REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 13 OF 2019

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND MANDAMUS

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

KENYA NATIONAL EXAMINATIONS COUNCIL.....1ST RESPONDENT

AND

THE TEACHERS SERVICE COMMISSION.....INTERESTED PARTY

EX PARTE:

IDRIS GARAT NOOR

ABDULLAHI OMAR HASSAN

ABDIRASHID ORE AHMED

ORAN ADAN HUSSEIN

ABDI SHEIKH HASSAN

IBRAHIM ALI

HASSAN ADO ABDI

MOHAMMED NOOR BARE

FARAH ADAN ALI

ISSACK MUHAMED MOHAMUD

ABDI AHMED ALI

ABDIRIZAK ADAN IBRAHIM

ABDIRIZAK ABDIRAHMAN

ABDULLAHI MUHAMMED

YSSUF KILAS ADEN

ALINOOR M. ABDI

ABDI DUBOW IBRAHIM

ALI ABDI HUSSEIN

ADAN EDIN HUSSEIN

RULING

Introduction

1. The *ex parte* Applicants herein are Chairpersons of Parents Teachers Associations of various schools, namely Dadaab Secondary School, Tarbaj Secondary School, Wagalla Memorial School, Griftu Secondary School, Yssuf Haji Girls Secondary School, Dertu Girls Secondary School, Kinna Secondary School, Ashabito Girls Secondary School, Wajir Bor Secondary School, Mansa Boys Secondary School, Diif Secondary School, Biyamathow Mixed Secondary School, Senior Chief Ogle Girls Secondary Scooh, Barwaqo Mixed Day Secondary School, Hulugho Boys Secondary School, Hulugho Girls Secondary School, Sankuri Secondary School, Kutulo Girls Secondary School and Kutulo Girls Model Secondary School. They were granted leave to bring judicial review proceedings against the Kenya National Examinations Council (hereinafter the 1st Respondent), which is a body corporate established by statute, and charged with the mandate of administering national examinations to the candidate who register for them. The Teachers Service Commission, which is a Constitutional Commission established under the Constitution with the mandate of regulation of teachers, is joined as an interested party.

2. The *ex parte* Applicants filed an application by way of Chamber Summons dated 21st January 2019 in which they sought and were granted leave to commence judicial review proceedings against the Respondents. The consequently filed a Notice of Motion dated 21 st January 2019 seeking orders of certiorari, prohibition and mandamus in relation the 1st Respondent's decision contained in a letter dated 15th January 2019, that cancelled the 2018 KCSE examination results of the candidates of the above listed ex parte Applicants' schools (hereinafter referred to as "the affected schools").

3. The main grounds for the application are stated in the Applicants Statutory Statement dated 21st January 2019, and a verifying affidavit sworn on the same date by the 1st ex parte Applicant. In summary, the ex parte Applicants claim that in lieu of receiving the examination results, the Applicants received a letter from the Respondent dated 21stDecember 2018 which was sent to the Principals of the affected Schools, informing them that it had withheld results of the candidate from the schools pending investigations into allegations of examination irregularity of collusion. That on 4th January 2018, the Applicants were informed that the investigations had been completed, and they were to be given the final report prior to being summonsed for hearings between 14th and 15th January 2019.

4. The *ex parte* Applicants allege that during the hearings, predetermined reports dated 8th January 2019 were availed to the Principals of the affected schools, which already had a determination that the Respondent had resolved to cancel the results of the candidates, with the affected schools being denied a reasonable opportunity to state their cases. Further, that during the hearings, the *ex parte* Applicants were denied access to materials and records relied upon by the Respondent to arrive at its decision to cancel the results. In addition, that the *ex parte* Applicants' responses were not incorporated in the final decisions to cancel the results which were communicated by letters dated 15t January 2019 that were signed by the Respondent's Chief Executive Officer.

5. According to the *ex parte* Applicants, the nature of the proceedings herein is not concerned with the merits of the Respondent's decision but the procedure it employed. The Applicants however pointed out and detailed specific errors and inconsistencies in the reports of investigation on the affected schools . They alleged that investigations were carried out unilaterally by the Respondent, the hearings conducted were a sham and procedurally unfair and in violation of the ex parte expectation that they would be granted a reasonable opportunity to present their responses, and that the decisions made were unreasonable and irrational on the basis of the noted inconsistencies. Lastly, that the Respondent also intends to hand over its reports to the Interested Party for disciplinary action to be taken against the Principals of the affected schools to their irreparable detriment.

6. The Respondent opposed the application through a replying affidavit sworn on 11th February 2019 by Andrew Francis Otieno. The deponent is the Deputy Director of the Research and Quality Assurance Division of the Respondent which is *inter alia* in charge of awarding and grading of examination results. He contended that the Respondent's functions of setting examination standards and conducting national examinations are set out in the Kenya National Examination Council Act No 29 of 2012. Further, that in the performance of these functions, the Respondent is also guided by subsidiary legislation, which addresses specific aspects of its role and relevance, including marking of examination; the release of examination results; and handling of examination irregularities.

7. The deponent averred that during the administration and examination of the 2018 KCSE examination, the Respondent received a number of reports from around the country of schools involved in malpractices. Further, that the affected schools were part of the examination centers whose results were under investigations, and he details out the subjects that were the subject of investigations in each of the affected schools. According to the Respondent, they have powers under the applicable rules, which is Rule 45 of the Kenya National Examination Council (Handling of Examination Irregularities) Rules of 2015, to withhold results pending investigations, and that the investigation were conducted between 17th December 2018 and 5th January 2019.

8. In addition, that under the said rules, the Respondent has power to withdraw or cancel results once it is satisfied that an examination irregularity was committed at an examination centre, or that the circumstances in which an examination is conducted are unsatisfactory. Further, that the law allows the 1st Respondent to determine the manner and procedure of conducting its investigations, and it is not obliged to interview the teachers, candidates or parents. The deponent confirmed in this respect that when they cancelled the results they informed

the ex parte Applicants of their right of review, and also received their request for review, which was responded to as alleged by the *ex parte* Applicants.

9. The Respondent detailed the procedure it undertook for each of the affected schools, and the findings of its investigations for each of the schools, and also responded to the allegations of errors and inconsistencies in its investigation reports that were made by the *ex parte* Applicants. The Respondent averred that it had on its own motion taken the liberty to correct typographical errors discovered in its letters to or reports on the affected schools, however that such corrections were on minor anomalies and do not affect its decision to cancel the results of the affected candidates. Therefore, that the decision to cancel the results of the affected schools was neither unjust nor unfair, as the collusion witnessed in the school cannot be condoned. The deponent also cited Rule 26 and 27 of the Kenya National Examination Council (Marking and Examinations Release of Results and Certification) Rules 2015, and Rule 15 of the Kenya National Examination Council (Handling of Examination Irregularities) 2015 that provide for a review of the examination results within 30 days of release or cancellation as the case may be, which he stated has not been sought by the affected schools.

10. Lastly, the Respondent averred that it is precluded and insulated from releasing information requested by the *ex parte* Applicants that would compromise the integrity of any examination that has been administered or compromise the examination process or right to privacy of any individual.

11. The Interested Party also opposed the application by way of Grounds of Opposition filed on 5th February 2019.

The Preliminary Objection

12. The Respondent also filed a Notice of Preliminary Objection dated 8th February 2019 on the grounds that the instant judicial review application is incompetent, as it violates section 9 of the Fair Administrative Action Act No.4 of 2015, Rules 26 and 27 of the Kenya National Examination Council (Marking and Examinations Release of Results and Certification) Rules of 2015, and Rule 15 of the Kenya National Examination Council (Handling of Examination Irregularities) Rules of 2015, and that the Applicants have not observed Part IV A of the Kenya National Examinations Council Act 2012.

13. This Court directed that the said preliminary objection would be heard and determined first, by way of written submissions. The 1st Respondent's Advocates on record, Obura Mbeche & Company Advocates, accordingly filed submissions dated 19th March 2019, while Garane & Somane Advocates, the *ex parte* Applicants Advocates, filed submissions dated 29th April 2019 in opposition to the Preliminary Objection. Stella Rutto Advocate for the Interested Party filed submissions in support of the Preliminary Objection.

14. The Respondent submitted that in addition to the appeal process within the Respondent's establishment provided by Rules 15, 16 and 17 of the Kenya National Examination Council (Handling of Examination Irregularities), section 40B of the Kenya National Examinations Council Act establishes the National Examination Appeals Tribunal, whose jurisdiction is provided for at section 40 H, which is that is to consider appeals against the decision of the t Respondent to withhold, nullify or cancel examinations. Further, that the *ex parte* Applicants have instituted these proceedings under Article 47 of the Constitution which is read together with the Fair Administrative Action Act, and the provisions of section 9 of the Act are therefore applicable.

15. The Respondent contended that there is no evidence that the *ex parte* Applicants exhausted the internal mechanisms of appeal available to them under Rule 15 and 16 Kenya National Examination Council (Handling of Examination Irregularities), and section 40J of the Kenya National Examinations Council Act before instituting the present judicial review proceedings, and that while it is aware that section 9(4) of the Fair Administrative Action Act allows the High Court to entertain a judicial review application even where an applicant has not complied with section 9(2), the applicant must show evidence of exceptional circumstances. That the *ex parte* Applicants have however not done so.

16. According to the Respondent, as the issue in dispute is the rationale of the cancellation of results of candidates from the affected schools which were set by the Respondent, the Respondent and Tribunal set under the Kenya National Examinations Council Act are best suited to dealt with by the ex parte Applicants' grievances, as they have the expertise to revisit the decisions made. Further, that the Courts can only intervene if the Respondent and Tribunal fail to observe the processes set out by law.

17. Reliance was placed on the Court of Appeal decision in **Cortec Mining Kenya Limited vs The Cabinet Secretary, Ministry of Mining and the Attorney General (2017) eKLR** for the holding that where Parliament has provided a statutory procedure, a party must disclose the alternative remedy and explain why it is not efficacious and he or she resorted to judicial review. Also relied on was the case of **Republic vs Sacco Societies Regulatory Authority, ex-parte Joseph Kiprono Maiyo and Others, (2017) e KLR, Republic vs The Ministry of Interior and Coordination of National Governement (2014) e KLR, Speaker of National Assembly vs James Njenga Karume (1992) e KLR, Adero & Another vs Ulinzi Sacco Society Ltd (2002) 1 KLR 62 and Republic vs The Kenya National Examination Council ex parte the Board of Management, Ortum Secondary School (2019) e KLR,** where the Courts held that they had no jurisdiction and/or struck out judicial review proceedings because there existed alternative remedies which were required to be, had not been followed.

18. In closing, the Respondent submitted that the application is incompetent and should be struck out for reason that the *ex parte* Applicants have failed to invoke the alternative dispute settlement procedures which are required to be observed by dint of section 9(2) of the Fair Administrative Action Act.

19. The Interested Party reiterated the arguments that this Court has no jurisdiction, as the ex Parte Applicants have not exhausted the alternative dispute resolution mechanisms provided by statute, and that the instant application is premature. The decision in **Republic vs Kenya Revenue Authority and Kenol Kobil Ltd ex parte Rayan Logistics Ltd, (2019) e KLR** was cited for this position.

20. The counsel for *ex parte* Applicants on their part submitted that the rights to a fair hearing, fair administrative action, equality, and access to justice are at stake in the present application and will be denied and infringed upon if the Applicants are denied a chance to present their case to this Court. The *ex parte* Applicants relied on Article 165(3) and Article 23 of the Constitution on this Coourt's jurisdiction to hear

and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights, and that the said Articles give the High Court oversight mandate over statutory bodies and quasi-judicial institutions.

21. On the exhaustion of alternative remedies, the ex parte Applicants submitted that it is only in circumstances where the alternative remedy is efficacious that the same will be invoked, and cited the decisions in **Mark Ndumia Ndungú vs Nairobi Bottlers Lts & Another, (2018) e KLR** and **Mohammed Ali Baadi and Others vs Attorney General & 11 Others (2018) e KLR** in this regard. However, that the circumstances of the instant application do not render a resort to the appeal process under statute viable, as it raises weighty and substantial constitutional issues which cannot be addressed by the Tribunal or mechanisms under the Kenya National Examinations Council Act.

22. The *ex parte* Applicants also placed reliance on the cases of **Wanuri Kahiu & Another vs CEO Kenya Film Classification Board – Ezekiel Mutua & 4 Others (2018) e KLR,** and **Moffat Kamau & 9 Otehrs vs Aelous Kenya Limited & 9 Others (2016) e KLR** for the position that the orders and remedies sought in the application do not fall within the purview of the jurisdiction of the National Examinations Appeals Tribunal.

23. Lastly, the *ex parte* Applicants argued that the questions raised in the application are purely legal, and that it is in the interests of justice that the Court entertains the instant application pursuant to section (4) of the Fair Administrative Action Act. Further, that resorting to the procedure under the Kenya National Examinations Council Act would result in unreasonable delay as the remedy would not be effective and would be futile. Therefore, that this Court should not shirk from its constitutional mandate to hear the *ex parte* Applicants as held in **Dyson vs Attorney General (1911) 1 KB 418**.

The Determination

24. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, as follows:

> ***"a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

25. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of **Oraro -vs- Mbaja (2005)1KLR 141**, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd(supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.

26. The issues for determination herein therefore are whether the grounds raised in the 1st Respondent's preliminary objection raise pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. Sections 9(2) (3) and (4) of the Fair Administrative Action Act provide as follows in this regard:

> **"(2) The High Court or a subordinate court 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 in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).**
>
> **(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application 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."**

27. In addition, a National Examinations Appeals Tribunal is established under section 40B of the Kenya National Examinations Council Act, and under section 40H and 40J of the Act the Tribunal's jurisdiction is to consider all appeals made against a decision of the Council to withhold, nullify or cancel examinations prepared and administered by the Council. Sections 9(2) (3) and (4) of the Fair Administrative Action Act and section 40H and 40J of the Kenya National Examinations Council Act are operative in the instant application, as it is not disputed that the impugned decision made by the 1st Respondent cancelled the examination results of the *ex parte* Applicants, and that the *ex parte* Applicants have not filed an appeal at the Tribunal. In addition, if upheld, the said provisions will divest this Court of jurisdiction to hear and determine the *ex parte* Applicant's application.

28. Exhaustion of alternative remedies is also now a constitutional imperative under Article 159 (2)(c) of the Constitution, and is exemplified by emerging jurisdiction on the subject, which was initially stated in **Speaker of National Assembly vs Karume (1992) KLR 21** in the following words:

> **"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."**

29. The doctrine of exhaustion of alternative remedies was further explained by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR** as follows:

> **"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews….. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."**

30. I therefore find for the foregoing reasons that a pure question of law has been raised by the Respondent.

31. As to whether the preliminary objection has merit, the *ex parte* Applicants argue that they are raising issues of infringement of their constitutional rights, which the National Examinations Appeals Tribunal does not have jurisdiction and is not competent to hear. The 1st Respondent on the other hand postulates that the National Examinations Appeals Tribunal is the best suited forum to address the technical issues raised by the application.

32. The Courts may, in exceptional circumstances, find that the exhaustion of alternative remedies requirement would not serve the values enshrined in the Constitution or law, and permit the suit to proceed before it, particularly, where dispute resolution mechanism established under an Act is not competent to resolve the issues raised in this Petition, or where it is not available or accessible to the parties for various demonstrated reasons. Section 9(4) of the Fair Administrative Action Act however suggests an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy.

33. The approach to be taken by the Courts when this issue is raised was suggested by the Court of Appeal in **R vs National Environmental Management Authority (2011) eKLR** as follows*:*

> **".. in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it…."**

34. Various considerations have been taken into account by Courts in considering whether an exception lies, and the list of exceptional circumstances is not closed. **In R. vs Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya (2017) eKLR** the High Court held as follows as regards the application of the exception:-

> **"[46] What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it.**
>
> **[47]. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also Moffat Kamau and 9 Others vs Aelous (K) Ltd and 9 Others(2016)eKLR. "**

35. Upon perusal of the *ex parte* Applicant's pleadings herein, it is evident that their grounds for the application impugn the process employed by the Respondent in addressing their request for review, which they allege contravenes various constitutional provisions, and do not address the merits of the decision made to cancel the examination results. It is also evident that the jurisdiction of the National Examinations Appeals Tribunal is limited to reviewing decisions made by the 1st Respondent cancelling the examination results of a candidate follows:

> **"40H. The Tribunal shall consider all appeals made against a decision of the Council to withhold, nullify or cancel examinations prepared and administered by the Council.**
>
> ***40J. (1) A person who is aggrieved by a decision of the Council to withhold or cancel the results of a candidate may lodge an appeal to the Tribunal in the prescribed form.***
>
> ***(2) An institution that is aggrieved by the decision of the Council to withhold or cancel the results of the candidates in that institution may lodge an appeal to the tribunal in the prescribed form.***
>
> ***(3) Notwithstanding the provisions of subsection (1), a person aggrieved by a decision of the Council may appeal to the Tribunal through the County Director of Education in the County in which the applicant resides."***

36. The said Tribunal cannot therefore be an effective remedy to the *ex parte* Applicants in the circumstances of this application, as the issues the application raises do not fall within the Tribunal's jurisdiction, and are within the jurisdiction of this Court. The exception in section 9(4) of the Fair Administrative Action Act therefore applies.

37. The Respondent's Preliminary Objection dated 8th February 2019 is thus found not to have merit, and the costs arising therefrom shall be in the cause.

38. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF JULY 2019

P. NYAMWEYA

JUDGE