



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

[CORAM: MRIMA, J.]

JUDICIAL REVIEW NO. 2 OF 2018

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE BOARD OF MANAGEMENT ST. JOSEPH SCHOOL, RAPOGI.....RESPONDENT

AND

SHAQUIL OYOO.....EXPARTE APPLICANT

JUDGMENT

1. The Exparte Applicant herein, **Shaquil Oyoo**, instituted these proceedings through his father one **Ibrahim Rumo Juma** as his next friend. I will hereinafter refer to Ibrahim Rumo Juma as '**the Father**'.
2. The proceedings were anchored on the **Constitution of Kenya, The Education Act, Cap. 211** of the Laws of Kenya and **The Education (School Discipline) Regulations** made thereunder, **The Law Reform Act, Cap. 26** of the Laws of Kenya, **The Fair Administrative Actions Act No. 4 of 2015, The Civil Procedure Act, Cap. 21** of the Laws of Kenya and **the Civil Procedure Rules** made thereunder.
3. On 24/05/2018 the Exparte Applicant filed a Chamber Summons seeking leave to institute judicial review proceedings. He also filed a Statement and an Affidavit of the father. The Chamber Summons was considered *exparte* and leave was granted. The leave was to operate as a stay of the decisions made against the Exparte Applicant.
4. The Exparte Applicant filed the substantive Notice of Motion dated 04/06/2018 on the even date.
5. The Respondent opposed the Notice of Motion. It filed a Replying Affidavit sworn by **Mr. Maurice Otieno**, the Respondent's Secretary and the Principal of St. Joseph School, Rapogi. The Affidavit was sworn on 14/09/2018 and filed on 17/09/2018. I will herein after refer to the institution as '**the School**' and to the School's Board of Management as '**the Respondent**'.
6. Directions on the hearing of the Notice of Motion were given. The parties proposed and this Court sanctioned the disposal of the Motion by way of written submissions. Both parties duly filed their respective submissions. Counsel for the Exparte Applicant also highlighted on the submissions.
7. I have carefully read and understood the parties' pleadings, submissions and the decisions they relied on. I note that the Respondent vehemently opposed the jurisdiction of this Court.
8. As a constitutional calling therefore, I must first satisfy myself whether this Court has jurisdiction over the matter. Jurisdiction is so central since it determines whether a Court will further deal with the matter. Its centrality has been echoed in many decisions. For instance, My Lordship **Ibrahim, JSC** in **Supreme Court of Kenya Civil Application No. 11 of 2016 Hon. (Lady) Justice Kalpana H. Rawal vs. Judicial Service Commission & Others** in demystifying jurisdiction quoted from the decision in **Supreme Court of Nigeria Supreme Case No. 11 of 2012 Ocheja Emmanuel Dangana vs. Hon. Atai Aidoko Aliusman & 4 Others** where **Walter Samuel Nkanu Onnoghen, JSC** and expressed himself as follows: -

...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...

9. The Court of Appeal in the case of *Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR* had the following to say on the centrality of the issue of jurisdiction: -

So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.

10. Recently in *Migori High Court Constitutional Petition No. 6 of 2019 James Marienga Obonyo & 2 Others vs. Fund Manager Suna West National Government Constituency Development Fund Committee and National Government Constituency Development Fund Board*, (unreported) this Court said as follows:

14. At the earliest possible opportunity, a Court must satisfy itself on the jurisdiction over the matter. If it finds that it is not seized of such then it must down its tools forthwith. There are no two ways about it. Conversely, if the Court arrives at a finding that it is properly seized of jurisdiction it must unreservedly discharge its mandate in accordance with the law....

11. Having said so, I must also look at the source of a Court's jurisdiction. The **Supreme Court of Kenya** in the case of *Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR* stated as follows:

A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

12. I will now turn to the parties' arguments on the issue of jurisdiction. The Respondent contended that the proceedings offended **Section 9** of the **Fair Administrative Action Act, No. 4 of 2015** (hereinafter referred to as '**the FAA Act**'). It raised two points in support. First, that the Exparte Applicant had not exhausted the dispute resolution mechanisms under **the FAA Act** on appeal. Second, an exemption from the dispute resolution mechanism was neither sought nor granted. The Court of Appeal decision in *Nairobi Civil Appeal No. 105 of 2015 Cortec Mining Kenya Limited vs. The Cabinet Secretary Ministry of Mining & 9 others (2017) eKLR* was cited in support of the submissions.

13. The Respondent prayed that the matter be struck out with costs as it is premature before this Court.

14. Responding to the issue, the Exparte Applicant submitted that the provisions of **Section 9** of **the FAA Act** were optional to a party and a party ought not to be restricted from accessing justice. He relied on **Article 165(3)** of the **Constitution** which gave the High Court unlimited jurisdiction in criminal and civil matters. The Exparte Applicant further submitted that he opted to instead invoke the jurisdiction of the High Court since the School's Disciplinary Committee, the Respondent and the Migori County Education Board had all found against him. He was therefore reasonably apprehensive that even the Education Appeals Tribunal would follow suit. He also submitted that there were lacunas in the procedures before the institutions under the **Basic Education Act No. 14 of 2013** (hereinafter referred to as '**the Education Act**'). He contended that the High Court remained his only hope. The Exparte Applicant prayed that this Court finds that it has jurisdiction over the matter.

15. This matter was instituted by way of a judicial review. It is not a Constitutional Petition. It is principally challenging how the Respondent dealt with the issue of the Exparte Applicant. There is no doubt that the Exparte Applicant was aggrieved by the administrative decision rendered by the Respondent. That being the case the matter therefore relates to *inter alia* the provisions of **Article 47** of the **Constitution** and **the FAA Act**.

16. **Article 47(3)** of the **Constitution** provides as follows: -

Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-

(a) **Provided for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and**

(b) **Promote efficient administration.**

17. The legislation contemplated thereunder is the **FAA Act**. It was assented to on 27/05/2015 and became operational from 17/06/2015. **Part III** (Sections 7 to 11 inclusive) of the **FAA Act** deals with Judicial Review. As to the procedure for judicial review, **Section 9** provides as follows: -

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

(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.

5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

18. In this case the internal mechanisms for appeal or review and any attendant remedies are provided for under **the Education Act and the Basic Education Regulations, 2015** (hereinafter referred to as '**the Regulations**').

19. **Regulations 39, 40, 41, 42 and 43** deal with the procedure for handling disciplinary cases. A disciplinary case must first of all be dealt with by the Board of Management of the institution. The Board of Management then makes a recommendation and communicates it to the County Director of Education within two days. On receipt of the recommendation the County Director of Education seeks the advice of the County Education Board (hereinafter referred to as '**the CEB**'). The County Director of Education then communicates the decision of CEB to the institution. The institution then informs the student, parent or the guardian of the decision of the CEB.

20. A student, guardian or parent aggrieved by the decision of the CEB may appeal to the Education Appeals Tribunal (hereinafter referred to as '**the EAT**').

21. In this matter the Exparte Applicant and the Father submitted to the Board. The Board made a recommendation to transfer the Exparte Applicant to another Secondary School. The Exparte Applicant and the Father were obviously aggrieved by the recommendation. The recommendation was communicated to the Migori County Director of Education. The Director convened the CEB and deliberated on the matter. The CEB adopted the recommendation of the Board as its resolution. The Exparte Applicant and the Father were aggrieved by the resolution. They then filed these proceedings.

22. The Exparte Applicant had two options on the resolution of the Migori CEB. He would have appealed to the EAT or filed judicial proceedings in the High Court. Whereas the right of appeal to the EAT is automatic, the recourse to the High Court is subject to **Section 9(4)** of the **FAA Act**. The said provision requires an applicant who wishes to be exempted from the internal dispute mechanism under any law to formally apply to the High Court. In that exemption application the applicant must disclose the existence of the alternative mechanism. The applicant must also state why that alternative process would not be efficacious hence resorting to judicial review. A Court will usually grant the exemption if it is satisfied of any exceptional circumstances and in the interest of justice. In this case the application for exemption would have even been part of the *exparte* Chamber Summons.

23. It is that exemption which ignites the jurisdiction of the High Court under **Section 9(4)** of the **FAA Act**. I must say that unless the exemption is in the first instance sought and granted the High Court's jurisdiction remains ousted by an Act of Parliament in appropriate instances.

24. The debate on whether a party is at liberty to bypass an alternative dispute mechanism laid down in an Act of Parliament is long settled. Courts have repeatedly held that the intentions of the citizens as carried out by Parliament in passing legislations must prevail unless the legislation itself otherwise provides. At the risk of such repetition I will only refer to the Court of Appeal in *Speaker of the National Assembly -vs- Karume (2008) I KLR (EP) 425* where the Court expressed itself as follows: -

In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievances prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed.

25. A similar situation as the one prevailing herein was dealt with by the Court of Appeal in the *Cortec Mining Kenya Limited* case (supra). In that appeal the Appellant was the Exparte Applicant before the High Court. The Appellant had challenged the rejection of the extension of its mining licence by the Commissioner of Mines and Geology under the **Mining Act Cap.306** of the Laws of Kenya. The Appellant then filed judicial review proceedings instead of complying with the laid down appellate process under **Section 93** of the **Mining Act**. The High Court declined to grant the judicial review orders owing to the availability of an alternative remedy. The Appellant appealed that finding.

26. The Court of Appeal extensively dealt with the matter in its judgment. Infact a reproduction of paragraphs 29 to 35 of that judgment would rest this matter. Concluding the appeal, the Court had the following to say: -

35. That was an alternative remedy which the appellant ought to have disclosed and explained why it was not efficacious, thus resorting to judicial review. The appeal process, unlike judicial review would afford the parties an opportunity to explore the merits of the decision. We think in the circumstances, the trial court did not misdirect itself in the exercise of its

discretion as it accorded with the law. That finding would be sufficient to dispose of this appeal.

27. The precedent was set. In this case the Exparte Applicant did not file any exemption application. He also did not disclose the existence of an alternative resolution mechanism in any of his pleadings. Infact it was the Respondent who raised the issue. Further, the Exparte Applicant did not render any explanation why that alternative process was not effective hence resorting to judicial review. An attempt to give an explanation was made at the tail end of the proceedings. That was in the written submissions. That cannot be appropriate. The disclosure and the reasons for opting for the alternative remedy were to be part of the documents the Exparte Applicant filed in Court in the first instance. Infact those were some of the considerations which this Court would have taken into account as it dealt with the *exparte* Chamber Summons for leave and stay.

28. The upshot is that the judicial review proceedings were instituted in contravention of **Section 9(4)** of the **FAA Act**. The jurisdiction of this Court was hence not properly invoked. The Notice of Motion dated 04/06/2018 lacks any legal leg to stand and is hereby struck out. Any orders made in this matter are accordingly set-aside. The Father, **Ibrahim Rumo Juma**, shall bear the costs of the matter.

29. As I come to the end of this judgment I must draw the attention of the Respondent to **Regulation 42** which states that 'no school shall withdraw the registration of a learner as a candidate in a national examination as a form of punishment.' For clarity, the said **Regulation 42** will only apply if the Exparte Applicant is still in the School and is duly registered as a candidate in a national examination.

30. Those are the orders of this Court.

DELIVERED, DATED and SIGNED at MIGORI this 15th day of October 2019.

A. C. MRIMA

JUDGE

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

Mr. Sigei Counsel instructed by the firm of Messrs. Abisai & Co. Associates Advocates for the Exparte Applicant.

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

Evelyne Nyauke – Court Assistant