REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 2 OF 2020

REPUBLIC..APPLICANT

-VERSUS-

THE COUNTY DIRECTOR OF EDUCATION,

NAIROBI COUNTY...1ST RESPONDENT

THE MINISTRY OF EDUCATION................................2ND RESPONDENT

THE HON. ATTORNEY GENERAL...............................3RD RESPONDENT

RULING

On 7 January 2020 the applicant obtained leave to institute proceedings for prerogative orders of certiorari and prohibition against the 1st and 2nd respondents.

As far as they are relevant to the present application, the pertinent parts of the prayers were framed in the summons as follows:

> ***"(a)…***
>
> ***(b) The applicant be granted leave to apply for an order of certiorari to remove into this honourable court and to quash the decision of the County Director of Education, Nairobi (the 1st Respondent herein) contained in his letter of 13th December, 2019 closing the operations of St. Charles Mutego Educational Centre.***
>
> ***(c) The applicant be granted leave to apply for an order of prohibition to prohibit and/or restrain the 2nd respondent (the Ministry of Education), its officers and any authority acting under its instruction from deregistering, closing down and in any other manner interfering with the smooth running and management of St. Charles Mutego Eduicational Center, Mutuini, Dagoretti, Nairobi.***
>
> ***(d) Pending the hearing and determination of the substantive motion to be filed herein and/or further orders of this Honourable Court, the grant of leave to commence the Judicial Review herein do (sic) operate as stay of;***
>
> > ***i) Implementation of the decision of the 1st Respondent ordering closure of St. Charles Mutego Educational Centre as contained in his letter of 13th December, 2019.***
> >
> > ***ii) The carrying out of the consequential intended actions of the Respondents and/or their officers pursuant to section 50(4) of the Basic Education Act (2013).***
>
> ***e)…***
>
> ***f) …"***

Besides obtaining leave to file the substantive motion, the applicant also succeeded in getting the order for leave to operate as stay. The respondents were no satisfied with this particular order and so by an application dated 25 February 2020, they sought to have the order

reviewed, varied or set aside. They also prayed for the enforcement of the 1st respondent's order to close St. Charles Mutego Educational Centre pending the hearing and determination of the substantive motion. It is this application that is the subject of the present ruling.

The application is made under Order 53 Rule 3(2), (3), (4) and 6, Order 51 Rule 1 of the Civil Procedure Rules and Section 50(1) and (2) of the Basic Education Act, 2013. It is supported by the affidavit of Jared Obiero who has described himself as the Regional Director of Education in Nairobi.

He has deposed that following the collapse of buildings at Talent Academy in which eighty learners lost their lives the respondents initiated an audit of all schools to assess their safety.

The assessment conducted at St Charles Mutego Educational Centre revealed contravention of the provisions of the Basic Education Act and the safety guidelines; of note was that most of the buildings and the structures in the school were in what he described as 'a deplorable condition'.

For instance, the school compound was littered with hazardous materials; the water tanks were not secured but only covered with iron sheets; the classrooms and dormitories were unsafe and their upper floors were sagging apparently because they were supported by wood rather than steel; there were naked electricity cables that posed danger to the students.

With these findings, it was recommended that the school be closed and a report to this effect was made. Based on this report the 1st respondent ordered the closure of the school.

A second assessment was undertaken in February 2020 after a section of the perimeter wall collapsed. Like in the first report, the second report also recommended the closure of the school.

The decision to close the school was informed by the need for safety of the students.

Mr Obiero deposed further that the stay order was granted without having given the respondents a hearing contrary to the dictates of natural justice. In the circumstances, the order for stay ought to be reviewed or set aside so that the respondent can be heard.

The record shows that all that the applicant filed in response to the respondent's motion are grounds of objection. Although their counsel indicated that a replying affidavit to the application had been filed together with the written submissions none of these documents are on record and neither have they been uploaded on the Central Tracking System of the Judicial Review Division portal.

In the grounds of objection, the applicant has stated that the application is incurably defective; that it has not been made in good faith but it is only meant to derail the hearing of the substantive motion; that if the stay order is vacated, the substratum of the motion will be lost and the motion itself rendered nugatory. Other grounds are that the report relied on by the respondent to close the applicant's school is concocted; that there is no reason why the respondent would prefer to seek to set aside the order for stay rather than have the substantive motion heard; and that it would not be in the interest of justice to vacate the stay order.

On 4 December 2020, when parties appeared before me to take a ruling date, Mr. Nyandieka informed the court that he had filed the grounds of objection together with a replying affidavit and submissions; however, as I have noted earlier, except for the grounds of objection, neither of the other two documents alleged to have been filed are on record. The only submissions on record are those filed on behalf of the respondents in support of the present application.

In these submissions, the applicants have reiterated the depositions in Mr. Obiero's affidavit. As far as the law is concerned, Ms. Chimau, the learned counsel for the respondents urged that the principles on whether a Court should allow leave to operate as stay in judicial review proceedings are spelt out in **Sun Africa Hotels Limited & another v Kenya Revenue Authority & 2 others [2018] eKLR** where Nyamweya, J. noted that the decision whether or not to grant a stay pursuant to leave is thus an exercise of judicial discretion and that discretion must be exercised judiciously. The learned judge relied on the case of **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127** where it was held that such a stay halts or suspends proceedings that are challenged by way of judicial review, and the purpose of a stay is to preserve the status quo pending the final determination of the claim for judicial review.

Counsel also cited the decisions in **George Philip M. Wekulo versus The Law Society of Kenya & Another (2005) eKLR** and **R versus Capital Markets Authority (2012) eKLR** for the proposition that if the decision sought to be quashed has been fully implemented leave ought not to operate as stay as there is nothing remaining to be stayed. Other decisions cited for the same legal proposition are **Jared Benson Kangwana versus Attorney General, Nairobi HCCC No. 446 of 1995; Republic versus Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya County Bus Owners Association and 8 Others, (2014) eKLR** and **James Opiyo Wandayi versus Kenya National Assembly & 2 Others (2016) eKLR.**

Based on these decisions, counsel urged that the order of the 1st respondent closing St. Charles Mutego Educational Centre had been implemented, more particularly by a letter dated 13 December 2019 and no further steps were required to be taken. Had the respondents been heard, so it was urged, they would have brought this development to the attention of the court before the order of stay was granted.

The stay granted, according to the respondents, perpetuates illegality and the learners at St. Charles Mutego Educational Center are exposed to danger as long as this stay order exists.

The factual basis of the applicant's case against the respondents can be found in the affidavits filed in support of the certificate of urgency and the chamber summons seeking for leave to file the substantive motion. The two affidavits have been sworn by Charles New Nyamote who is the proprietor of Charles Mutego Educational Center. In the first affidavit, he swore as follows:

“3. That whereas the school is registered and has been smoothly running, on or about 3rd January 2020 towards the end of December holiday, I learnt from a parent of a letter by the County Director of Education, Nairobi ordering for immediate closure of the school.

4. That I had no prior and of (sic) adequate notice of the nature and reasons for the closure order.

5. That whereas I intend to take steps to pursue an appeal with the Ministry to rescind its decision, it is however imperative that I seek this court’s intervention for the following reasons:

> *a) I had no prior notice of the intended closure.*
>
> *b) To my knowledge, no inspection and audit has been carried at the school prior to issuance of the closure order.*
>
> *c) The closure order is intended to take immediate effect*.
>
> *d) were the order to be implemented as directed I stand extremely prejudiced as it is the beginning of academic year where (sic) students are being admitted.*
>
> *e) The school staff a minimum 30 in number will be greatly affected as they may lose their jobs on closure of the school.*
>
> *f) The school is servicing a loan for purchase of school buses which may escalate and lead to sale of the school buses.*
>
> *g) Unless the order is suspended, the respondents have threatened punitive measures that may lead to the malicious and wrongful arrest and prosecution of the ex parte applicant.*
>
> *h) It is in the interest of justice that the closure order ne urgently stayed.”*

The same facts have been deposed to in the affidavit in support of chamber summons. As far as his knowledge of the closure order is concerned, Nyamote swore as follows:

“10. That on or about Friday, 3rd January, 2020 I received a text message from a parent, one Mr. Justus Mokoronto of telephone number 0718-421554 demanding a refund of payment of this year’s school fees for his son, a student in the school, on the grounds that the school has been closed by the Ministry of Education. While dismissing the statement as rumour mongering, I got extremely surprised when the aforementioned parent, sent me through WhatsApp, a copy of a letter dated 13th December, 2019, ordering closure of the school with immediate effect.”

But according the affidavit sworn by Jared Obiero, an assessment of the infrastructure and safety conditions was done as early as November 2019 in the presence of the school head teacher, a Mr. Erick Mweresa. The relevant parts of the copy of a report of this assessment read as follows:

“*Particulars of the school*

1.1 Name of the school: *St. Charles Mutego Education Centre*

1.2 Name of Head teacher: *Erick Mweresa*

1.7 Date of Current Assessment: *6/11/2019*

1.8 Purpose of assessment: *Audit on safety of school infrastructure/ monitoring conduct of KCSE examination*

3.0 Methodology

The team used the following methods to collect information.

> *1) Interviews*
>
> *2) Observation*

4. FINDINGS

> *1…*
>
> *2. The current principal, who was TSC-Registered reported that he was one month old in the school and did not know much about the school. However, he was not registered by the CEB as the school’s manager.”*

The report recommended that the school be closed after the examination period and the proprietor apply afresh for re-registration and re-opening after meeting the required standards.

A second assessment was done on 7 January 2020, this time round in the presence of the proprietor of the school. Part of the assessment report noted as follows:

> ***"4.1 Current status***
>
> ***The school was found to be in operation and students had reported on Monday 6th January, 2020 and some were still reporting by the time of assessment. The school director denied having received the letter from the Ministry of Education closing the school. However, he acknowledged having received a copy from one of the parent (sic) who was asking for a refund having paid fees for the term. The sub county Education Office confirmed that the letter to the school was dispatched and signed for by a representative of the school. The school was operating without authority since the letter of closure was still in effect as confirmed by the County Director of Education's Office."***

The depositions in the respondent's affidavit have not been controverted and so there is no basis to doubt their truthfulness. Going by these depositions, it is apparent that that the applicant was aware of the inspection undertaken by respondents on his school as early as November 2019. The inspection was undertaken in the presence of the School Head, who has been identified Erick Mweresa. The latter has not sworn any affidavit to deny that the inspectors were in the school in November 2019 or that they carried out an inspection of school to ascertain the safety of its infrastructure. If the inspection is not denied, it cannot also be denied that a report on the inspection was made and that the school was ordered closed based on the recommendations in the report.

It has also emerged from the respondent's affidavit that the school was audited, not once but twice, and on each of these occasions it was established not to be safe for use by the learners. As a matter of fact, the applicant himself was at the school during the second occasion when the school was assessed.

It follows that it cannot be true that the applicant only came to learn of the closure of the school from a parent who was desperate to get back his refund after he learned that the school had been closed; it is not plausible that such a parent would have known about the closure of the school before its owner was aware.

The applicant was thus all along aware that the safety standards of his school was under scrutiny by the respondents and therefore, contrary to what he informed the court when his application was heard ex parte, the closure order was neither drastic nor a surprise. This does not in any way suggest that what the respondents did is not susceptible to judicial review; the point is that the applicant either suppressed or did not make full disclosure of facts which, in my humble view, were material to his application.

It is trite that suppression or non-disclosure of material facts in an ex parte application would automatically result to setting aside of any order that the applicant may have obtained and which he has taken advantage of. This point was addressed as early as 1916 in ***King versus The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington ex parte Princess Edmond De Polignac (1917) 1 K.B 486*** where it was held that an order granted upon an affidavit which was not candid and did not fairly state the facts but stated them in such a way as to mislead and deceive the court, there is power inherent in the court, in order to protect itself and prevent an abuse of its process, to discharge the order and refuse to proceed further with the examination of the merits of the case.

It was held further in that case that the rule of the court requiring *uberrima fides* on the part of an applicant for an ex parte injunction applied equally to the case of an application for a rule nisi for a writ of prohibition; the order for prohibition in this case was refused because the applicant was held to have suppressed material facts when she appeared before court *ex parte*.

Lord Cozens-Hardy M.R. stated at page 504:

> ***It is a case in which it seems to me there was plainly a suppression of what was material, and we cannot be too strict in regard to that which to the best of my belief has been a long established rule of the Court in applications of this nature and has been recognised as the rule. The authorities in the books are so strong and so numerous that I only propose to mention one which has been referred to here, a case of high authority, Daglish v. Jarvie (1850) 2 Mac. & G. 231 which was decided by Lord Longdale and Rolfe B. The head note, which I think states the rule quite accurately, is this: "It is the duty of a party asking for an injunction to bring under the notice of the Court all facts material to the determination of his right to the injunction; and it is no excuse for him to say that he was not aware of the importance of any facts which he has omitted to bring forward." Then there is an observation in the course of the argument by Lord Langdale:***
>
> ***"It is quite clear that every fact must be stated, or, even if there is evidence enough to sustain the injunction, it will be dissolved." That is to say he would not decide upon the merits, but said that if an applicant does not act with uberrima fides and put every material fact before the court it will not grant him an injunction, even though there might be facts upon which the injunction might be granted, but he must come again on a fresh application."***

The learned judge continued:

> ***"I have nothing to add to what Lord Langadale has said upon the general merits of the case; but upon one point it seems to me proper to add thus much, namely, that the application for special injunction is very much governed by the same principles which govern insurances, matter which are said to require the utmost degree of good faith, 'uberrima fides.'…so here, if the party applying for a special injunction, abstains from stating facts which the Court thinks are most material to enable it form its judgment, he disentitles himself to that relief which he asks the court to grant. I think, therefore the injunction must fall to the***

ground." That is merely one and perhaps rather a weighty authority in favour of the general proposition which I think has been established, that on an ex parte application uberrima fides is required, and unless that can be established, there is anything like deception practised on the Court, the court ought not to go into the merits of the case, but simply say "we will not listen to your application because of what you have done." (Emphasis added).

The proposition that *ubberima fides* is required not only in applications for injunctions but also in every other application of ex parte nature was emphasised by Warrington L.J. in the same matter; he noted as follows:

It is well settled that a person who makes an ex parte application to the Court- that is to say, in the absence of the person who will be affected by that which the Court is asked to do-is under an obligation to the Court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.

I need not say more save to state that I am persuaded that the respondents have made out a case for setting aside the stay granted to the applicant upon obtaining leave to file the substantive motion for the judicial review orders. Accordingly, the order granted by this honourable court on 7 January 2020 according to which leave granted was to operate as stay is hereby set aside. The costs of this motion shall abide the outcome of the substantive motion. It is so ordered.

Dated, signed and delivered on 26 February 2021

Ngaah Jairus

JUDGE