REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

MILIMANI LAW COURTS

JR MISC APPLICATION NO.61 OF 2018

IN THE MATTER OF AN APPLICATION BY ABDUKADIR ELMI ROBLEH FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF THE STATE DEPARTMENT FOR BASIC EDUCATION

AND

IN THE MATTER OF THE KENYA NATIONAL EXAMINATION COUNCIL ACT NO. 29 OF 2012

AND

IN THE MATTER OF AMOUD HIGH SCHOOL AND DARU ELMU ACADEMY

AND

IN THE MATTER OF ARTICLES 22, 23, 43, 47 AND 165 (2) (b) OF THE CONSTITUTION OF KENYA

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY DIRECTOR OF

EDUCATION, NAIROBI.....1ST RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF EDUCATION.....2ND RESPONDENT

THE DIRECTORATE OF CRIMINAL INVESTIGATIONS

(FLYING SQUAD HEADQUARTERS).....3RD RESPONDENT

THE CEO, KENYA NATIONIAL EXAMINATIONS

COUNCIL (KNEC).....4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....5TH RESPONDENT

AND

EX PARTE: ABDUKADIR ELMI ROBLEH

JUDGEMENT

Introduction

1. By a Notice of Motion dated 19th February, 2018, the *ex parte* applicant herein, **Abdukadir Elmi Robleh,** seeks the following orders:

> **a. That an order of Prohibition directed at the 4th Respondent, its officers and any other authority acting under its instructions from de-registering, closing down and in any other manner interfering with the smooth running, management and leaving of the Applicant's school Amoud High School and Daru Elmu Academy situate in Kamkunji Sub County, Nairobi.**
>
> **b. That an order of certiorari to remove into this honourable court and quash the 4th Respondents decision made on the 18th January 2018 of deregistering the Applicants schools –Amoud High School as an examination centre NO. 20402061 and Daru Elmu Academy as an examination centre No. 20402066.**
>
> **c. That the Honourable be at liberty to make such further and any orders as it deems fit to grant for the ends of justice to be met.**
>
> **d. Costs of this application be provided for.**

Ex Parte Applicants' Case

2. According to the ex parte applicant, it is the proprietor of two schools known as **Amoud High School** and **Daru Elmu Academy** both these institutions of learning are situated in Eastleigh Nairobi within the Kamkunji Sub-County which schools were applied for by the Applicant and approved the 2nd Respondents officers whereon certificates for their registration were issued.

3. It was averred that upon issuance of the registration certificates by the 2nd Respondent's offices, the Applicant started enrolling students thereat for purposes of their educational uplifting and or realization of the objectives of the establishment of the educational institutions and that the two educational institutions have been running since and have enrollment of over 400 students with a workforce of a cumulative average of 50 teachers and 15 support staff.

4. The applicant disclosed that in the year 2017, the school presented its first badge of KCSE Candidates who sat for the 2017 KCSE Examinations after the 2nd Respondent's quality Assurance and Standards Officers had visited the Institution (secondary) thereby giving it a clean bill of health. Subsequent to the Issuance of the clean bill of operations by the Respondents officers, the school was able to present its students for the 2017 secondary examinations after approval by the Respondent's officers which results for the 2017 examinations were duly received where some parents/students are yet to pick their results.

According to the applicant, of the 17 schools that comprise the Kamkunji sub-county, the Applicant's schools was ranked number 6 overall in the 2017 results postings.

5. The applicant averred that the enrollment is impressive and the dedication from the teachers has ensured that the catchment area where the school is situated serves the population in achievement of a Universal right to education which even the Kenyan Constitution embraces and promotes as one of the core basic and fundamental right and freedom and that the school is compliant in all its municipal laws and obligations which it has never flouted even a single one.

6. It was however averred that in the last quarter of year 2017, the office of the 3rd Respondents started to investigate the Applicant on allegations that he least knew about which investigations culminated into the Applicant being charged at the Milimani law court in criminal case No. 2002 of 2017, which case is still pending trial before the chief magistrate where the Applicant is out on bond. Among the charges that are preferred by the 3rd Respondent against the Applicant is the charge of him running the schools without a licence whereas the same was duly issued by the 2nd Respondent as well as a charge of forgery of the very certificates that the Ministry issued for the 2nd schools and being unlawfully present in Kenya.

7. It was revealed by the applicant that the officers from the 3rd Respondents office whilst investigating the matter now pending in court and before the arraignment thereat openly and wantonly told the Applicant in the face that they cannot have a foreigner running educational affairs in the county and enrich himself unduly when the locals are watching and that they were to Orchestrate and bring him down with the school as it was benefiting members of a particular community at the expense of other Kenyans. Further and in an effort to scare the Applicant the sleuths alleged that they will plant an allegation that the Applicant was in fact radicalizing the youth and have him close down the school irrespective of the law having been followed or not in the licensing thereof.

8. True to their word the applicant averred that the 4th Respondent, by a letter dated 18th January 2018 (but posted on the 5th February 2018) de-registered the schools as examinations centres without affording the Applicant any notice, reason, ground or information behind the closure. The said letters, it was deposed, were received by the District Education Officer, Kamkunji on the 9th February 2018 and forwarded to the Applicant the same day.

9. According to the applicant, the issuance of the letters deregistering the Applicants schools is in itself a wider scheme by the Respondents jointly to frustrate the Applicant and his lawful engagements and that the scheme is achieved largely by the joint conduct of the Respondent to have him suffering by the closure.

10. The applicant disclosed that in what the Applicant thought was a streak of fake news, the letter dated 18/1/2018 (as now finally received) was in late January 2018 in the phones via WhatsApp groups of some of the parents/students who called in the Applicant's offices to confirm of its authenticity which the Applicant had no knowledge of. The applicant averred that the postage stamp/franking on the letter of 18/1/2018 is done on the 5th February 2018 long after its contents were circulating on social media.

11. It was therefore the applicant's case that the conclusion is that the Respondents do not want the schools and want to cause jitters with the parents and the students to force its closure. It was the applicant's case that the information of closure of the school confirms the Applicants fears of a well choreographed, orchestrated and purposed will of the closure of the institutions against a backdrop of impunity without following of the law.

12. It was the applicant's case that by a letter dated 12th February 2018, the Applicant's then advocates demanded for a discontinuance of the illegal intimidation and blackmail that the Respondents have jointly hatched to embarrass the Applicant which communiqué has not elicited any positive reactions.

13.The applicant averred that the registration for the 2018 candidates is complete and the Applicant's school have students who have been registered as such and it ostensibly means that the said students will

not sit at the end of the year for their 2018 KCSE/KCPE exams on account of the illegal actions by the Respondents.

14. It was the applicant's case that there is no merit at all or any known legal procedure that has been undertaken for the Respondents to purport to close down the schools and that there is absolutely no fair administrative action by the Respondents joint approach on the issue of the Applicant's schools with the deregistration verdict.

15. The applicant contended that the decision to de-register the schools is not well thought out as the effect thereof has astronomical ramifications as to the plight of the learners, their parents/guardians, teachers and support staff. Education being one of the economic and a social right as such and is attainable under the Kenyan constitution should be left to freely and evenly be run without let or hindrance.

16. The applicant averred that there are 180 students registered as candidates in both primary wing and secondary wing that have registered for the 2018 KCPE/KCSE Examinations and by deregistering them by the Respondents means that the administrative action that informed the deregistration is not lawful reasonable and procedurally fair as the plight of the said students now hangs in the balance; yet no reasons that have been advanced by the Respondents on the de-registration and or closure of the centers.

17. The applicant therefore urged that the Respondents' joint action is a classic case of abuse of administrative powers which this court ought to reign on and arrest.

Determinations

18. I have considered the issues raised in this matter.

19. 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.***

20. Apart from that provision section 4(1), (2) and (3) of the ***Fair Administrative Action Act*** provides as follows:

> ***(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) Every person has the right to be given written reasons for any administrative action that is taken against him.***
>
> ***(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***
>
> > ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
> >
> > ***(b) an opportunity to be heard and to make representations in that regard;***
> >
> > ***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***
> >
> > ***(d) a statement of reasons pursuant to section 6;***

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

21. What the Constitution requires in my view is the notification of the intention to take an action against a person likely to be adversely affected thereby and the reasons for the intended action. The said reasons, it is my view must depend on the peculiar circumstances of each case and it is those peculiar circumstances which ought to be considered which consideration must under Article 47 of the Constitution entail an opportunity to the applicant to be heard on the circumstances alleged to constitute satisfactory reasons for the taking of the adverse action.

22. In this case the applicant's case is that despite being registered by the 2nd Respondent herein in respect of his two institutions of learning, and having enrolled students in the said institutions, the Respondents have in violation of the rules of natural justice decided to deregister the Applicant's said institutions.

23. In this case, the applicant having been duly registered to operate the subject institutions of learning, a cancellation of the said registration was clearly an administrative action as defined in section 2 of the ***Fair Administrative Action Act*** which defines the same to include:

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.

24. It follows that there was a constitutional and statutory obligation placed on the Respondent Commission to give the applicant prior and adequate notice of the nature and reasons for the proposed administrative action and an opportunity to be heard and to make representations in that regard. There is no evidence that this was done since the allegations made by the Applicant were not controverted as the Respondents did not respond to the application.

25. Apart from that it was the Applicant's case that the said decision was based on irrelevant factors being the allegation that the Respondents cannot have a foreigner running educational affairs in the country and unduly enrich himself at the expense of the locals.

26. It is now clear that judicial review remedies can be granted on grounds of *ultra vires*, jurisdictional error, misdirection in law, errors of precedent fact such as fundamental factual errors or findings devoid of evidence, abdication of or fettering discretion, insufficient inquiry or failure to consider material or relevant facts, considering irrelevant facts, bad faith or improper motive, frustration of the legislative purpose, substantive or procedural fairness, inconsistency in decision making, unreasonableness, lack of proportionality, bias and failure to give reasons for the decision. See ***Judicial Review Handbook*** 6th Edition by **Michael Fordham**, **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300, Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479.**

27. *In my view the notice* contemplated *under Article 47 of the Constitution as read with s*ection 4(3) of the ***Fair Administrative Action Act*** must not only be *prior to the decision but must also be adequate and must disclose the nature and reasons for the proposed administrative action*. This was the position in **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR** where it was held that:

"20. Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and principles of public service including *"(c) responsive, prompt,*

effective, impartial and equitable provision of services"* and *"(f) transparency and provision to the public of timely, accurate information."

...

28. ***As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response*****. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well. (See *Donoghue v South Eastern Health Board* [2005] 4 IR 217). Hilary Delany in his book, *Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272,* notes that, *"Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision."***

30. In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, *information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be*. (*See Charkaoui v Canada* [2007] SCC 9, *Alberta Workers' Compensation Board v Alberta Appeals Commission (*2005) 258 DLR (4th), 29, 55 and *Sinkovich v Strathroy Commissioners of Police (1988) 51 DLR (4th) 750)." *[Emphasis provided].*

28. Similarly in **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** the Court held:

"I would at this stage adopt the observations made in the *Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77* where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; "1.if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best…; 4.*The person accused must know the nature of the accusation made*; 5.*A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward*; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi–lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it." [Emphasis added].

29. It is my view that fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

"The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…*The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases."* [Underlining mine].

30. Whereas the *authority concerned* may well have proper reasons to act in the manner it intends to act, where its decision is tainted by procedural impropriety the same cannot stand. It was therefore held in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

> **"A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."**

31. This was a restatement of Lord Wright's decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

> **"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."**

32. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

> **"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."**

33. I associate myself with the position in **Board of Education vs. Rice; [1911] AC 179** in which **Lord Loreburn LC** stated that:

> **"a decision-making body should not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it, is fundamental to the principle of law (which governs public administration as much as it does adjudication) that to act in good faith and listen fairly to both sides is 'a duty lying upon everyone who decides anything."**

34. In **Msagha vs. Chief Justice & 7 Others Nairobi HCMCA no. 1062 of 2004 (Lessit, Wendo & Emukule, JJ on 3/11/06) (HCK) [2006] 2 KLR 553** it was held:

> **"The Court observes firstly that the rules of natural justice "*audi alteram partem*" hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days we of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision-maker deprives himself of the views of the person**

who will be affected by the decision. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision…It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.

35. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in **Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held:

"**The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."**

36. In **Selvarajan vs. Race Relations Board [1976] 1 All ER 12** at page 19 of the judgement **Lord Denning** MR observed that:

"In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report."

37. In **Egal Mohamed Osman vs. Inspector General of Police & 3 Others [2015] eKLR** at page 7 the Court at the time referred to **The Management of Committee of Makondo Primary School and Another v Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, the Ugandan Supreme Court stated as follows regarding the rules of natural justice:

"It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

38. In **Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR**:

> **"Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body."**

39. I agree with **Chief Constable Pietermaritzburg vs. shim 1908 29 NLR 338 341** where the court held that:

> **"it is a principle of common law that no man shall be condemned unheard, and it would require very clear words in the statute to deprive a man of that right. To the applicant, this court's decision shows that the *audi alteram partem* rule would only be excluded if parliament intended its exclusion, irrespective of whether or not the rights of individuals are affected. The *audi alteram partem* rule ensures a free and impartial administrative process, within which decisions and cognizance of facts and circumstances, occur altogether openly."**

40. In my finding, a process by which an administrative body makes findings and proceeds to implement the same before affording persons affected thereby, an opportunity of being heard, cannot by any stretch of imagination be termed as fair in order to meet the provisions of Article 50 of the Constitution. For a hearing to be said to be fair not only should the case that the respondent is called upon to be meet be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it given, but also the authority concerned ought to approach the issue with an unbiased disposition. In other words the authority ought not to base its decision on irrelevant factors. Conversely the authority is required to take into consideration relevant factors in arriving at its decision. It was in respect of this ground that the Court in **Republic –vs- Attorney General & Another Ex Parte Waswa & 2 Others [2015] 1 KLR 280** had this to say about decisions reached at after taking into account irrelevant considerations that;

> **"we again hold that the taking into account irrelevant consideration invites this Court's intervention in judicial review. Irrelevant consideration is one of the recognized grounds for intervention and again on this ground alone the deregistration decision ought to be brought and quashed."**

41. In **Fernandes vs. Kericho Liquor Licensing Court Kisumu HCCA No. 7 of 1967, [1968] EA 640 Chanan Singh, J** on 8/03/68) (HCK) held that:

> **"Section 16 of the Liquor Licensing Act (Cap 121) provides the conditions under which a licensing court may refuse to renew licence and enacts that a licensing court may refuse to renew an existing licence only when it is satisfied that one or more of six specified circumstances exist. Under section 16 the licensing court is not entitled to refuse the renewal of an existing license on the ground that there is nolonger a need for the licence in the particular locality. The licensing court has no jurisdiction or power to refuse to grant the renewal of the licence on the ground stated in section 16(a) without first informing the applicant of its objection and giving him an opportunity to answer it as provided in section 12(2)…In the instant case the appellant was never informed by the licensing court as required by section 12(2) that the court did not regard him fit and proper person to hold licence. A demand for production of a Kenya citizenship certificate would not amount to an objection on the ground that the appellant was "not a fit and proper person". If the court does seriously believe that an applicant is not a fit and proper person, then it is only right that he should be told so in specific terms. Secondly, the expression "fit and proper" refers to the personal qualities of an applicant and not to his national status…It is quite clear that the renewal of the licence in this case was refused on the ground that the appellant was not a Kenya citizen. That, however, is no disqualification for the purposes of the liquor licensing law. No other disqualification is imputed to the appellant and therefore the application was illegally**

refused."

42. To deregister a school simply because the proprietor is a foreigner, when that is not one of the grounds for such action, not only amounts to a consideration of an irrelevant factor but is also discriminatory and irrational.

43. **Lord Denning** in **Breen vs. Amalgamated Engineering Union [1971] All E.R. 1148**, expressed himself as follows:

> **"It is now settled that a statutory body which is entrusted by Statute with discretion must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand or as administrative on the other or what you will, still it must act fairly. It must in a proper case give chance to be heard."**

44. It must also be noted that section 5(1) of the ***Fair Administrative Act, 2015*** provides that:

> ***In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall-***
>
> **a.** ***Issue a public notice of the proposed administrative action inviting public views in that regards;***
>
> **b.** ***Consider all views submitted in relation to the matter before taking administrative action;***
>
> **c.** ***Consider all relevant and material facts;***

45. That the impugned decision was likely to materially and adversely affect the legal rights or interests of a group of persons or the general public is not in doubt since the decision would have affected the rights and interests of the students and their parents/guardians. The importance of this requirement is emphasised by the provision of section 4(3) of the same Act which provides that:

Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

> ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
>
> ***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

46. There is no indication that before the impugned decision was arrived at the Respondents issued a public notice of the proposed administrative action inviting public views in respect of the proposed deregistration of the Applicant's schools let alone considering the resultant views.

47. I agree that in deciding on what action to take an authority ought to apply the principle of proportionality. Accordingly I associate myself with the position taken in **The Indian Borough of Newham vs. Khatun-Zeb and Iqbal [2004] EWCA Civ. 55** where it was held that:

> **"Clearly a public body may choose to deploy powers it enjoys under Statute in so draconian a fashion that the hardship suffered by the affected individuals in consequence will justify the court in condemning the exercise as irrational or perverse...At all events it is plain those oppressive decisions may be held to repugnant to compulsory public law standards."**

48. In my view to deregister an institution of higher learning at the time when the students are readying themselves to register for final exams without offering them alternatives is such a draconian step as to amount to irrationality.

49. Having considered the issues raised herein, it is my view and I find that the Respondents' decision to deregister the applicant's schools did not meet the requirements under sections 4(3) and 5(1) of the ***Fair Administrative Action Act*** since it did not afford the applicant and the public whose rights and interests stood to be adversely affected by the Respondents' administrative action a prior and adequate notice of the nature and reasons for the proposed administrative action. Further the said decision was clearly based on irrelevant factors, failed to consider relevant factors, was irrational and was breach of the principle of proportionality. In a sum, the Respondents' action did not meet the tenets of a fair administrative action.

50. In the premises the Motion dated 19th February, 2018 is merited and succeeds.

Order

51. Accordingly:

a) An order of prohibition is hereby issued directed at the 4th Respondent, its officers and any other authority acting under its instructions from unlawfully de-registering, closing down and in any other manner interfering with the smooth running, management and learning in the Applicant's schools Amoud High School and Daru Elmu Academy situate in Kamkunji Sub County, Nairobi

b) An order of certiorari is hereby issued removing into this Court for purposes of quashing the 4th Respondent's decision made on the 18th January 2018 deregistering the Applicant's schools –Amoud High School as an examination centre No. 20402061 and Daru Elmu Academy as an examination centre No. 20402066, which decision is hereby quashed.

c) The applicant is awarded half the costs of these proceedings.

52. It is so ordered.

Dated at Nairobi this 27th day of February, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nyaberi for the Applicant

CA Ooko