REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 2 OF 2018

CORAM: D.S. MAJANJA J.

BETWEEN

PIUS MANDERE OGARI t/a

UTUBORA MIXED SECONDARY SCHOOL.....PETITIONER

AND

KISII COUNTY EDUCATION BOARD.....1ST RESPONDENT

MINISTRY OF EDUCATION.....2ND RESPONDENT

ATTORNEY GENERAL..... 3RD RESPONDENT

JUDGMENT

1. As the title shows, the petitioner is the proprietor of Utubora Mixed Secondary School ("the School'). In this judgment, I shall refer to either the petitioner or the School where the context admits.

2. The petitioner's case is set out in the petition dated 12th February 2018 supported by the petitioner's affidavit sworn on the same day. The petitioner states that on 23rd March 2000, the Ministry of Education ("the Ministry") issued him with a certificate of registration No. PE/1084/2000 licensing him to operate a private secondary school offering basic education within Kenya as he had complied with all registration requirements.

3. The petitioner's complaint is that the Kisii County Education Board ("the Board"), through a letter dated 10th January 2018, informed him that, *"Following the County Education Board (CEB) meeting held on 20th December 2017 vide minute 7/20/12/2017, it was resolved that your school be deregistered for failing to comply with provisions of the Basic Education Act."* The petitioner contends that the de-registration is a violation of his right to fair administrative action protected under **Article 47** of the Constitution and **section 5** of the ***Fair Administrative Action Act, Act No. 4 of 2015*** ("the ***FAA***") as the Board did not issue a public notice prior to the de-registration decision being taken. Consequently, the petitioner will suffer great prejudice, loss and damage while exposing innocent learners, who have registered for national examinations, to uncertainty. Likewise, he urges that third parties dealing with the School like teachers, suppliers and the community will be materially affected by the decision.

4. The petitioner therefore seeks a declaration that the decision to de-register the School be declared null and void, that the decision be quashed by an order of certiorari and that a permanent injunction be issued restraining the 1st and 2nd respondent from de-registering the school as a basic education learning institution. He also prays for general damages and costs of the petition.

5. In addition to the petition, the petitioner relied on his affidavit sworn on 12th February 2018. Apart from stating the facts, the petitioner, contrary to the law governing affidavits, proceeded to set out his arguments supporting the petition. It is the arguments set out in the deposition that his counsel adopted when he made oral submissions.

6. The petitioner contended that the school was registered by the Minister under **section 15** of the repealed ***Education Act (Chapter 211 of the Laws of Kenya)*** and following enactment of the ***Basic Education Act, Act No. 14 of 2013,*** ("the ***BEA***") the County Education Board could not de-register the school as it was not empowered to do so and thus the de-registration decision contained in minute no. 7/20/12/2017 was *ultra vires* its legal mandate. Counsel for the petitioner also submitted that the decision to de-register the school was done in contravention of **section 5(1)** of the ***FAA*** which requires that the public affected by any decision to be notified to the public. The petitioner contended that the legitimate expectation of children already registered for Kenya Certificate of Secondary Education ("KCSE") with the

Kenya National Examination Council ("KNEC") was violated.

7. The respondents opposed the petition through the affidavit of Dr Lerionkah Henry Nyabuto Onderi, the Chairman of the Board, sworn on 6th March 2018. He deposed that after the School was assessed between 2012 and 2014, it was advised to make improvements which it has failed to do. He annexed reports dated 19th June 2012, 26th October 2012, 17th October 2014 and 30th November 2017. He further stated that the Board warned the School against poaching students but despite the warning, the School continued to do so. Dr Onderi deponed that the Board issued a de-registration notice dated 31st January 2018 after the School failed to comply with the advice, recommendations and warnings.

8. The respondents also contend that the School was not properly registered as it failed to comply with the law. Dr Onderi deposed that the petitioner did not comply with full registration requirements as he did not supply the Ministry with a business registration certificate, a public health report, a title deed and an application for registration. He also stated that there was a variation between the names of the School set out in the certificate of registration of business which shows the name *UTUBORA MIXED ACADEMY* of *209 OGEMBO* while the certificate of registration issued by the Ministry shows the name of the School as *UTUBORA MIXED SECONDARY SCHOOL*. The respondents also contend that under **section 50(3)** of the ***BEA***, the School, being a private school, was to have provisional registration for one year renewable for a further term until the institution was quality assured but in this case the petitioner did not produce the provisional certificate.

9. The respondents also relied on the Dr Onderi's further affidavit sworn on 16th July 2018. The deposition shows that on 20th February 2018, the County Director of Education wrote to the Principal Secretary of the Ministry of Education to confirm whether *UTUBORA SECONDARY SCHOOL* has been registered. The Principal Secretary responded by the letter of 9th March 2018 stating that, *"records held in this office do not have a school by the name Utubora Secondary School."* In addition, the respondents produced a letter dated 8th March 2018 from the Kenya National Examination Council (KNEC), directing the Gucha Sub-County Director of Education to ensure that the students registered in the School for the examination in 2019 are transferred to other approved centres. The respondents confirmed that the students were placed in other examination centres as evidenced by the letter dated 9th March 2018 from the Gucha Sub-County Director of Education to KNEC.

10. Likewise, the respondents in the replying affidavit, set out legal arguments which were the subject of their counsel's submissions. The respondents contended that under **section 82(2)(c)** as read with **section 18(1)(g)** and **(l)** of the ***BEA***, the County Education Board has the mandate to register and de-register educational institutions and since the petitioner violated the provisions of the ***Act***, the Board was entitled to act in the manner it did. The respondents also argued that under **section 85** of the ***Act***, anyone aggrieved by the decision of the County Education Board is entitled to appeal to Education Appeals Tribunal established under ***section 93*** of the ***Act*** hence this court lacks jurisdiction to entertain this application. The respondents urge the court to dismiss the petition as the applicant ought to have filed an application for judicial review.

11. At the core of this case is whether in fact the petitioner was duly registered as a school. The evidence is that the petitioner applied for registration through a business name which showed that he intended to trade in the name and style of *UTUBORA MIXED ACADEMY* as reflected in the certificate dated 5th January 2000. The school that was subsequently registered was *UTUBORA MIXED SECONDARY SCHOOL* which is the name reflected in the inspection reports produced in evidence by the respondent. I note however that in fact, that letter of deregistration dated 10th January 2018 refers to *UTUBORA SECONDARY SCHOOL*. When the Principal Secretary was asked by the Board to confirm the authenticity of the Certification of Registration, a copy of which was sent to him, he confirmed that the school known as *UTUBORA SECONDARY SCHOOL* did not exist. In my view, all the schools refer to one and the same entity and in view of the fact that the Board carried out inspections over the 2012 to 2015 period and the last inspection being the one carried out in 2017, leaves no doubt that the petitioner's school did in fact exist but whether the School was in fact registered is a factual contention that was raised by the respondents.

12. Under **section 13** of the ***Education Act***, the Minister was required to maintain a register of unaided schools. The respondent raised the issue that the petitioner did not provide evidence of the application, the provisional registration and public health report which would confirm that it complied with **section 15** of the ***Education Act*** for the School to be registered. The petitioner did not respond to or contest these issues and even when the letter from the Principal Secretary disputed its existence. In view of the uncontroverted evidence from the Ministry showing that the School was not registered or that its registration was doubtful, I would decline to grant relief as prayed. I shall return to this issue later in the judgment.

13. But this is not the end of the matter. Even assuming that the School was registered as indeed the Board assumed when it took the decision to de-register the petitioner as evidenced by the letter dated 10th January 2018, did it have such power under the ***BEA***? The respondent relied on the provisions of the ***BEA*** to support their contention that the Board had the power to de-register the School.

14. The mandate of the County Board is licensing, registration and accreditation of institutions of education, training and research is set out in **Part X** of the ***BEA*** titled, *"Licencing, registration and accreditation procedures in Basic Education."* **Section 76(1)** thereof prohibits any person from offering basic education in Kenya unless the person is accredited and registered under the ***Act***. **Section 76(2)** requires such a person intending to establish an institution to apply to the County Education Board which may allow the application or reject it under the provisions of **section 77** of the ***Act***. Under **section 79**, the Board is required to establish and maintain a databank of inter alia, all registered institutions of education and training. **Section 82(2)** of the ***Act*** provides the minimum standards which an applicant must meet before being registered.

15. Since the County Board is a creature of statute, it must point to a specific power of authority entitling it to de-register a duly registered school. I have read the Act and I do not find any power to de-register the School. The power donated to the County Board under **Part IX** of the ***BEA*** is to consider and approve application for registration of education and training institutions. **Section 99** of the ***BEA*** preserves all licences, certificates and registration issued under the ***Education Act (Repealed)***, the County Board could only exercise such power in relation to the registration as provided in the BEA and since none exists, I find that the decision of the County Board was without any statutory basis as there is no power under the ***BEA*** allowing the Board to de-register a school. My reasoning is fortified by reference to the

provisions of **section 16** of the ***Education Act (Repealed)*** which empowered the Minister to close an unaided school if certain grounds exist after serving the manager of the school with a notice in writing specifying the breaches of the Act and requiring the school to remedy those breaches within a period not exceeding 6 months. I would also be reluctant to imply such a power to de-register since the basis and procedure for de-registration is not provided for in the ***Act*** and to do so would amount to active legislating on an area that this court does not have any expertise or authority. Since the Board did not have jurisdiction to de-register the School, the decision made on 20th December 2012 is *ultra vires* the ***BEA***.

16. The issue of *ultra vires* is sufficient to dispose of this petition. However, in terms of framing relief, I return to the issue I had addressed earlier, whether the School was properly registered. This issue is relevant to the question whether the petitioner is entitled to the reliefs set out in the petition. This principal that the grant of orders of judicial review is discretionary is summarized in ***Halsbury's Laws of England 4th Edition Vol 1 (1) para. 12 at p. 270*** as follows:

> *The remedies of quashing orders (formerly known as order of certiorari), prohibition orders (formerly known as orders of prohibition) mandatory orders (formerly known as orders of mandamus) are all discriminatory. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief, the court will take into account the conduct of the party applying and consider, whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.*
>
> *Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or further, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question; would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfillment. The court has an ultimate discretion whether to set aside the decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow a temporary decision to take their course, considering the compliance and intervening if at all later and in retrospect by declaratory orders.*

17. In this case there are serious questions raised about registration of the School. Those issues were not controverted by the petitioner. The respondents also raised questions about the management of the School. The three inspection reports show that the School did not have adequate facilities or adequate trained and registered teachers, it lacked student records including accurate records of student enrollment amongst other breaches of the ***BEA***. The latest report dated 30th November 2017 noted, for example, that the School was operating an illegal boarding section, it had no laboratory or library and concluded that, *"The school had many deficits in both physical and human resources hence never met several standards to operate as an ideal secondary school."* Finally, the School was accused of poaching students and registering them for examination when it did not have capacity to mount the exercise. All these issues raised by the respondents remained uncontroverted. Although the petitioner pleaded that the students would suffer irreparable damage, the Board in conjunction with KNEC, has already taken steps to ensure that examination students are registered in other centres.

18. Following the facts I have outlined above, I am not inclined to grant the petitioner any relief save to dismiss the petition. The petitioner is not left without relief. At paragraph 5 of the respondents' further replying affidavit, Dr Onderi depones, *"That the petitioner has on several occasions been given ample time to regularize the registration of the school and further comply with the Basic Education Act, 2013 but he had failed to do so."* The petitioner should now follow invitation.

19. There shall be no order as to costs.

DATED and DELIVERED at KISII this 20th day of September 2018.

D.S. MAJANJA

JUDGE

Mr Begi instructed by Aboki Begi and Company Advocates for the petitioners.

Ms Chepkurui, instructed by the Office of the Attorney General for the 1st, 2nd and 3rd respondents.