REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC CIVIL APPLICATION NO. 368 OF 2012

REPUBLIC..APPLICANT

VERSUS

THE KENYA NATIONAL EXAMINATION KNEC.....RESPONDENT

AND

"EX PARTE"

Charels Obara

Kenneth O. Azenga

Margaret Muthoni Kyalo

Marck Ochieng

Ruth Ng'ang'a

Jane Wamucii Ndichu

Stella Namakula

Rosemary Ndanu Musau

And

MARGARET KAGORI KINYANJUI PRINCIPAL - INSTITUTE OF HUMAN RESOURCE MANAGEMENT

RULING

INTRODUCTION

1. By a Notice of Motion dated 4th October, 2012 and filed in court on 8th October 2012, the *ex parte* Applicants herein seek the following orders:

a. **That this application be certified urgent and heard *ex parte* on priority basis.**
b. **That leave be granted to the *ex parte* Applicants to apply for an order of Certiorari to remove into court and have quashed the decision of the Respondent contained in the letter dated 30th July 2012 pending the results of the *ex parte* Applicants who sat for the Examination in November 2011, leading to an award of Diploma in Personnel Management.**
c. **That leave be granted to the *ex parte* Applicants to seek orders of Mandamus to compel the Respondent to release the results of the ex parte Applicants who sat for the Examination in November 2011, leading to an award of Diploma in Personnel Management.**
d. **That such leave granted to the *ex parte* applicant pursuant to prayer 2 and 3 above do operate as stay of decision and/or order of the Respondent as contained in its letter dated 30th July 2012.**
e. **That costs be in the cause.**

***EX PARTE* APPLICANTS' CASE**

2. The application is based on the following grounds:

a. **The Respondent in complete disregard of the Constitutional Rights of the *ex parte* Applicants purported to withhold their results from the list of candidates who sat for the Examination in November 2011, leading to an award of Diploma in personnel Management and particularly their right to education enshrined in Article 43(1)(f).**
b. **The Respondent has with impunity and without giving the *ex parte* Applicants the right to be heard purported to unilaterally withhold the results of the *ex parte* Applicants who sat for the Examination in November 2011, leading to an award of Diploma in Personnel Management, despite the ex parte Applicants having complied with the general regulations with regard to the minimum entry requirements for registration of the said course.**
c. **The Respondent has purported to withhold the results of the Ex parte Applicants who sat for the November 2011 Examination in total disregard of the facts that the Ex parte Applicants had duly been registered, paid for the Examination and also sat for the November 2011 Examination leading to an award of Diploma in Personnel Management.**
d. **The *ex parte* Applicants duly complied with the requirements set out by the Respondent for the eligibility to sit for the November 2011 Examination leading to an award of Diploma in Personnel Management.**

3. The said application is supported by the supporting affidavit sworn by **Margret Kagori Kinyanjui**, the Principle of the Institute of Human Resource Management, the 9th *ex parte* Applicant herein on 4th October 2012. According to the Applicants, they were students at the Institute of Human Resource Management (hereinafter referred to as the Institute) and duly registered candidates for the November 2011 Business Examination leading to an award of Diploma in Personnel Management administered by the Respondent herein the Kenya National Examination KNEC (hereinafter referred to as KNEC). It is the *ex parte* Applicants' case that after successfully finishing their course and sitting the said Examinations accordingly, the Respondent vide a decision contained in the letter dated 13th march, 2012, communicated its decision to pend their results until they produced their original KCSE certificates on or before 13th April, 2012. The deponent states that she was no able to obtain all the affected students results by 13th April 2012 but she explained to the Respondent who agreed to extend the deadline.
4. Thereafter, vide a letter dated 30th July 2012, the respondent informed the 9th *ex parte* Applicant that after scrutiny of the 8 *ex parte* applicants' certificates, it was satisfied that they did not meet the minimum qualifications for award of Diploma in Personnel Management. The *ex parte* Applicants contend that the decision of the Respondent to withhold their examination results after duly registering, paying and sitting for the November 2011 Examination is unfair, unreasonable and a breach of the Applicants' Constitutional rights to education. The decision of the Respondent was biased since as holders of Certificate of Education Division III the Applicants had met the entry requirements for registration of the said course. They rely on KNEC's General Regulations and the Institute's brochures. It is also their case that the Respondent's decision of 30th July, 2012

to withhold and cancel their results was reached at unilaterally and without giving the Ptincipal of the institution a chance to be heard; in breach of the principles of natural justice.

5. The Applicants further state that the Respondent made the said adverse decision against them despite the fact that it has always been enrolling and registering candidates of similar qualifications as theirs in the course of Diploma in Management. Thus, according to the *ex parte* applicants, the Respondent breached their legitimate expectation which it had created with regard to the qualifications for diploma courses.
6. Accordingly, the *ex parte* Applicants urge this court to quash the decision of the Respondent to pend their results and order it to release the said Examination results accordingly.

RESPONDENT'S CASE

7. In opposition to the application, **Mr. Andrew M. Nyachio**, a Senior Legal Officer of the Respondent swore an affidavit on 21st November 2012, in which he deposed that the statutory mandate conferred upon the Respondent by the Kenya National Examinations Act Cap 225A, is the supervision and regulatory control of examinations in Kenya. That on the 16th April, 2010 the KNEC issued a circular to the Principals of National Polytechnics, Technical Training Institutes, Youth Polytechnics and Vocational training Colleges and Private Technical and Commercial Colleges registering candidates for KNEC Exams to ensure that the said candidates had obtained an equation of their certificates if obtained from foreign schools. The Principals were also required to ensure candidates registered in their institutions meet the minimum requirements for the relevant course and advising them not to register candidates who did not meet the said minimum requirements. That the Institute of Human Resource Management registered 73 candidates for the course of Diploma in Personnel Management course ref 2808 and 206 candidates in Higher Diploma in Human Resource Management course ref 3808.
8. Thereafter, after the *ex parte* Applicant had sat the said Examinations, KNEC research division which is tasked with quality assurance discovered that some candidates were unqualified prompting it to pend the results and request them to forward their original certificates for further verification. The Applicants herein were among the affected candidates. Pursuant thus, KNEC issued a letter dated 13/03/2012 requesting the applicants to forward the original certificates of the affected candidates to enable KNEC ascertain the true position within 30 days failure to which KNEC would cancel the results. Specifically, KNEC requested original certificates for 13 candidates in Course Ref: 2808 Diploma in Personnel Management and 173 candidates for Course Ref: 3808 - Higher Diploma in Human resource Management.
9. He avers that the *ex parte* Applicants failed to produce the said KCSE certificates even after extension of the deadline severally and as at 30th July, 2012 only one candidate, **Kenneth O. Azenga**, one of the ex parte applicants who had not submitted his original KCSE certificate. Mr. Nyachio depose that upon validation of the original certificates of all the candidates who had been affected, KNEC proceeded to release the results of all the candidates for Higher Diploma in Human resource Management course Ref: 3808 and under course code 2808 – Diploma in Human Resource management the results of 65 of the candidates. However, certificates of 7 candidates, the *ex parte* Applicants herein registered for Diploma in Personnel Management were found not to have met the minimum requirements for an award of a diploma in Human Resource management as set out in the KNEC ***Combined Awards Rules and Regulations for School and Post-School Examinations 1st Edition 2009*** and ***Circular dated 16/4/2010*** above. The results for ex parte Applicant **Kenneth O. Azenga** were cancelled due to his failure to meet the deadline to submit his original KCSE certificate.
10. Mr. Nyachio states that under the ***KNEC Combined Award Rules and Regulations for School and Post-School Examinations 1st Edition 2009,*** paragraph 4.3.1 (c) the minimum entry qualifications for the diploma courses is: a Completion and in a relevant craft course, KCSE grade for C- minus grade or KCE Division II or passed craft in personnel management or Equivalent qualification. He explains that the term equivalent qualification means that any candidate who wishes to pursue this course but had certificates under Uganda Certificate of Education (UCE), General Certificate of Education (GCE), International General Certificate of Secondary Education (IGCSE), East African Certificate of Education (EACE) among other foreign education certificates had to seek equitation of their certificates before enrolling for the course. He states that

this was well elaborated in the Circular dated 16/04/2010 under paragraph 1 which required all candidates with foreign certificates to seek equation of their certificates from KNEC at least one year before registration for any Examination with it.

11. As such, according to him, **Stella Namakula,** one of the ex parte applicants was in violation of the regulations as she had an un-equated Uganda Certificate of Education Division III at the time of registration.
12. It is also the case of the Respondent that since the onset of the 8-4-4 system of Education, KCSE grades have been equated to the KCE by the Ministry of Education and KIE; specifically, KCE Division III has been equated to the KCSE grade of D+; according to the ***KNEC Guidelines and Regulations for Equations, Accreditation and Issuance of Replacement Certificates first edition December 2008***, paragraph 8.0.
13. Thus, *ex parte* Applicants **Charels Obara, Margaret Muthoni Kyalo, Marck Ochieng, Ruth Ng'ang'a, Jane Wamucii Ndichu and Rosemary Ndanu Musau ,** holders of KCE Division III were found not to have met the minimum grade of KCSE (C plain) set out in the requirements.
14. With regard to non-adherence to the principles of natural justice, Mr. Nyachio avers that the 9th *ex parte* Applicant had prior notice of the registration regulations set out in the KNEC's circular dated 16/4/2010 but choose not to heed to the same to the detriment of the Institute's students. He also opines that the issue of qualification and meeting minimum qualifications does not require parties to be heard as the results are immutable facts where no discretion can be granted. The Respondent acted fairly, carefully and without malice in the cancellation of the results of the 8 candidates who failed to meet the minimum requirements.
15. Further, the *ex parte* Applicants were informed of the Respondent's decision vide a letter dated 13 July, 2012 addressed to the Institute of Human Resource Management. Thus according to him, the Institute was at fault for not properly advising its candidates before enrolling them of the minimum requirements for the award of a Diploma in Human Resource Management. As such, the loss occasioned to the Applicants should be borne by the institute and not the Respondent.

EX PARTE APPLICANTS' RESPONSE TO THE REPLYING AFFIDAVIT

16. In response to the Respondent's Replying affidavit, the ex parte Applicants filed a supplementary affidavit sworn by **Margret Kagori Kinyanjui** on 5th December 2012. The deponent depose that she did not know of the existence of the ***KNEC Guidelines and Regulations for Equations, Accreditation and Issuance of Replacement Certificates 1st Edition December 2008*** and ***KNEC Combined Award Rules and Regulations for School and Post-School Examinations 1st Edition 2009,*** as the Respondent did not make the same available to her Institution. The earlier regulations require foreign certificates to be equated one year before a candidate can register for Examination with KNEC. The later regulation set the minimum qualification for diploma courses as: a completion and a pass in a relevant craft course, KCSE grade C- or KCE Division II or any other approved equivalent qualification.
17. The *ex- parte* Applicants further argue that the Respondent allowed them to register for the said Examination in January 2010 before the purported circular dated 16th April 2012 was issued thereby they were not affected by the said circular. Further, the Institute did not receive the attachments described to have been attached to the circular. The deponent avers that the Respondent allegedly commenced verification of certificates of the 8 ex parte Applicants after registration, entering them into the nominal roll, accepting payment, allowing them to sign the nominal roll, confirming that their documents were in order and met the relevant qualifications. The Respondent went further to allow the 8 *ex parte* Applicants to sit for the November 2011 Examination and it was only before the release of the results that the Respondent raised the issue of qualification.
18. In respect of **Stella Namakula**, the 9th *ex parte* Applicant avers that the Respondent had from inception been admitting students with Division III. At the time of registration, the aforesaid student presented her documents to the Respondent who received, accepted and approved them for registration and went ahead to receive payment and entered the name of the aforesaid student in the nominal roll.
19. The 9th *ex parte* Applicant further contend that the 8 *ex parte* Applicants delayed to comply with

the Respondent's directive to submit the original certificates as some students were out of the country or couldn't be reached. Regarding **Kenneth O Azenga**, she states that he had been transferred by the public service commission to East Pokot and therefore it was very difficult to obtain his certificate within the time provided by the Respondent. However, she confirms that she eventually located him and was able to obtain his original KCE certificate which she sent to the Respondent via registered mail.

SUBMISSIONS IN SUPPORT OF THE *EX PARTE* APPLICANTS' APPLICATION

20. The *ex parte* Applicants reiterated the contents of the Motion and the affidavits and Sought to rely on **Republic v Kenya National Examinations KNEC Ex- parte Kemunto Regina Ouru (Suing through her next friend James Ouru) & Others [2009] eKLR** to the effect that the Respondent was in breach of the principle of the right to be heard by purporting to cancel the affected students Examination without giving them an opportunity to present their case.

RESPONDENT'S SUBMISSIONS

21. While reiterating the contents of the Replying Affidavit, the Respondent submitted that it is a creature of statute established by the Kenya National Examinations Act (hereinafter referred to as the Act). Under Section 10(a) of the Act, the Respondent has powers to "conduct such academic, technical and other Examinations within Kenya as it may consider desirable in the public interest". In exercise of its powers under Section 10(e) of the said Act it has powers to "make rules regulating the conduct of Examinations and for all purposes incidental thereto". Accordingly, the Respondent made the regulations contained in the **circular No. KNEC/EA/PM/PET/REG/CIRC/10/10** dated 16/04/2010, ***KNEC Guidelines and Regulations for Equations, Accreditation and Issuance of Replacement Certificates 1st Edition December 2008* and *KNEC Combined Award Rules and Regulations for School and Post-School Examinations 1st Edition 2009.***
22. On the strength of the court's finding **In the Matter of an Application by Ali Sele, Benson Wairagu & Joseph Ng'ethe gitu [2008] eKLR,** the Respondent stated that it had acted within its mandate as Section 10 of the Act does not provide for the right to be heard but instead it grants KNEC the unfettered discretion to conduct its affairs in relation to Examinations. It also submitted that it would be impractical and adversely affect KNEC's operations if it were to be required to hear each of the hundred thousands of candidates it examines orally. The cases of **Charles Kanyingi Karina –v- Transport Licensing board, Nairobi Misc. Civil Application No. 1214 of 2004, Kenya National Examinations KNEC v Republic, Civil Appeal No. 266 of 1996** and **Kenya National Examinations KNEC vs. Republic & Kemunto Regina Ouru (supra),** were relied on.
23. To demonstrate that it afforded the *ex parte* Applicants an opportunity to be heard in the circumstances, the Respondent submitted that it notified *the ex parte A*pplicants through their Principal of its decision to pend their Examination results on 13th March, 2012 and requested them to submit the relevant certificates within 30 days. The *ex parte* Applicants did not submit the same and the Respondent was forced to extend the deadline until 30th July, 2012 when it cancelled the said results.
24. Regarding the *ex parte* Applicants allegations that they did not know of the existence of the ***KNEC Combined Award Rules and Regulations for School and Post-School Examinations 1st Edition 2009,*** which sets the minimum qualification for diploma course, the Respondent submitted that the Principal of the Institution was aware of this regulations as the same had been prepared through a consultative forum involving all stakeholders. It further submits that the Kenya Institute of Education (hereinafter referred to as KIE) sets the syllabi and the Institution being an accredited institution must have been aware of the regulations and in any case as part of their duty the Institution should have consulted KNEC or K.I.E. on the applicable regulations. It is the Respondent's case that the Institution is wrong to claim ignorance of directives issued to all the institutions.
25. According to the Respondent, through the **Circular No. KNEC/EA/PM/PET/REG/CIRC/10/10**

dated 16/04/2010, in which it expressly notified the Institution that all candidates registering for KNEC Examinations must meet minimum requirements and candidates with foreign certificates to seek equation, it diffused any legitimate expectation it may have created before, if any existed. On the authority of **Mount Kenya Bottlers Limited & 3 Others –v- Attorney General & 3 Others [2012]eKLR,** the Respondent submitted that the practice before the enacting of ***KNEC Combined Award Rules and Regulations for School and Post-School Examinations 1st Edition 2009,*** cannot said to have survived the changes in regulations.

26. The Respondent further submitted that as a public authority, it cannot be estopped from performing its statutory duty under Section 10 of the Act as this may prejudice public interest and thus the *ex parte* Applicants claim that by virtue of accepting to register them it was estopped from pending or cancelling their results is not founded on law. It relied on **Republic –v- Kenya revenue Authority ex parte Aberdare Freight Services Ltd Misc. Civil Application No. 946 of 2004** in which the court citing ***DE Smith Woolf and Jowell Judicial Review of Administration Action, 5th Edition pg. 566, stated:***

    "Purported authorization, waiver, acquaintance and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims."

27. The Respondent also submitted that the authority of the superior court relied on by the Applicants is bad law as it was overturned by the court of Appeal.

DETERMINATION

28. *Sui moto*, in the court's view the first issue for determination is whether or not the Court has the jurisdiction to make the orders sought in the Notice of Motion herein since if it has no jurisdiction the application would be thereby rendered incompetent and would be struck out. The Notice of Motion herein seeks:

a. **That this application be certified urgent and heard *ex parte* on priority basis.**
b. **That leave be granted to the *ex parte* Applicants to apply for an order of Certiorari to remove into court and have quashed the decision of the Respondent contained in the letter dated 30th July 2012 pending the results of the *ex parte* Applicants who sat for the Examination in November 2011, leading to an award of Diploma in Personnel Management.**
c. **That leave be granted to the *ex parte* Applicants to seek orders of Mandamus to compel the Respondent to release the results of the ex parte Applicants who sat for the Examination in November 2011, leading to an award of Diploma in Personnel Management.**
d. **That such leave granted to the *ex parte* pursuant to prayer 2 and 3 above do operate as stay of decision and/or order of the Respondent as contained in its letter dated 30th July 2012.**
e. **That costs be in the cause.**

15. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354:**

"Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition."

29. Therefore to the extent that what is sought in the substantive Motion are orders for leave to commence judicial review application, the application is incompetent. It is the duty of the advocate to comply with the rules designated to facilitate the work of the court and not expect court to resort to inherent jurisdiction if the application is not properly before court. See, **George Kigoya v Attorney General of Uganda [1966]EA 463.**
30. However, in the wider interests of justice, I will proceed to deal with the substantive issues.
31. The functions of KNEC are outlined under Section 10 of the ***Kenya National Examinations Council Act*** which provides as follows:

10. (1) The functions of the KNEC shall be to—

(a) set and maintain Examination standards, conduct public academic, technical and other national Examinations within Kenya at basic and tertiary levels;

(b) award certificates or diplomas to candidates in such Examinations; such certificates or diplomas, shall not be withheld from the candidate by any person or institution;

(c) confirm authenticity of certificates or diplomas issued by the KNEC upon request by the government, public institutions, learning institutions, employers and other interested parties;

(d) issue replacement certificates or diplomas to candidates or diplomas to candidates in such Examinations upon acceptable proof of loss of the original

(e) undertake research on educational assessment;

(f) advise any public institution on the development and use of any system of assessment when requested to do so, and in accordance with such terms and conditions as shall be mutually agreed between the KNEC and the public institution;

(g) promote the international recognition of qualifications conferred by the KNEC;

(h) advise the Government on any policy decision that is relevant to, or has implications on, the functions of the KNEC or the administration of Examinations in Kenya;

(i) do anything incidental or conducive to the performance of any of the preceding functions.

(2) In the performance of its functions under subsection (1), the KNEC shall have powers to —

(a) make rules regulating the conduct of Examinations and for all purposes incidental thereto;

(b) make rules regulating the confirmation of Examination results and for purposes incidental thereto;

(c) make rules regulating the conduct of issuance of replacement certificates or diplomas and for all purposes incidental thereto;"

(d) make rules regulating the conduct of issuance of certificates or diplomas and for all purposes incidental thereto;

(e) withhold or cancel the results of candidates involved in Examination irregularities or malpractices;

(f) appoint any officer responsible for education or training, including heads of education and training institutions to assist in the administration of Examination as may be prescribed by the KNEC in consultation with the Cabinet Secretary;

(g) equate certificates issued by accredited foreign examining bodies with the qualifications awarded by the KNEC;

(h) conduct Examinations on behalf of foreign states or entities upon request by such states or entities;

(i) conduct academic, technical and other Examinations outside Kenya on request;

(j) offer Examination services and other advisory services relevant to Examinations to private institutions in Kenya upon request by such institution and on such terms as the KNEC may determine;

(k) invite such body in or outside Kenya, as the KNEC may consider necessary, to conduct on its behalf, academic, technical and other national Examinations within Kenya, or to conduct these Examinations jointly with the KNEC and to award certificates or diplomas to successful candidates in such Examinations;

(l) co-operate with such bodies, under paragraph (k), in the performance of its functions;

(m) advise the bodies invited under paragraph (k) upon the adaptation of Examinations necessary in Kenya and to assist any.

32. It is clear then that KNEC has express powers donated by the Act to regulate the conduct of Examinations and make rules and regulations thereof. As such, this court is only concerned with the issue whether the said power was exercised judicially and in accordance with the principles of natural justice as it is not the function of the courts to substitute their decision in place of those made by the targeted or challenged body. As was held by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

33. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
34. In exercise of the powers donated by section 10 of the Act to conduct the affairs of the examination and make rules thereof, KNEC made the ***KNEC Guidelines and Regulations for equations, accreditation and Issuance of Replacement Certificates 1st Edition December 2008*** and ***KNEC Combined Award Rules and Regulations for School and Post-School Examinations 1st Edition 2009.*** To ensure compliance with the said rules, it issued the Circular dated 16/04/2010 which reads:

REF: REGISTRATION REGULATIONS

The Kenya national Examination Council wishes to Inform all Post School institutions registering candidates for KNEC examinations to ensure that the following regulations are followed and adhered to:-

1. **All candidates with foreign certificates must seek equation of their certificates from KNEC one year before registration for the examination which will be done at a fee**
2. **All candidates registering for KNEC examination must meet the minimum entry requirements of the relevant examination and those without the minimum entry requirements should NOT BE REGISTERED.**
3. **Courses offered locally that are similar to those offered by KNEC are NOT EQUITABLE and certificates offered by those institutions CANNOT BE USED TO REGISTER A CANDIDATE FOR A HIGHER COURSE OFFERED BY KENYA NATIONAL EXAMINATIONS COUNCIL- Note that the LAST batch of students to be considered for registration are from the January 2010 intake**.

35. KNEC Combined Award Rules and Regulations for School and Post-School Examinations 1st Edition 2009**,** sets the minimum qualification for diploma course as;

"a completion and a pass in a relevant craft course, <u>KCSE grade C- or KCE Division II or</u> any other approved equivalent qualification."

36. KNEC's Guidelines and Regulations for Equations, Accreditation and Issuance of Replacement Certificates, First Edition, 2008 paragraph 8.0 reads:

Nevertheless, for purposes of academic progression and training, three KCSE grades have been pegged to KCE by the Ministry of Education and KIE since the onset of the 8.4.4 System of Education as follows:

0. **KCSE mean grade C- = KCE Division 11**

<u>8.1.2 KCSE mean grade D+ = KCE Division 111 (emphasis)</u>

8.1.3 KCSE mean grade D = KCE Division IV

37. Regulation 7.3 of the same regulations states:

The KCE, EACE, CSC and LGCE Examinations are directly equitable to each other on a one to one basis in both grades and points.

38. It is therefore clear that the 6 *ex parte* Applicants **Charels Obara, Margaret Muthoni Kyalo, Marck Ochieng, Ruth Ng'ang'a, Jane Wamucii Ndichu and Rosemary Ndanu Musau** with KCE Division III certificates equated to D+ KCSE do not meet the minimum qualifications for a Diploma course which is KCE Division II as per the KNEC Combined Award Rules and Regulations for School and Post-School Examinations 1st Edition 2009
39. **Stella Namakula** with EACE Division III does not also meet the minimum qualifications as her certificate is equated to KCE Division III which is in turn equated to KCSE grade D+.
40. The 9th *ex parte* Applicant admits receiving the Circular dated 16/04/2010 from the Respondent but deny that the circular was accompanied by the two sets of regulations above. Accordingly, she argues that she continued to use the old criteria to admit students in her Institution and the Respondent continued to accept the said students even beyond January 2010 intake indicated in the circular. Further, she submits that if January 2010 intake was the last acceptable to be allowed to register for the said Examination, the *ex parte* Applicants were within the limits as the group was admitted for the diploma in personnel management in January 2010 and slated to sit for Examinations in November 2011 as the programme had to take two years.
41. A close scrutiny of regulation 3 in the said Circular reveals that the regulation does not in any way address changes in the minimum requirements for entry into a diploma course but rather it

concerns certificates offered locally by other institutions which cannot be used to register for a higher course offered by KNEC. Thus, the *ex parte* Applicants' argument that since January 2010 was the deadline, they should be accepted as the last batch does not hold water.

42. The Applicants contended that the Respondent had in the past admitted students with similar qualifications as the 8 *ex parte* Applicants herein thus creating a legitimate expectation that the ex parte Applicants certificates were acceptable for the said course. The Respondent argues that the Circular dated 16/04/2010 changed that trend. Further, the Respondent cited with approval **Mount Kenya Bottlers Limited & 3 Others –v- Attorney General & 3 Others** (Supra) where **Lenaola J. Stated:**

"I would in the circumstances disagree with the Petitioners' argument and would find that practice alone cannot be said to oust clear provisions of the written law especially where such prior practice was based on the same law.

43. Regarding the allegations that the Respondent failed to give the *ex parte* Applicants a chance to be heard, the respondent states that Section 10 of the Act gives it discretion to act without consulting the affected examination candidates. It also properly relies on the Court of Appeal findings in **Kenya National Examinations KNEC vs. Republic & Kemunto Regina Ouru (Suing through her next friend James Ouru) & Others [2010] KLR,** to the effect that "the procedure of hearing each candidate might place an unnecessary heavy burden on the shoulders of the Council"

44. Further, also cited in the **Kemunto case** (supra) is **Republic v Criminal Injuries Compensation Board Ex Parte Dickson C.A. 199**6 and **Lloyd V Mahon H. 1987**, in which Lord Bridge held:

"What the requirements of fairness demands...depends on the character of the decision making body, the kind of decision it has to make and the statutory framework in which it operates." (emphasis mine).

45. It is also the *ex parte* Applicants case that the actions of the Respondents violates their right to education as enshrined under Article 43(1)(f) of the Constitution. However, I find that the *ex parte* Applicants' Constitutional right to education is subject to the rules and regulations which govern the education system and in this case to maintain the standards of education. I associate myself with the decision in **John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others [2011] eKLR** where it was held that:

"we need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case will therefore require will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one contest may not necessarily be unfair in different context. At the heart of this case, therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyse a claim of discrimination has both a subjective and an objective component...In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context...It is only by examining the larger context that a court can determine whether differential treatment results in equality."

46. In result, I associate with the decision in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarstheth [1985] LRC** where the court stated:

"so long as the body entrusted with the task of framing the rules or regulations acts within

the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of the efficaciousness of such rules and regulations. It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair."

47. In the circumstances, I agree with the Respondent that as an accredited institution by the KIE, the Institute must have been aware of the regulations and in any case it was part of their core duty to exercise due diligence by taking the necessary steps to acquaint itself on behalf of its students with the Respondent's rules and regulations. The Institution is wrong to plead ignorance of the regulations and if the court was to harken to their plea, a very dangerous precedent would be set where institutions would admit unqualified candidates then feign ignorance of the rules.
48. In the instant case the respondent's position is that the results of the applicants were cancelled. In **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR** the Court of Appeal expressed itself inter alia as follows:

"The Council told the respondents that it had obliterated, crossed out, annulled, made void, abolished etc their results. Yet despite that averment, which we have said was never challenged, the respondents are still insisting that the results be released to them....But the High Court would not be entitled to order the Council when carrying out the process of marking the examination papers, to award any particular mark to any particular candidate. That duty or function lies wholly within the province of the Council and no court has any right to interfere. To conclude this aspect of the matter, an order of mandamus compels performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done...We recognise that cancelling of results of an examination is not the same thing as failing or passing an examination. A candidate may well have passed in the cancelled and it is obvious to us and to anyone else that in cancelling a result, considerations other than merit of the performance of the candidate must inevitably come in....Of course....we know that the marking of examinations must retain confidential as opposed to being secretive. In this respect no amount of liberalisation, transparency or accountability would ever convince the courts that the marking of examinations should be conducted at Moi International Sports Centre, Kasarani, so that the candidates and anybody else who feels inclined to do so can attend and see that the marking is fair and open. In life, there are certain things which must be taken on trust. When an examiner decides that a particular candidate has failed there cannot be any doubt that the examiner is deciding on a matter touching on the very future of the candidate. And yet no one in his proper senses would contend that before such a candidate is declared to have failed the examiner ought to give him a hearing. We, however suspect that when it comes to dealing with question whether or not the Council is justified in cancelling particular results, different considerations may well apply. That was not the question which Mr. Justice Kuloba was asked to deal with in this matter and his condemnation of the Council as an enclave secretiveness and arbitrariness was wholly unjustified by the material before him. The question of whether the Council is in law bound to hear a candidate before it cancels the result must remain for consideration on another occasion, though if we were forced to decide it in this matter, we would ourselves be inclined to take the view that it

might palace an unnecessarily heavy burden on the shoulders of the Council to insist on hearing before cancellation. That mode of procedure may also destroy the confidentiality necessary to marking of examinations."

49. From the foregoing, it is clear that where the Council cancels the results of an examination as opposed to where it determines that the candidate has failed different considerations apply. In the former, the Council may well be required to justify to the court the reason(s) why it thought the respondent's results ought to be cancelled.
50. As I have already held hereinabove, the 6 *ex parte* Applicants **Charels Obara, Margaret Muthoni Kyalo, Marck Ochieng, Ruth Ng'ang'a, Jane Wamucii Ndichu and Rosemary Ndanu Musau** with KCE Division III certificates equated to D+ KCSE do not meet the minimum qualifications for a Diploma course which is KCE Division II as per the KNEC Combined Award Rules and Regulations for School and Post-School Examinations 1st Edition 2009 while **Stella Namakula** with EACE Division III does not also meet the minimum qualifications as her certificate is equated to KCE Division III which is in turn equated to KCSE grade D+. The decision by the Respondent whether it was right to equate the same in the manner it did is not a matter for judicial review. It is however contended that since the said ***KNEC Guidelines and Regulations for equations, accreditation and Issuance of Replacement Certificates 1st Edition December 2008*** and ***KNEC Combined Award Rules and Regulations for School and Post-School Examinations 1st Edition 2009*** were not brought to the attention of the applicants. Assuming that position was correct, the said Regulations are not under challenge in these proceedings and without challenging their applicability this court would not be entitled to simply ignore the same.
51. With respect to the claim by **Kenneth O. Azenga,** Article 47(1) and (2) of the Constitution provides as follows:

(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.

52. Article 43(1)(f) of the Constitution provides that every person has the right to education. The right to education would make no sense if a person's academic qualification is not recognised by the State on unreasonable grounds. Where therefore the authorities concerned hold the view that a particular person's educational qualification is not recognised, the authority is under a Constitutional duty to furnish the person with written reasons for non-recognition. Article 47 of the Constitution imposes a duty on the Council to ensure that the candidate is afforded an opportunity to dispute any allegation regarding the invalidity of his qualifications before the cancellation of the certificate and this duty cannot be said to have been fulfilled by mere notification to the educational institution concerned. The right to education is personal to the person concerned and cannot be transmuted to his educational institution. Accordingly I am not convinced that the council was justified in cancelling the said applicant's results before ensuring that he was notified of the intended action.
53. That however is not the end of the matter. Even if I were to find that the application was merited the law is that the decision whether or not to grant the remedy of judicial review is discretionary. In **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and hence the Court will refuse to grant judicial review remedy when it is nolonger necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order

where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

54. In this case the said **Azenga O Kenneth** obtained Division III in his East African Certificate of Education hence by the same standards was not qualified to undertake the course in accordance with the respondent's regulations. It follows that to grant the orders herein though merited would be an exercise in vain.

ORDER

55. In the result, even if these proceedings had been instituted properly under Order LIII of the Civil Procedure Rules, I would still have found no merit in the Notice of Motion dated 4th October, 2012 and would have dismissed the same. It follows that the application is incompetent and is struck out but with no order as to costs.

Dated at Nairobi this 5th day of July 2013

G V ODUNGA

JUDGE

Delivered in the presence of Mr Omari for the ex parte applicant and Mr Wilson for Mr Njenga for the Respondent