



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CONSTITUTIONAL PETITION NO. 17 OF 2020

**IN THE MATTER OF ARTICLES 10 (2), 20 (2), 21(1), 22(1) & (2), 23(1), 27(1), 47,48,50(1), 159, 165& 258 OF THE
CONSTITUTION, 2010**

AND

IN THE MATTER OF THE BASIC EDUCATION ACT, 2015

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, 2015

AND

IN THE MATTER OF DISOLUTION OF BOARD OF MANAGEMENT

AND

IN THE MATTER OF KENYORO SECONDARY SCHOOL

AND

IN THE MATTER OF VIOLATION AND/ OR INFRINGEMENT OF THE FUNDAMENTAL RIGHTS OF THE PETITIONERS

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS & FUNDAMENTAL FREEDOM)
PRACTICE AND PROCEDURE RULES, 2013**

BETWEEN

1) JAMES OMARIBA NYAOGA

2) JAMES ARIGA ORINA

3) JOHN MATUNDA OMWENGA

4) REV. ZACHARY N. ORINA

5) MARGARET MOMANYI

6) DAMARIS NYACHIRO

7) DORCAS MOMANYI

8) BERINA K. ONDIEK

9) THE BOM, KENYORO SECONDARY SCHOOL PETITIONERS

VERSUS

1. COUNTY EDUCATION BOARD-KISII COUNTY
2. NATIONAL EDUCATION BOARDRESPONDENTS
3. COUNTY DIRECTOR OF EDUCATIONKISII COUNTY

AND

1. THE PRINCIPAL, KENYORO SECONDARY SCHOOL
2. THE TEACHERS SERVICE COMMISSION
3. THE CABINET SECRETARY, MINISTRY OF EDUCATION
4. THE HON. ATTORNEY GENERALINTERESTED PARTIES

RULING

1. The petitioners filed this constitutional petition contemporaneously with a Notice of Motion dated 10th November 2020 challenging the respondents' decision to remove them from the Board of Management of Kenyoro Secondary School. In the Notice of Motion, which is the subject of this ruling, the petitioners sought the following orders:

- 1) spent
- 2) spent
- 3) spent
- 4) spent
- 5) The honorable court be pleased to grant **Conservatory Order**, barring and/or prohibiting the respondents herein either by themselves, agents, servants and/or anyone acting on their instructions from respondents herein from arbitrarily disbanding and/or dissolving the Board of Management and/or otherwise implementing the unlawful, *albeit* arbitrary decision made on the 2nd day of November 2020, to disband the Board of Management, Kenyoro Secondary School, without regard to the provisions of the Basic Education Act, 2013 as read together with the Fair Administrative Act, 2015, pending the hearing and determination of this petition;
- 6) The honorable court be pleased to grant **Conservatory Order** preserving and/or conserving the status of the 1st – 8th petitioners/applicants as the duly appointed members of the 9th petitioner/applicant, for a term of three(3) years w.e.f. 22nd day of May 2019 and in particular, barring the implementation and / or enforcement of the arbitrary, albeit verbal decision by the respondents made on the 2nd day of November 2020 to disband and/or dissolve the 9th petitioner/applicant pending the hearing and determination of this petition;
- 7) The honorable court be pleased to grant an order of temporary injunction, prohibiting and/or restraining the respondents herein either by themselves, agents, servants and/or anyone acting on their instructions from respondents herein from arbitrarily disbanding and/or dissolving the Board of Management and/or otherwise implementing the impugned verbal decision made on the 2nd day of November 2020(*sic*) disbanding the Board of Management, as read together with the Fair Administrative Actions Act, 2015, pending the hearing and determination of this petition;
- 8) The honorable court be pleased to give appropriate directions and/or orders towards the expeditious hearing and disposal of the petition herein;
- 9) Costs of this application be borne by the respondents and the interested parties jointly and/or severally; and
- 10) Such further and/or other orders be made as the court may deem fit and expedient.

2. The 1st petitioner, swore an affidavit in support of the application on behalf of the petitioners on 10th November, 2020. In it, he averred that the 1st respondent inaugurated them as members of the Board of Management of the 9th petitioner on 22nd May 2019. Between January and June 2019, the petitioners learnt about the misappropriation of a sum of Kshs. 849,000/= belonging to Kenyoro Secondary School. They summoned the 1st interested party to a board meeting, interrogated him about the misappropriated funds and he sought the petitioners' indulgence to repay the amount. Over the course of time, the 1st interested party made repayments towards the settlement of the sum of Kshs. 849,000/= and by the time the 1st petitioner swore his affidavit, the 1st interested party had paid a total of Kshs. 750,000/=.

3. The petitioner averred that that notwithstanding, the 1st interested party had indulged in under hand dealings leading to the loss of various

resources of the school including engaging in direct procurement in violation of the provisions of the Public Procurement and Asset Disposal Act, 2015. The petitioners brought up the issue with the 1st interested party and the school's sponsor, the Pentecostal Assemblies of God Church but the 1st interested party continued with the offensive activities and even began inciting the community against the petitioners to cover up his fraudulent activities.

4. The 1st interested party's actions prompted the petitioners to generate a complaint addressed to the County Director, Teachers Service Commission, Kisii County. The petitioner claimed that as a result of the complaints generated by the Board of Management, the 1st interested party sought protection from the 3rd respondent using the school's resources. As a result, the 3rd respondent, who is a member of the 1st respondent summoned the petitioners to an impromptu meeting without notice on 2nd November 2020. He declined the petitioners' request to reschedule the meeting and proceeded together with the Chairman of the 1st respondent to confront them, demanding to know why they had generated complaints against the 1st interested party pertaining to misappropriation of funds. The 1st petitioner sought to respond to the accusations but the 3rd respondent and the Chairman of the 1st respondent would not hear him. They verbally abused the petitioners, humiliated them and told them off on their dressing code. The 1st petitioner's request to re-schedule the meeting to avert further confrontation was once again denied by the 3rd respondent and the Chairman of the 1st respondent who went on to disband the Board of Management during the meeting.

5. The petitioners claim that they were ambushed by the respondents who had not supplied them with the agenda of the impromptu meeting or the charges that were to be addressed during the meeting. They were therefore ill equipped to respond to the allegations raised against them in the meeting. The petitioner deposed that they were denied the tenets touching Fair Administrative Action. The convention of the meeting, the proceedings and the verbal decision made on 2nd November 2020 are challenged for being undertaken in contravention of the due process of the law. The petitioners argue that the manner in which the impromptu meeting was held and characterized by verbal abuse and humiliation was intended to intimidate them and halt investigations into the theft of public resources at the school.

6. The petitioner also claimed that the manner in which the verbal decision was arrived at is likely to create an impression that they condone the mismanagement of resources. That the only way to protect the petitioners' integrity is to suspend the offensive decision pending interrogations into the circumstances leading up to it. The 1st petitioner averred that they had suffered cruel and inhumane treatment and thus require the protection of this court.

7. The 3rd respondent, Pius Odhiambo, swore an affidavit in response to the petition and application on 26th November 2020. He averred that when they were appointed, the petitioners had been appraised on their duties as per Section 59 of the Basic Education Act, but they chose to disregard their mandate hence the dissolution.

8. The 3rd respondent claimed that the petitioners had been holding meetings but the 1st petitioner, who had been elected as the chairman of the Board of Management, had neglected to sign minutes. He claimed that the petitioners had held meetings within and outside the school in the absence of the 1st interested party and had also failed to comply with Regulation 6 of the Fourth Schedule of the Basic Education Act, which mandated that they hold meetings once every 4 months. Despite these irregularities, the petitioners had been receiving money for attending the illegal meetings in contravention of the law.

9. The petitioners were also accused of running the school affairs in total disregard of personal conflicts of interest and were said to have awarded themselves tenders against Regulation 10 of the 4th Schedule of the Basic Education Act. That the 1st petitioner, in particular, had been getting milk from the school without paying for it in full and claiming that the cows being grazed at the school's compound were his having bought them from the school's sponsor. It was also alleged that the 1st petitioner had allowed his cattle to graze on the school compound and his graze man was being paid by the school.

10. The 3rd respondent further averred that the 1st petitioner had been instructing the 1st interested party to withdraw the school's money. That the petitioners had instructed the 1st interested party to draw a cheque in the 2nd petitioner's daughter's name for supplying cereals to the school. He also claimed that the 1st petitioner had instructed the 1st interested party to withdraw funds from the school's account for purposes of reconstructing the burnt school dormitory which he knew to be illegal. The 3rd respondent deposed that on 17th September 2020, the petitioners instructed the 1st interested party to initiate the transfer of enough funds from the infrastructure account to pay two month's salary to support staff which was not actualized but showed the lack of integrity and poor management of the school's funds by the petitioners. It was further alleged that the petitioners had authorized the school's clerk to collect money from the school's account without following due process. The petitioners were also accused of chasing away ex-officio members of the Board of Management who were authorized to attend meetings and in doing so, manifested that they were conducting illegal business.

11. The 3rd respondent stated that the County Education Board, had held the meeting on 2nd November 2020 and resolved to dissolve the petitioners as the Board of Management following an audit conducted at the school by the Directorate of Schools Audit Services, Kisii County on 14th October 2020 which revealed a lot of malpractices. He averred that a new board had been inaugurated on 23rd November 2020 hence the application herein had been overtaken by events.

12. In response to the claim that the 1st interested party had misappropriated funds amount to Kshs. 849,000/=, the 3rd respondent stated that the money was not misappropriated but was withdrawn at the instance of the 1st petitioner who wanted to misuse the money.

13. The respondent asserted that the petitioners were given ample time to defend themselves but resorted to verbal abuse and disrespect of the County Education Board members. He stated that the impromptu meeting was necessitated by the actions of the petitioners and the respondents called for the meeting in good faith and in the best interests of the students at Kenyoro Secondary School. He claimed that the petitioners were all aware of the allegations against them and sufficient notice was given to them. That further, written representations were not mandatory and given the gravity of the misconduct of the petitioners and the nature of the duty imposed on the Board of Management of

any institution, it was in the best interest of the students at Kenyoro to conduct oral representations as opposed to written representations.

14. The respondent maintained that the petitioners had been accorded the right to be heard and any allegations of breach of right to be heard, should be disregarded. He stated that Kenyoro School had suffered due to the misuse of funds by the petitioner and the court was urged to direct the petitioners to refund the school monies amounting to Kshs. 98,000/= which they had stolen from the school.

SUBMISSIONS

15. Mr. Oguttu, learned counsel for the applicant and Ms. Chepkirui, learned counsel for the respondents canvassed the application before me by way of oral submissions. Mr. Oguttu narrowed down the reliefs being sought by the applicant to prayers 5, 6, 7 and 8 of the application. His first point in support of the application was that the petitioners had a specific contractual term of 3 years and had accrued legitimate expectation which is constitutional in nature. Secondly, that their legitimate expectation had been terminated without prior notice or right of defence in violation of Articles 47 & 50 (1) of the Constitution and without due regard to the Fair Administrative Actions Act. Counsel pointed out that the Petition and the Motion had been filed on 18th November 2020 and that if any swearing in of another Board took place, which had not been proved, it would amount to contempt and a contravention of the doctrines of 'lis pendens' and the doctrine of sub-judice which prohibited any public body from proceeding in manner meant to destroy the substance of a suit upon service of the petition. He stated that the issues raised were serious as they pertained to the misuse of public funds by the Respondents.

16. Responding to the above arguments, Ms. Chepkirui urged that the petitioners had been holding meetings in the absence of the 1st interested party and then forced him to pay them their allowances which is illegal. In her view, if the petitioners were allowed to go back as Board of Management the students would suffer. Counsel submitted that before the Board of Management was dissolved, the petitioners were invited and they were aware of the meeting. She urged the court to disallow the application and order the petitioners to refund the school the monies they had taken.

17. In brief rejoinder, Mr. Oguttu emphasized that the crux of the application was the failure by the respondents to issue notices and give the petitioners an opportunity to respond before action was taken. He submitted that the respondents had not proffered any evidence to show that the petitioners were given an opportunity to respond. Responding to Ms. Chepkirui's submissions on the interests of the students, counsel urged that the rights of the petitioners could not be subordinated to the rights of any other body including that of the students.

ANALYSIS AND DETERMINATION

18. The prayers sought by the petitioners in this application are conservatory orders and a temporary injunction. The Supreme Court had opportunity to interrogate these reliefs in the case of ***Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others Application No. 5 of 2014 [2014] eKLR*** where it held:

[85] ... Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. ...

[86] "Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes. [emphasis mine]

19. The dispute before this court pits former members of the Board of Management of Kenyoro Secondary School against the respondents which are public bodies tasked with managing educational institutions at various levels in the country. This matter leans more towards the realm of public law as opposed to a civil claim. The court will thus focus on the conservatory orders sought by the petitioners.

20. In the case of ***Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) Nairobi Civil Appeal 151 of 2011 [2016] eKLR*** the court defined a conservatory order in the following terms:

"A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter."

21. There is a many judicial authorities on the factors to be considered by the court in determining whether or not to grant conservatory orders. The *locus classicus* on the issue is the decision of the Supreme Court in ***Gatirau Peter Munya (supra)*** above. Having considered that decision of the apex court and other decisions on conservatory orders, Lenaola J (as he then was) summarized the factors to be considered by courts in granting conservatory orders in the case of ***Wilson Kaberia Nkunja vs The Magistrate and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No.154 of 2016 [2016] eKLR*** as follows:

(a) An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.

(b) Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and

(c) The public interest must be considered before grant of a conservatory order.

22. A *prima facie* case is established when the material presented to the court by the applicant demonstrates that there has been an apparent infringement of a right which will necessitate the respondent's rebuttal to the claim. (see *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125*)

23. The removal of the 1st to 8th petitioners from the Board of Management of Kenyoro Secondary School is not disputed. It is also common ground that the 1st respondent convened a meeting on 2nd November 2020 and proceeded to revoke the appointment of the 1st to 8th petitioners as members of the Board of Management of the secondary school.

24. The petitioners contend that they were not given prior notice of the meeting or the agenda of the meeting in which they were removed from office. They claim that they were not availed an opportunity to address the respondents and that the meeting was characterized by verbal abuse and humiliation. It was also the petitioners' case that their removal from the Board was done in contravention of Article 47 of the Constitution and the Fair Administrative Actions Act.

25. **Article 47** of the **Constitution** provides:

47(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.

(3) Parliament shall enact legislation to give effect to the rights in clause (1) ...

26. The **Fair Administrative Actions Act** was enacted pursuant to Article 47 (3) above. At **section 4** thereof, the Act provides the manner in which administrative actions should be taken against individuals. It stipulates:

4. (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.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

27. The 3rd respondent acknowledged that the meeting held on 2nd November 2020 was an impromptu meeting which he claimed was necessitated by the gross misconduct of the petitioners. He also deposed that the petitioners had been given ample time to defend themselves but did not indicate when such notice had been given or attach the notice to his affidavit.

28. What is evident from the material before this court at this point, is that there was no prior notice of the meeting held on 2nd November 2020. There is also no evidence that the petitioners were informed of the accusations facing them before they attended that meeting. The petitioners have established that the manner in which their appointments were revoked by the respondents was questionable. The parties

traded accusations on the mismanagement of the secondary school which I will not delve into at interlocutory stage. Nevertheless, I find that the petitioners have established a *prima facie* case against the respondents.

29. Another issue that arose in the course of the proceedings was the claim that the application is overtaken by events for the reason that a new board has been inaugurated by the respondents. The 3rd respondent averred that the new board had been inaugurated on 23rd November 2020 and claimed to have attached copies of appointment letters to his affidavit which were marked as “PM-8.” However, the annexure marked as “PM-8” in the 3rd respondent’s affidavit is a copy of the minutes of the meeting held on 2nd November 2020. A thorough examination of all annexures attached to the 3rd respondent’s affidavit indicates that there is no proof of the inauguration of a new Board of Management as submitted the petitioners’ counsel. I note the process for the constitution of a Board of Management in the Basic Education Regulations, 2015. It could well be that the respondents are in the process of constituting a new Board of Management.

30. One of the factors a court is to consider in determining whether to grant conservatory orders is whether the petition will be rendered nugatory if the orders are not granted. The petitioners were appointed as members of the Board of Management of Kenyoro Secondary School on 22nd May 2019 and were to serve in that position for 3 years. They claim that they had legitimate expectation of serving their term of 3 years which was taken away without compliance to Article 47.

31. The court in **Republic vs Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280** defined a legitimate expectation as follows:

“The principle of a legitimate expectation to a hearing should not be confined only to past advantage or benefit but should be extended to a future promise or benefit yet to be enjoyed. It is a principle, which should not be restricted because it has its roots in what is gradually becoming a universal but fundamental principle of law namely the rule of law with its offshoot principle of legal certainty. If the reason for the principle is for the challenged bodies or decision makers to demonstrate regularity, predictability and certainty in their dealings, this is, in turn enables the affected parties to plan their affairs, lives and businesses with some measure of regularity, predictability, certainty and confidence. The principle has been very ably defined in public law in the last century but it is clear that it has its cousins in private law of honouring trusts and confidences. It is a principle, which has its origins in nearly every continent. Trusts and confidences must be honoured in public law and therefore the situations where the expectations shall be recognized and protected must of necessity defy restrictions in the years ahead. The strengths and weaknesses of the expectations must remain a central role for the public law courts to weigh and determine.”

32. I have already found that the petitioners have established a *prima facie* case against the respondents. There is high likelihood that the respondents may conclude the process of constituting another board before this petition is heard and determined. If at all such a board was appointed on 23rd November 2020, which has not been proved, it would have been appointed after the filing of the petition on 18th November 2020. Keeping in mind the public interest demands for fair hearing, good effective administration of justice and the need to preserve the substratum of a suit before its determination by the court, I find that there is need to grant conservatory orders pending the determination of the petition. The application dated 10th November 2020 is thus granted in terms of prayers 5 that a **Conservatory Order do issue**, barring and/or prohibiting the respondents herein either by themselves, agents, servants and/or anyone acting on their instructions from respondents herein from arbitrarily disbanding and/or dissolving the Board of Management and/or otherwise implementing the unlawful, *albeit* arbitrary decision made on the 2nd day of November 2020, to disband the Board of Management, Kenyoro Secondary School, without regard to the provisions of the Basic Education Act, 2013 as read together with the Fair Administrative Act, 2015, pending the hearing and determination of this petition. Prayer 6 is also granted that a **Conservatory Order** preserving and/or conserving the status of the 1st – 8th petitioners/applicants as the duly appointed members of the 9th petitioner/applicant, for a term of three(3) years w.e.f. 22nd day of May 2019 and in particular, barring the implementation and / or enforcement of the arbitrary, *albeit* verbal decision by the respondents made on the 2nd day of November 2020 to disband and/or dissolve the 9th petitioner/applicant pending the hearing and determination of this petition.

33. The costs of the application shall be in the cause.

Dated, Signed and Delivered at KISII this 25th day of March, 2021.

R.E. OUGO

JUDGE

In the presence of:

Mr. Mulisa For the Petitioner/ Applicants

Respondents Absent

Miss Chepkirui For the Interested Parties

Ms Rael Court Assistant