

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CONSTITUTIONAL, HUMAN RIGHTS & JUDICIAL REVIEW
DIVISION
JUDICIAL REVIEW APPLICATION NO. E020 OF 2024

REPUBLIC.....APPLICANT

-VERSUS-

BOARD OF MANAGEMENT SHIMO

LA TEWA SCHOOL.....1ST RESPONDENT

MOMBASA COUNTY EDUCATION

BOARD.....2ND RESPONDENT

ex parte:

SAMI A. KIVATSI

JUDGMENT

1. Before court is a motion dated 1 August 2024 in which the applicant seeks judicial review reliefs of certiorari, mandamus and prohibition. He has framed the prayers for these reliefs as follows:

“1. An Order of Certiorari to remove into this honourable Court and quash the decision of the Board of Management Shimo la Tewa School made on 11th May 2024 ousting and/or removing the applicant from his position as the Chairman of the Board.

2. An Order of Mandamus compelling the 1st respondent to reinstate the applicant back to his position as Chairman of the Board.

3. An order of prohibition to prohibit the 2nd respondent from confirming and/or implementing the decision made on 11th May 2024.”

2. As usual in applications of this nature, the application was preceded by a chamber summons seeking leave to file the instant substantive motion. Both applications are based on a statutory statement and an affidavit sworn by the applicant in verification of the facts relied upon.
3. According to the applicant’s affidavit, on 29 October 2019, the applicant was appointed to the Board of Management of Shimo la Tewa School (hereinafter “the board”) by the County Education Board for a term of three years. Upon his appointment, he was elected the chairman of the board, a position he was to hold for the term of his appointment as a member of the board of management.
4. On 6 June 2022, he was reappointed to serve another term of three years and, therefore, at the time of filing the instant suit, he had served four and a half years as the chairman of the Board. However, on 8 May 2024, the board reached a resolution to hold a special meeting on 11 May 2024 to discuss the applicant’s conduct as the Chairman of the board. In that meeting of 11 May 2024, the applicant was ousted as the Chairman of the board. According to the applicant, the board’s decision is tainted because he was not formally invited to the meeting in which he was ousted as the

chairman of the board and that the one-day notice given to him was too short; in any event, it fell short of the 14-day notice period prescribed by the Basic Education Act, cap. 211. Accordingly, the applicant has contended, he was condemned unheard and his rights under articles 47 and 50 of the Constitution violated.

5. The respondents opposed the applicant's application and Mathew Mbinda Mutiso, the principal of Shimo la Tewa School filed a replying affidavit to that end. According to Mutiso, on 1 May 2024, a formal written invitation via a text message from the registered official phone number of Shimo La Tewa Secondary School was sent to all the board members in their registered personal phone numbers, including the Applicant's requesting them to attend a full board meeting on 8 May 2024.
6. On 8 May 2024, the board convened a meeting under the chairmanship of the Vice Chair in line with the Basic Education Act where it was unanimously resolved that the board shall have a special meeting on 11 May 2024 to discuss the conduct and ouster of the Applicant as the Chair to the board. The Applicant was notified of this meeting through a short text message to his registered mobile number and also through his email address on 10 May 2024. In the meeting, the board recommended the removal of the applicant as the chairman of the board.
7. The applicant was removed because of what is said to have been his strained relations with the board. According to Mutiso, the Applicant is

frequently hostile to the members of the 1st Respondent and in constant insubordination of the resolutions passed by the 1st Respondent. Nonetheless, the recommendations of the board of the 1st Respondent have not yet been transmitted to the 2nd Respondent as the appointing authority to conduct any proceedings and make the final determination on the removal of the Applicant or any further action.

8. Mutiso has been advised by his learned counsel, which advice he verily believes to be true, that the 2nd Respondent is the appointing body which is yet to conduct any administrative action against the Applicant. Accordingly, the applicant's Application is premature, ill-advised and bad in law since it is said to pre-empt an administrative action without any formal or final decision.
9. Without venturing deeper into the merits of the applicant's application, one undisputed and critical fact, pivotal to the fate of the applicant's application is that the applicant has already served the maximum two terms for which he was eligible to serve as a member of the board. This fact has been acknowledged in the submissions filed on his behalf where the applicant's learned counsel has urged, *inter alia*, as follows:

“27. The ex-parte applicant submits that after his reappointment as chairman of the Board for a further term not

exceeding 3 years, he is expected to lawfully exit office sometimes in May 2025.

10. Thus, if the applicant's term ended in May 2025, none of the prayers sought is plausible and it would be futile for the court to grant them.

11. It is trite that judicial review reliefs are discretionary and of the several factors the court will consider in exercising its discretion whether or not to grant a judicial review remedy, the futility of the grant of the order sought stands out prominently as a major factor. This was so held in **R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities (1986) 1 All ER 164.**

12. In that case the Association of Metropolitan Authorities applied to quash the Housing Benefits Amendment (No 4) Regulations 1984, S1 1984/1965, made by the Secretary of State for Social Services under the Social Security and Housing Benefits Act 1982, on the ground that the Secretary of State failed to consult the applicant association properly or at all with regard to the making of the regulations before making them. Alternatively, the association applied for a declaration that the Secretary of State failed to comply with the duty of consultation imposed on him by s 36(1) of that Act.

13. Section 36(1) of the 1982 Act provided that before making regulations, including the regulations in question in the case, "the Secretary of State

shall consult with organisations appearing to him to be representative of the authorities concerned”. It was not in dispute that the Association of Metropolitan Authorities was an organisation appearing to the Secretary of State to be representative of authorities concerned.

14. The court established that regulations were made on 17 December 1984. They were laid before Parliament on 18 December and they came into operation on 19 December without the requisite consultation. Webster, J. held that the Secretary of State had not complied with section 36(1) and, accordingly, was emphatic that:

“I am satisfied that the Secretary of State failed to fulfil his obligation to consult before making the regulations.”

15. Nonetheless, in declining to grant the relief of certiorari, the learned judge held as follows:

“Having decided that the provisions of s 36(1) are mandatory and that they were not complied with before the regulations were made, I now have to consider the relief which I should give to the applicant association. They ask me to quash the regulations. I do not think that I should do so.

I acknowledge, with respect, that in the ordinary case a decision (I emphasise the word 'decision') made ultra vires is likely to be set aside in accordance with the dictum of Lord Diplock in

Grunwick Processing Laboratories Ltd v Advisory Conciliation and Arbitration Service [1978] 1 All ER 338 at 364, [1978] AC 655 at 695 where he said:

'My Lords, where a statutory authority has acted ultra vires any person who would be affected by its act if it were valid is normally entitled ex debito justitiae to have it set aside, if he has proceeded by way of certiorari, or to have it declared void, if he has proceeded by way of an action for a declaration. The court may exercise its discretion to refuse the remedy on grounds of laches or of acquiescence or maybe, though there appears to be no reported case of this, where the ultra vires act of the authority was induced by the unlawful acts of the complainant himself.'

16. The learned judge held, *inter alia*, that the regulations have been in force for about six months and, that if they were to be revoked, all applicants who had been refused benefit because of the new regulations would be entitled to make fresh claims, and all authorities would be required to consider each such claim.

17. For this reason, amongst other reasons, the learned judge refused, to exercise his discretion, to revoke the Housing Benefits Amendment (No 4) Regulations 1984. He however made a declaration, which the

applicants sought, that the Secretary of State had failed to comply with section 36(1) of the Act.

18. The rationale is, where the judicial review relief sought may otherwise be merited, it will not be granted if it would be rendered futile. For this reason, I decline the applicant's application. It is hereby dismissed but I make no orders as to costs. It is so ordered.

Signed, dated and delivered on 16 December 2025

Ngaah Jairus
JUDGE