



MCS ((Suing through the next friend and father IS)) v Board of Management Cardinal Ojunga Girls High School (Judicial Review E010 of 2022) [2023] KEHC 447 (KLR) (24 January 2023) (Ruling)

Neutral citation: [2023] KEHC 447 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
JUDICIAL REVIEW E010 OF 2022**

DK KEMEL, J

JANUARY 24, 2023

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO
COMMENCE PROCEEDINGS IN THE NATURE OF JUDICIAL
REVIEW**

AND

**IN THE MATTER OF THE BASIC EDUCATION ACT NO. 14 OF
2013**

AND

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS
ACT NO. 4 OF 2015**

BETWEEN

**MCS APPLICANT
(SUING THROUGH THE NEXT FRIEND AND FATHER IS)**

AND

**BOARD OF MANAGEMENT CARDINAL OJUNGA GIRLS HIGH
SCHOOL RESPONDENT**

RULING

1. Vide a chamber summons dated November 21, 2022, the *ex-parte* applicant therein sought for judicial review remedy of *certiorari* to remove to this court and quash the decision of the respondent made on November 14, 2022 purporting to expel the applicant from Cardinal Otunga Girls High school. The applicant further sought for an order that the leave so granted do operate as a stay of the decision of



- the respondent made on November 14, 2022 purporting to expel the applicant from Cardinal Otunga Girls High School.
2. Vide directions dated November 21, 2022, this court granted the applicant's request for leave to file the judicial review remedy of *certiorari* and further directed the applicant to file the substantive notice of motion written seven (7) from that date. The court further directed that the question whether leave so granted should operate on a stay of the impugned decision was to be conversed during the date scheduled for directions.
 3. The matter came up for directions on November 28, 2022 and November 29, 2022 when parties agreed to file and exchange responses to the substantive notice of motion dated November 25, 2022. The issue of stay was deferred to the January 19, 2023.
 4. On the January 19, 2023, Mr Owuor, learned counsel for the applicant proposed that the substantive justice motion be canvassed by way of oral submissions. He sought for leave to put in a further affidavit and that the issue of stay be canvassed then orally. Mr Makokha for the respondent objected to the filing of a further affidavit by the applicant on the ground that the same is not provided for under order 53 of the *Civil Procedure Rules*. He indicated that he was ready to proceed with the oral submissions.
 5. Mr Owuor submitted that the applicant is likely to stand prejudiced if she is denied going to school next week when schools re- open. He submitted that the issue of security at the school will have to be guaranteed by the school. Learned counsel pointed out that judicial review is about fair hearing. He submitted that the *Basic Education Act* provides for the procedure of discipline in schools and that the respondent was supposed to recommend to the ministry the exclusion of the applicant from school. He further submitted that the Board's meeting of November 21, 2022 resolving to deny the applicant her educational rights must be challenged. It was finally submitted that it is in the interest of the applicant that she joins school like the rest so that her studies do not suffer.
 6. Mr Makokha opposed the leave being allowed to operate as a stay. He submitted that the chambers' summons is full of lies and falsehoods in that the applicant claims that she was denied a chance to appear before the board yet the response by the secretary in the notice of motion dated November 25, 2022 gives a different picture in that the applicant and her mother appeared before the board. Learned counsel pointed out that the judicial review deals with matters of administrative proceedings and not the merits of the decision complained of. He submitted that the applicant was found in possession of more than twenty items belonging to her fellow students who have vowed to lynch her if she came back to school. It was submitted that the school board of management after hearing the applicant and her mother advised that the mother to the applicant do offer counselling to her as the board referred the matter to the county education board and that the applicant is yet to appear before the County Education Board as per the *Basic Education Act*. It was also submitted that the applicant's security is not guaranteed as there is a student population of 4000 and that the respondent has already availed copies of threats issued by some of the students. Learned counsel suggested that it is not safe at the moment to allow the applicant back to school before the County Education Board handles the matter and that she needs counselling from her parents. Reliance was placed in the case of Kisumu civil appeal No 41 of 2013 *Jacinta Papa v Paul Mafwabi Wanyama*.
 7. I have given due consideration to the oral submission of both learned counsels. It is not in dispute that the ex parte applicant has already filed the substantive notice of motion as directed by the court. It is also not in dispute that the respondent has already filed a response to the said notice of motion. It is also not in dispute that the applicant has since been processed by the school disciplinary committee and the Board of Management which advised her to be offered counselling and guidance by her parents while awaiting the decision to be ratified by the County Education Board. It is also not in dispute that



the said County Education Board is yet to be constituted and to ratify the decision by the Board of Management. I find the only issue for determination is whether the leave so granted should operate as a stay of the impugned decision dated November 14, 2022.

8. The *ex parte* applicant's request at this stage is guided by order 53 rule 1 (4) of the [Civil Procedure Rules](#) which provides as follows;

“The grant of leave and this rule to apply for an order of prohibition or an order *certiorari* shall, if the judge so directs, operate as a stay of proceedings in question until determination of the application or until the judge orders otherwise.”

From the above provision, it is clear that a stay suspends or stops the proceedings that are challenged by the application for judicial review. Its purpose being to preserve the status quo pending determination of the judicial review. In the case of [Republic v National Transport Safety Authority and 10 others](#) (2014) EKLK the court held;

“The standard for the grant of an order of stay is however a high one. In a situation where an Applicant seeks to stop the implementation of a law, he must demonstrate that the implementation of the law will cause irreparable harm. Otherwise the court will be reluctant to suspend the operation of the law.”

Again, Nyamweya J (as she then was) in [Sauti Communications Ltd v Communication Authority of Kenya](#) [2020] EKLK held as follows:

“The circumstances under which a court may grant a direction that the grant of leave to operate as a stay of proceedings or of a decision, and the factors to be taken into account by the courts in this regard were laid down in the various decisions by several courts regarding the question whether the decision sought to be stayed has been fully implemented. Where decisions sought to be stayed is complete, the court cannot stay the same unless it is a continuing process in which case the court considers the completeness or continuing nature of the implementation.”

In determining whether or not leave should act as a stay, Odunga J (as he then was) in [Beatrice Kwamboka v Majority Leader Nairobi County Assembly](#) [2016] EKLK held as follows:

“Apart from the foregoing, the court must also look at the likely effect of granting stay to the proceedings in question. In other words, the court ought to weigh the likely consequences of granting stay or not doing so and lean towards an undesirable outcome. What the court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which is aimed at placing the parties on equal footing and see where the scales of justice lie considering the fact that it is the business of the court so far as possible to secure that any transitional motions before the court do not render nugatory the ultimate end of justice. The court in exercising discretion should always opt for the lower rather than the higher risk of injustice.”

It is noted that the impugned decision was made on the November 14, 2022 wherein the applicant was sent home to be counselled by her parents. At the time of filing the application one week after the decision, valuable time had elapsed in which the applicant could have sought for orders of stay. The opportune time would have been immediately the applicant was summoned for the disciplinary proceedings. This application was made



after the decision had been rendered and the applicant having left the school compound. It is instructive that the purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision-making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is also trite that where the decision sought to be stayed is complete, the court cannot stay the same unless it is a continuing process in which case the court considers the completeness or continuing nature of the implementation. Since a stay suspends or stops the proceedings that are challenged by the application for judicial review with the sole aim to preserve the status quo pending determination of the judicial review proceedings, the same is not applicable where the decision has already been made and/or implemented.

9. The applicant's substantive notice of motion is yet to be canvassed and which will entail issues concerning the decision-making process and not the merits of the said decision. The guiding authority in that regard is the case of *Municipal of Mombasa v Republic & Umoja Consultants Ltd* civil appeal number 185 of 2991 where Ojwang J (as he then was) held as follows:

“Judicial review is concerned with the decision-making process, not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision maker had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision maker took into account relevant matters or did take into account irrelevant matters. The court should not act as a court of appeal over the decider which would involve going into the merits of the decision itself- such as whether there was sufficient evidence to support the decision. It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it's a statutory body which can only do what is authorized by the statute creating it and in the manner authorized by statute.”

The applicant is expected to be guided by the above authority when canvassing the substantive notice of motion.

10. The applicant in her application for leave to apply for judicial review remedy of *certiorari* has confirmed that the impugned decision was made on November 14, 2022 and that at the time of filing the present application she was already out of the school. It is thus obvious that the decision maker had already made the decision and in fact implemented the same. It was contended by the applicant that she will be prejudiced if the order of stay is not granted as she will not be able to re-join school when it re-opens on the January 23, 2023. The respondent has countered this by claiming that the applicant is now persona non grata at the school since most of the students had expressed their anger over theft of their properties by the applicant and who have vowed to lynch her if she ever returns back to school. It was contended by counsel for the applicant that the school should ensure that the safety of the applicant is secured while counsel for the respondent maintains that the school with a population of 4000 students might not guarantee the security of the applicant. Even though these are germane issues and concerns, the same appear in my view to have been overtaken by events in that they will not have any effect on the issue of stay pending determination of the substantive notice of motion since the impugned decision has already been made and implemented. An order of stay in the circumstances will be an exercise in futility. Even though the applicant has maintained that County Education Board is yet to ratify the decision of the Board of Management, the fact still remains that the decision challenged is the one dated November 14, 2022 and not any other. Hence, as it is, the decision dated November 14, 2022, is not a continuing one and that the County Education Board has only been given copies of the disciplinary



proceedings and the decision for their records and information. The applicant, though a student, and entitled to her rights under the *Basic Education Act* No 14 of 2013, must now fall back on the pending substantive notes of motion and prosecute the same as a matter of priority so that the question whether the decision dated November 14, 2022, was made in accordance with the provisions of the law. The applicant ought to know that where a decision has been implemented, leave ought not to operate as a stay since the stay is no longer efficacious as there may be nothing remaining to be stayed unless there exist exceptional circumstances to warrant the court to reverse a decision which has been implemented. The onus is on the applicant to prove that such circumstances exist. She has not done so.

11. For the foregoing reasons, I am satisfied that the applicant has not placed sufficient material before me to warrant the direction that leave should operate as a stay in the instant case. The application for leave to operate as a stay is declined. The parties are hereby directed to proceed and canvass the notice of motion dated November 25, 2022 on priority basis.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF JANUARY, 2023

D.KEMEI

JUDGE

In the presence of :

Owuor for Ex-Parte Applicant

Wekesa for Makokha for Respondent

Kizito Court Assistant

