REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

JUDICIAL REVIEW NO. 3 OF 2016

REPUBLIC.....APPLICANT

VERSUS

THE COUNTY EDUCATION BOARD.....1ST RESPONDENT

THE COUNTY DIRECTOR OF EDUCATION BUSIA.....2ND RESPONDENT

AND

BRIDGE INTERNATIONAL ACADEMIES LTD.....EXPARTE APPLICANT

JUDGMENT

1. The ex-parte Applicant, Bridge International Academies Limited is a limited liability company incorporated under the Companies Act, Cap 486 of the Laws of Kenya. It describes itself as an operator of low cost basic education institutions for the low income cadre of the Kenyan society. The 1st Respondent is the Busia County Education Board ("the Board"). Section 17(1) of the Basic Education Act, 2013 ("the

Act') establishes a County Education Board for every county to act as an agent of the National Education Board. Its functions are as provided by the Act. The 2nd Respondent is the Busia County Director of Education. A County Director of Education is the Secretary of the County Education Board and is an appointee of the Cabinet Secretary responsible for matters relating to basic education and training.

2. On 4th July, 2016 the ex-parte Applicant sought and obtained the leave of this Court to commence judicial review proceedings against the decision of the respondents as conveyed in letters dated 4th April, 2016 and 28th June, 2016 directing the closure of all the ex-parte Applicant's schools in Busia County. At the time of granting leave the Court directed the said leave to operate as stay of the respondents' impugned decision.

3. Subsequently the ex-parte Applicant filed the notice of motion application dated 20th July, 2016 seeking orders as follows:

"1. THAT:-

1. **An order of certiorari to remove into this Honourable Court for the purpose of being quashed the decision of the 1st Respondent of the 19th March 2016 vide minute 19/8/13/2016 and further as contained**

In the 2nd Respondent's letters dated 4th April 2016 and 29th June 2016 closing all Bridge International Academies in Busia County.

2. An order of certiorari to quash the decision of the 1st Respondent to close down the Applicant's academies before a Quality Assurance Inspection has been carried out and a report tendered to the 1st Respondent for consideration in line with the provisions of the Basic Education Act.

2.THAT:-

a) An order of mandamus directed to the 1st Respondent commanding the 1st Respondent to consider the Applicant's application for registration of its academies under the Alternative Provision of Basic Education and Training Guidelines ("APBET Guidelines") as formulated pursuant to Section 95(3) of the Basic Education Act.

b) An order of mandamus to compel the 2nd Respondent and her officers to allow and/or direct the respective Quality Assurance and Standards Officers to assess the following Bridge academies: Amagoro, Bumala, Butula, Funyula, Katikoko, Malaba, Marachi, Nambale, Ojamii, Port Victoria, Rugunga and Sio Port to determine and/or establish whether the Applicant's academies comply with the requirements for registration under the APBET guidelines as formulated under Section 95(3) of the Basic Education Act.

3. THAT:-

a) An order of prohibition to restrain the 2nd Respondent and her officers and or their agents from closing/shutting down the following Bridge academies; Amagoro, Bumala, Butula, Funyula, Katikoko, Malaba, Marachi, Nambale, Ojamii, Port Victoria, Rugunga and Sio Port.

b) An order of prohibition directing the 2nd Respondent and her officers to cease and desist directing and or interfering with the functions of the respective Quality Assurance and Standards Officers in their

determination of the Applicant's applications for registration as per the APBET guidelines.

4. THAT costs of this application be provided for."

4. Before highlighting the grounds upon which the application is based, I find it important to reproduce the letters containing the decision the ex-parte Applicant challenges. There are three letters exhibited by the ex-parte Applicant. The first letter which was written by the 2nd Respondent on 31st March, 2016 was addressed to the Sub-County Directors of Education within Busia County and states as follows:

"RE: CLOSURE OF BRIDGE ACADEMIES BUSIA COUNTY

Following the CEB Meeting held on 19th March, 2016 vide Min. 9/18/13/2016 the board recommended that all Bridge Academies operating in Busia County be closed with effect from 2/5/2016 due to non-compliance of Basic Education and Learning Institutions Registration Requirements as per the Basic Education Act 2013 under Section 77-78

You are therefore expected to liaise with your respective Deputy County Commissioner to enforce this directive."

5. It seems that the ex-parte Applicant immediately responded to that letter and on 4th April, 2016 the 2nd Respondent addressed the Director of the ex-parte Applicant as follows:

"RE: DIRECTIVE ON CLOSURE OF BRIDGE INTERNATIONAL ACADEMIES IN BUSIA COUNTY

We are in receipt of your letter Ref. BI/RC/BC/03/16 dated 1st April on the above subject.

Kindly be informed that the decision of the County Education Board of 19th March, 2016 vide Min. 9/18/13/2016 which was communicated to you on 31st March, 2016 vide Ref. No. BSA/CDE/ED/10/12/135 still stands.

We wish to inform you that Bridge International Academies can qualify to operate as Alternative Provision of Basic Education and Training (APBET) schools and as such, you are advised to follow the guidelines for registration provided by Ministry of Education, Science & Technology. Once approved, the Academies are registered and can legally operate.

Kindly comply with the recommendations of the County Education Board.

Thank you."

6. The third letter dated 28th June, 2016 addressed to the ex-parte Applicant's Director by the 2nd Respondent states:

"RE: DIRECTIVE TO CLOSE BRIDGE INTERNATIONAL ACADEMIES IN BUSIA COUNTY

Your letter Ref. No. BI/RC/BC/04/16 dated 2nd June, 2016 refers.

Please note that you ignored the directive of the County Education Board of 19th March, 2016 vide Min. 9/18/13/2016 which was communicated to you vide letter Ref. No. BSA/CDE/ED/10/12/135 concerning closure of Bridge International Academies in the County.

The decision to close the academies was to provide opportunity for the County Education Board to establish if they qualified for registration as Alternative Provision of Basic Education and Training (APBET) schools but to date the schools are unlawfully operating. This was lawful instructions which you either ignored or failed to comply.

Based on the above facts, the directive of the County Education Board still stands before any engagement for registration under the APBET guidelines is initiated."

7. A perusal of the statutory statement and the verifying affidavit of the ex-parte Applicant's Director of Legal Services, Antony

W. Mugodo which were filed together with the chambers summons application for leave disclose that the ex-parte Applicant challenges the respondents' decisions on several grounds.

8. The ex-parte Applicant's case is that the decision of the respondents to close its schools was inchoate as no quality assurance inspection report under the Alternative Provision of Basic Education and Training Guidelines ("APBET Guidelines") had been done and presented to the 2nd Respondent with a recommendation for closure. It is the ex-parte Applicant's case that the decision of the 2nd Respondent was made in excess of jurisdiction as the 1st Respondent had acted in total disregard of the APBET policy which was formulated under Section 95(3) of the Act by the Cabinet Secretary in consultation with the National Education Board.

9. The ex-parte Applicant contends that the 1st Respondent's decision is a nullity, invalid and *void ab initio* for being *ultra vires* the delegated powers of the Cabinet Secretary under the Act and the APBET Guidelines for the reasons that:

(a) Under sections 18 and 66(2) of the Act, the respondents can only give effect to the recommendation of a Quality Assurance and Standards Officer to temporarily close a school;

(b) The respondents' decision on 19th March, 2016 to close the ex-parte Applicant's schools in Busia County was arbitrary as there was no recommendation made to the Board by the various Quality Assurance and Standards Officers to close the schools;

(c) The respondents did not comply with Section 77(1) of the Act which requires that an applicant must be notified of a rejection of its application to register a school. It is the Applicant's contention that its applications for registration of its schools in Busia County had not been rejected to warrant the closure of the schools;

(d) The respondents have directed the Quality Assurance and Standards Officers not to inspect the ex-parte Applicant's academies which is contrary to the Act and amounts to failure to adhere to due process and partiality on the part of the respondents; and

(e) The respondents have indicated that the ex-parte Applicant has failed to comply with sections 77 and 78 of the Act which provides the conditions to be met before the registration of a school but have at the same time failed to either reject or accept its applications for registration of its academies.

10. It is the ex-parte Applicant's assertion that the directives issued by the 2nd Respondent are reckless, malicious, unreasonable and motivated by ulterior motives and amount to unfair administrative action in that:

(a) The respondents' letters do not state why the ex-parte Applicant's academies do not qualify for consideration for registration as APBET schools as contemplated under the APBET Guidelines;

(b) The respondents' letter dated 28th June, 2016 expressly contradicts that of 4th April, 2016 in which the respondents had urged the ex-parte Applicant to consider seeking registration under the APBET Guidelines;

(c) It is malicious and unreasonable for the respondents to shut down the ex-parte Applicant's academies before

conducting a quality assurance inspection on those academies;

(d) It is malicious and unreasonable for the respondents to close the ex-parte Applicant's academies before assessing whether they qualify for registration under the APBET Guidelines;

(e) It was inhumane and unreasonable for the respondents to close the schools through the media without first issuing notice to the ex-parte Applicant;

(f) The decision is an affront to the pupils' right to education; and

(g) The respondents' decision was based on ulterior motives, and irrelevant and flimsy considerations.

11. The ex-parte Applicant asserts that the respondents' decision was arrived at in breach of the rules of natural justice in that:

(a) The 1st Respondent did not inform the ex-parte Applicant of the meeting whose agenda was to discuss the closure of its schools;

(b) The ex-parte Applicant only learned of the decision through the media as no notice was given to it;

(c) The respondents did not confront the ex-parte Applicant with the evidence upon which the decision to close its schools en masse was based;

(d) The ex-parte Applicant was not given a hearing before the decision was made; and

(e) The 1st Respondent acted in a reckless, partisan, selective and discriminatory manner.

12. The ex-parte Applicant posits that the respondents' decision was mischievous, discriminatory and based on bad faith in that the respondents acknowledge that the ex-parte Applicant's schools could have qualified for registration under the APBET Guidelines which Guidelines acknowledges the existence of APBET schools prior to the promulgation of the Guidelines. Further, that the respondents acted without any recommendation by a Quality Assurance and Standards Officer.

13. The respondents opposed the application through a replying affidavit sworn on 16th August, 2016 by Prof. Stephen Odebero the Chairman of the 1st Respondent. The respondents' case is that they acted within the law in closing the ex-parte

Applicant's schools. According to the respondents, they did not breach the rules of natural justice and their decision was reasonable, rational and lawful.

14. It is the respondents' averment that the Act mandates them to close schools that do not meet the requirements of the Act. They contend that in the instant case the ex-parte Applicant was informed of the requirements but failed to meet those conditions. The respondents exhibited letters addressed to the ex-parte Applicant containing information on why each of its academies in Busia County could not be registered. In those letters the ex-parte Applicant's schools were given up to 31st December, 2014 to meet the requirements failing which the schools were not going to be allowed to operate from January, 2015.

15. It is the respondents' case that the ex-parte Applicant never bothered to comply with the conditions for registration but continued to operate illegally only opting to file this case after its schools were closed. According to the respondents, the ex-parte Applicant did not appeal against the decision to close its schools. The respondents contend that the ex-parte

Applicant is not entitled to the orders sought as it failed to exhaust the dispute resolution mechanisms provided by the Act before filing these proceedings.

16. The respondents assert that their action did not breach the principles of natural justice as the ex-parte Applicant was informed in writing that its schools had not met the requirements for registration. The respondents submit that they gave the ex-parte Applicant an opportunity to meet the registration conditions but it failed to do so. According to the respondents, the decision to close the schools was in the best interests of the pupils as they are entitled to quality education.
17. On the ex-parte Applicant's averment that its schools can be registered under the APBET Guidelines, the respondents assert that Busia County is not among the seven municipalities that are supposed to offer basic education and training under the APBET Guidelines.
18. The respondents contend that the ex-parte Applicant's schools were inspected by the Quality Assurance and Standards Officers and the claim that the officers were prevented from assessing its schools is reckless, false and

misleading. The respondents assert that the ex-parte Applicant cannot use the registration of a business name to circumvent the provisions of the Act.

19. In response to the respondents' reply, the ex-parte Applicant filed a further affidavit sworn on 26th September, 2016 by its Director of Legal Services Antony W. Mugodo. The ex-parte Applicant reiterates that the respondents breached the law by not informing it of the meeting that was called to discuss the closure of its schools. Further, that in closing its schools the respondents did not follow the procedure provided by the Act for closing schools. It is the ex-parte Applicant's firm position that a school can only be closed upon the recommendation of Quality Assurance and Standards Officers.

20. It is also the ex-parte Applicant's position that the Cabinet Secretary's statement in the forward to the APBET Guidelines that most schools operate informally due to failure to meet the conditions for registration reflects the status of its schools. The ex-parte Applicant asserts that it operates schools in informal settlements and marginalized areas and it cannot meet the

requirements for registration which includes acreage, staffing and facilities.

21. The ex-parte Applicant contends that the respondents have not explained to the Court why the decision to close its schools which was made in 2014 was withheld for a period of three years. It asserts that the decision to close its schools which was made in 2014 cannot be relied upon due to the passage of time.

22. In particular reference to its school at Malaba, the ex-parte Applicant exhibited minutes of a meeting held on 17th June, 2013 by the 1st Respondent in which the school's registration was approved.

23. The ex-parte Applicant asserts that after the applications for the registration of its schools in 2014, it made improvements and those improvements were accepted by the respondents. In support of this assertion it points to a Standards Assessment Report for its Port Victoria School. The report which was attached to the verifying affidavit shows that the assessment, which was conducted on 6th October, 2015, had recommended the provisional registration of the school.

24. The ex-parte Applicant states that it has been engaging the Ministry of Education, Science and Technology and the Kenya Institute of Curriculum Development in order to have its schools recognized and regulated.

25. On whether its schools meet the requirements for registration under the APBET Guidelines, the ex-parte Applicant asserts that they do. Its case is that in the statistics released for the Kenya Population and Housing Census of 2009, Busia County had 743,946 residents thus making it qualified for classification as a municipality under Section 9(3) of the Urban Areas and Cities Act, Cap 275 which states that among the requirements for conferment of a municipal status on a town is a population between 70,000 and 249,000 residents.

26. The issues that requires the determination of this Court are:

a) Whether the respondents' decision to close the ex-parte Applicant's schools was in excess of its jurisdiction;

b) Whether the respondents acted in breach of the rules of natural justice;

c) Whether the ex-parte Applicant is entitled to the remedies sought; and

d) Costs of the application.

27. The purpose of judicial review is to ensure that public bodies execute their mandates within their statutory remit while at the same time ensuring fairness by complying with the rules of natural justice. There is also the need to ensure that those decisions are rational. The boundaries of judicial review were demarcated by Lord Diplock in the famous case of **Council of Civil Service Unions v Minister for the Civil Service [1984] 3 ALL ER 935** thus:

"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety."……..

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"

(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that

no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

28. Justice Kasule of Uganda explained the meaning of illegality, irrationality and procedural impropriety in the case of **Pastoli v Kabale District Local Government Council & others [2008] 2 EA 300** when he stated that:

"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 2; and also *Francis Bahikirwe Muntu and others v Kyambogo University*, High Court, Kampala, miscellaneous application number 643 of 2005 (UR).

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality.....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: *Re An Application by Bukoba Gymkhana Club* [1963] EA 478 at page 479 paragraph "E".

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision. (*Al-Mehdawi v Secretary of State for the Home Department* [1990] AC 876)."

29. The grounds upon which judicial review can be granted are not limited. Judicial review is an important tool which the courts use to ensure that the officers and bodies vested with constitutional and statutory authority exercise their powers in the best interests of the society. Nyamu, J (as he then was) enumerated some of the grounds for grant of judicial review orders in **Republic v Vice Chancellor, Jomo Kenyatta University of Agriculture and Technology Ex-parte Cecilia Mwathi and another [2008] eKLR** as follows:

"1. Where there is abuse of discretion.

2. **Where the decision maker exercises discretion for an improper purpose.**
3. **Where the decision maker is in breach of duty to act fairly.**
4. **Where the decision maker has failed to exercise statutory discretion reasonably.**
5. **Where the decision maker acts in a manner to frustrate the purpose of the Act donating power.**
6. **Where the decision maker fails to exercise discretion.**
7. **Where the decision maker fetters the discretion given.**
8. **Where the decision is irrational and unreasonable."**

30. It is also important to add that any administrative action must be taken in compliance with the Fair Administrative Action Act, 2015. Section 4 of that Act emphasises compliance with the rules of natural justice.

31. The remedies available in judicial review and their efficacy was explained by the Court of Appeal in **Nairobi Civil Appeal 266 of 1996 Kenya National Examination Council v Republic ex-parte Geoffrey Gathenji Njoroge & 9 others** when it stated that:

"That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition of certiorari. These remedies are only available against public bodies such as the Council in this case. What does an <u>ORDER OF PROHIBITION</u> do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the

rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised..... The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.

The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

At paragraph 90 headed "the mandate" it is stated:

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of

performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.....

To conclude this aspect of the matter, an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

32. Having stated the applicable law, I will now proceed to apply that law to the facts of this case. The ex-parte Applicant accuses the respondents of acting in excess of jurisdiction. Its position is that the decision to close its schools was not based on the reports of the Quality Assurance and Standards Officers as required by Section 66(2) of the Act.

33. Section 66(2) provides that:

"An officer appointed under this section shall have power to recommend temporary suspension of operations of institutions to the County Education Board for a specific period until the basic standards are met."

34. The cited provision cannot be read in isolation. It must be read in the context of Part IX (sections 64-75) of the Act which provides for Standards, Quality Assurance and Relevance. Section 66 specifically provides for the Powers of Quality Assurance and Standards Officers. A reading of Part IX clearly shows that those provisions are meant to monitor the quality and standards of the institutions that are already registered to provide basic education and training.

35. The provisions applicable to registration of schools are found in Part X (sections 76-85). Part X provides for licensing, registration and accreditation procedures in basic education. It is only after an application for registration is approved that the County Education Board informs the office representing the Education, Standards and Quality Assurance Council ("the Council") at the county in the case of a pre-primary, primary or secondary school – see Section 76(4). Other roles played by the Council are found in sections 81 and 82 of the Act.

Under Section 81 the Cabinet Secretary is expected to, in consultation with the Council and the relevant stakeholders, establish guidelines and prescribe rules and regulations for the establishment, licensing, accreditation and registration of basic education and training institutions. As provided by Section 82, before a basic and training institution is registered by the County Education Board, it must be inspected by the Council to ensure due compliance with the standards formulated and developed under the Act.

36. In the case before me, the ex-parte Applicant's submission is aimed at conflating the roles of the Council in the processing of an application for the registration of a school and the inspection of an already registered school. This is not correct as these two roles are distinct. On one hand the Council's role is to establish whether a proposed school meets the standards for registration and on the other hand the Council's role is to ensure that a school which is already registered continues meeting the standards. It is only in the case of an already registered school that the Council can recommend temporary closure under Section 66(2). It cannot exercise

such power in the case of a school whose registration is still being processed. It is not possible for the Council to recommend the temporary closure of a school which is not yet registered for it is only a registered school that is by law allowed to operate. The ex-parte Applicant's assertion that the respondents could not close its schools without the recommendation of the Council therefore lacks legal foundation.

37. The 1st Respondent is the body mandated to determine, based on the parameters set down in the Act and regulations, whether a school should be registered. Where an application for registration is rejected, the school if already established is shut down. That power belongs to the 1st Respondent and the argument that the 1st Respondent can only accept applications for registration but cannot close down schools operating without registration is not based on any identifiable law.

38. There was the ex-parte Applicant's assertion that the respondents ought not to have closed their schools as they were qualified for registration under the APBET Guidelines. This

submission has no foundation as the APBET Guidelines were launched in 2016. All the ex-parte Applicant's applications for registration of its schools were made prior to the inauguration of these Guidelines. Indeed the ex-parte Applicant was told by the respondents through the letter dated 4th April, 2016 that its institutions could qualify for registration as APBET schools but it was to follow the registration guidelines provided by the Ministry. At the moment there is no evidence that the ex-parte Applicant has made any application for the registration of its schools under the APBET Guidelines. Whether or not the ex-parte Applicant's schools are qualified to be registered as APBET schools is a matter to be considered by the respondents when the applications are made. This is not an issue for consideration in these proceedings. The respondents cannot at this stage be compelled to consider applications that have not been made.

39. Looking at the papers filed in Court by the ex-parte Applicant, there is no basis upon which to reach the conclusion that the respondents acted illegally by ordering the closure of its schools. Indeed the ex-parte Applicant's applications to have

its schools registered were rejected meaning that its schools could not operate.

40. The ex-parte Applicant claimed that it was not notified of the rejection of its applications for registration of its schools. It also submitted that since decision to reject the registration of its schools was made in 2014 it is unreasonable to implement the said decision in 2016. The ex-parte Applicant's arguments cannot be accepted. The evidence availed in this case shows that it was immediately informed about the rejection of the application for registration of its schools. The ex-parte Applicant was told what it was expected to do in order for its schools to qualify for registration. There is no evidence that it tried to meet the conditions or explain to the respondents why it could not meet the conditions.

41. Between 2014 and 2016 there has been exchanges of correspondences in an attempt to resolve the impasse. The ex-parte Applicant cannot therefore be allowed to claim that the respondents delayed in implementing the decision to close its schools.

42. The second issue is whether the respondents complied with the rules of natural justice in closing down the ex-parte Applicant's schools. The rules of natural justice require fairness in the decision-making process. The ex-parte Applicant contends that it ought to have been called to the meeting of 19th March, 2016 as that is the meeting that sealed the fate of its schools.

43. The documents exhibited by both sides show that the ex-parte Applicant was given the opportunity to present its side of the story before it was decided that its schools in Busia County be closed. There was no need for an oral hearing as the ex-parte Applicant had put across its case in writing. The rules of natural justice were therefore not breached in regard to the meeting of 19th March, 2016.

44. The third issue is whether the ex-parte Applicant is deserving of any orders. The respondents assert that the ex-parte Applicant is not deserving of any orders as it failed to exhaust the other mechanisms provided for resolving the dispute before commencing these proceedings. There are two legal principles applicable to this argument.

45. The first principle is that where the law has established the procedure for resolving a dispute that procedure should be followed. Judicial review is thus not available where the Constitution or statute has established the procedure for dealing with a given dispute – see **Kipkalya Kiprono Kones v Republic & 6 others [2006] eKLR** and **The Speaker of the National Assembly v James Njenga Karume, Civil Appeal No. 92 of 1992.**

46. The second principle is that judicial review is a remedy of last resort which can be denied where an applicant has failed to exhaust the other available remedies before invoking it. However, where judicial review is the most efficacious remedy, an applicant may move the Court for orders. This principle is explained by H.W.R Wade and C.F. Forsyth in **Administrative Law, 9th Edition, 2008** at Page 703 thus:

"In principle there ought to be no categorical rule requiring the exhaustion of administrative remedies before judicial review can be granted. A vital aspect of the rule of law is that illegal administrative action can be challenged in the court as soon as it is taken or threatened. There should be no need first to pursue any administrative procedure or appeal to see whether the action will in the end be taken or not. An administrative appeal on merits of the case is something quite different from judicial determination of the legality of the whole matter. This is merely to restate the essential difference between review and appeal which has already been emphasized. The only qualification is

that there may occasionally be special reasons which induce the court to withhold discretionary remedies where the more suitable procedure is appeal."

47. The matter at hand is one to be guided by the second principle. Section 85 of the Act provides that:

"Any person aggrieved by the decision of County Education Board under this Part may, within thirty days of being notified of the decision, appeal against such a decision to the Education Appeals Tribunal established under section 93."

As already stated in this judgement, Part X under which Section 85 falls provides for Licensing, Registration and Accreditation Procedures in Basic Education. A challenge to the rejection of the ex-parte Applicant's applications for the registration of its schools was therefore a matter within the jurisdiction of Education Appeals Tribunal. Even if the ex-parte Applicant for any reason believed that its case did not fall under Part X, it is still clear that Section 93 provides for appeals against the decisions of the County Education Board generally.

48. The ex-parte Applicant's act of failing to challenge the respondents' decision at the Education Appeals Tribunal before approaching this Court is contrary to Section 9(2) of the Fair Administrative Action Act, 2015 which requires any

person aggrieved by an administrative action to first exhaust all the mechanisms, including internal mechanisms for appeal or review, and all remedies available under any other written law before resorting to the judicial review jurisdiction.

49. Be that as it may, I hold the view that the window for direct access to the courts for judicial review relief should not be completely shut. In certain instances the intervention of the Court may be urgent and imperative so that resort to statutory procedure may result in irreparable damage to an applicant. In such instances the Court will fall back on its constitutional supervisory mandate and do that which is just. I also think that where a Court has heard an applicant for orders of judicial review, it would be callous to dismiss a meritorious matter for the simple reason that the applicant did not resort to other remedies before seeking judicial review.

50. In view of what I have stated in this judgement it follows that the ex-parte Applicant's case substantially fails as the grounds for grant of judicial review orders have not been met. However, the ex-parte Applicant did adduce evidence that two of its schools may have been registered or recommended

for registration. The application for registration of a school is made and considered in reference to the circumstances of the particular school. It is therefore not clear why Port Victoria and Malaba schools were closed. These two schools should continue their operations.

51. Consequently, an order of certiorari will issue calling into this Court the respondents' decision closing the ex-parte Applicant's schools at Port Victoria and Malaba and having the decision, in so far as it relates to the two schools, quashed. Having issued that order there is no need for issuing orders of mandamus or prohibition. Otherwise the ex-parte Applicant's application in respect of the other schools fails in its entirety and the same is dismissed.

52. In the interest of the affected children, the respondents' decision to close the ex-parte Applicant's schools needs post judgement management. As such the respondents' decision to close the schools shall be suspended so that the schools shall remain open until the end of the current school term. Meanwhile the respondents will secure placements in public schools for all the children in the schools to be closed. This will

enable the children to start the coming term in their new schools. The respondents will file in Court the placement lists indicating the names of the pupils, their new schools and the evidence of acceptance by the new schools. This should be done within 45 days from the date of the delivery of this judgement. The parents of the affected children are at liberty to take their children to schools of their choice.

53. In view of the outcome of this application the appropriate order on costs is to ask the parties to meet their respective costs of the litigation. It is so ordered.

Dated, signed and delivered at Busia this 16th day of February, 2017

W. KORIR,

JUDGE OF THE HIGH COURT