



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
PETITION NO. 2 OF 2016

STEPHEN NDUNG’U GACHAUT/A ARK ROAD ACADEMY....PETITIONER

VERSUS

KENYA NATIONAL EXAMINATIONS COUNCIL.....RESPONDENT

RULING

The petitioner has filed a constitutional petition against the respondent praying for several declarations and orders; in particular he has sought for:-

- i. A declaration that the act of respondent in cancelling Ark Road Academy as a Kenya National Examination Council examinations centre is in breach of the petitioner’s constitutional rights under article 27 (1), (2) and (3), 28, 41 and 50 of the Constitution and that the same is null and void for all intents and purposes.
- ii. A declaration that the said cancellation is in breach of the Ark Road Academy’s students constitutional rights in standard 8, 7, and 6 as enshrined in articles 27(1), 2 and 3, 28,41, 50 and 53 of the Constitution.
- iii. Pending the hearing and determination of the petition, conservatory orders of stay do issue staying the cancellation of Ark Road Academy as a Kenya National Examinations Council examinations centre and ordering the respondent to register all standard eight students in the year 2016 in Ark Road Academy in the usual manner for the 2016 Kenya Certificate of Primary Education.
- iv. An order directing the respondent to reinstate the petitioner’s school, Ark Road Academy as a Kenya National Examinations Council examinations centre.
- v. An order of judicial review in the nature of certiorari to bring into this court the letter by the respondent dated 4th January, 2016 quashing the same.
- vi. Any other order this court may deem mete and just to grant.

Alongside the petition, the petitioner filed a motion under **article 22 and 258** of the Constitution primarily seeking a conservatory order more or less in terms of prayer iii in the petition pending the hearing and the determination of the petition.

While arguing the motion, counsel for the petitioner relied on the affidavit in support of the petition

sworn by the petitioner himself on 14th January, 2016. In that affidavit, the petitioner swore that he is the proprietor of Ark Road Academy which is a primary school in Mweiga, Nyeri County and which is duly registered by the Ministry of Education.

The petitioner deposed that though he has been registering candidates for Kenya Certificate of Primary Education over the years, and neither the school nor any of these candidates have been involved or found to be involved in examination malpractices, the respondent has arbitrarily cancelled his school as an examinations centre for a period of three years commencing January, 2016.

The petitioner's main bone of contention is that before the respondent took the decision to cancel his school as an examination centre, he was not given any opportunity to be heard and neither were the children who are now in class eight and look forward to sitting for examinations at the school this year.

The drastic decision by the respondent, according to the petitioner, is in violation of the his constitutional rights and those of the children and in particular, it is a decision that has ignored the principles of natural justice, fair administrative action and the children's rights as enshrined in article 53 of the Constitution and the Children's Act, 2001.

Further it is the respondent's contention that the respondents action is in violation of **articles 27, 47 and 53** of the **Constitution** and that it has also failed to uphold the national values and principles set out in article 10 of the Constitution.

The respondent opposed the motion and filed a replying affidavit sworn by its Chief Executive Officer who is also the Secretary of the respondent, Mr Joseph M. Kivilu.

In the affidavit, Mr Kivilu deposed that indeed the petitioner presented 30 candidates for the 2015 Kenya Certificate of Primary Education examinations; their scripts were marked and their results released without any question of examinations malpractice or misconduct.

However, despite what seemed to be a seamless process, Mr Kivilu swore that the respondent's monitoring officer " nabbed " the school's head teacher, one Mary Wamboi Nderitu, one of the teachers at the school, one Peter Munyagi Mwangi and two invigilators Anne Muchiri Wambui and Juliet Mbinya Kaloki having deliberately breached the respondent's regulations on handling what Mr Kivilu described as spare or extra examination papers. Specifically, Mary Wamboi Nderitu and Peter Munyagi Mwangi were found working out the answers to the Kiswahili language examination paper when the pupils were sitting for the examination of this particular paper. In Mr Kivilu's view, this conduct was not only a threat to the fair and proper conduct of examinations but was also in breach of the express instructions of the respondent regarding conduct of examinations and handling of spare papers as contained in " Instructions for the conduct of 2015 KCPE examination ".

Mr Kivilu swore that those who were involved were arrested and charged with examination related offences.

According to Mr Kivilu it is against this background that the respondent, vide its impugned letter dated 4th January, 2016, wrote to the petitioner cancelling his school as a centre for the Council's examinations and in his view, the respondent should not have been surprised by the decision taken by the Council.

The major question that arose at the hearing of the motion was whether due process was followed before the respondent decided to deregister Ark Road Academy as an examination centre. The petitioner's answer was that it was not and in the submissions in the prosecution of the motion, the petitioner's counsel reiterated the depositions made in his affidavit in support of the motion. He argued that the petitioner was entitled to a fair administrative action and made specific reference to **article 47** of the **Constitution** and the **Fair Administrative Action Act** No. 4 of 2015 which came into force on 17th June, 2015.

Counsel for the respondent similarly reiterated the depositions made by Mr Kivilu in his affidavit in her

submissions opposing the motion. She admitted that the petitioner was not summoned to the respondent before the administrative action was taken but urged that examination candidates can always be registered in any centre other than Ark Road Academy and therefore the deregistration of the school as an examination centre cannot be said to have infringed on their right to education.

I am minded that this ruling is only on a motion for conservatory orders and not a judgment on the petition itself and therefore it is important not to make any conclusive remarks on the merits or otherwise of the petition at this stage. All I am concerned is whether the petitioner has made out a prima facie case with a probability of success and whether he will suffer irreparable harm if the conservatory order he is seeking is not granted.

The origin of the dispute between the petitioner and the respondent is a letter from latter dated 4th January, 2016; in order to understand the import of that letter, it is appropriate to reproduce it here. It is addressed to the head teacher of Ark Road Academy through the Kyeni West Sub-county Education Officer; in its pertinent part it states:-

RE: DEREGISTRATION OF ARKROAD ACADEMY AS A KNEC EXAMINATION CENTRE

During the year 2015 Kenya Certificate of Primary Education (KCPE) examination, the Kenya National Examination Council (KNEC) noted with concern that KNEC examination rules and regulations were grossly flouted in your school, which was tantamount to abetting examination irregularities.

Due to the above, KNEC has reached a decision to deregister your school as a KNEC examination centre for three (3) consecutive years.

In view of this decision, you are required to make arrangements with the Sub-County Education office, Kieni West Sub-County to register any pupils enrolled in your school to sit for the KCPE examination in the next three years as private candidates.

Please note that your institution shall only be granted registration status on application for the same after three years have elapsed and the School Administration has demonstrated commitment to offer the KCPE examination under stringent examination rules and regulations as stipulated by KNEC.

Signed

Dr Joseph M. Kivilu

CHIEF EXECUTIVE OFFICER

As the letter would no doubt show, the action taken by the respondent was an administrative action; such action is referred to under **article 47** of the **Constitution** which states:-

47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

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

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

(b) promote efficient administration.

Parliament has enacted the Fair Administration Action Act No. of 4 of 2015 pursuant to **Article 47. (3)** of the Constitution; while the Constitution guarantees the substantive right to fair administrative action, the Act provides the details of how this right is appropriated or asserted and given effect. **Section 2** of the Act prescribes circumstances in which administrative action may be said to obtain; it states:-

“administrative action” includes—

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

I did not hear the respondent dispute the fact that the action it took to deregister Ark Road Academy as an examination centre and more particularly its letter dated 4th January, 2016 was not in exercise of its powers or functions as an authority or that its decision did not affect the rights or interests of the respondent. It follows that its action falls under any of the circumstances prescribed in **section 2** of the Fair Administration Action Act and is therefore subject to the application of that Act. **Section 3** of the Act is even clearer and removes any doubt on the scope of the Act's application; it says:-

3. Application.

(1) This Act applies to all state and non-state Application agencies, including any person-

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under the Constitution or any written law;
or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

It must be noted, however, that the mere fact that the respondent is subject to the application of the Act in its duties, functions and exercise of authority does not, by itself, suggest that the respondent has infringed the petitioner's rights under **article 47** of the **Constitution** or breached the provisions of Act; the petitioner bears the burden to demonstrate further how the Constitution has been infringed in respect of his rights. He has also to demonstrate how the respondent has failed to give effect to the provisions of Fair Administrative Action Act or how those provisions have been breached to his detriment.

This then leads one to the question of what, for instance, amounts to “*an expeditious, efficient, lawful, reasonable and procedurally fair*” administrative action which the Constitution guarantees under **article 47 (1)**. The answer to this question is not left to speculation; it is captured in **section 4** of the Fair Administrative Action Act which details what this right entails; it states as follows:-

4. Administrative action to be taken expeditiously, efficiently, lawfully etc.

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(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;**
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**
 - (d) a statement of reasons pursuant to section 6;**
 - (e) notice of the right to legal representation, where applicable;**
 - (f) notice of the right to cross-examine or where applicable; or**
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**
- (a) attend proceedings, in person or in the company of an expert of his choice;**
 - (b) be heard;**
 - (c) cross-examine persons who give adverse evidence against him; and**
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.**
- (5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.**
- (6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.**

This provision is self-explanatory and if I understood the petitioner correctly, his case is that the respondent did not adhere to the procedure set out in this provision before coming to the decision to deregister his school as an examination centre and to the extent that it disregarded the rather elaborate procedure spelt out by the Act in handling his case, the respondent violated the Constitution and the petitioner's constitutional rights.

This, to me, appears to be the crux of the petitioner's petition and the most appropriate time when this question can be interrogated, in my humble view, is at the hearing of the main petition. It is at that time that the petitioner will demonstrate, for instance, whether the respondent failed to comply with the provisions of the Constitution and the Act and whether such failure amounted to contravention of the Constitution or his constitutional rights. It is also at that time that the respondent will probably show whether it complied with the Constitution or the Act or whether, assuming it did not comply, such failure can be said, for example, to amount to infringement of the petitioner's rights.

The questions raised are valid questions that demand answers but which will probably be given at the hearing of the substantive petition; for now and for purposes of determination of this application, all I can say is that the petitioner has established a prima facie and arguable case with a probability of success; the damage to his rights may be irreparable considering, for instance, that his is a private business enterprise, if the conservatory order sought is not granted. It would be in the interest of justice that the order be issued pending the determination of his petition. Accordingly, I hereby allow the petitioner's motion dated 13th January, 2016. Costs shall abide the outcome of the petition. It is so ordered.

Signed, dated and delivered in open court this 8th April, 2016

Ngaah Jairus

JUDGE