

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW MISC. APPLICATION NO. E035 OF 2026
IN THE MATTER OF AN APPLICATION BY INNOCENT MASARA
FOR AN ORDER OF CERTIORARI

AND
IN THE MATTER OF SECTIONS 5, 13 AND 28 OF THE COMMISSION
ON ADMINISTRATIVE JUSTICE ACT, NO. 23 OF 2011

AND
IN THE MATTER OF SECTIONS 4 & 39 OF THE BASIC EDUCATION
ACT NO. 14 OF 2013 AS READ WITH SECTION 13 OF THE
CHILDREN’S ACT AND SECTION 53 (1) (B) OF THE
CONSTITUTION OF KENYA

-BETWEEN-

REPUBLICAPPLICANT

-VERSUS-

THE CHAIR- COMMISSION ON
ADMINISTRATIVE JUSTICE RESPONDENT
CABINET SECRETARY EDUCATION1ST INTERESTED PARTY

PRINCIPAL NGARA GIRLS
HIGH SCHOOL..... 2ND INTERESTED PARTY

-AND-

INNOCENT MASARA EX-PARTE APPLICANT

JUDGMENT

1. Before this Court for determination is the Notice of Motion dated 13th February 2026 filed pursuant to leave granted by this Court on 11th February 2026 in HCJR Application No. E033 of 2026. The Notice of motion is premised on Order 53 Rules 1 and 2 of the Civil Procedure Rules, Cap 21 Laws of Kenya. The *ex-parte* Applicant seeks the following ORDERS: -

**(1). THAT this Honourable Court be pleased to grant the Applicant
an order of certiorari to issue to bring into court and quash the**

contents, proceedings and decision in the Respondent's letters dated 26th January 2026 and 3rd February 2026.

(2). THAT costs of this Application be provided for.

2. The application is premised on the grounds on the face of it and further supported by the Supporting Affidavit of INNOCENT MASARA the *ex-parte* Applicant herein, sworn on the even date, in which he reiterates the grounds supporting the Application.
3. In grounds of the Application, the *ex-parte* Applicant avers that the Respondent contravened **Section 53 (1) of the Basic Education Act** and acted in excess of its jurisdiction in purporting to supervise the governance and management of Ngara Girls High School, which the law has reposed on the Cabinet Secretary through institutions such as the County Education Board, the Board of Management and the Education Standards and Quality Assurance Council.
4. It is averred that the question of placement of children is outside the Respondent's and the school principal's legitimate scope of authority as it is a purely government prerogative to ensure that all children attend and remain in school to complete their basic education requirements under **Section 4 of the Basic Education Act** as read with **Section 13 of the Children Act** and **Article 53 (1) (b) of the Constitution**.
5. It is deposed that it is unreasonable and in excess of jurisdiction for the Respondent to usurp or transfer to the 2nd Interested Party the responsibility

of the Cabinet Secretary Ministry of Education under **Section 39 of the Basic Education Act** which include to ensure compulsory admission and attendance of children of compulsory school age at school and to provide infrastructure for learning amongst others.

6. He further deposes that **Section 8 of the Commission on Administrative Justice Act** as read with **Article 53 (2) of the Constitution of Kenya** does not vest in the Respondent the powers of the Cabinet Secretary under **Section 39 and 53 (1) of the Basic Education Act**.
7. It is contended that the Respondent's 'decision' as captured in the letters dated 26th January 2026 and 3rd February 2026 are an overreach and in excess of its authority under **Section 8 of the Commission on Administrative Justice Act** as read with **Article 53 (2) of the Constitution of Kenya**. Further, that the said provisions do not vest the Respondent with powers of the Cabinet Secretary under **Sections 39 and 53 (1) of the Basic Education Act**, and is therefore irregular, illegal, ultra vires and void ab initio.

Response

8. In response to the Application, the Respondent Commission of Administrative Justice, (CAJ), through its legal Counsel, filed a Notice of Preliminary Objection dated 5th March 2026 raising the following grounds:

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(1) THAT the Honourable Court lacks jurisdiction since the suit herein failed the test of justiciability and ripeness as the ex-parte Applicant is inviting the Court to embark on an academic exercise which is a waste of precious and scarce judicial time, considering the inquiry and investigations process has not been concluded as contemplated under Articles 59 (1), (2) and 252 (1) (d) of the Constitution of Kenya as read with Section 8 (a), (b), (c), (d) and (h) of the Commission on Administrative Justice Act, 2011 and Regulations 19 and 21 of the Commission on Administrative Justice Regulations, 2013.

(2) THAT the suit as filed, does not raise any reasonably triable issues for determination since there is no real and substantial issues in controversy save for hypothetical issues.

(3) THAT the suit as framed against the Respondent is incompetent since he is incapable of being sued for acting in good faith in the discharge of his duties on account of a body corporate with its own legal/juristic personality, capable of suing and being sued as enshrined under Section 5 of the Commission on Administrative Justice Act, 2011.

9. It was the Respondent's prayer that the Preliminary Objection be heard on a priority basis and be upheld on the grounds raised and that the substantive Notice of Motion Application dated 13th February 2026 and the

attendant documents be struck out and/or dismissed in their entirety as they constitute an abuse of the court process together with costs awarded to the Respondent.

10. Vide directions on 17th February 2-26, this Court directed the parties to canvass the main Application by way of oral submissions.

Submissions

11. Counsel for the *ex-parte* Applicant submitted on the main motion that there is a procedure for handling grievances on standards and quality of education particularly with the Quality and Assurance Council under the ***Basic Education Act, at Section 53***. While he conceded that the Respondent has a general obligation, he submitted that the Cabinet Secretary, County Education Board and Education Quality Assurance Officers were specifically empowered to ensure standards. He cited the case of ***Abok James Odera vs. John Patrick Machira C.A 161/1999*** and reiterated that the procedure for determining the issues that are raised exists so the Respondent cannot intervene and the Court should quash the two letters issued by the Respondent.
12. On the Preliminary Objection dated 5th March 2026, Counsel submitted that the Court has jurisdiction to hear and determine this case, under ***Rule 21 of the Fair Administrative Action Rules*** and relied on the same case of ***Abok James Odera vs. John Patrick Machira C.A 161/1999***.

13. On their part, Mr. Amollo Counsel for the Respondent submitted that the Preliminary Objection ought to be upheld because the Court lacks jurisdiction to hear the suit since it fails the test of justiciability & ripeness. He submitted that the inquiry and investigative process has not been concluded as stipulated in **Article 59 (1) (2) and Article 252 (1) (d) as read with Section 8 (a) (b) (c) (d) & (h) of the Commission on Administrative Justice Act, and Regulation 19 & 21 of the Commission on Administrative Justice Regulation, 2013.**
14. It is the respondent's Counsel's submission that the above-cited provisions empower the Respondent/Commission to inquire into and investigate any complaint of maladministration of any public officer, state organ or any officer and urged that the matter herein does not raise any reasonable issues but merely hypothetical issues for determination.
15. It is also submitted that there is misjoinder of the Respondent being sued in his own name instead of suing the Commission. That the want of jurisdiction stems from the fact of the *ex-parte* Applicant having come to court too early in the day because there is no action or investigation being carried out as mandated by law and neither is there any decision to be quashed.
16. Counsel submitted that **Article 59 and Article 260 of the Constitution** which is the supreme law of the land confers jurisdiction on the Respondent/ Commission while the Commission on Administrative Justice

Act at **Section 8(a) (b) (c) (d) & (h)** as read with **Regulation 19** empowers the Commission to investigate maladministration. Further, that the matter before the Court concerns the welfare and wellbeing of children which is guaranteed by **Article 53**, and therefore, it is a misconception for the *ex-parte* Applicant to say that the Respondent has no mandate over the administrative functions of the principals of schools simply because there exists a Quality Assurance & Board of Management.

17. Counsel reiterated that the Commission on Administrative Justice is empowered by law to investigate into how children are being treated in a public school, whether maladministration is being advanced contrary to oversight policies or whether policies are being advanced in the best interest of students. Counsel urged the Court to consider the authorities cited in their written submission and dismiss the Application as it is misconceived.
18. The above oral submissions mirror the brief written submissions which the applicant and the respondent filed.
19. The interested parties neither filed responses nor submissions.

Analysis and Determination

20. I have considered the application dated 13th February, 2026, response by way of preliminary objection dated 5th March, 2026 together with the

written and oral submissions by the respective parties' counsel. The main issues for my determination are:

- (i) Whether the Notice of Preliminary Objection is merited.**
- (ii) If the answer to issue no. 1 above is in the negative, whether the Notice of Motion dated 13th February 2026 is merited and therefore should the orders sought issue.**

i. Whether the Notice of Preliminary Objection is merited

21. It is trite that when a party raises a Notice of Preliminary Objection, the same must be determined on a priority basis before the Court can delve into any other issues raised in the suit. The law on preliminary objections is now well-established. In the *locus classicus* case of **Mukhisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] EA 696** at page 700 Pr. D-F Law JA (*as he then was*) defined what a preliminary objection is as follows:

“...A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

22. Sir Charles Newbold, P.; on the other hand, at pg.701 paragraph B-C added the following:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”

23. Considering the *ratio decidendi* in the above cited authority, the test to be applied in determining whether the Preliminary Objection raised by the Respondent herein is merited is to determine whether a pure point of law has been raised and secondly, whether all the facts as pleaded by the Applicant are correct and thirdly to confirm that there is no fact that needs to be proved or ascertained. In other words, if there are facts in contention, the said Preliminary Objection will fail as it will mean that the parties are not arguing pure points of law.
24. Applying the above principles, I note that the Respondent raises the issue of non-justiciability and specifically, the doctrine of ripeness as the jurisdictional points of law in their Preliminary Objection. Non-justiciability entails three doctrines which are crosscutting and closely intertwined as follows: -

(a) the Political Question Doctrine;

(b) the Constitutional-Avoidance Doctrine; and,

(c) the Ripeness Doctrine.

25. I have considered a innumerable of authorities on what non-justiciability entails. A 3-Judge High Court Bench at Nairobi in **Kiriro wa Ngugi & 19 Others v Attorney General & 2 others Nairobi Constitutional Petition No. 254 of 2019, [2020] eKLR** aptly explained the concept of non-justiciability and elucidated the constituent doctrines at length as follows: -

“96. The Black’s Law Dictionary, 9th Edition, Thomson Reuters Publishers at page 943-944 defines justiciability as follows:

“proper to be examined in courts of justice” or “a question as may properly come before a tribunal for decision”

97. A Court must satisfy itself that the case before it is not caught up by the bar of non-justiciability. The concept of non-justiciability is comprised of three doctrines: Firstly, the Political Question Doctrine; secondly, the Constitutional-Avoidance Doctrine; and, thirdly, the Ripeness Doctrine. The doctrines are crosscutting and closely intertwined. We shall however endeavour to as far as possible delimit the operation of each doctrine in isolation.

107. The doctrine (of ripeness) focuses on the time when a dispute is presented for adjudication. The Black’s Law Dictionary 10th Edition, [supra] at page 1524 defines ripeness as:

The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made.

108. Courts should therefore frown upon disputes that are hypothetical, premature or academic which have not fully matured into justiciable controversies.

109. The Court of Appeal in National Assembly of Kenya & another v Institute for Social Accountability & 6 others Nairobi Civil Appeal 92 of 2015 [2017] eKLR, faulted the Constitutional Court for adjudicating upon hypothetical matters. The court held:

[72] The broad questions which were raised in the consolidated petitions, namely, – division of functions, powers and authority; the equitable sharing of revenue of national government, whether the Amendment Bill concerned county government and the role of the Senate in the legislative process, are questions which relate to inter-governmental relations and which should have been raised by either government in the appropriate forum and in case of a dispute such a dispute should have been resolved by the designated institutions through the prescribed mechanism. This is one peculiar case where the Constitution stipulates that a dispute should be in essence be resolved by other institutions through a prescribed mechanism before the jurisdiction of the High Court can be invoked.

[74] Furthermore, questions such as division of functions, division of revenue, legislative process and budget process are essentially political questions which fall within the political question doctrine; and which the Constitution has assigned to other political institutions for resolution and created institutions and mechanisms for such resolution.

110. *In National Assembly of Kenya & Another v The Institute for Social Accountability & 6 others [supra] the Court of Appeal held:*

[73] Since there was no actual live dispute between the national and county governments about CDF and if any, the mechanisms for resolving such disputes was not employed, the questions which were brought to High Court for determination had not reached constitutional ripeness for adjudication by the court. In reality, TISA and CEDGG invented a hypothetical dispute which was brought to court in the guise of unconstitutionality of CDFA.

111. *In Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others Nairobi Constitutional Petition No. 453 of 2015 [2016] eKLR, Onguto J stated:*

[27] Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases... The court is prevented from determining an issue when it is too

early or is simply out of apprehension, hence the principle of ripeness. An issue before court must be ripe, through a factual matrix for determination.”

26. Applying the above principles to the present case, the *ex-parte* Applicant is calling on this Court to quash the letters dated 26th January 2026 and 3rd February 2026 on account that the Respondent acted in excess or outside the confines of its statutory powers, where there are other institutions already vested with that mandate.
27. I have read the contents of the said impugned letters. The first letter dated 26th January 2026 is basically a request for information by the Chairperson of the Commission directed to the Principal of Ngara Girls High School to provide information on various issues such as recent admissions and enrolment approvals, student population, existing infrastructure amongst others.
28. I further note that the said letter does not indicate any punitive action or adverse decisions intended against the recipient of the said letter but merely requests for a response within seven (7) days of receipt.
29. A cursory look at the second letter of 3rd February 2026 is that it reiterates the original request in the first letter and seeks a response on the queries made. This second letter further highlights the fact that the Commission is undertaking the said exercise in the public interest and in furtherance of its statutory and constitutional obligations and warns that disregard of the

request may warrant a summoning of the school's principal, amongst other measures, in compliance with the law.

30. My understanding of the above letter and the issues being raised is that there exists a public interest issue relating to the welfare of school-going children, that was brought to the attention of the Respondent and the Commission has decided to look into the matter or investigate the same by first seeking clarity from the institution in question.
31. So far, no decision has been made. In other words, there exists an allegation over the state of academic and boarding conditions at Ngara Girls High School which calls for action by all relevant authorities, including the Respondent herein, but those allegations and the facts as presented including the writing of letters by the Respondent, seeking for information have not reached a state or developed sufficiently into a decision that would warrant quashing by this Court.
32. In arriving at the above finding, I rely on the decision by the Court of Appeal in **Benjamin vs. General & 55 others (Civil Appeal E722 of 2023) [2024] KECA 1672 (KLR) (22 November 2024) (Judgment)** at paragraph 31 where the Court explained the issue of non-justiciability and when the court's powers on judicial review can be invoked. The learned judges held as follows: -

“We agree with the appellant that the concept of non-justiciability is comprised of three doctrines – political question doctrine, the

constitutional avoidance doctrine and the ripeness doctrine. See Anthony Miano & Others v Attorney General & Others (2021) eKLR.

However, none of these doctrines would bar a court from interrogating whether the Executive or the Legislature violated the Constitution in the nomination and approval of the persons concerned. But the Court must be moved in accordance with the prescribed statutory procedure. The learned judge was alive to that fact, and that is why he stated that: “The Court further holds that it enjoys jurisdiction for judicial review on merits of the decisions made by the respondents in that regard such as on account of the doctrine of unreasonableness such as envisaged in Article 47 of the constitution, on account of the principles of illegality, on account of constitutionality, and on account of established manifest justice.”

33. In this case there is no decision on merit that has been made by the Commission or its chairperson, the Respondent herein. In simple terms, the issues of *ultra vires* raised by the *ex-parte* Applicant have not yet arisen because so far there is only request for information by the Commission.
34. Does the Commission have the mandate to ask for information on alleged maladministration? The quick answer is yes and therefore the question of *ultra vires* does not arise. This answer is informed by the provisions of

section 8 of the Commission on Administrative Justice Act which provides for the functions of the Commission in the following extensive manner:

8. Functions of the Commission

The functions of the Commission shall be to—

(a) investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;

(b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;

(c) report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;

(d) inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service;

(e) facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;

- (f) work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;*
- (g) recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;*
- (h) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;*
- (i) publish periodic reports on the status of administrative justice in Kenya;*
- (j) promote public awareness of policies and administrative procedures on matters relating to administrative justice;*
- (k) take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;*
- (l) work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and*
- (m) perform such other functions as may be prescribed by the Constitution and any other written law.*

35. To hold that the Commission or its chairperson is acting *ultra vires* in making a request for information regarding the wellbeing of school children as it did would mean that this Court is setting a precedent whose effect would be to stifle inquiries and investigative procedures of oversight bodies. The matter as it stands is not yet ripe for determination by this Court and therefore fails the test of justiciability.
36. In the premises, I find that the point of law of non-justiciability, particularly the ripeness or lack thereof of the matter before the Court has been sufficiently established by the Respondent. As such, the Preliminary Objection finds merit and is therefore upheld.
37. Having made the above findings, the second issue for my determination is now moot. Accordingly, I dismiss the *ex-parte* Applicant's Application dated 13th February, 2026 in its entirety.
38. I make no orders as to costs.
39. This file is closed.
40. Orders accordingly.

Dated, Signed and Delivered virtually at Nairobi this 22nd Day of April, 2026

**R.E. ABURILI
JUDGE**