



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

CONSTITUTIONAL PETITION NO. 30 OF 2020

IN THE MATTER OF: A PETITION BY M.H, M.G.J, J.C.G

(Suing of their own Accord and on behalf Of OAMPGA- parents and Guardians of minor students Enrolled in Oshwal Academy Mombasa)

AND

IN THE MATTER OF: ARTICLES 10,19,20,22, 23, 27, 28, 32, 33, 43(1)(F), 46,47,53 AND 258 CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF: SECTIONS 4, 5, 9, 12, 13, 14, 15 and 84, of CONSUMER PROTECTION ACT, 2012, LAWS OF KENYA.

AND

IN THE MATTER OF: SECTION 3, 4, 5(2) (C) and 7 OF THE FAIR ADMINISTRATION ACTIONS ACT, 2015, LAWS OF KENYA.

AND

IN THE MATTER OF: BREACH AND THREATENED CONTINUED BREACH OF THE BILL OF RIGHTS UNDER ARTICLES 27, 28, 32, 33, 43(1) (F), 46, 47 AND 53 CONSTITUTION OF KENYA, 2010.

-BETWEEN-

1. MH

2. MGJ

3. JCG (Suing of their own Accord and on behalf Of OAMPGA - parents

and Guardians of minor students Enrolled in

O Academy Mombasa.....PETITIONERS

AND

1. NITIN PRAVINCHANDRA MALDE

2. MUKESH VELJI SAVLA

3. SAAJAN RAMESH SHAH

4. SUHASH RATILAL SHAH

5. DIPAL DHIRAJLAL SHAH

6. SHITAL SHANTILAL HARIA

7. BHARAT VELJI SHAH (All sued as OFFICE BEARERS

OF THE O EDUCATION & RELIEF BOARD)

8. O ACADEMY MOMBASA.....RESPONDENTS

RULING

1. There are two applications before court for consideration and subject of this Ruling.

2. The first application is the Petitioners' **Notice of Motion** application dated **30th October, 2020** and filed on the even date. It seeks for orders that:

a) Spent;

b) That pending inter parties hearing of this application, interim orders do issue in the following terms;

a. An order do issue restraining the Respondents, whether by themselves, their agents, servants, employees, assignees, representatives from deregistering and/or continuing any learner from the 8th Respondent Institution and/or the 8th Respondent institution's virtual learning experience (VLE) Platform on account of:

i. Non-payment of the 50% Fees,

ii. Non-Payment of the full fees, on or before 31/10/2020 in respect of the period April, 2020 to July 2020, the Period declared by this Honourable Court not to be a normal school term.

b. An order do issue Restraining the Respondent, whether by themselves, their agents, servants, employees, assignees, representatives from compelling any learner to:

i. Engage in the VLE;

ii. Pay up any portion of the fees in respect of the period April, 2020 to July, 2020 the Period declared by this Honourable Court not to be a normal school term.

c. An order do issue restraining the Respondents, whether by themselves, their agents, servants, employees, assignees, representatives from all and any acts and/or omissions amounting to Harassment, intimidation coercion, undue influence, victimization and/or discrimination against any learner on account of fees status in respect of the period April, 2020 to July, 2020 the period declared by this honourable court not to be a normal school term or at all.

c) That he orders subject of prayer 2 above be served upon the court bailiff for purposes of monitoring compliance therewith.

d) That the orders subject of prayers 2 and 3 above do persist until the Hearing and Determination of this Application.

e) That the prayers subject of prayer 2 above do issue permanently, pending the formation of a parents Teachers Association and Conclusion of Deliberations between the Respondents and the PTA as regards the;

i. Mode of dissemination

ii. Pricing

f) That the costs of this application be provided for.

3. The Petitioners' Application is supported by the fourteen (14) grounds on the face of it and an affidavit of **MH**, the first petitioner herein. In a brief summary, the Petitioner's case is that the Respondents have failed to comply with the Judgment delivered in this suit on 2/9/2020 by failing to form a PTA within 60 days of the Judgment as was directed by the court. Instead, the Respondents have resorted to demanding full fees payment for term 3 even without making any attempts to engage the Petitioners with a view of resolving the impasse between the parties. The Petitioners annexed their letter dated 19/10/2020 and addressed to the Respondents in an effort of resolving the impasse between the parties but as averred, it was received with hostility.

4. The Respondents opposed the application vide a Replying affidavit sworn on 17/11/2020 by **Jackline Bwari Aminga**, the 8th

Respondent's head of school. She deponed that the Respondents elected to appeal to the Court of Appeal against part of the Judgment of this court in which it was decided that the period between the closure of the 8th Respondent on 15/3/2020 and the normal reopening thereof as directed by the Ministry of Education is not a normal school term and the engagement of the Petitioners' Children during such period does not amount to normal school term and that the Applicants had violated Articles 46 and 47, both of the Constitution of Kenya. In the deponent's view, the instant application is only intended to defeat the preferred appeal.

5. She deponed that the court had directed the full payment of school fees and the subsequent orders for status quo are interfering with the school management. It averred that the court is estopped from making a contrary finding to its orders directing the full payment of fees despite the respondents' efforts to accommodate the parents who had not paid the full school fees by extending the deadlines. In any case, the deponent asserted the view that the court's judgment was with regard to the fees payable in the 2019/2020 academic year while the 8th Respondent Institution has transposed to 2020/2021 academic year.

6. The second application is the Respondents' Notice of Motion Application dated 3/11/2020 brought under the provisions of Section 1A, 1B, 3A and 95, all of the Civil Procedure Act, Order 50 Rule 6 and Order 51 Rule 1 both of the Civil Procedure Rules, Article 159 of the Constitution, Rule 30 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and all enabling provisions of law. The application seeks for orders that;

a) Spent;

b) Spent;

c) That the Honourable court be Pleased to extend time within which the Respondent shall constitute a PTA by 160 days,

d) That the costs of this application be in the cause.

7. The application is supported by an affidavit sworn on affidavit sworn on 3/11/2020 by **Jackline Bwari Aminga**; the 8th Respondent's head of school. Here, the deponent reiterates that the Respondents have preferred an appeal against part of the Judgment delivered on 02/9/2020 to the extent I have described above.

8. She however adds that the order requiring the establishment of a Parents' Teachers' Association (PTA) is not subject to the intended appeal and the Applicants are keen to give effect to that order. That there was a considerable delay in obtaining copies of the judgment and challenges brought about by the ravages of Covid-19, hence the Applicants could not comply by setting up the PTA within 60 days as ordered. It is averred that the circumstances were beyond the control of the Applicants, and in the interest of Justice the court should exercise its discretion by extending the period for the formation of PTA for a further **160 days**.

9. This application is opposed by the Petitioners on basis the of the Grounds of opposition dated on 17/11/2020 and filed on the even date. The grounds are:

a) That the Application is belated, ill-conveived, misinformed and tainted with mala fides for the reasons that:-

i. It seeks orders that are untenable in the circumstances of this case;

ii. It is vexatious and does not meet the threshold requirements for grant of the orders sought

iii. It is bad in law and an abuse of court process in light of the rules of practice & procedure

iv. It bears grounds not supported by any facts as deponed to in the supporting affidavit;

v. It is fatally defective,

vi. It is a poorly-concocted after-thought only meant to delay the Petitioners' access to and enjoyment of justice herein.

b) That the application is therefore grossly incompetent, fatally defective, frivolous, vexatious, wholly unmerited and ought to be struck out ab initio for being an abuse of the court process;

c) That it is therefore only in the interest of justice that the Respondents' said Application be dismissed with costs to the Petitioners.

10. Both applications proceeded for hearing on 18/11/2020 and they were canvassed by oral submissions with **Mr. Ngonze** representing the Petitioners and **Mr. Mwangi** and **Mr. Kaula** representing the Respondents. The submissions by the parties' advocates mirrored the pleadings namely the originating summons and supporting affidavit, the further affidavit and the Replying affidavit and the further replying affidavit which need not be replicated here as they are well captured in the facts of this case as restated above.

11. **Mr. Ngonze**, Counsel for the Petitioners was however amenable to the court allowing the application for the extension of the period for the formation of the PTA, provided that it is carried out on in good faith and the orders of status quo issued by the court do persist until then.

12. On behalf of the Respondents, **Mr. Kaula** submitted that the Petitioners were trying to obtain a further injunction after a judgment has

been delivered. In his view, the Petitioners were misconceived to think that the court can still order a 50% payment of fees. He added that the only avenue for the Petitioners after a Judgment has been delivered is either through an appeal or a review which can only be granted when the court is satisfied that there is an error apparent on the face of Judgment or a mistake discovered by the court.

Analysis and Determination

13. I have considered the two applications, the grounds in support of each application, the replying affidavits, able submissions by counsels and the law. What is in momentous in both applications is with regard to the extent of jurisdiction this court can exercise having pronounced the final Judgment on the issues surrounding this Petition.

14. The Petitioners herein seek for an order restraining the Respondents from discontinuing any learner from Virtual Learning Platform or from compelling any learner to engage on the virtual learning platform until a Parents' Teachers' Association is formed. They also seek for an order restraining the Respondent from discriminating any learner on account of payment of 50% school fees or even failure in engaging in the 8th Respondent's VLE Platform.

15. The Respondents on the other hand are of the view that these issues were determined and a Judgment delivered. Therefore no substantive order could issue save for purposes of either reviewing the Judgment or Appeal. Also, parties seem to be amenable to this court extending the period for the formation of a PTA only that the Petitioners are concerned that the Respondents should be restrained from demanding full school fees or discontinuing any learner from the VLE Platform until a PTA is formed.

16. In my view, the structure of the Kenyan courts is that there must be finality to proceedings/litigation and the court should refrain from issuing orders which are detrimental to the concept of finality in litigation within hierarchy and structure of the Kenyan courts.

17. This Court also takes cognizance that when this court has delivered judgment, it is believed that all pertinent issues and points of law have been fully canvassed and considered. It is also believed that upon delivery of Judgment, the rights of the parties have been determined and it is a legal requirement that the decree emanating from the judgment be executed.

18. With regard to the Application dated 30/10/2020 filed by the Petitioners seeking injunctions as highlighted above, the submissions by counsels, evidence on record, points of law and relevant authorities all have been raised, re-examined, weighted, deliberated upon and judgment made.

19. By asking the court to grant an injunction restraining the Respondent from discontinuing the learners on account of non-payment of 50% fees would be tantamount to asking the court to vary its Judgment delivered on 2/9/2020 given that the court had ordered for full payment of school fees by parents who opted to continue with the virtual classes. Therefore, payment of full school fees was optional to parents who opted to engage in the virtual classes.

20. As it appears to me, the Petitioners' application is based on the discomfort of the fact that no PTA has been formed as directed by this court. However, in my view, orders by this court, which is a court of equity, can only be used as a shield and not as a sword. In other words a party cannot seek orders from the court to use an axe of his/her/its own grind.

21. Respectfully, I wish to state that, this Court is *functus officio* with regards to the issues raised in the application dated 30/10/2020 and the justiciable forum to consider the merits or otherwise of these new circumstances must shift from this Court to the Court of Appeal.

22. I wish to adopt the dicta by the Supreme Court in the case of **Raila Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR**, where the court observed that;

“A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available”

23. It then follows that, this court in exercise of its legal and constitutional obligation and so as to uphold decorum and integrity in the scheme of justice-delivery, should only grant orders aimed at perfecting the Judgment delivered in this Petition on 2/9/2020.

24. In the Judgment of 2/9/2020, this court directed that Respondents do facilitate the formation of Parents' Teachers' Association within 60 days of the Judgment and thereafter engage the Parents' Teachers' Association in matters of provision of Education services through virtual Class and tuition fees payable thereof.

25. The court further directed that the parents who wished to enroll their children for the virtual classes, pay full fees pending compliance with the formation of PTA.

26. In relation to the two applications under consideration the court ought to give an order aimed at perfecting the Judgment delivered on 2/9/2020. However, the issue which remains for determination is whether the court should extend the days for the Respondents to comply with the order directing the formation of a PTA for a period of 160 days.

27. I must hasten to add that this court exists for the sole purpose of administering justice and in doing so, it must of necessity balance between competing rights and interests of all the parties herein but within the confines of the law so as to ensure the ends of justice are met. Litigants in every matter also bear a corresponding duty to comply with the orders of court equally.

28. In the end I am of the opinion that to ensure compliance with the Judgment herein, the period for the formation of the Parents' Teachers Association should be allowed as sought. In the circumstances, I do make the following orders:

- a) The time within which the Respondent shall constitute a Parents Teachers Association (PTA) is hereby extended by 160 days;*
- b) Failure to comply with the orders in (a) above the Petitioners be at liberty to move the court for contempt proceedings;*
- c) There shall be no orders as to cost.*

DATED, SIGNED and DELIVERED at MOMBASA on this 15TH Day of DECEMBER, 2020.

D. O CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.