Kenya National Examination Council v Republic & 4 others (Civil Appeal 500 of 2019) [2025] KECA 1172 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1172 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 500 OF 2019

DK MUSINGA, M NGUGI & GV ODUNGA, JJA

JUNE 20, 2025

BETWEEN

KENYA NATIONAL EXAMINATION COUNCIL .... APPELLANT

AND

REPUBLIC .... 1ST RESPONDENT

MINISTRY OF EDUCATION .... 2ND RESPONDENT

ATTORNEY GENERAL .... 3RD RESPONDENT

CHAIRMAN FORM FOUR PARENTS' ASSOCIATION 2018 IKHLAS INTEGRATED HIGH SCHOOL (SUING ON BEHALF OF IKHLAS INTEGRATED HIGH SCHOOL) .... 4TH RESPONDENT

ADIRAZAK OMAR IBRAHIM & 124 OTHERS (SUING ON BEHALF OF IKHLAS INTEGRATED HIGH SCHOOL) .... 5TH RESPONDENT

(Being an appeal from the Ruling of the High Court at Nairobi (P. Nyamweya, J) dated 28th June 2019 in Judicial Review Miscellaneous Application No. 36 of 2019)

JUDGMENT

1. This appeal arises from the decision of the High Court at Nairobi in Judicial Review Miscellaneous Application No 36 of 2016. By that decision, the learned Judge (Nyamweya, J as she then was), on 28th June 2019 dismissed a preliminary objection raised by the appellant herein, (a body corporate established by statute, and charged with the mandate of administering national examinations to the candidates who register for them), dated 4th March 2019 by which the appellant contended that the judicial review application was incompetent.

2. The background of this appeal, from what we can gather, was that Ikhlas Integrated School (hereinafter the School), entered candidates for the 2018 Kenya Certificate of Secondary Education (KCSE) Examination. Following the release of the results by the appellant, the management of the School received a letter dated 21st December 2018 from the appellant conveying the appellant's cancellation of the results for English Paper (101/2) of 125 candidates from the School.

3. Aggrieved by the said decision, the 4th and 5th respondents (hereinafter referred to as the *ex parte* applicants), by way of Chamber Summons dated 14th February 2019, sought and were granted leave to commence judicial review proceedings against the appellant and the 1st, 2nd and 3rd respondents. Consequently, they filed a Notice of Motion dated 20th February 2019 seeking orders of certiorari, prohibition and mandamus in relation to the appellant's said decision.

4. The *ex parte* applicants contended: that the appellant, through a letter dated 21st December 2018 informed the School's management that it had received a report of an alleged examination irregularity in the School for a number of candidates in the English Paper, and had consequently cancelled the results of the candidates; that all procedures for the preparations and administration of the said examination were followed, and there were no reports of any impropriety by the invigilators and/or supervisors of the examination, neither was any incident of examination malpractice brought to the attention of the School's management; that through their letter dated 4th January 2019, the *ex parte* applicants requested the appellant to review their decision on the basis that they were never accorded a right to be heard nor was due process followed; that the appellant, on 8th February 2019, issued another letter informing the School's management that the decision to cancel the results still remained, despite not according the *ex parte* applicants an audience; that therefore, the cancellation of the results was arbitrary and in violation of the candidates, parents and School's rights enshrined in the *Constitution*.

5. The appellant, in opposing the application relied on a replying affidavit sworn on 4th March 2019 by Keith Maleche, the appellant's Principal Research Officer in the Research and Quality Assurance Division in which it was deposed: that the 1st respondent's functions of setting examination standards and conducting national examinations are set out in the *Kenya National Examinations Council Act* No 29 of 2012; that in the performance of these functions, the appellant is also guided by subsidiary legislation, which addresses specific aspects of its role and relevance, including marking of examination, the release of examination results and handling of examination irregularities; that during the administration and examination of the 2018 KCSE examination, the appellant received a number of reports from around the country of schools involved in malpractices; that the examination marking experts identified Ikhlas Integrated High School as one of the schools involved in examination irregularities; and that after receiving and investigating a report from the examiners of the English Paper 2 (101/2), it was determined that out of the 128 students who had sat the examinations, 125 had colluded, either by themselves or with the help of unknown persons.

6. It was the appellant's position: that it has powers under the applicable rules to cancel results once it is satisfied that there has been widespread examination irregularities at an examination centre, or that the circumstances in which an examination is conducted are unsatisfactory; that the law allows the appellant to determine the manner and procedure of conducting its investigations, and it is not obliged to interview the teachers, candidates or parents; that when it cancelled the results it informed the *ex parte* applicants of their right of review, and also received their request for review, which was responded to as admitted by the *ex parte* applicants; that therefore, the decision to cancel the results of Ikhlas Integrated High School was neither arbitrary nor irrational, and was neither unjust nor unfair, as the collusion witnessed in the School cannot be condoned; and that the appellant is precluded and insulated from releasing marking reports, investigation reports, supervisors' reports, security reports,

examination monitors reports, or Chief Examiners report, beyond what they divulged in the replying affidavit.

7. Simultaneously with the replying affidavit, the appellant filed a Notice of Preliminary Objection dated 4th March 2019 in which it, in substance, asserted that the judicial review application was incompetent, as it violated section 9 of the *Fair Administrative Action Act* No 4 of 2015 as read with Part IV A of the *Kenya National Examinations Council Act* 2012.

8. It was contended: that section 40B of the *Kenya National Examinations Council Act* establishes the National Examination Appeals Tribunal (the Tribunal), whose jurisdiction, as provided for at section 40H, is to consider appeals against the decision of the appellant; that the appellant having declined the *ex parte* applicants' review, their next port of call, as provided under rule 15 of the *Kenya National Examinations Council (Handling of Examination Irregularities) Rules*, was to appeal to the Tribunal; that taking into account the fact that the proceedings were instituted under Article 47 of the *Constitution* as read with the *Fair Administrative Action Act*, the provisions of section 9 of the Act were relevant to the application, yet there was no evidence that the *ex parte* applicants exhausted the internal mechanisms of appeal; that although section 9(4) of the *Fair Administrative Action Act* allows the High Court to entertain a judicial review application even where an applicant has not complied with section 9(2) thereof, the applicant must show evidence of exceptional circumstances, which the *ex parte* applicants failed to show; that the issue of cancellation of results is best suited to be dealt with by the Tribunal, which has the expertise to deal with the *ex parte* applicants' complaints, and establish whether they are merited; and that the courts can only intervene if the Tribunal fails to observe fair procedure.

9. The *ex parte* applicants, on their part, took the view: that they raised fundamental constitutional issues enshrined under Article 47 of the *Constitution* of the failure to be afforded audience before the decision to cancel the results was made; that they applied for review of the decision which review was discarded without fair consideration; that Articles 23 and 47 of the *Constitution* donates to the court unfettered jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights, and gives the High Court oversight mandate over statutory bodies and quasi-judicial institutions; that the *ex parte* applicants raised fundamental constitutional issues which the Tribunal does not have jurisdiction or powers to hear and determine, as they are only vested in the High Court; that under section 40J of the *Kenya National Examinations Council Act*, a person aggrieved by a decision to withhold or cancel the results of a candidate may lodge an appeal to the Tribunal in the prescribed form; that the permissive terms dictates that it's not compulsory to lodge an appeal at the Tribunal as the decision to do so is discretionary; that the *ex parte* applicants chose to file the proceedings in court as they did not get a fair hearing before the appellant; that the lengthy process of the Tribunal would hinder access to justice for the students who were awaiting the release of the results to further their studies, a delay which would fly in the face of Article 48 of the *Constitution*; and that under Article 258, it's the right of every person to institute court proceedings where he/she feels that their right is being threatened and or contravened.

10. In her decision, the learned Judge found: that a pure question of law was raised by the appellant; that courts may, in exceptional circumstances, find that the exhaustion of alternative remedies requirement would not serve the values enshrined in the *Constitution* or law, and permit the suit to proceed before it, particularly, where the dispute resolution mechanism established under an Act is not competent to resolve the issues raised or where it is not available or accessible to the parties for various demonstrated reasons; that section 9(4) of the *Fair Administrative Action Act*, however, suggests an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy; that it was evident that the grounds of the application impugned the process employed by the

appellant in addressing the request for review, which the *ex parte* applicants alleged contravened various constitutional provisions, and did not address the merits of the decision made to cancel the examination results; that it was also evident that the jurisdiction of the Tribunal was limited to reviewing decisions made by the appellant in cancelling the examination results of a candidate; that the Tribunal could not therefore give an effective remedy to the *ex parte* applicants in the circumstances of the application, as the issues the application raised did not fall within its jurisdiction, but were within the jurisdiction of the Court; and that the exception in section 9(4) of the *Fair Administrative Action Act* therefore applied.

11. Accordingly, the learned Judge found no merit in the appellant's Preliminary Objection dated 4th March 2019 and dismissed it.

12. Dissatisfied with that decision, the appellant is challenging the same on the grounds:

    1. The Learned Judge erred in Law and in fact in finding that the High Court had jurisdiction to hear Judicial Review Miscellaneous Application No 36 of 2019 before it despite the fact that the Ex-parte Applicants had not exhausted statutory procedures providing for alternative remedies.

    2. The Learned Judge erred in Law and in fact in holding that statutorily provided procedure requiring that a decision by the Appellant should be challenged by an appeal to the National Examination Appeals Tribunal was inapplicable to the circumstances of the *ex parte* Applicants.

    3. The Learned Judge erred in Law and in fact in finding that the National Examination Appeals Tribunal does not have the jurisdiction to determine whether the process employed by the Appellant in cancelling the examination results contravened various Constitutional provisions.

    4. The Learned Judge erred in Law and in fact in finding that the provisions of Section 40(H) and 40(J) of the Kenya National Examination Council Act are not couched in mandatory terms.

    5. The Learned Judge erred in fact and in law by failing to appreciate that the final prayers sought by the Ex-parte Applicants in the Judicial Review Application cannot be granted by the High Court but can only be obtained from the Appellant and/or the National Examination Appeals Tribunal.

    6. The Learned Judge erred in Law by exempting the Ex-parte Applicants from the legal requirements under Section 9 (2) of the Fair Administrative Act without a formal application by the Ex-parte Applicants that they be so exempted.

        1. We heard the appeal on the Court's virtual platform on 5th March 2025 when learned counsel, Mr Geoffrey Obura, appeared for the appellants. The respondents, who had not filed their submissions, were not represented at the hearing despite due service of the hearing notice. Mr Obura relied entirely on the written submissions filed on behalf of the appellant.

        2. In those submissions it was contended, on the basis of several decisions: that the learned Judge ignored Part IVA of the *Kenya National Examinations Council Act* which is deemed to have been framed with Article 47(3) of the *Constitution* in mind; that the provisions negate the learned Judge's argument that the alleged breaches of Article 47 of the *Constitution* and the provisions of the Fair Administrative Actions Act can only be addressed by the High Court; that the *ex parte* applicants, having sought

review of the decision by the appellant to cancel the 2018 KCSE examination pursuant to a statutory provision, were obliged to exhaust the procedure under the statutory provision by referring the matter to the Tribunal if aggrieved; that Article 20(4) of the *Constitution* gives any court or Tribunal or any authority the power to interpret and promote the Bill of Rights and therefore nothing stopped the *ex parte* applicants from raising what they considered to be a violation of the constitutional rights of the candidates before the Tribunal in the form of an appeal as required by section 40J of the Act; that the Judicial Review application was by its very nature an appeal against the cancellation of the examination results by the appellant and the same fell squarely within the provisions of section 40H and 40J of the Act; that section 9(4) of the Fair Administrative Actions Act requires a party intending to be exempted must apply, thus the learned Judge did not have such a discretion to come to a conclusion on her own volition when such application had not been lodged by the *ex parte* applicants; that by assuming the jurisdiction, the learned Judge overlooked the provisions of section 40O of the Kenya National Examinations Act which gives the High Court such jurisdiction only in its appellate capacity from the decision of the Tribunal; that the question of law to be addressed by the High Court under the said section mirrors the issues raised by the *ex parte* applicants in the judicial review application; and that to consider the issues under a judicial review process amounts to an abuse of the process.

15. We have considered the submissions made. The decision being appealed against arose from a preliminary objection. It was not a decision arrived at after the hearing of the suit on its merits. Accordingly, we must eschew any attempt to address the issues that were not the subject of the preliminary objection and on which no decision was made. In a case such as this, care must be taken to avoid expressing a conclusive view of the matters which have not been determined by the trial court. The practice in such cases is for an appellate court, if necessary, to only express its views in the matters in controversy on a prima facie basis to avoid tying the hands of the trial court in the event that the matter is to proceed to hearing. See *Said Almed v Mannasseh Benga & another* [2019] eKLR.

16. Sections 40H and 40J of the *Kenya National Examinations Council Act* provides as follows:

> “ 40H. the Tribunal shall consider all appeals made against a decision of the Council to withhold, nullify or cancel examinations prepared and administered by the Council. 40J. (1) A person who is aggrieved by a decision of the Council to withhold or cancel the results of a candidate may lodge an appeal to the Tribunal in the prescribed form.

2. an institution that is aggrieved by the decision of the Council to withhold or cancel the results of the candidates in that institution may lodge an appeal to the Tribunal in the prescribed form.
3. notwithstanding the provisions of subsection (1), a person aggrieved by a decision of the Council may appeal to the Tribunal through the County Director of Education in the County in which the applicant resides.”

17. Clearly, these provisions provide for an alternative dispute resolution mechanism to court proceedings and as was held by this Court in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR:

> “ It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring

that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the *Constitution* which commands Courts to encourage alternative means of dispute resolution. We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed."

18. The Supreme Court in *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others* SC Petition No 3 of 2020 [2020] eKLR restated the position when it expressed itself as follows:

> "(51) Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism."

19. This position has statutory validation in section 9(2), (3) and (4) of the *Fair Administrative Action Act* which provides that:

    2. The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

    3. The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

    4. Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."

20. There is, however, a window under section 9(4) of the said Act for the court to exempt a party from exhausting the mechanisms, but only in exceptional circumstances, and where the interest of justice so demands. Exceptional circumstances, are however, not defined by the Act and it is left to a court, in the exercise of its discretion, to determine what it amounts to. In this respect, the Supreme Court in *others; National Environmental Complaints Committee & 5 others (Interested Parties)* (Petition E007 of 2023) [2023] KESC 113 (KLR) (The Abidha Nicholus Case) stated that:

> "...where there is an alternative remedy, especially where Parliament has provided a statutory appeal procedure, then it is only in exceptional circumstances that the court can resort to any other process known to law."

21. And at paragraph [107] of the above decision, the Supreme Court explained that:

> "...where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis

on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism."

22. Accordingly, the Supreme Court identified, as one of the exceptional circumstances, a situation where the reliefs provided by the alternative mechanism are not adequate or effective, for example where what is alleged is a violation of the *Constitution*. The alleged violation of the *Constitution* must, however, be the primary issue for consideration in the matter. The Court therefore stated:

> " That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms.
>
> We say this persuaded by the elegant reasoning in *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) stated:
>
> 'In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere "bootstraps" or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.'"

23. In this case, the learned Judge, while exempting the *ex parte* applicants from resorting to the avenue provided in section 40J of the Kenya National Examinations Act, stated that since the *ex parte* applicants contended that, in addressing the request for review, the appellant contravened various constitutional provisions, and since the jurisdiction of the Tribunal was limited to reviewing decisions made by the appellant cancelling the examination results of a candidate, the Tribunal could not have been an effective forum. The *ex parte* applicants' grievance, in our understanding, was that the cancellation of the examination results was improper as there were no malpractices during the examination. They contended that had they been heard, they would have proved that all procedures for the preparations and administration of the said examination were followed and there were no reports of any impropriety by the invigilators and/or supervisors of the examinations. The primary grievance, in our view, was the cancellation of the examination results. The failure to afford them an opportunity of being heard was not the primary grievance. That being the position, the grievance fell within the ambit of section 40J of the *Kenya National Examinations Act*. We borrow the words of Georges, CJ in *Minister of Home Affairs v Bickle & others* (1985) L.R.C. Cost.755, to the effect that:

> " ...where a matter can be disposed of without recourse to the *Constitution*, the *Constitution* should not be involved at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so (*Wahid Munwar Khan v The State* AIR (1956) Hyd.22) ...Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights."

24. As the Supreme Court appreciated in *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* [2012] eKLR:

> "...the *Constitution* is a solemn document, and should not be a substitute for remedying emotional personal questions or mere control of excesses within administrative processes."

25. In our view, the mere fact that a cause of action may be traced to a constitutional provision, however remote, does not necessarily elevate the case to one which raises a constitutional issue. In this case, we find that the mere fact that the *ex parte* applicants contended that they were not heard before the decision to cancel the examination results was made did not remove it from the strictures of section 40J aforesaid.

26. In the premises we find this appeal merited. We set aside the ruling of the High Court made on 28th June 2019 in Judicial Review Miscellaneous Application No 36 of 2019 and substitute therefor an order allowing the preliminary objection dated 4th March 2019.

27. Consequently, the Notice of Motion dated 20th February 2019 is struck out. Considering the nature of the dispute, we make no order as to costs.

28. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE, 2025.

D. K. MUSINGA (PRESIDENT)

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.. JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR