



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISC. APPLICATION NO. 472 OF 2018**

**BETWEEN**

**NAZIR JINNAH.....APPLICANT**

**VERSUS**

**HIS HIGHNESS PRINCE AGA KHAN SHIA IMAMI**

**ISMAILI NATIONAL CONCILIATION AND**

**ARBITRATION BOARD OF KENYA.....1<sup>ST</sup> RESPONDENT**

**AGA KHAN EDUCATION SERVICES KENYA.....2<sup>ND</sup> RESPONDENT**

**AGA KHAN EDUCATION SERVICES NAIROBI.....3<sup>RD</sup> RESPONDENT**

**CHIEF MAGISTRATES COURT NAIROBI.....4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. Nazir Jinnah, the *ex parte* Applicant herein (hereinafter referred to as “the Applicant”), is a member of the Shia Imami Ismaili Muslims. The 1<sup>st</sup> Respondent is a Board established under the Constitution of the Shia Imami Ismaili Muslims to hear and adjudicate disputes between members of the Shia Imami Ismaili Muslims in Kenya. The 2<sup>nd</sup> Respondent is a limited company incorporated in Kenya under the Companies Act. The status of the 3<sup>rd</sup> Respondent is unknown, as it did not enter appearance nor participate in these proceedings. Lastly, the 4<sup>th</sup> Respondent is a subordinate Court established under Article 169 of the Constitution of Kenya.

2. The *ex parte* Applicant was granted leave by this Court to commence judicial review proceedings against the Respondents, and filed an application by way of a Notice of Motion application dated 7<sup>th</sup> August 2019, in which he seeks the following orders:-

**a) THAT this Court be pleased to issue an order of Certiorari directed to the Nairobi Chief Magistrate’s Court to bring to the High Court the record/proceedings in Civil Case Number 1002 OF 2017- Aga Khan Education Services (Kenya) vs Nazir Jinnah for purposes of being quashed.**

**b) THAT this Court be pleased to issue an order of Mandamus to compel the 1<sup>st</sup> Respondent to admit and thereafter hear and adjudicate the Applicant’s complaint against members of the 2<sup>nd</sup> Respondent as contained in the Applicant’s submission forms of 13<sup>th</sup> March 2018.**

**c) THAT costs for this application be in the cause.**

3. The application is supported by the grounds on its face, a statutory statement dated 4<sup>th</sup> December 2018, a verifying affidavit sworn by the *ex parte* Applicant on even date, and a further affidavit he swore on 7<sup>th</sup> February 2019. In response to the instant application, the 1<sup>st</sup> Respondent filed a replying affidavit sworn on 21<sup>st</sup> January 2019, by its Chairman, Kassamali Abdul Sultan. The 2<sup>nd</sup> Respondent relied on and adopted the contents of the replying affidavit of Kassamali Abdul Sultan filed by the 1<sup>st</sup> Respondent.

4. This Court directed that the said application be canvassed *inter partes* by way of written submissions, which were adopted by the parties for purposes of this judgment. The respective cases of the parties are set out in the following sections.

#### **The ex parte Applicant's Case.**

5. The *ex parte* Applicant deponed that his family members are members of the Shia Imami Ismaili Muslims and bound by the Constitution of the Shia Imami Ismaili Muslims (hereinafter the "Ismaili Constitution") and so are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' members and directors. It was also his deposition that he enrolled his three children at the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' learning facilities from the year 2008. However, it was his averment that sometime in the year 2010, he underwent some economic difficulties directly affecting his children's educational curriculum and planning at the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents' school.

6. Therefore, that in accordance to the Ismaili Constitution and the guidance of His Highness the Aga Khan's recitals, he approached the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to address these issues and to find a solution to protect his young family whereby upon deliberations with the 2<sup>nd</sup> Respondent's Director and Chairman at that time Mr. Moez Jamal, his three children were allowed to continue to receive their education undisturbed and granted a waiver on payment of fees within the doctrines of the Ismailia community.

7. It is the *ex parte* Applicant's averment that he was thereafter able to perform his part of the agreement and continued to make minimum payments of fees for his children, with the said waiver being reflected in the applicable invoices, receipts and statements. That this notwithstanding, a dispute arose between him and the 2<sup>nd</sup> Respondent with respect to the payment of school fees as per the terms of the waiver referenced above. In his view, subject to Article 13. 1. b) i) of the Ismaili Constitution, the 1<sup>st</sup> Respondent is empowered to act as an arbitrator and judicial body to hear and adjudicate upon such disputes of commercial, business and other civil liability matters between the members of the Shia Imami Ismaili Muslims. According to the *ex parte* Applicant, the dispute with respect to payment of fees qualifies as a commercial, business and/or other civil liability that ought to be referred to arbitration by the 1<sup>st</sup> Respondent.

8. It was also his averment that as a result of the dispute, some members of the 2<sup>nd</sup> Respondent ignored, disregarded and mistreated him and acted in a manner that amounted to gross misconduct warranting disciplinary action under Article 14 of the Ismaili Constitution which provides for disciplinary action against a member of the Shia Imami Ismailia Community. In the circumstances, he submitted complaints with the 1<sup>st</sup> Respondent for the commencement of disciplinary actions against the said members. However, the 1<sup>st</sup> Respondent declined to admit the said complaints on grounds that they lack the jurisdiction to act on the complaints. Furthermore, he requested for an arbitration from the Respondents to be set up to conduct the dispute between him and the school but the Respondents categorically declined to take up his matter allegedly on the ground that they had no jurisdiction to resolve the said issues.

9. According to the *ex parte* Applicant, the members of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are members of the Shia Imami Ismaili Muslims and are bound by the Constitution of the Shia Imami Ismaili Muslims. Further, that contrary to the provisions of the Constitution of the Shia Imami Ismaili Muslims, the 2<sup>nd</sup> Respondent has lodged a civil suit before the **Chief Magistrate's Court in CMCC No. 1002 of 2017 - Aga Khan Education Services vs Nazir Jinnah** that is pending determination. He annexed copies of the pleadings in the said suit. It is the *ex parte* Applicant's case that the said subordinate court lacks jurisdiction to entertain the subject dispute, whereas the 1<sup>st</sup> Respondent on the other hand has express jurisdiction over the same. The *ex parte* Applicant in reply to the Respondents responses also made further allegations as to the credibility of the deponents and veracity of the averments made therein.

#### **The Respondents' Case**

10. The Respondents averred that the 1<sup>st</sup> Respondent is established under Article 13.1 of the Ismaili Constitution, and its aims and objects including *inter alia*: assisting in the conciliation process between parties in differences or disputes arising from commercial, business and other civil liability matters; acting as an arbitrator and judicial body and accordingly to hear and adjudicate upon commercial, business and other civil liability matters; and taking disciplinary action under the Constitution and any Rules and Regulations.

11. The Respondents contended that the said Constitution binds, and is only applicable to Shia Imami Ismaili Muslims as individuals, and that it is the responsibility of the individual who desires to have a dispute conciliated or arbitrated to apply to the Board as provided under Article 3.1 and 13.5 of the Constitution. That the instant application is therefore misconceived and a non-starter, as it seeks to compel the 1<sup>st</sup> Respondent to admit and adjudicate the *ex parte* Applicant's complaint against the 2<sup>nd</sup> Respondent, yet the 1<sup>st</sup> Respondent does not have that jurisdiction because the 2<sup>nd</sup> Respondent is not an individual. The deponent also contended that the 2<sup>nd</sup> Respondent is an independent legal entity responsible for managing education services in Kenya on behalf of the Aga Khan Development Network (AKDN), and a body corporate governed by its own rules and regulations.

12. It is the Respondents' case that the *ex parte* Applicant has been notified and is aware that the 1<sup>st</sup> Respondent does not have jurisdiction to hear the matters complained of. That, the *ex parte* Applicant, through eleven letters dated 15<sup>th</sup> March 2017, requested the Board to take disciplinary action against Board members of the 2<sup>nd</sup> Respondent for alleged actions taken against the *ex parte* Applicant's son. It is contended that the Board responded vide letters dated 22<sup>nd</sup> March and 3<sup>rd</sup> April 2017 stating that it lacked jurisdiction to accept the complaints for reasons that:

- (a) The alleged acts, which are the basis of the Ex parte Applicant's complaints, do not fall within the ambit of Article 14.1 of the Constitution;
- (b) The Board does not have power to award the remedies sought and;
- (c) Volunteers, paid staff and office bearers of AKDN institutions are under the guidance and supervision of their appointing

authorities for their workings and activities and as such, jurisdiction with matters pertaining to these personnel rests with the appointing authority and not the Board.

13. According to the Respondents, the basis of the *ex parte* Applicant's complaints are acts of the learning institution where his children attend school. Further, that the *ex parte* Applicant is in arrears of school fees totaling to Kshs. 3,915,266.30, hence the civil suit lodged against him by the said institution for recovery of the same. It is also contended that the said action has nothing to do with the institution's officers, and that the Ismaili Constitution is applicable to Ismaili Muslims as individuals and not institutions. Therefore, that this is merely a commercial matter pending before the court, hence there is no decision or action capable of being challenged under judicial review. That the *ex parte* Applicant ought to instead make any applications or raise any defence it has against the 2<sup>nd</sup> Respondent under the said suit.

14. The Respondents' view therefore is that the instant application is baseless, misconceived, an abuse of the court process and amounts to forum shopping. It is contended in this regard that the *ex parte* Applicant has filed five (5) suits against the 2<sup>nd</sup> Respondent, including the instant application, with the aim of preventing the 2<sup>nd</sup> Respondent from recovering school fees; and educating his children at the Aga Khan Academy free of charge. That, the said suits, for which the *ex parte* Applicant is guilty of non-disclosure thereof before this Court, include:

(a) Constitutional Petition 48 of 2017, which was dismissed on 30<sup>th</sup> July 2018, wherein the *ex parte* Applicant sought orders to compel the 2<sup>nd</sup> Respondent to readmit his son and to keep him in school until he completes his studies. That, following the dismissal, the *ex parte* Applicant has, with the intent to appeal, applied for a stay pending appeal.

(b) Children's Court Miscellaneous Application No. 52 of 2017 wherein the *ex parte* Applicant seeks orders to compel the 2<sup>nd</sup> Respondent not to disclose the names of his children in the documents filed in court. That, the said application was dismissed for want of prosecution and later reinstated and is yet to be prosecuted.

(c) Petition No. 152 of 2018. where the *ex parte* Applicant seeks orders to compel the 2<sup>nd</sup> Respondent to release his daughter's academic certificates, which was pending hearing

(d) High Court Miscellaneous Application No. 129 of 2018, where the *Ex parte* Applicant seeks committal orders against various officials of the 2<sup>nd</sup> Respondent for allegedly failing to comply with orders issued in Miscellaneous Application No. 52 of 2017, which application is pending r hearing.

15. The Respondents averred the High Court has determined in Constitutional Petition 48 of 2017 that the issue and dispute between the parties herein is simply commercial and for recovery of money owed, hence not one raising constitutional questions. It is therefore contended that there is no decision capable of being challenged through judicial review. That in light of the foregoing, the *ex parte* Applicant ought not to be entertained and instead be declared a vexatious litigant and cautioned against wasting judicial time and be penalized for lost time.

16. The Respondents further sought to have the instant application dismissed based on the following points of law:

(a) The application is time barred since Order 53 Rule 2 of the Civil Procedure Rules 2010 provides that an application for leave is to be made not later than 6 months after the date of the proceedings. That in any event, the subject suit, **CMCC No. 1002 of 2017** against the *ex parte* Applicant was filed in February 2017, and the instant application was filed on 5<sup>th</sup> December 2018. Hence, that the *ex parte* Applicant is guilty of inordinate delay and cannot file suit to challenge the 2<sup>nd</sup> Respondent's decision to file suit to recover a debt the *ex parte* Applicant owes; and

(b) Whereas the Chief Magistrate's Court has been joined as the 4<sup>th</sup> Respondent in the instant application, the Chief Magistrate's Court cannot be sued and the Applicant ought to have, if necessary sued through the Attorney General.

(c) There is no decision by the 2<sup>nd</sup> Respondent capable of being subjected to judicial review and none has been stated.

### **The Determination**

17. A majority of the foregoing points of law raised by the Respondents were disposed of at the leave stage, with this Court finding that the *ex parte* Applicant is seeking orders to quash the entire proceedings in **Chief Magistrate's Court in CMCC No. 1002 of 2017 - Aga Khan Education Services vs Nazir Jinnah**, which are on-going and of a continuous nature, and not specific proceedings of a particular date. Therefore, the six months' limitation rule in Order 53 Rule 2 of the Civil Procedure Rules and section 9(3) of the Law Reform Act is not applicable in the present application. It is also notable in this respect that the remedy of certiorari only applies to quash a definite decision or act that has already been made or undertaken, and Order 53 rule 2 therefore envisages that the action sought to be quashed has been completed.

18. On whether the Nairobi Chief Magistrates Court is wrongly joined in the application, this Court did find that any issue of non-joinder or misjoinder of parties are issues that go to amendment of pleadings and not striking out of an application, and that the effect of such joinder and/or non-joinder is one to be decided upon after a full hearing. The Court also noted that the Nairobi Chief Magistrates Court is a subordinate Court created under the Constitution, and as its decisions clearly affect the *ex parte* Applicant's rights and interests, it is amenable to this Court's supervisory jurisdiction. To this extent it has been properly joined as a respondent in these proceedings. Similarly, the Court found that the 1<sup>st</sup> Respondent were amenable to judicial review for the same reason.

19. Coming to the substantive issues for determination, it is not in dispute that the 1<sup>st</sup> Respondent has jurisdiction to hear and determine the disputes provided in Article 13(1) of the Ismaili Constitution as follows:

**“There shall be a National Conciliation and Arbitration Board for each or the territories specified in the Seventh Schedule to be known as "His Highness Prince Aga Khan Shía Imami Ismaili National Conciliation and Arbitration Board" for the territory for which it is formed:**

**(a) to assist in the conciliation process between parties in differences or disputes arising from commercial, business and other civil liability matters, domestic and family matters, including those relating to matrimony, children of a marriage, matrimonial property, and testate and intestate succession;**

**(b) to act as an arbitration and judicial body and accordingly to hear and adjudicate upon:**

**(i) commercial; business and other civil liability matters;**

**(ii) domestic and family matters including those relating to matrimony children of a marriage, matrimonial property and testate and intestate succession;**

**(iii) disciplinary action to be taken under this Constitution and any Rules and Regulations.”**

20. Three issues present themselves for determination, arising from the pleadings and submissions filed by the *ex parte* Applicant and the Respondents on the 1<sup>st</sup> Respondent’s decision to decline jurisdiction in respect of the *ex parte* Applicant’s complaints. The first is whether the 1<sup>st</sup> Respondent acted unreasonably in declining jurisdiction over the *ex parte* Applicant’s complaint. The second issue is whether the reference of the *ex parte* Applicant’s complaint to the 1<sup>st</sup> Respondent ousted the jurisdiction of the Nairobi Chief Magistrates Court in **Chief Magistrate’s Court in CMCC No. 1002 of 2017 - Aga Khan Education Services vs Nazir Jinnah**. Lastly, the third issue is whether the *ex parte* Applicant merits the relief sought.

21. Khaminwa and Khaminwa Advocates appearing for the *ex parte* Applicant, filed written submissions dated 8<sup>th</sup> November, 2019. On the part of the Respondents, Oraro and Company Advocates appearing for the 1<sup>st</sup> Respondent filed written submissions dated 5<sup>th</sup> February, 2020, while Waweru Gatonye & Company Advocates appeared for the 2<sup>nd</sup> Respondent and filed written submission dated 14<sup>th</sup> January, 2020.

#### ***Whether the 1<sup>st</sup> Respondent acted unreasonably***

22. On the first issue as to whether the 1<sup>st</sup> Respondent acted unreasonably by declining jurisdiction, the *ex parte* Applicant’s counsel submitted that by declining to admit the *ex parte* Applicant’s request for adjudication of a dispute and consideration of a disciplinary complaint, the 1<sup>st</sup> Respondent acted in contravention of the Ismaili constitution. He cited the decisions in **Pastoli vs Kabale District Local Government Council and Others, (2008) 2EA 300; Republic vs The Commissioner of Lands Ex Parte Lake Flowers Limited, Nairobi HC Misc. Application No. 1235 of 1998; Judicial Service Commission vs Mbalu Mutava & Another, (2015) eKLR, and R vs Greater London Council Ex Parte Blackburn, (1976) 3 All ER 184** on the grounds for judicial review and for the submission that judicial review is concerned with the decision making process and not necessarily with the merits of the decision itself. Accordingly, that by denying the *ex parte* Applicant his right to arbitration despite complaints on his part, the Respondents acted in a manner that is unreasonable, discriminatory and inconsistent with the letter and spirit of the Constitution and the principles on natural justice and fair administrative action.

23. The 1<sup>st</sup> Respondent’s counsel on his part submitted that from the onset the 1<sup>st</sup> Respondent made it clear that it lacked the requisite jurisdiction to adjudicate over his dispute, and cited the well-established principle of law that a body impaired of jurisdiction cannot adjudicate over a dispute as posited in **Owners of the Motor Vessel ‘Lilian S’ vs Caltex Oil (Kenya) Limited, (1989) KLR**. The same position was taken by the court in the case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others, (2012) eKLR**. In counsel’s view therefore, the 1<sup>st</sup> Respondent cannot vest itself of jurisdiction that it does not possess and although established under the Constitution, the said Constitution is binding on individual Shia Imami Ismaili Muslims, and not binding on institutions such as the 1<sup>st</sup> Respondent.

24. The counsel further submitted that judicial review is a means of redress available when determining the legality of the decision-making process, and it is not concerned with the merits of the decision as was pronounced by the court in **Republic vs Public Procurement Administrative Review Board & 2 Others ex parte Rongo University, [2018] eKLR**. It was his contention that the duty of the High Court in judicial review proceedings is to confirm whether the decision-making authority acted in a rational, proportionate and procedurally proper manner in arriving at its decision, as was aptly expounded upon in **Pastoli vs Kabale District Local Government Council & Others, [2008] 2 EA 300**. He further brought to the attention of the court that in reaching its decision concerning the complaints raised by the *ex parte* Applicant as against the eleven aforementioned persons, the 1<sup>st</sup> Respondent. Counsel therefore submitted that the 1<sup>st</sup> Respondent, having scrutinised the *ex parte* Applicant’s complaints and forming the opinion that it was unable to adjudicate over the same for lack of jurisdiction was wholly justified and acted in a legal, rational and procedurally proper.

25. This Court notes that the main grievance by the *ex parte* Applicant in this respect is that he brought complaints against members of the 2<sup>nd</sup> Respondent, which the 1<sup>st</sup> Respondent unreasonably declined to hear. The *ex parte* Applicant and Respondent annexed copies of the said complaints to their respective pleadings. The 1<sup>st</sup> Respondent on the other hand claims that it has no jurisdiction under the Ismaili Constitution to hear complaints against the 2<sup>nd</sup> Respondent. The reasons for this position were given by the 1<sup>st</sup> Respondent in its letter dated 3<sup>rd</sup> April 2017 addressed to the *ex parte* Applicant, which was annexed to its replying affidavit. The said letter states as follows:

**“Mr. Nazir Jinnah**

**Legal Consultant**

**M&A Law Chambers**

**Top Plaza 4" Floor Suite 6**

**PO Box 63882-00619**

**NAIROBI**

**Dear Nazir,**

**DISCIPLINARY PROCEEDINGS**

**We thank you for your letter of 24 March, 2017 which was in response to our letter of 22nd March, 2017, on the above subject.**

**As explained to you during the preliminary meeting which my colleagues and I 20th March, 2017: had with you on**

**(1) The alleged acts, which are the basis of your complaints, do not fall within the ambit of Article 14.1 of our Constitution.**

**2) The remedies sought by you are not available to NCAB (K) under Article 14.3 of the Constitution.**

**(3) The overall scheme of the Constitution and the Rules and Regulations governing it provide that Volunteers, Paid Staff and Office Bearers of our Institutions are ultimately under the direct guidance and supervision of the appointing authority for their workings and activities. As such, the jurisdiction in matters pertaining to these personnel rests with the appointing authority**

**In view of the above factors, NCAB (K) does not have the jurisdiction to accept your complaints against the named individuals.**

**We further wish to clarify that our offer to render our services to resolve any dispute/differences that you may have with any of our Institutional bodies is only aimed at advising you of an alternative course of action which may be open to the Parties.**

**With kind regards and Ya Ali Madad.**

**Yours sincerely**

**KARIM S. DAWOOD**

**CHAIRMAN”**

26. The decisions in **Associated Provincial Pictures Ltd v Wednesbury Corporation [1948] 1 KB 223** and **Council of Civil Service Unions vs Minister for Civil Service [1984] 3All ER 935** defined a decision that is unreasonable and irrational as one which is so outrageous in its defiance of logic or of accepted moral standards, that no sensible person who had applied his mind to the question to be decided could have arrived at it. Section 7(2)(i) of the Fair Administrative Act expounds on the circumstances when a decision will be considered irrational, as being those where there is no demonstrated connection between the decision and its purpose, the evidence relied on, or its reasons.

27. As regards what factors ought to be taken into account by a decision maker in reaching the decision, the general rule as stated in **Associated Provincial Picture Houses Ltd vs Wednesbury Corporation, (1948) 1 KB 223**, is that a public body when making a decision, must take into account all the factors which the legislation conferring the relevant function expressly or implicitly requires it to have regard.

28. Article 14 of the Ismaili Constitution in this respect provides for disciplinary actions brought either by a Council of Ismailis or any Ismaili against fellow Ismailis. It was the applicable Article to the *ex parte* Applicant’s complaints, as he averred that he had requested for disciplinary proceedings to be initiated against certain members of the 2<sup>nd</sup> Respondents, and annexed correspondence to this effect,

29. The 2<sup>nd</sup> Respondent is on the other hand provided for in the Ismaili Constitution in Article 6, as one of the apex institutions that make up the Aga Khan Development Network, and Article 6.5 specifically provides that each constituent institution and agency of the Aga Khan Development Network has such executive authority for the attainment of its aims and objects, as is prescribed in its statutes, by-laws or other document of incorporation. The *ex parte* Applicant in this respect averred and annexed as Annexure “B” to his verifying affidavit a copy of a CR12 form showing that the 2<sup>nd</sup> Respondent is incorporated as a limited company under the Companies Act of Kenya. It is trite law that the effect of such incorporation is that the 2<sup>nd</sup> Respondent is a legal person separate from its members, as amplified in the celebrated case of **Salomon vs Salomon & Co. Limited, (1897) A.C.22**.

30. Conversely, its members cannot be held personally liable for any acts done on its behalf with authority and in good faith. As held in **Post Bank Credit Limited (In Liquidation) vs. Nyamangu Holdings Limited (2015) e KLR:-**

**“ The status of separate corporate personality of a company as a legal person in Salomon v Salomon is the greatest legal innovation in company law. Although artificial person and does not possess the body of natural person, a company is a juristic person; a legal person in law. It exists only in contemplation of law. Because of its artificial nature, a company acts through human persons, namely, the directors, officers, shareholders, and corporate managers, etc., for its management and day to day running. But these individuals represent the company and accordingly whatever they do within the scope of the ostensible or authority conferred upon them by the Memorandum and Articles of Association, in the name and on behalf of the company, they bind the company and not themselves. Thus, the Directors, Members or shareholders of a limited liability company are not liable for the debts or liabilities of the company; the company is.”**

31. In this regard, it is evident from the letter dated 3<sup>rd</sup> April 2019 that the 1<sup>st</sup> Respondent did take into account the relevant provisions of the Ismaili Constitution, and gave reasons as to why it has no jurisdiction over the 2<sup>nd</sup> Respondent. Taking into account the said provisions of the Ismaili Constitution and the law on the nature and legal status of the 2<sup>nd</sup> Respondent, as described in the foregoing, I find that the decision of the 1<sup>st</sup> Respondent in declining jurisdiction over the *ex parte* Applicant’s complaints was not unreasonable.

#### ***Whether the jurisdiction of the Nairobi Chief Magistrates Court is ousted***

32. The *ex parte* Applicant did not give any reasons as to why the proceedings in the Nairobi Chief Magistrate’s Court in **CMCC No. 1002 of 2017 – Aga Khan Education Services (Kenya) vs Nazir Jinnah** should be quashed, save for his arguments that it had referred a complaint about members of the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent. Therefore, the implication is that that this reference in effect ousts the jurisdiction of the said Magistrate’s Court in the said case.

33. The 1<sup>st</sup> Respondent’s counsel on his part submitted that the *ex parte* Applicant herein has failed to establish any nexus between the disciplinary process that he seeks before the 1<sup>st</sup> Respondent, and the legal proceedings in **CMCC No. 1002 of 2017 – Aga Khan Education Services (Kenya) vs Nazir Jinnah** that he seeks to have quashed. It was counsel’s contention that the latter dispute is one of a purely commercial nature, wherein the 2<sup>nd</sup> Respondent seeks to recover fees arrears in the sum of Kshs. 3,915,266.30 which remains outstanding from the *ex parte* Applicant on account of school fees arrears for his three children at the Aga Khan Academy, Nairobi. Therefore, the orders sought by the *ex parte* Applicant herein would be misplaced, given the distinct and mutually exclusive nature of the disciplinary process sought *vis-à-vis* the court proceedings already initiated by the 2<sup>nd</sup> Respondent.

34. Furthermore, that by failing to enjoin parties who would be directly and adversely affected by the orders sought, the *ex parte* Applicant strips the said individuals of their constitutional right to be heard and is in breach of the rules of natural justice. Counsel further submitted that unbeknown to this court, the *ex parte* Applicant has also filed 5 suits against the 2<sup>nd</sup> Respondent, with the sole aim of preventing the 2<sup>nd</sup> Respondent from recovering the debt due and owing to it. This non- disclosure in counsel’s view, was a material fact and fatal, as held in **The Matter of Title Number Chembe Kibabemshe/406, [2013] eKLR** and **Republic vs Vice Chancellor Moi University & 3 Others ex parte Benjamin J. Gikenyi Magare, [2018] eKLR**.

35. The 2<sup>nd</sup> Respondent’s counsel reiterated that judicial review is available as a remedy to review and question the decision making process by bodies performing public functions, and the duty of the court is to confine itself to the question of legality, which is whether a decision making authority exceeded its powers, committed an error of law, committed a breach of the rules of natural justice, reached a decision which no reasonable tribunal could have reached, or abused its powers. He accordingly relied on the case of **Pastoli vs Kabale District Local Government Council & Others (supra)** and **Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji, [2014] eKLR**.

36. The counsel also cited the decision of this in **Republic vs Nairobi City County and Another [2019] eKLR** stated however erroneous the judgment or a decision may be in law or whatever injustice that erroneous judgment or decision may inflict, the erroneousness or injustice of the judgment or decision does not make the judgment contrary to natural justice.

37. The extent of the applicability of the Ismaili Constitution to the 2<sup>nd</sup> Respondent is provided in Article 3 of the said Constitution which provides as follows:

**“3.1. This Constitution shall come into force and bind and be applicable to all Shia imami Ismaili Muslims wherever they may be by not later than 18th December 1987.**

**3.2 This Constitution shall apply to Ismailis worldwide subject only to the overriding effect of any applicable laws of the land of abode of any Ismaili to the extent of any inconsistency.**

**3.3 The Rules and Regulations applicable in respect of each territory shall come into force on such date as Mawlana Hazar Imam may determine.”**

38. It is not disputed that the 2<sup>nd</sup> Respondent is not a natural person but a juristic person. The main difference between a natural and juristic person, is that personal laws, including religious laws such as the Ismaili Constitution, while applicable to natural persons, do not normally apply to juristic persons unless specifically provided for in its constitutive legal instrument. In this respect, the 2<sup>nd</sup> Respondent, being a limited company, is governed by the provisions of the Companies Act.

39. This Court cannot therefore rely on the Ismaili Constitution to impose obligations upon the 2<sup>nd</sup> Respondent with respect to any dispute between it or its members and the *ex parte* Applicant. It is also notable that under Article 3 thereof, the Ismaili Constitution does not apply to the exclusion of the laws of the place where Ismailis are resident, and is on the contrary expressly subjected to those laws.

40. In this respect, sections 6, 7 and 8 of the Magistrates Court Act, being one of the laws that apply in the residence of both the *ex parte* Applicant and Respondents, provides for the jurisdiction of Magistrates Courts in the criminal, civil, human rights violations, employment, labour relations and land and environment matters specified therein. The *ex parte* Applicant has not pleaded nor shown that the Nairobi Chief Magistrate's Court lacks jurisdiction in **CMCC No. 1002 of 2017 – Aga Khan Education Services (Kenya) vs Nazir Jinnah** or has exceeded its jurisdiction or otherwise acted unlawfully in the exercise of the said jurisdiction.

41. The above observations, coupled with the finding of this Court that the 1<sup>st</sup> Respondent decision to decline jurisdiction was not unreasonable, lead to a conclusion that there is no cogent justification proffered by the *ex parte* Applicant for this Court to interfere with the proceedings of the Nairobi Chief Magistrate's Court in **CMCC No. 1002 of 2017 – Aga Khan Education Services (Kenya) vs Nazir Jinnah**.

#### ***On the remedies sought.***

42. The last issue of the remedies sought was submitted on extensively by the counsel for the 2<sup>nd</sup> Respondent. It was submitted in this regard that an order of certiorari issues to quash a decision already made and if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with as was emphasized by the Court of Appeal in **Kenya National Examination Council vs Republic ex parte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996** and Mativo J. in **Republic vs National Land Commission Ex-Parte Ephraim Muriuki Wilson & others [2018] e KLR**.

43. It was contended in this respect that the *ex parte* Applicant has not presented any order, ruling or any specific decision from the lower court that is illegal, unreasonable or unreasonable to warrant this Court's supervisory jurisdiction, and the attempt to quash the proceedings in **CMCC No. 1002 of 2017 – Aga Khan Education Services (Kenya) v Nazir Jinnah** is misinformed as the proceedings are purely of a commercial nature.

44. In addition, counsel submitted that on the order of mandamus sought be the *ex parte* Applicant, and cited the pronouncement in the case of **Mureithi & 2 Others v Attorney General & 4 Others, [2006] 1 KLR (E&L) 707** that mandamus issues to enforce a duty, the performance of which is imperative and not optional or discretionary. Counsel also relied on the decisions to this effect in **Republic vs National Employment Authority & 3 others Ex-Parte Middle East Consultancy Services Limited [2018] eKLR** and **Republic vs Public Procurement Administrative Review Board & 2 others Ex-Parte Pelt Security Services Limited [2018] eKLR**.

45. Accordingly, counsel submitted that the *ex parte* Applicant has not demonstrated that in failing to adjudicate the complaint due to lack of jurisdiction the 1<sup>st</sup> Respondent acted illegally, irrationally or committed procedural impropriety. It was also counsel's submission that there was no outright refusal by the 1<sup>st</sup> Respondent to admit the complaints, and on the contrary, that it dutifully accepted the complaints, and after reviewing the same advised that it did not have jurisdiction.

46. Lastly, it was submitted that it is trite that a court cannot issue orders in vain, as held in **Republic vs Anti-Counterfeit Agency & 2 others Ex parte Surgippharm Limited [2015] eKLR** and the decision in **Republic v Independent Electoral and Boundaries Commission Ex-Parte Mohamed Ibrahim Abdi & 4 others [2017] eKLR** was also cited for the position that the Court will consider if the remedy of judicial review is the most efficacious in the circumstances.

47. I am guided by the parameters for the grant of certiorari and mandamus orders, as set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR** thus:

**“...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.”**

48. This Court's powers to grant relief in judicial review are also discretionary, and once it reaches a conclusion that a particular decision or action was unlawful, it has discretion to grant or refuse a final remedy. If and when the Court grants a final remedy, it also has discretion as to what remedy should be granted.

49. In the present application, no illegality has been demonstrated with regards to the proceedings in the Nairobi Chief Magistrate's Court in **CMCC No. 1002 of 2017 – Aga Khan Education Services (Kenya) vs Nazir Jinnah** to merit a quashing order. In addition, the *ex parte* Applicant has also not established that the 1<sup>st</sup> Respondent acted illegally or unreasonably, and it is also not in dispute that the 1<sup>st</sup> Respondent did receive the *ex parte* Applicant's complaints, and made a decision to decline jurisdiction in light of its powers under the Ismaili

Constitution.

50. The 1<sup>st</sup> Respondent in effect did apply its mind to *the ex parte* Applicant's complaint and made a decision thereof, and therefore effectively exercised its duty and powers in this regard, albeit not to the *ex parte* Applicant's liking. It is notable in this respect that under the Ismaili Constitution, the *ex parte* Applicant has an option to appeal to the International Conciliation and Arbitration Board set up under Article 12, if dissatisfied with the 1<sup>st</sup> Respondent's decision.

51. Lastly, the grant of the order of mandamus is discretionary, and it is notable in this respect that the *ex parte* Applicant did not disclose that he has various other suits involving the 2<sup>nd</sup> Respondent over the same subject matter as the present application. There is thus the risk of the various Courts granting conflicting decisions, and given that judicial review is a remedy of last resort, the *ex parte* Applicant is in the circumstances not deserving of the exercise of this Court's discretion.

### **The Disposition**

52. In the premises, I find that the *ex parte* Applicant's Notice of Motion application dated 7<sup>th</sup> August 2019, is not merited, and is accordingly dismissed. Each party shall bear its own costs of the said Notice of Motion.

53. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF AUGUST 2020**

**P. NYAMWEYA**

**JUDGE**

### **FURTHER ORDERS ON THE MODE OF DELIVERY OF THIS JUDGMENT**

**In light of the declaration of measures restricting Court operations due to the COVID -19 Pandemic, and following the Practice Directions issued by the Honourable Chief Justice dated 17th March 2020 and published in the Kenya Gazette on 17th April 2020 as Kenya Gazette Notice No. 3137, this judgment will be delivered electronically by transmission to the email addresses of the *ex parte* Applicant's and Respondents' Advocates on record.**

**P. NYAMWEYA**

**JUDGE**