REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION NO. 298 OF 2019

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR

JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLE 53 (1) (B), ARTICLE 56 (B)

AND ARTICLE 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 4 AND 5

OF THE FAIR ADMINISTRATIVE ACTION ACT.

BETWEEN

THE KENYA ALLIANCE OF NON-FORMAL

SCHOOLS WELFARE ASSOCIATION(KANSWA).....APPLICANT

VERSUS

THE PRINCIPAL SECRETARY, STATE DEPARTMENT

OF EARLY LEARNING AND BASIC EDUCATION.....RESPONDENT

RULING

Introduction

1. Kenya Alliance of Non-Formal Schools Welfare Association ("KANSWA") (hereinafter referred to as "the Applicant") describes itself as a registered society ,and umbrella body for over 1000 non-formal schools operating in urban informal settlements and pockets of poverty in rural areas in Kenya. It has sued Principal Secretary of Basic Education in the Ministry of Education (hereinafter "the Respondent"), which is a constitutional office in the public service. The Applicant's suit arises from a circular issued by the Respondent dated 26th September 2019, issued a circular directing, *inter alia*, the closure of all schools that are not registered with the Ministry of Education and learners in the said schools be placed in public schools.

2. The Applicant consequently filed an application by way of Chamber Summons dated 8th October 2019, in which it is seeking leave to commence judicial review proceedings against the Respondent. In particular, the Applicant is seeking the following orders :

> **(a) That the Applicant be granted leave to seek by way of judicial review for an order of Certiorari to issue to remove to this Court for purposes of being quashed and forthwith quash the Respondent's circular dated 26th September, 2019.**

(b) That leave be granted to the Applicant to seek by way of judicial review for an order of Prohibition, prohibiting the Respondent or any person acting under the Respondent's behest, direction and authority, from implementing the circular dated 26th September, 2019 from the Respondent.

(c) That leave be granted to the Applicant to seek by way of judicial review for an order of Prohibition, prohibiting the Respondent or any person acting under the Respondent's behest, direction and authority, from closing any non-formal school pursuant to the circular dated 26th September, 2019 from the Respondent.

(d) That the leave so granted do operate as a stay of implementation of the circular dated 26th September, 2019 directing the closure of unregistered schools, until the hearing and determination of the substantive application or further orders of this Court.

(e) That costs of this application be provided for.

3. The main grounds for the application are stated in the Applicants Statutory Statement dated 8th October 2019, and a verifying and further affidavit sworn by Allan Juma Masika, the Applicant's Chairman on the 8th October 2019 and 14th November 2019 respectively. Sherwin Njoroge & Associates, the Applicant's Advocates on record, also filed submissions dated 15th November 2019.

4. In summary, the Applicant claims that majority of the unregistered schools that the Respondent intends to close are non-formal schools that operate under the Alternative Provision of Basic Education and Training (APBET) Guidelines, and which provide low cost educational structures and primary education in poor urban informal settlements and arid and semi-arid areas. Further, that the impugned decision will negatively impact over 20,000 schools and over 2 million learners who are currently enrolled in the said schools, and who stand to suffer and lose out on basic education contrary to the provisions of the Constitution.

5. According to the Applicant, despite concerted efforts by stakeholders including to have the APBET guidelines fully implemented, the Respondent has failed to do so and has instead resulted in the arbitrary and unlawful closure of the non-formal schools. Furthermore, that the impugned circular was issued without the Respondent consulting or notifying the Applicant and other stakeholders, especially the affected schools, parents and learners. In addition, that the Respondent has not given any proper or rational reason for its draconian decision, and has therefore acted in an unlawful, unreasonable, and discriminatory manner.

6. The Applicant averred in its further affidavit that on 28th October 2019, it wrote to the Education Appeals Tribunal formally placing a grievance on behalf of non-formal schools, However, that in a response dated 4th November, 2019, the Education Appeals Tribunal indicated that its mandate is limited to handling grievances from persons aggrieved with decisions of the County Education Board, and consequently declined to preside over the Applicant's grievance.

7. In its submissions, the Applicant urges that it is alive to section 93 of the Basic Education Act, which provides for the establishment of the Education Appeals Tribunal, and appeals to the said Tribunal by any person aggrieved by the decisions of the County Education Board. However, that the Respondent in issuing the directive bypassed the County Education Board which was never given a chance to sit and deliberate on the closure directive. Furthermore, that under section 66 (2) of the Basic Education Act, the County Education Board may only reach the decision to close down a school on the recommendation of the Education Standards and Quality Assurance Council, following an inspection of the school. The Applicant contends that the Respondent therefore also effectively bypassed the Education Standards and Quality Assurance Council as well as the County Education Board in arriving at the decision to issue the closure notice.

8. The decision of the Education Appeals Tribunal in **Josephine Kathure Muriungi vs Teachers Service Commission [2019] eKLR**, that its jurisdiction is strictly limited by section 93(2) of the Basic Education Act to matters arising from the decisions of the County Education boards was relied upon, to submit that in the absence of a decision of the County Education Board on the closure of the schools, the Tribunal has no jurisdiction to entertain the matter. Further, that in the unlikely scenario that this court finds that the Applicant failed to exhaust the other available remedies, it is still possible for the illegal and unprocedural action by the Respondent in issuing the closure directive can still be challenged before this court.

The Response

9. The Respondent opposed the application through Grounds of Opposition dated 4th February 2020, wherein he termed the application as frivolous, vexatious and an abuse of the court process. The Respondent cited section 76 of the Basic Education Act which provides for the licensing, registration and accreditation of persons and institutions of basic education, and stated that non-formal schools ought to be regulated and must meet the standard requirements of formal schools, in line with section 82 of the Basic Education Act.

10. According to the Respondent, the Principal Secretary, Ministry of Education is guided by the relevant provisions of the law, the Basic Education Act and the Regulations thereunder, and the Alternative provision of Basic Education and Training (APBET) guidelines in executing his mandate. In addition, that the APBET guidelines provide for registration procedures which the Applicant should comply with to ensure that learning institutions are registered and therefore not interfered with. Further, that the registration of non-formals schools is necessary to ensure that the schools meet the accepted minimum standards of quality

11. The Respondent contended that the Applicant has not disclosed whether the affected non-formal schools have complied with the APBET guidelines nor attached any registration certificate confirming registration, and that its non-formal schools are operating illegally, and the order of stay is not available to them. Therefore, that the Applicant has not made any *prima facie* case with any chances of success.

The Determination

12. I have considered the arguments and submissions made by the Applicant and Respondent. The applicable law on leave to commence judicial review proceedings is *Order 53 Rule 1* of the Civil Procedure Rules, which provides that no application for judicial review orders should be made unless leave of the court was sought and granted. The reason for the leave was explained by Waki J. (as he then was), in **Republic vs. County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996** as follows:

> **"The purpose of application for leave to apply for judicial review is firstly to eliminate at an early stage any applications for judicial review which are either frivolous, vexatious or hopeless and secondly to ensure that the applicant is only allowed to proceed to substantive hearing if the Court is satisfied that there is a case fit for further consideration. The requirement that leave must be obtained before making an application for judicial review is designed to prevent the time of the court being wasted by busy bodies with misguided or trivial complaints or administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for judicial review of it were actually pending even though misconceived… Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full *inter partes* hearing of the substantive application for judicial review. It is an exercise of the court's discretion but as always it has to be exercised judicially".**

13. On whether leave once granted should operate as a stay, Order 53 Rule 1(4) of the Civil Procedure Rules further provides as follows:

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

14. There are two limbs to the issue as regards granting of leave to the Applicant in the present application. First, it is trite that in an application for leave such as the present one, the Court ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before court and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. The merits test commonly applied is whether the ground of challenge is arguable. In **Sharma vs Brown Antoine (2007) I WLR 780**, Lord Bingham explained that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success, however, that the test is flexible depending on the nature and gravity of the issues.

15. In the present application, the dispute between the Applicant and Respondent emanates from a circular made by the Respondent in a letter dated 29th May 2018. The circular read as follows:

> **"Regional Directors of Education**
>
> **County Directors of Education**
>
> **Date 26th September, 2019**
>
> **RE: Safety of Learners in Basic Education Institutions**
>
> **The Basic Education Act 2013 mandates the Cabinet Secretary to establish and maintain basic education learning institutions. According to the Act, the establishment of basic education learning institutions shall be guided by regulation outlining the requirements and procedures to be followed in establishing and maintaining these institutions. It is in light of this that guidelines for registration of schools have been developed and which should strictly be adhered to.**
>
> **It has been observed that some basic education institutions have been established without following due process. A number of institutions exist without registration certificates while others have failed to reapply for re-registration when their circumstances change. These institutions are therefore existing illegally. Most of those institutions do not meet the minimum standards required of them to be registered and some of them have infrastructure that are below standard and which pose danger to the learners.**
>
> **In view of the foregoing, it has been decided that:-**
>
> **i. Schools that are not registered with the Ministry of Education be closed and learners placed in public schools.**
>
> **ii. All schools whose infrastructure standards have deteriorated and/or altered since registration should have their registration certificate withdrawn and school closed immediately.**
>
> **iii. Schools that have charged their status to be re-assessed for re-registration immediately. This includes schools that have increased their enrolment.**
>
> **iv. All field officers together with other government agencies to carry out assessment of schools and make appropriate decisions before schools close on the 25th October, 2019.**
>
> **v. Any school which has employed teachers not registered by Teachers Service Commission be considered having failed to meet the guidelines and be closed immediately.**

vi. Parents with support of education filed officers are asked to ascertain the registration status of the schools where their children are currently enrolled before end of third term.

All officers are instructed to carry out the exercise with diligence and failure to do so will result in disciplinary action being taken against the officers concerned. Reports in implementation of this circular should reach this office by 31st October, 2019.

Dr. Belio R. Kipsang, CBS

PRINCIPAL SECRETARY"

16. The Respondent alleges it acted according to the applicable law and guidelines in issuing the said circular, particularly the law that requires registration of non-formal schools that it cited. The Applicant on the other hand alleges that the decision made by the Respondent was unconstitutional and affects the rights to education of the affected students, was made without following the applicable procedures, and disregarded the principles of fair administrative action and natural justice. The Applicant relied on provisions of the Constitution and of the Basic Education Act to support its averments, and to this extent I find that it has established a legal basis for its case, and has shown an arguable case.

17. The second limb as regards this Court's jurisdiction to hear the said dispute arising from the existence of an internal dispute resolution mechanism in the Basic Education Act, which under section 93 establishes the Education Appeals Tribunal to hear appeals from decisions made under the Act. Sections 9(2) (3) and (4) of the Fair Administrative Action Act provide as follows in this regard:

"(2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

(4) Notwithstanding subsection (3), the High Court or a subordinate Court may, in exceptional circumstances and on application by the applicant, exempt such person from the obligation to exhaust any remedy if the court considers such exemption to be in the interest of justice."

18. Exhaustion of alternative remedies is also now a constitutional imperative under Article 159 (2)(c) of the Constitution, and is exemplified by emerging jurisdiction on the subject, which was initially stated in **Speaker of National Assembly vs Karume (1992) KLR 21** in the following words:

"Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

19. The doctrine of exhaustion of alternative remedies was further explained by the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others vs Samuel Munga Henry & 1756 Others (2015) eKLR** as follows:

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews….. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

20. The Courts may, in exceptional circumstances, permit a suit to proceed before it, particularly, where dispute resolution mechanism established under an Act is not competent to resolve the issues raised in an application, or where it is not available or accessible to the parties for various demonstrated reasons. Section 9(4) of the Fair Administrative Action Act however suggests an application to the court, by the aggrieved party, for exemption from the obligation to exhaust an internal remedy.

21. The approach to be taken by Courts in making such an exemption was suggested by the Court of Appeal in **R vs National Environmental Management Authority (2011) eKLR** as follows*:*

".. in determining whether an exception should be made and judicial review granted, it was necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it…."

22. In the present application, the Applicant argues that the internal dispute resolution mechanisms under the Basic Education Act are not applicable in the instant case, as the Education Appeals Tribunal set up under the Basic Education Act has no jurisdiction over decisions made by the Respondent. In particular, that the appealable decisions are those made by the County Education Boards, and not the Respondent, and he also brought evidence of a letter from the said Tribunal confirming this position.

23. Section 93 (1) and (2) of the Basic Education Act in this regard provides as follows:

> **" (1) There is established an Education Appeals Tribunal.**
>
> **(2) Any person aggrieved by the decisions of the County Education Board may appeal to the Education Appeals Tribunal**."

24. It is evident that the jurisdiction of the Education Appeals Tribunal is limited to reviewing decisions made by the County Education Boards and not the Respondent. The said Tribunal cannot therefore be an effective remedy to the Applicant in the circumstances of this application. In addition, the issues raised in the application fall within the supervisory jurisdiction of this Court as provided for in Article 165 (5) of the Constitution. The exception in section 9(4) of the Fair Administrative Action Act therefore applies, and the Applicant is thus entitled to move this Court for judicial review orders.

25. As to whether the orders sought of stay can thereby be granted, these orders are an exercise of judicial discretion, which must be exercised judiciously. In **R (H). vs Ashworth Special Hospital Authority (2003) 1 WLR 127,** it was held that such a stay halts or suspends proceedings that are challenged by a claim for judicial review, and the purpose of a stay is to preserve the *status quo* pending the final determination of the claim for judicial review. The circumstances under which a Court may grant a direction that the grant of leave do 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 said decision, and in various decisions by Kenyan Courts.

26. The main factor is whether or not the decision or action sought to be stayed has been fully implemented. It was thus held in **Jared Benson Kangwana vs. Attorney General, Nairobi HCCC No. 446 of 1995** that stay of proceedings should be granted where the situation may result in a decision which ought not to have been made being concluded. Similarly, Maraga J. (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** expressed himself on this factor as follows:

> **"As injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction… In judicial review applications the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application and therefore where the order is efficacious the Court should not hesitate to grant it though it must never be forgotten that the stay orders are discretionary and their scope and purpose is limited… 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 and it is not limited to judicial or quasi-judicial proceedings as it encompasses the administrative decision making process being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. It is however not appropriate to compel a public body to act… A stay order framed in such a way as to compel the Respondents to reinstate the applicant before hearing the Respondent cannot be granted."**

27. This factor was also discussed in **R (H). vs Ashworth Special Hospital Authority (supra)** where Dyson L.J. held as follows**:**

> **"As I have said, the essential effect of a stay of proceedings is to suspend them. What this means in practice will depend on the context and the stage that has been reached in the proceedings. If the inferior court or administrative body has not yet made a final decision, then the effect of the stay will be to prevent the taking of the steps that are required for the decision to be made. If a final decision has been made, but it has not been implemented, then the effect of the stay will be to prevent its implementation. In each of these situations, so long as the stay remains in force, no further steps can be taken in the proceedings, and any decision taken will cease to have effect: it is suspended for the time being.**
>
> **I now turn to the third situation, which occurs where the decision has not only been made, but it has been carried out in full. At first sight, it seems nonsensical to speak of making an order that such a decision should be suspended. How can one say of a decision that has been fully implemented that it should cease to have effect? Once the decision has been implemented, it is a past event, and it is impossible to suspend a piece of history. At first sight, this argument seems irresistible, but I think it is wrong. It overlooks the fact that a successful judicial review challenge does in a very real sense rewrite history...It is, therefore, difficult to see why the court should not in principle have jurisdiction to say that the order shall temporarily cease to have effect, with the same result for the time being as will be the permanent outcome if it is ultimately held to be unlawful and is quashed. I would hold that the court has jurisdiction to stay the decision of a tribunal which is subject to a judicial review challenge, even where the decision has been fully implemented …. But the jurisdiction should be exercised sparingly, and where it is exercised, the court should decide the judicial review application, if at all possible, within days of the order of stay"**

28. A similar position has been taken by Odunga J. in **Republic vs Cabinet Secretary for Transport & Infrastructure & 4 Others ex parte Kenya Country Bus Owners Association and 8 Others (2014) e KLR** and in **James Opiyo Wandayi vs Kenya National Assembly & 2 Others, (2016) eKLR,** where the learned judge held that it is only where the decision in question is complete that the Court cannot stay the same. However, where what ought to be stayed is a continuing process, the same may be stayed at any stage of the proceedings.

29. From the above decisions, it follows that were the action or decision is yet to be implemented, a stay order can normally be granted in such circumstances. Where the action or decision is implemented, then the Court needs to consider the completeness or continuing nature of such implementation. If it is a continuing nature then it is still possible to suspend the implementation. However, once implementation is complete then such discretion to stay should be exercised sparingly, and even then when the Court is sure that the judicial review application can be disposed of in the shortest of time possible.

30. In the present application the decision made by the Respondent in the circular dated 26th September 2019 was to have effect immediately, and the affected schools were to be closed immediately. It is therefore a decision which has been implemented. In addition, the

Applicant in its supporting affidavit alluded to the origin of the circular, being the collapse of a classroom in one of the affected schools, which resulted in the death of several students.

31. Therefore, it is the finding of this Court that even though it has jurisdiction and the discretion to suspend the Respondent's decision, a number of factors militate against the exercise of that discretion. Firstly, as noted above, this discretion should be exercised sparingly where a decision has been fully implemented. Secondly, there is a public interest element involved, as there is the safety and life of students at risk, which is an overriding factor when determining whether or not to grant stay orders. It was s explained by Majanja J. in **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (2012) eKLR,** that judicial review proceedings are public law proceedings for vindication of private rights, and for this reason public interest is a relevant consideration in the granting of stay orders.

32. The public interest element in the grant of a stay was also the subject of the decision in **R (H). vs Ashworth Special Hospital Authority (supra)**, where Dyson L.J held that where there is a public interest element involved, the Court strike a balance between the rights of an individual and the public interest, and in striking that balance, the court should usually refuse to grant a stay unless satisfied that there is a strong, and not merely an arguable, case that a decision was unlawful. There is thus need to preserve the current *status quo* until the legality of the Respondent's circular is established.

33. In the premises, the Applicant's Chamber Summons dated 8th October 2019 is allowed only to the extent of the following orders:

I. The Applicant is granted leave to seek by way of judicial review proceedings, an order of Certiorari to issue to remove to this Court for purposes of being quashed and forthwith quash the Respondent's circular dated 26th September, 2019.

II. The Applicant is granted leave to seek by way of judicial review proceedings, an order of Prohibition, prohibiting the Respondent or any person acting under the Respondent's behest, direction and authority, from implementing the circular dated 26th September, 2019 from the Respondent.

III. The Applicant is granted leave to seek by way of judicial review proceedings, an order of Prohibition, prohibiting the Respondent or any person acting under the Respondent's behest, direction and authority, from closing any non-formal school pursuant to the circular dated 26th September, 2019 from the Respondent.

IV. The prayer that the leave so granted do operate as a stay of implementation of the circular dated 26th September, 2019 directing the closure of unregistered schools is declined.

V. The costs of the said Chamber Summons shall be in the cause.

VI. The Applicant shall file and serve its substantive Notice of Motion within 14 days, and shall also serve the Respondent with the hearing notice for the said Notice of Motion within the said 14 days.

VII. The hearing of the said Notice of Motion shall be on 25th March 2020.

34. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF FEBRUARY 2020

P. NYAMWEYA

JUDGE