



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

JUDICIAL REVIEW APPLICATIONS NO.13 AND 14 OF 2013

**IN THE MATTER OF AN APPLICATION BY KORIR KIPYEGO JOSEPH (NO.13 OF 2013)
AND PEPALA KHISA JOSEPH (NO.14 OF 2013) LEAVE FOR ORDERS OF CERTIORARI
AND PROHIBITION)**

AND

IN THE MATTER OF LAW REFORM ACT

CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF THE TEACHERS SERVICE COMMISSION

CODE OF REGULATIONS FOR TEACHERS (REVISED 2005)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE BOARD OF GOVERNORS, OUR LADY OF VICTORY GIRLS

SCHOOL KAPNYEBERAL.....1ST RESPONDENT

THE TEACHERS SERVICE COMMISSION.....2ND RESPONDENT

AND

EXPARTE

KORIR KIPYEGO JOSEPH (NO. 13 OF 2013)

AND

PEPALA KHISA JOSEPH (NO. 14 OF 2013)

JUDGMENT

The two Judicial Review applications were consolidated at the time of hearing. Submissions were made in file No.14 of 2013. The respondents are the same and were sued by the respective Ex-Parte applicants vide Notices of Motion dated 26th August, 2013 brought under Order 53 Rules 3(1), 4, and 7 (2) of the Civil Procedure Rules and all other enabling provisions of the law. The prerogative orders sought are:-

1. **An order of certiorari to forthwith remove into the High Court and quash the decision of the 1st respondent made on 20th June, 2013 or thereabout which has the effect of interdicting the applicants.**
2. **An order of prohibition to prohibit the 2nd respondent from executing the decision of the 1st respondent made on 20th June, 2013 or thereabout which has the effect of interdicting the applicant.**
3. **Costs be provided for.**

The applications were supported by statements in support of the applications dated 6th August, 2013 and Verifying Affidavits sworn by the respective *Ex-Parte* applicants sworn on 6th August, 2013.

Both applications were opposed by way of Replying Affidavits sworn by Rosemon C. Kirui. On 13th November, 2013 and 6th December, 2013 in respect of the first application (13/2013) and 2nd application (14/2013).

I shall summarize the case for each of the Ex-Parte applicants as follows:-

Case for Korir K. Joseph (JR. No.13/2013)

His case is set out in both the Statement of Facts and Verifying Affidavit aforesaid. He was in charge of academics in the 1st respondent school. His main duty in that capacity entailed management of tuition during the holidays. He collected tuition fees from students and he was required to account for every penny collected. The principal of the 1st respondent school demanded accountability of the tuition fees collected and he did so vide annexures marked KKJ 2(a), (b) and (c) which are statements of teachers involved in the tuition, the amounts paid to them and other expenditure incurred respectively. He later resigned from being the head of academics vide a letter dated 13th January, 2013 but was later summoned to appear before the Board of Governors (BOG) for disciplinary action. He did so in the company of Kenya Union of Post Primary Education Teachers (KUPPET) officials but the BOG declined to accord him a fair hearing in their presence. The BOG nevertheless proceeded with the disciplinary meeting and interdicted him without hearing him.

Case for PepalaKhisa Joseph (JR. No.14/2013)

His case is also spelt out in the Statement of Facts and Verifying Affidavit. On his part, he had been appointed by the 1st respondent school as the in charge of the Department of Quality Assurance and Standards and was in charge of the tuition fees collection book. He averred that at some time he incurred his own money to the tune of Kshs.300,000/- to run the tuition programme on the promise that he would be refunded. He was able to account for every penny collected but the principal of the 1st respondent/school was not happy with his explanation. He was summoned to appear before the 1st respondent for disciplinary action. He too sought the company of KUPPET officials but the 1st respondent declined to hear him in their presence. Disciplinary action was nevertheless undertaken and he was interdicted.

Respondents' case

Their case is born out in two Replying Affidavits; both sworn by Sister Rosemon C. Kirui, the principal of the 1st respondent school on 20th November, 2013 and 6th December, 2013 respectively on behalf of both respondents. The gist of the two Replying Affidavits is that both applicants were legally and lawfully interdicted. That the 2nd respondent is vested with power to institute disciplinary proceedings against teachers in its service and such process may be initiated directly or through an authorized agent. Further that the two Ex-Parte applicants were given an opportunity to defend the accusations leveled against them but failed to do so. Instead, they disrupted the disciplinary meeting while accompanied by KUPPET officials and Kass Media TV crew, yet the said officials and media had not been invited to the meeting. Further that the interdiction letter still gave the Ex-Parte applicants an opportunity to present their side of the story to the 2nd respondent but so far they had not exploited that opportunity.

SUBMISSIONS

Ex-Parte applicants' submissions

The Ex-Parte applicants' filed their submissions are dated 25th March, 2014 in reply to the respondents' submissions dated 5th June, 2014. Their submission is that the principal of the 1st respondent and the 2nd respondent initiated disciplinary proceedings against them which led to their interdiction. They argue that the process leading to their interdiction was un-procedural and against the principles of natural justice. That by dint of Article 47 of the Constitution which provides for fair administrative action, every person is entitled to a fair hearing which was not accorded to them. It was submitted that the action taken by the respondent had very grave repercussions because it could lead to their dismissal hence cutting source of their livelihood. It was, therefore, important that they be heard before any disciplinary action could be taken against them. The court was referred to the case of **Nyongesa & 4 Others –Vs- Egerton University College Civil Appeal No.90 of 1989 reported at (1990) KLR 692-700** in which the court noted that the duty of the court is to curb excesses of officials and bodies who exercise administrative and disciplinary measures in unlawful manner as the court is the ultimate custodian of the rights and liberty of people.

The case of **Republic –Vs- Jomo Kenyatta University of Agriculture and Technology; Ex-Parte Kiguru Maina Mark (2012) e KLR, H.C. at Nairobi, Judicial Review No.58 of 2012** was also referred, in which the court observed that the principle of natural justice demands that an accused person must be accorded an opportunity to challenge the case against him and that one of the methods of challenging an accusation is through the cross-examination of witnesses, which right was not accorded to the applicants.

It was further submitted that the presence of KUPPET officials was not a good reason why the Ex-Parte applicants should have been denied a fair hearing process since they represent them in safeguarding their rights and as such no law was violated. That by the respondent's agreeing to lift the interdiction of the Ex-Parte applicants by consent dated 16th January, 2014, it was a gesture that the interdiction was wrongful and unlawful. Towards this end, the court was referred to the case of **Zachariah Wagunza & Another – Vs- Office of the Registrar Academic Kenyatta University & 2 Others (2013) eKLR, HC at Nairobi Judicial Review No.155 of 2013**. In that case learned Odunga, J while referring to **Peter Okech Kadamas –Vs- Municipal Council of Kisumu Civil Appeal No.109 of 1984 (1985) KLR 954 (1986-1989) EA 194** a holding by Nyarangi, JA, stated that the provisions of Article 50(1) of the Constitution requires that every person has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, if appropriate, another independent and impartial tribunal or body and that a hearing cannot be said to be fair where a complainant also sits as a judge in the same proceedings.

Respondent's Submissions

The same are dated 22nd April, 2014 and filed on 25th April, 2014 by Dennis O. Wabwire litigation counsel on behalf of the Attorney General for the 1st respondent. The second set of submissions are dated 17th April, 2014 and filed on 22nd April, 2014 by Juliet Busienei Advocate for the 2nd respondent. On behalf of the 1st respondent, it was submitted that the BOG is established under **Section 10** of the

Education Act Chapter 211 Laws of Kenya, with duties and functions stipulated therein. The BOG derives its powers from **Section 4(1)** of the Teachers Service Commission Act, Chapter 212, Laws of Kenya. The Ex-Parte applicant wrote a resignation letter to the principal of the 1st respondent who is also the secretary to the BOG. She in turn informed the chairman of the BOG who convened a BOG meeting in which the 1st applicant was invited to attend and submit a report. It was submitted that this process was in accordance with Regulation 65(b) of the Code of Regulations (COR) for the teachers and this is not against any law. The court was referred in this regard to the case of **Republic –Vs- Secretary Teachers Service Commission; Ex-Parte Stephen Muthengi Kanui (2003) @ KLR, HC at Nairobi, Judicial Review No. 98 of 2011** in which the court held that the applicant had been given an opportunity to cross examine the witnesses and that there was no evidence of bias or malice. In the instant case, the Ex-Parte applicants who were given an opportunity to appear before the BOG did not raise an issue of bias by the fact of the presence of the principal of the 1st respondent school.

Counsel submitted that the process of natural justice was not violated in any way because Ex-Parte applicants were given an opportunity to be heard by invitations to be at the BOG meetings three times. The 1st respondent faithfully attended those meetings and is not therefore right to say that the principal of the 1st respondent was the complainant in her case. Further, the action taken against the applicants was administrative in nature between an employer and employee which fell within the bracket of private law as opposed to public law. As such, the best remedy was to sue for damages. In this regard, the court was referred to the case of **Staff Disciplinary Community of Maseno University and 2 Others versus Prof. Ochong' Okello (2012) e KLR; Court of Appeal at Kisumu, Civil Appeal No.182 of 2004** in which the court observed that the breach or threatened breach of the appellant's contract of employment was not a public act or matter of public law but was a matter of contractual relationship between the respondent and the appellants, governed by private law and that it was therefore not an appropriate action justifying the grant of orders of judicial review. The Court of Appeal faulted the High Court for granting the orders of judicial review as the Ex-Parte applicant did not have a public law right capable of protection under the supervisory jurisdiction of the court.

Further submissions on behalf of the respondent were filed by M/S Kimaru Kiplagat and Co. Advocates on 25th April, 2014. Those submissions reiterated the submissions by Dennis O. Wabwire the Litigation Counsel aforesaid.

2nd Respondent's submissions

In submissions made on behalf of the 2nd respondent, Learned Counsel Juliet Busienei reiterate the submissions by Dennis O. Wabwire, Prosecuting Counsel on behalf of the 1st respondent. In addition it was submitted that the Teachers Service Commission, which is established under Article 237 of the Constitution, has constitutional authority to exercise disciplinary control over teachers. Under **Article 252 (1) (a)**, the Teachers Service Commission (TSC) is empowered to conduct investigations either on its own initiative or on a complaint made by a member of the public. Through its agent, the Board of Management interdicted the Ex-Parte applicants for breach of professional duty as laid down in the Code of Regulations therein. In any case, an interdiction is not a punishment but merely the beginning of a process of determining the guilt or innocence of an accused person.

Further submissions are that under Section 47(2)(a) of the Teachers Service Commission Act, the Commission is mandated to compile a Code of Regulations to govern the teaching service. Regulation 66(4) of the Code of Regulations (COR) outlines the disciplinary process to be undertaken when a teacher is interdicted. In pursuance thereof, the 1st respondent served the Ex-Parte applicants with interdiction notices and asked them to file their defences within 21 days. According to the 2nd respondent, the entire process as laid down in **Regulation 66 (3)** of the **COR** was followed. In that case, the Ex-Parte applicants ought to have awaited for the full investigations before coming to court. Part of that process would entail hearing witnesses and interrogating their evidence. In this respect, the court was referred to the case of **Evans Rees and Others –Vs- Richard Alfred Crane (1994) 2 WLR** as cited in **Nancy Makokha Baraza –Vs- Judicial Service Commission and 9 Others (2012) eKLR, HC at Nairobi**

Petition No.23 of 2012 where it was noted that in most types of early stages of investigations, some sort of action must be taken in order to set the wheels of investigation in motion and it is expected that natural justice should follow and be observed by the investigator in the sense of having to hear both sides. It was further observed that at the early stage of investigations, no one's livelihood or reputation is in danger. That therefore, invoking the jurisdiction of the court at the early stage of investigations amounted to interfering with administrative processes of an employee/employer relationship which would put the Honourable Court in an awkward position in running the affairs of the Commission. In this respect, the case of **Nyongesa and 4 Others –Vs- Egerton University College (1990) KLR, 692** as referred to by Musinga, J in **Republic –Vs- Egerton University Ex-Parte Robert Kipkemoi Koskey (2006) eKLR, HC at Nakuru Misc. Civil Appeal No.712 of 2005** refers. In that case it was noted that the court would be hesitant to interfere with decisions of domestic bodies and tribunals including colleges but will quash decisions of any bodies that are manifestly unfair and unjust and where the due process of natural justice was not followed.

It was submitted that the Ex-Parte applicants were interdicted on grounds of insubordination, disrespectfulness and adamantly failing to adhere to instructions which was against the provisions of the Code of Regulations and the Teachers Service Commission Act.

Further, although the right to a fair hearing is a constitutional right, the same ought to depend on facts and circumstances of each and every case. See **David Oloo Onyango –Vs- Attorney General, C.A. at Nairobi Civil Appeal No.152 of 1986**(Unreported) as cited by Majanja, J in **Republic –Vs- Teachers Service Commission & Another Ex-Parte Jared Mongare Nyakundi (2012) eKLRH.C. at Nairobi JR Misc. Application No.251 of 2007.**

Finally, Counsel for the 2nd respondent submitted that an order of certiorari will only issue where a decision is made without or in excess of jurisdiction and the rules of natural justice were not followed. The Ex-Parte applicants had not passed the test and counsel urged that the application be dismissed.

Issues for determination

From the foregoing, I arrive at the issues for determination to be:-

- **Whether the instant application is premature.**
- **Whether the applicants were condemned unheard.**
- **Whether the Board of Management (BOM) also known as Board of Governors (BOG) was a judge of its own cause.**
- **Whether the Ex-Parte applicants are entitled to the remedies sought.**

Whether the instant application is premature

According to the respondents, the applicants moved to court prematurely because by the letter of their interdiction dated 20th June, 2013, early investigations were commenced and the applicants ought to have awaited the outcome of the internal investigations. Since the courts are slow to interfere with private affairs which are in the nature of an employer/employee relationship, the court is not the suitable place to determine the dispute herein. But according to the Ex-Parte applicants, the interdiction had the effect of cutting their source of livelihood as some payments into their salary would not be made.

This question can be answered by determining whether the respondents followed the due process of interdiction as laid down in the Code of Regulations. Regulation 66(3) outlines the process of interdiction as follows:-

- (a) **On receiving allegations against a teacher conduct investigations and assemble evidence to establish whether the teacher has a case to answer.**
- b. **Where there is a Board of Governors the Board will invite and interview the teacher except for desertion.**

- c. If satisfied that the teacher has a case to answer, serve the teacher with a notice of interdiction on the form prescribed in schedule XXXVIII specifying the actual allegations made against him/her.
- d. Send a copy of interdicting notice to the Secretary Teachers Service Commission attaching all the relevant documentary evidence.
- e. Ensure that the interdicted teacher/head teacher clears and leaves the institution and the institution house (where applicable) within 48 hours upon receiving the letter of interdiction.”

Regulation 66(4) establishes disciplinary proceedings by the Commission as follows:-

“Disciplinary Proceedings by the Commission. The Commission shall in accordance with Section 9(1) and (2) of the Act investigate, consider and determine each case of interdiction whether it is alleged that a registered teacher should have his/her name removed from the register.

The commission shall:-

- a. Inform the teacher concerned on/about the nature of the allegation made against him/her, afford that teacher adequate time for the preparation and presentation of his/her defence and opportunity of being heard in person.
- b. Act on general evidence or statements relating to the character or conduct of the teacher concerned, and evidence admissible in court of law, and
- c. Administer oaths and may, for the purpose of dealing with any matter before it, summon any person to attend and give evidence and produce any relevant documents.
- d. Consider only those allegation that the teacher has been informed and charged with.”

Under our case law in a recent decision in **Fredrick Saundu Amolo –Vs- Principal Namanga Mixed Day Secondary School & 2 Others (2014) eKLR, Industrial Court at Nairobi, Cause No.747 of 2014,** learned Justice Mbarudelivered herself as follows:-

“As was held in the case of Mogothle –Vs- Premier of the North-West Province etal (2009) 4 BLLR At paragraph 27

“...the freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity. For mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfillment of what it is to be human – is most often bound up with being accepted as socially useful.

Therefore, before an interdict can be found to be valid, the same must be based on fair reasons and must be implemented pursuant to fair procedure. This is what can be cited as the 3 dimension criteria;

First, the employer must have a justifiable reason to believe the employee has engaged in serious misconduct to form what is commonly called *prima facie* case;”

Secondly, there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct, or some relevant factor that would place the investigation or the interest of the affected parties in jeopardy; and

Thirdly, the employee is given the opportunity to state his case or be heard before any final decision to interdict is made.”

It is my view, as enunciated above, that at whatever stage of the interdiction process, one thing must be observed; that an accused must be given an opportunity to be heard. The two applicants were yet to

undergo the second stage of interdiction process which would have been conducted by the Commission itself as laid down under **Regulation 66(4)**. At the first stage, the process was carried out by the Commission's agent, that is the BOG (1st respondent) in a flawed manner. This means that the second stage could not commence as the same too would have been founded on a non-starter process. Accordingly, I find that the two Ex-Parte applicants' grievances are founded on good reason as they are hinged on lack of a fair process of being denied audience as envisaged by Regulation 66(3) (b) which requires that an accused person be given a hearing by being interviewed.

Whether the applicants were condemned unheard

Having found that the first issue for determination be and is affirmatively determined in favour of the applicants, it follows that this question should be also answered in their favour. I however, would wish to comment on the final blow that led to the interdiction. There were minutes of the meeting held on 13th June, 2013 which show that the Ex-Parte applicants were accused of the following;

“Having love a fair with some students, using their lesson period to incite students against the administration and other members of staff and discrediting the development projects initiated by the Board of Management in the school.”

They were not given an opportunity to defend these accusations on the ground that they were accompanied by members of KUPPET. That is when they were accused of insubordination. The next minute dated 2nd June, 2013 entitled “*discipline of staff*” reads, *inter alia*, as follows:-

“.....following these developments, the Board Members revisited the charges that had been leveled against each of the two teachers as follows:-

1. **Mr. Joseph K. Papela;**
 - a. **Insubordination.**
2. **Mr. Joseph K. Korir;**
 - a. **Insubordination.**

The members felt too that this incident of refusal to present themselves to the Board of Management without KUPPET officials was in itself insubordination to the Board” (See the annexure marked RCK 5).

The BOM unanimously reached a decision to interdict the Ex-Parte applicants. In reaching the foregoing decision, the BOM observed as follows:-

“They invited the KUPPET officials and adamantly defied the Board’s instructions to release the KUPPET officials from the meeting to allow the Board to dialogue with them as they had earlier requested. In fact, they defiantly walked out of the meeting with the KUPPET officials and squandered their opportunity to be heard before determining their cases. Following these observations the Board of Management unanimously resolved to interdict Mr. Pepala K. Joseph TSC No.480822 and Mr. Joseph K. Korir TSC No.395091 for insubordination.”

The above is indicative that the final bow by the Ex-Parte applicants was on the ground of insubordination but not as indicated in the minutes of 13th June, 2013. They were also not given an opportunity to defend themselves against that accusation, thus being condemned unheard.

This principle of being condemned unheard inter-twines with the principle of natural justice which encompasses two rules: **One, *nemo iudex in causasua*** that is to say, *no one should be a judge in his own cause* or the rule against bias and two, ***audialteram partem*** that is, hear the other party or the rule of

fair hearing or the rule that no one should be condemned unheard.

According to the Halsbury's Laws of England, (Administrative Law) Fourth Edition, 2001 Re-issue at page 218, paragraph 95, natural justice is defined as follows:-

“Natural justice comprises two basic rules; first that no man is to be a judge in his own cause (*nemo iudex in causa sua*), and second that no man is to be condemned unheard (*audi alteram partem*). These rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct. The rules of natural justice must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, save where their application is excluded expressly or necessary implication, or by reason of other special circumstances”.

In view of the foregoing definition, I am prompted to ask the following questions: ***What is a fair hearing? Or, what is hearing? Or, what entails being condemned unheard for that matter?*** According to the Black's Law Dictionary, Seventh Edition at page 725 a, ***hearing*** in relation to Administrative Law has been described as;

“Any setting in which an affected person presents arguments to an agency decision-maker.”

While ***fair hearing*** is defined as,

“ajudicial or administrative hearing conducted in accordance with the due process.”

Under the definition in the Halsbury's Laws of England, the *audi alteram partem* rule is focused on the manner in which a decision is taken rather than on whether the decision is correct. Therefore, so a person must be accorded an opportunity to defend himself.

The rule of natural justice was summarized in the case of **Kanda –Vs- The Government of Malaya (1962) AC 322** as cited by Korir J. in the case of **Republic –Vs- Inspector General Corporations & Another Ex-Parte Titus K. Barmazai (2013) eKLR HC at Nairobi J. R. No.1082 of 2004**, where it was reiterated as follows:-

“In the opinion of their Lordships, however, the proper approach is somewhat different. The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the maxims: *Nemo iudex in causa sua*: and *Audi alteram partem*. They have recently been put in two words, Impartiality and fairness. But they are separate concepts and are governed by separate considerations.”

Again, in **Kenya Revenue Authority –Vs- Menginya Salim Murgani (2010) eKLR C.A. at Nairobi, Civil Appeal No.108 of 2009**, the learned judges R.S.C Omollo, P. N. Waki and J. G. Nyamu JJA, referred to **Local Government Board –Vs- Arlidge (1915) A.C. 120, 132-133, Selvarajan –Vs- Race Relations Board (1975) 1 WLR 1686, 1694 and Republic –Vs- Immigration Appeal Tribunal Ex-Parte Jones (1988) WLR 1686, 1694, and Republic –Vs- Immigration Appeal Tribunal Ex-Parte Jones (1988) 1 WLR 477 481** and reiterated that a hearing does not necessarily have to be an oral hearing in all cases and that there is ample authority that decision-making bodies, other than courts and bodies whose procedures are laid down by statute are masters of their own procedure, provided that they achieve the degree of fairness appropriate to their task. It is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing.

Also in **Russel –Vs- Duke of Norfolk (1949) 1 All ER at 118** as cited by Odunga J, in **Peris Wambogo Nyaga –Vs- Kenyatta University (2014) eKLR, HC at Nairobi, JR No.320 of 2013**, the court observed that **“the requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting and that whatever standard is adopted it is essential that the person concerned would have had a reasonable opportunity of**

presenting his case.”

In **Republic –Vs- Aga Khan Education Services Ex-Parte AliSele& 20 Others High Court Misc. Application No.12 of 2002 (UR)**, as cited by Odunga J, in the **PerisWambogoNyaga case (supra)**, it was held,*inter alia*, that it is not in every situation that the other side must be heard. The court noted that there are situations where a hearing would be unnecessary and even in some cases obstructive. It was observed that each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. The court went further and opined that there will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance.

In **Republic –Vs- Public Procurement Complaints Review & Appeals Board Ex-ParteInvesco Assurance Co. Ltd (2014) @ KLR H.C. at Nairobi Miscellaneous Application No.996 of 2003** the learned Odunga J, at para17, cited the holding in **Republic –Vs- The Honourable the Chief Justice of Kenya & Others Ex-ParteMoijoMataiyo Ole Keiwua Nairobi HCMCA No. 1292 of 2004**, where the High Court stated that whereas the rules of natural justice are not engraved on tablets of stones, fairness demands that when a body has to make a decision which would affect a right of an individual,it has to consider any statutory or other framework in which it operates and that in essence, natural justice requires that the procedure before any decision making authority, which is acting judicially, shall be fair in all circumstances.

As earlier noted, the process of a fair hearing as enshrined in the principle of natural justice requires that an accused person must be accorded an opportunity to be heard before he is condemned. The nature of the hearing is varied depending on circumstances and the institution the accused is working in. It may entail an oral hearing or written submissions or the calling of evidence/witnesses. The process of fair hearing in the instant case is well stipulated under **Regulation 66 (3) (b)** and must be oral because the said Regulation stipulates that a person be given an opportunity to be interviewed by the agent (BOG). For the avoidance of doubts the paragraphs provides as follows:-

“where there is Board of Governors the board will invite and interview the teacher except for the desertion cases.”

Under Regulation 66(4) (a), proceedings before the Commission also require that a person be heard. Unfortunately, the scenario presented by the case of the Ex-Parte applicants is that the respondents took a hard-line stance and accused them of insubordination as a result of which they were interdicted without being heard in whatsoever manner. Accordingly, in my view, they were not accorded a fair hearing and to say the least, they were condemned unheard.

Whether the Board of Management (BOM) also known as Board of Governors (BOG) was a judge in its own cause

The initial complaints leveled against the applicant were as a result of their fallout with the principal of the 1st respondent school. They had been accused of not accounting for tuition fees and they resigned from their respective designations. This degenerated into other accusations amongst them having love affairs with the students, using their lesson periods to incite students against the administration and other members of staff and discrediting development projects in the school. The first sitting of the BOM was on 13th June, 2013 and the principal sat as its secretary. She fully participated in the meeting despite the fact that she was the accuser against the Ex-Parte applicants. That is how a stalemate ensued and the Ex-Parte applicants were then accused of insubordination leading to their interdiction.

In the Collins Concise Dictionary 4th Edition, at page 746, the word ‘insubordination’ is defined as, ***“not submissive to authority; disobedience or rebellious.”*** From the history of the case, the Ex-Parte applicants were being accused of being disobedient to the BOM and refusing to attend its meeting to defend themselves. The term ‘refusing’ was insinuated by the BOM because the Ex-Parte applicants attended the meeting accompanied by the KUPPET officials who the BOM said were not invited.

In my view then, it is clear that the BOM was the complainant against the Ex-Parte applicants. It was therefore, inappropriate for it to resolve the complaint at hand. In the same spirit, it was also inappropriate for the principal to sit in the said BOM meeting to deliberate upon the previous charges she had brought against the Ex-Parte applicants; as there was an obvious conflict of interest.

In the case of **James Mwarari Gatome & 7 Others (All T/A Gatome & Associates –Vs- Republic (2008) @ KLR C.A. at Nairobi, Civil Appeal No.25 of 2005**, the Court of Appeal cited the holding in **Republic –Vs- Rand (1966) L.R. QB 230** where Blackburn, J stated that:-

“Any direct primary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter.”

In **Republic –Vs- Kenya Airports Authority Ex-parte Anthony Muthumbi Wachira (2012) eKLR H.C at Nairobi Judicial Review 333 2010**(supra), the learned judge Githua J., opined as follows:-

“The first tenet of the rule of natural justice that no man shall be a judge in his own cause prohibits the participation of persons with an interest in a matter from participating in proceedings or sitting in judgment over matters in which they have either a pecuniary or other form of interest in order to avoid the perception or likelihood of bias.”

The rule against bias is well captured in Halsbury’s Laws of England, 4th Edition Vol.1(1) paragraph 86 where the author states:-

“It is a fundamental principle (often expressed in the maxim *memo judex in causasua*) that, in the absence of statutory authority or consensual agreement or the operation of necessity, no man may be a judge in his own cause. Hence where persons having a direct interest in the subject matter of an inquiry before an inferior tribunal take part in adjudicating upon it, the tribunal is improperly constituted and the court will grant an order of certiorari to quash a determination arrived at by it, or such other remedy (for instance, an injunction or a declaration) as may be appropriate.”

As I conclude under this head, I state in no uncertain terms that the accuser in this case sat as the prosecutor and the judge at the same time. And as the adage goes, ***justice must not only be done but be seen to be done***, the respondents manifestly violated the basic principle of natural justice by purporting to adjudicate in their own cause, ultimately doing great injustice to the applicants. It is for this reason, amongst others, that the remedies sought ought to be granted.

Whether the Ex-parte applicants are entitled to the remedies sought

According to the respondents, they submitted that the nature of the complaint against the Ex-Parte applicants were not public in nature and were also brought prematurely and as such the court ought not to interfere with the decision arrived at by the respondents.

I have elsewhere in this judgment clearly outlined the reasons why those arguments cannot stand and I need not belabour repeating myself. Let me emphasize though, that the Teachers Service Commission Code of Regulations as enunciated earlier, was violated with utter disregard. Further, the impugned decision arrived at against the Ex-Parte applicants was tainted with unfairness in that they were condemned unheard. And the same having been arrived at illegally, it follows that this application must succeed. See **Republic –Vs- Public Procurement Administrative Review Board and 2 Others Ex-Parte – Sanitam Services (E.A) Limited (2013) eKLR, H.C. at Nairobi (Milimani), Misc. Appl. No.204 of 2013** Mumbi Ngugi, J. cited a decision of the Court in Uganda in **Pastoli –Vs- Kabale District Local Government Council and others (2008) 2 EA 300**, in which the court restated the grounds on which the court exercises its judicial review jurisdiction. The Court, citing with approval the English case of **Council of Civil Servants Union –Vs- Minister for the Civil Service (1985) AC 2**, stated as follows:-

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety..... Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

Also in **Republic –Vs- Judicial Service Commission & Another (2013) eKLR, H.C.at Nairobi, Miscellaneous Application 648 of 2009**, learned Odunga,J cited the decision by Nyamu J, in **Republic – Vs- the Commissioner of Lands Ex-Parte Lake Flowers Ltd Nairobi HC Misc. Application No.1235 of 1998** where it was observed as follows:-

“Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief.....The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the courts must resist the temptation to try and contain judicial review in a straight jacketAlthough judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations or act contrary to legitimate expectations..... Even on the important principle of establishing standing for the purposes of judicial review the courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them.....Judicial Review is a stool of justice, which can be made to serve the needs of a growing society on a case-to-case basis.....The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society.”

The question that seeks to be answered is whether the orders sought should be granted. The applicants have been able to demonstrate that they were subjected to an unfair process in addressing their complaints which went against the principles of natural justice. They were condemned unheard, reasons wherefore their prayers must succeed. Consequently, I grant prayers 1 and 2 in the respective Notices of Motion. I order that each party bears its own costs.

It is so ordered.

DATED and SIGNED on 22nd day of June, 2015.

G. W. NGENYE – MACHARIA

JUDGE

DELIVERED at **ELDORET** this 6th day of July, 2015.

BY: G. KIMONDO

JUDGE

In the presence of:-

- 1. No appearance for Ex-Parte applicants**
- 2. No appearance for the 1st respondent**

3. No appearance for the 2nd respondent