



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW APPLICATION NO. 1 OF 2020.**

**REPUBLIC .....APPLICANT**

**VERSUS**

**CABINET SECRETARY MINISTRY OF EDUCATION.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF EDUCATION, NAKURU COUNTY.....3<sup>RD</sup> RESPONDENT**

**EXPARTE .....ROSE WARURU T/A ROSEVILLE ACADEMY & 12 OTHERS**

**RULING.**

1. The Notice of Motion by the applicant dated 7<sup>th</sup> June 2021 prays for the following orders;

**a) That this court be pleased to lift or set aside the order of stay issued on the 23<sup>rd</sup> January 2020 pending the hearing and determination of the application.**

**b) That the court be pleased to dismiss the application for want of prosecution.**

2. The application is supported by the grounds on the face of the application and the sworn affidavit of **Gabriel Lopus** the County Director of Education dated 8<sup>th</sup> June 2021.

3. The applicants deponed that the respondent's schools were closed sometimes in October 2019 for failing to comply with the requirements of the Ministry of Education as anticipated under the Basic Education Act. They moved to this court and obtained exparte orders on **23<sup>rd</sup> January 2020** for leave which the court granted and ordered the same to operate as a stay.

4. The applicant contends that by the time the respondents moved to the court the said schools had been closed and the pupils redistributed to other schools. The respondents did misrepresent the facts to the court.

5. It is the applicant's case that the respondents have failed to adhere to the basic requirements of compliance for instance the availability of adequate land and classrooms for the schools and having teachers registered with the Teachers service commission among others.

6. He deponed that the orders obtained by the respondents did not order reopening of the schools but prohibited the applicant from closing the schools. It was therefore the applicants concerned that the respondents have opened the school's courtesy of the said order without complying with the requirements including the fact that most of the learners who are candidates have not been registered for their national exams as their schools are not legally recognised by the ministry.

7. In the premises the applicant avers that in the interest of the pupils the orders ought to be lifted so that the applicant can monitor and ensure that the said schools comply with the legal guidelines provided by the ministry. It is impossible for the learners from unregistered schools for example to obtain their Unique Identifier Number and thus they will not be able to undertake national continuous assessment tests.

8. The application was vehemently opposed by the respondents through the replying affidavit of **Simon Wahome** sworn on 21<sup>st</sup> June 2021 who is the proprietor of Kids Academy. He also stated that he had authority to swear on behalf of the rest of the applicants.

9. He said that the schools were not closed as alleged by the applicants but a verbal notice was issued when the respondent visited the

schools. That was the reason that made them moved to court and obtained the said stay orders as well as leave to institute the judicial proceedings.

10. He went on to state that due to Covid 19 pandemic the respondents have been hit hard economically and have been unable to raise any income. That indeed they are interested in prosecuting the application and they have been unable to get dates in court because of the said Covid 19 impediment which at some point necessitated that the courts be closed.

11. He said that the issues raised in this suit are weighty legally as they seek to find that the applicants have breached the law and the constitution, principles of natural justice, biasness among others.

12. The parties were directed to file written submissions which they have complied. The applicant submitted that the court is entitled to set aside the stay orders as there was no sufficient evidence that the respondents have a prima facie case. They relied on the case of **REPUBLIC V. PRINCIPAL SECRETARY AGRICULTURE, LIVESTOCK AND FISHERIES & 3 OTHERS EXPARTE DOUGHLAS M BARASA & 2 OTHERS (2015) eKLR**.

13. They submitted that the orders granted came later in the day as the said schools had already been closed and that any opening was in total contravention of the law. That by the court agreeing with the respondents the same is perpetuating an illegality as the schools have failed to comply with the basic requirements of the Basic Education Act.

14. The applicant reiterated the contents of their affidavit that the learners in these schools will not benefit from undertaking their national exams as their institutions are not registered and will not be availed a Unique Identifier Number. Consequently, they prayed that the application be allowed.

15. The respondents filed their submissions arguing that the matter cannot be dismissed as there was no provisions for dismissal under Order 51 and 53 of the Civil Procedure Rules. They reiterated that under the current prevailing Covid 19 environment it was not feasible to determine the matter expeditiously. In most cases the matter could not be fixed for trial as the courts were closed.

16. They further submitted that the matter was of public interest as the issues touched on the constituents of Nakuru West Sub County. That it was in the interest of the respondents that the children from that area access school which was a fundamental right under our Constitution.

#### **ANALYSIS AND DETERMINATION.**

17. The court has perused the entire proceedings, the submissions as well as the cited authorities. What is clear here is that the respondents run private schools. The applicants who are regulators of education within the county ordered that the said schools do comply with the requirements of the Basic Education Act. They verbally ordered the schools to be closed. Verbally because from the documents available there is nothing in writing.

18. Against these verbal directions the respondents filed the suit seeking the prerogative writs of *prohibition* and *certiorari*. They also prayed that the court grants them stay which indeed it did.

19. The applicants have urge the court to discharge the orders since first of all the said schools were already closed and that the respondents after obtaining the ex parte orders went ahead to open the same. Whether this is true or not is a subject of further investigation.

20. What then is the position of the applicant legally.? Theirs is to regulate education system pursuant to the provisions of Basic Education Act and to ensure compliance. It is a legal mandate donated to them by parliament. The provisions that the respondents must have adequate land, classrooms, qualified teachers, enrolment of pupils so as to undertake exams among others is their mandate.

21. This is a judicial review matter. The limit therefore is basically on the administrative exercise. That is, was it undertaken by the applicants lawfully, was there any biasness, was there any breach of the rules of natural justice among other clear directions. The other details of compliance with the provisions of the Basic Education Act is a subject of another forum.

***“It must always be remembered that the decision whether or not to grant a stay pursuant to leave is no doubt an exercise of judicial discretion and that discretion like any other judicial discretion must be exercised judicially. Accordingly, it has to be exercised on fixed principles and not on private opinions, sentiment and sympathy or benevolence but deservedly and not arbitrarily or capriciously. The Court’s discretion being judicial and must therefore be exercised on the basis of evidence and sound legal principles. See CHARLES NYAMWANGE OTEMWA & 2 OTHERS V. REGISTRAR GENERAL & 5 OTHERS EXPARTE REPUBLIC (2013) EKLR.***

22. The court takes notice of the fact that all that the respondents were and are required to do is to comply with the Act. They have not rebutted the averments by the sub county director of education that the respondent’s schools lack qualified personnel or teachers registered under the Teachers Service Commission, that they were unable to register their pupils under the new regime of Unique Identifier Number among other accusations.

23. Respectfully I do not see any fault with the above requirements. Both parties have submitted extensively on the rights of the children as provided by the Children’s Act. The same for all intent and purposes is paramount. The respondents are duty bound to comply just like all other educational institutions. If for arguments sake the pupils are not registered to undertake the national exams, who are they going to blame. Obviously the parties herein.

24. In my view therefore, the requirements by the applicants are not too onerous. To the extent that the respondents are carrying out and or

providing educational services, they have no options but must comply with the provisions governing the education sector. The said oversight and demands must however be undertaken under the umbrella of strict adherence and fidelity to the law.

25. The stay orders granted have now been in force for more than one year. Presumably if there were any requirements to be complied with the respondents must have done. Needless to state that the issues of Covid 19 cannot be a ground of non-compliance. The respondents are providing education on a private basis and it is of course in business supplementing what is offered by public institutions. That does not mean that they should not be prudent to follow the law.

26. The court cannot be used to micro manage other government agencies. Neither can it be used by private individuals to circumvent the law. This court does not in the premises see any reasons why the respondents should continue enjoying the exparte orders granted herein. The other limbs of the application can be dealt with substantively later.

27. For the above reasons, the orders of stay issued on 23<sup>rd</sup> January 2020 are hereby set aside. The other prayers therein shall be determined separately.

28. Costs shall await the outcome of the main application.

**Dated signed and delivered via video link at Nakuru this 29<sup>th</sup> day of July 2021.**

**H. K. CHEMITEI**

**JUDGE**