporting Affidavit of **Nancy Nyaguthii Gachewa** sworn on 6<sup>th</sup> June, 2018.

3. The Applicant's case is she is the director and proprietor of Gremon Education Centre hereafter called ("the centre) - a Private Secondary School that has been in operation since 2012 and was later registered fully on 4<sup>th</sup> December 2014 under Registration number 01P3000012. Sometime in February 2015, the 2<sup>nd</sup> Respondent recommended the registration of the Centre as an examination centre on full registration status in time for the 2015 Kenya Certificate of Secondary Education examinations, upon a full assessment of the standards conducted on 24<sup>th</sup> July 2014. The recommendation was made in a Report dated 20<sup>th</sup> February 2015.

4. The Applicant states that before the report with the recommendation was submitted to the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent ensured that the recommendations made therein to the Applicant's school had been complied with, and a further assessment scheduled for January 2015 had been done. **The Applicant alleges that sometime in 2017, she started receiving threats from the 3<sup>rd</sup> Respondent herein, that the School would be closed down for reasons which were never specified. The Applicant ignored the threats as the School was in full compliance with all the rules and regulations for operating an Examination Centre. At the start of 2018, the Ministry of Education decided to roll out the NEMIS programme, where the details of all students would be registered afresh and each student issued with a unique identification number to be used in all stages of education. The Applicant attempted, on several occasions, to start the registration process, using the School's code, 03121215 as issued by the 1<sup>st</sup> Respondent, but was not successful. On enquiry at the office of the County Director of Education on 20<sup>th</sup> February 2018, the Applicant was advised by the Sub-County Director of Education to await the issuance of new codes as the Ministry of Education intended to re-designate the School to Nyali Sub-County from Kisauni Sub-County, where it originally was, as they intended to start a new Sub-County in Nyali, Mombasa. The Applicant was later belatedly issued with a new NEMIS system code, 03126117, for the Nyali Sub-County. On the 23<sup>rd</sup> February, 2018, the Applicant wrote a letter to the County Director of Education, Mombasa County enquiring why the new code was not opening the systems for Nyali Centre. After inquiry at the Sub-County offices in Nyali, the Applicant was told by the 1<sup>st</sup> Respondent's officer that they had issues to sort out with the County. The Sub-County Director of Education however claimed to not be aware of any issues. The Applicant was later informed that the Centre had been cancelled.**

5. **The Applicant states that during the 2017 KCSE period, an anomaly had occurred where a student who was to sit for a special paper wasn't registered. The Quality Assurance Officer from Nyali then threatened to ensure that the school was not registered as a Centre anymore after the School Manager had refused to open the Centre for the special paper to be done. The Applicant alleges that true to the threats earlier issued, the 1<sup>st</sup> Respondent, by a letter dated 18<sup>th</sup> January 2018 deregistered the School as an Examination Centre on the grounds that the examination rooms were small; the School charged students fees contrary to government policy; and the classrooms had poor lighting. The Applicant states that it is important to take note that the said letter, addressed to the School, through the Sub-County Director of Education, was not forwarded up until the 27<sup>th</sup> February 2018 when the Applicant had gone to make further inquiry on the challenges she was facing in uploading her students' data to the NEMIS system. The Applicant contends that the late service by the 3<sup>rd</sup> Respondent was malicious and intentional so as to deprive the applicant their right to appeal against the said decision as provided for under section 85 of the Basic Education Act:**

**"Any person aggrieved by the decision of County Education Board under this Part may, within thirty days of being notified of the decision, appeal against such a decision to the Education Appeals Tribunal established under section 93."(Emphasis given)**

6. **The said letter was given to the Applicant 39 days later and as a result the applicant cannot therefore appeal the said decision to the Education Appeals Tribunal as they are time barred leaving this court as the only possible recourse. The Applicant states that the said omission by the 3<sup>rd</sup> Respondent also deprived the Applicant her due right provided under Section 4(3) (c) of the Fair**

Administrative Actions Act which provides as follows:

**(c) Notice of a right to a review or internal appeal against an administrative decision, where applicable;**

**7. The Applicant states that the act of deregistration carried out by the 1<sup>st</sup> Respondent** without affording the Applicant any notice or opportunity to be heard on the reasons, before the decision, is contrary to the spirit of *audi alteram partem* and the letter of Section 4(3) of the Fair Administrative Actions Act which provides:

**(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

- (a) Prior and adequate notice of the nature and reasons for the proposed administrative action;**
- (b) An opportunity to be heard and to make representations in that regard;**
- (d) A statement of reasons pursuant to section 6;**
- (g) Information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

8. Further, the aforesaid letter dated 18<sup>th</sup> January 2018 referenced a report and recommendations therein, made by the 3<sup>rd</sup> Respondent, Nyali, that the School be deregistered as an examination Centre. The applicant contends that neither the 3<sup>rd</sup> Respondent nor any representative of the same ever made a visit to the School thus making the same suspect. The Applicant states that the decisions were made devoid of merit given that no evidence was ever produced to show the reasons for the said recommendation and if it was, the same has not been shown to the Applicant. However, immediately upon receipt of the letter, the Applicant immediately wrote back to the 1<sup>st</sup> Respondent, vide a letter dated the same 27<sup>th</sup> February 2018, refuting the allegations made in the 1<sup>st</sup> Respondent's letter, and addressed the claimed issues. The Applicant further states that she invited 1<sup>st</sup> Respondent's officials to visit the centre and carry out an inspection to disprove the allegations contained in the letter dated 18<sup>th</sup> January 2018. Upon receiving the Applicant's letter dated 27<sup>th</sup> February 2018, the 1<sup>st</sup> Respondent replied vide the letter dated 16<sup>th</sup> March 2018, which was not forwarded to the Applicant until the 13<sup>th</sup> April 2018. The 1<sup>st</sup> Respondent did not disprove the fact that no inspection had been carried out prior to the making of their earlier decision instead they advised that they would organize for an inspection and further, that the original decision to deregister the School as an examination centre would stand as earlier communicated in the letter dated 18<sup>th</sup> January 2018. The Applicant later received a letter dated 3<sup>rd</sup> April 2018, from the 1<sup>st</sup> Respondent listing a different set of reasons for the deregistration after an inspection had been duly carried out. The reasons therein being:

- i. That the school did not have a head teacher;
- ii. The school had insufficient and unqualified teaching staff not registered with the Teachers Service Commission;
- iii. The School did not have a laboratory and adequate learning equipment
- iv. The building was under construction.

**The Response**

9. Only the 1<sup>st</sup> Respondent replied to the application vide a Replying Affidavit sworn by **Andrew Nyachio** on 24<sup>th</sup> August, 2018. The 1<sup>st</sup> Respondent's case is that it is established under Section 3 of the Kenya National Examinations Council Act, No. 29 of 2012 (hereinafter referred to as "the Act"). Under the Act, the 1<sup>st</sup> Respondent is tasked with the responsibility to, *inter alia*, **set and maintain examination standards, conduct public academic, technical and other national examinations within Kenya at basic and tertiary levels**. In the performance of its functions, the 1<sup>st</sup> Respondent states that it is authorised under the Act to make rules regulating the conduct of examinations and for all purposes incidental thereto. Pursuant to the 1<sup>st</sup> Respondent's aforesaid powers, the 1<sup>st</sup> Respondent formulated and published a user guide for the management of the Kenya Certificate of Secondary Education Examinations (KCSE). (The said regulations were annexed to affidavit of Andrew Nyachio and marked "AM 1").

10. The Respondent states that the Applicant is a private secondary school located in Mombasa County. That at all material times, the Applicant has been in violation of the KCSE examination regulations and in particular the 1<sup>st</sup> Respondent's User Guide for the Management of Kenya Certificate of Secondary Education Examinations. The 1<sup>st</sup> Respondent avers that, the Sub- County Director of Education –Nyali wrote to KNEC on 10<sup>th</sup> January 2018, informing the Applicant the decision to De-register the centre as a KNEC examination centre due to the following reasons which were stated in a letter marked AM 2. These reasons included allegations that examination rooms are small in size against the Ministry of Education guidelines; that the Applicant has been previously engaged in the examination malpractice; that the Applicant charges candidates examination fees contrary to Government policy and circulars; that the Applicant's classrooms have poor lighting and ventilations; that, KNEC wrote to the Applicant through the Sub-County –Nyali on 18<sup>th</sup> January 2018 on KNEC decision to de-register the school as an examination centre due to the inspection report dated **20<sup>th</sup> March 2018 ("Marked AM 3")**; that the Applicant wrote to KNEC on 27<sup>th</sup> February 2018, disputing the allegations made against it by the office of the sub-County Director of Education and requested KNEC to visit the school and inspect it (**Letter Marked AM-4**); that the 1<sup>st</sup> Respondent has express powers donated by the Act to regulate the conduct of examinations and make rules and regulations thereof.

11. The 1<sup>st</sup> Respondent states that in the instant case, it exercised these powers judicially and rationally. The 1<sup>st</sup> Respondent avers that, the

Applicant's institution did not have a head teacher to supervise the teaching and learning in the school, and that, the Applicant has insufficient and unqualified teaching staff. Further, the 1<sup>st</sup> Respondent alleges that the Applicant does not have a library and adequate learning equipment's despite offering all sciences as a subject, and that the Applicant's building is under construction, the stair cases are steep and not protected, the corridors and balconies in first floor lack metal grill, therefore dangerous to the students. The 1<sup>st</sup> Respondent states that it wrote to the school through the Sub-County Director of Education – Nyali - informing them of the decision to deregister the school based on the findings stated above. The 1<sup>st</sup> Respondent avers that at all material times, the Applicant has been in violation of the KCSE examination regulations and in particular the 1<sup>st</sup> Respondent's user guide for the management of KCSE 1<sup>st</sup> Edition 2017. The 1<sup>st</sup> Respondent states that the Applicant is seeking the intervention of this Court through deceit and should not be allowed to obtain any advantage from the proceedings herein, and that the Applicant is only intending to arm-twist the 1<sup>st</sup> Respondent into considering the Applicant's demand and or intention to have her school unlawfully registered for the 2018 KCSE examinations. The 1<sup>st</sup> Respondent urged the Court to dismiss the application with costs.

### **Submissions**

12. Parties filed submissions which were highlighted in court on 18<sup>th</sup> October, 2018.

### **Determination**

13. I have considered the application and the rival submissions. In my view the only issue for determination is whether the process through which the Ex parte Applicant was deregistered as an examination centre was lawful.

14. It is now trite law that Judicial Review proceedings are not concerned with the merits leading to a particular decision. The Judicial Review is more concerned with the process. That means that the starting point in this matter is that the Ex parte Applicant was already enjoying the status of an examination centre. That status could be taken away by the Respondents in the event that the Ex parte Applicant breached the relevant regulations. Indeed, the 1<sup>st</sup> Respondent states that the Ex parte

Applicant was deregistered on the basis that:

- It did not have a head teacher to supervise teaching and learning in the school
- It had insufficient and qualified teachers
- It did not have a library
- It had building under construction hence issue of student safety
- Examination rooms were small
- School charged fees contrary to government policy and circulars, etc.

15. In my view these are meritorious reasons to cause the 1<sup>st</sup> Respondent to deregister the Ex parte Applicant. But one should also ask why these short comings were not detected before the status was granted in the first place.

16. The above notwithstanding, the issue this court must address is whether the Ex parte Applicant, who was already enjoying the status as an examination centre, was ever given any notice that the said status would be revoked. The letter communicating the decision of deregistration is dated 18<sup>th</sup> January, 2018. However, the same was forwarded to the Ex parte Applicant on the 27<sup>th</sup> February, 2018, **39** days after the decision was made. It is clear that the late service was intentional, so as to deprive the Ex parte Applicant of the right to appeal the decision vide **Section 85 of the Basic Education Act** which provides that:

**“Any person aggrieved by the decision of County Education Board under this part may, within thirty days of being notified of the decision, appeal against such decision to the Education Appeals Tribunal established under Section 93.”**

17. The said letter was delivered after the said thirty nine (39) days thereby denying the Ex parte Applicant the right to appeal, and thereby leaving recourse to those proceedings as the only option and hope for the Ex parte Applicant. The said omission by the 3<sup>rd</sup> Respondent also deprived the Ex parte Applicant her right provided under Section 4(13) (c) of the Fair Administrative Actions Act:

**(c) Notice of a right to a review or internal appeal against an administrative decision, whatever is applicable.”**

18. Reference is made to a letter dated 10<sup>th</sup> January, 2018 which indicated that the de-registration would take place on grounds stated in that letter. There was no evidence that this letter was served upon the Ex parte Applicant. In any event the said letter is not addressed to the Ex parte Applicant but to the Chief Executive Officer of the 1<sup>st</sup> Respondent.

19. Further, the aforesaid letter dated 18<sup>th</sup> January, 2018 made reference to a report and recommendations therein, made by the 3<sup>rd</sup> Respondent, that the school be deregistered as an examination centre. The applicant contends that neither the 3<sup>rd</sup> Respondent nor any of its representatives ever made a visit to the school. This Court is of the view that the statue which was conferred upon the Applicant as an examination centre could be revoked by the Respondent for any valid reason. However, the process of such an action should be judicious,

and notice of such a decision cannot be hidden, and given 39 days after the decision was made.

20. From the foregoing it is the finding of this court that the Notice of Motion under reference is merited and is allowed as prayed. However, each party shall bear own costs.

**Dated, Signed and Delivered in Mombasa this 4<sup>th</sup> day of April, 2019.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Tajbhai holding brief Wachenje for Applicant

Mr. Makuto for Respondents

Mr. Kaunda Court Assistant