REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 53 OF 2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDER OF MANDAMUS

AND

IN THE MATTER OF RKG (A MINOR)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CHILDREN'S ACT NO. 8 OF 2001, LAWS OF KENYA

-BETWEEN-

REPUBLIC...APPLICANT

-AND-

THE BOARD OF MANAGEMENT,

[PARTICULARS WITHHELD] SCHOOLS............1ST RESPONDENT

HELLEN OCHIENG (HEAD TEACHER)

[PARTICULARS WITHHELD]

SCHOOLS, BURU BURU..2ND RESPONDENT

AND

PK...*EX PARTE* APPLICANT

JUDGMENT

Introduction.

1. The *ex parte* applicant seeks an order of *mandamus* compelling the first and second Respondents to re-admit his son RKG- Minor, a pupil in class seven (7) at the first Respondent's [Particulars Withheld] School Buru Buru.

Factual Matrix.

2. The *ex parte* applicant contends that the minor, has been a pupil at [Particulars Withheld] School, Buru Buru from baby class, and, that in January 2019, the minor reported to the school, and was assigned a locker, a seat, books and a place in class 7.

3. He also states that the minor sat for the school opening exams, but he missed school for a few weeks, with the knowledge of the school due to transport logistics. Additionally, he states that he notified the class teacher about the predicament, but on 11th February 2019, when he took the minor back to the school, the school administration declined to accept him back on grounds that the class was full.

Legal foundation of the application.

4. The applicant contends that the refusal to re-admit the minor is a violation of his right to education, and, offends Respondent's statutory duty to consider the minor's best interest.

The Respondent's Replying Affidavit.

5. **Hellen Ochieng,** the School's Head Teacher swore the Replying Affidavit dated 20th March 2019. She averred that the minor had been a pupil in their school since 1st August 2009, and that, he is currently supposed to be in class seven. She further averred that during the time he had been a student in the school, the minor was involved in serious disciplinary issues, which the school overlooked to allow him to continue with his education. She also averred that when the school opened on 8th January 2019 for the 2019 academic year, the minor reported, but without any notice or permission from the school, he absented himself from 9th January 2019 to 11th February 2019 in violation of the school's rules and regulations.

6. M/s Ochieng deposed that on 11th February 2019, the minor's mother accompanied by the minor went to the school to seek his re-admission. She avers that his mother informed the school that they had transferred the minor to a boarding school in Kitengela known as [Particulars Withheld] International School but he refused to settle down, hence, the reason why they were seeking his re-admission in the their school.

7. She stated that they notified his mother that since they had withdrawn and transferred the child without informing the school, they did not act in good faith, hence, they would not re-admit the child. Additionally, she averred that on 5th March 2019, she visited [Particulars Withheld] International School and confirmed that the minor is a pupil in the said school. She also deposed that the minor did not sit for the school opening exam as alleged and in support of the said averment; she annexed a copy of class results register to her affidavit.

8. M/s Ochieng also stated that the minor's mother admitted having transferred the child to another school. She contended that there was no formal communication on the minors' absenteeism. Further, she contended that by withdrawing the child from the school one year before his final examination, the applicant failed to consider the minors best interests, and, that, and the school has no obligation to admit a pupil who is a student in another school.

9. Upon analysing the facts presented by the Parties, I find that the only issue for determination is whether the *ex parte* applicant has established any grounds for the court to grant the order of *Mandamus.*

10. However, before addressing the above issue, I find it appropriate to mention that the first Respondent is a private institution, namely a school. The second Respondent is a private citizen. The *ex parte* applicant seeks an order of *Mandamus.* This being a judicial Review relief, the question arises whether an order of *Mandamus* can issue against a private institution or a private citizen. Unfortunately, none of the counsels deemed it fit to address this point despite being prompted by the court to do so.

11. Traditionally, the Judicial Review orders of *Mandamus*, *Certiorari* and *prohibition* were only available against public bodies. Judicial Review developed as a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the Rule of Law.

12. Judicial Review Remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the Rule of Law. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring administrative bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Judicial review is the procedure used by the courts to supervise the exercise of public power. It is a means by which improper exercise of such power can be remedied and it is therefore an important component of good public administration. [1]

13. Traditionally, judicial review orders were only available against public bodies in public law matters. In essence, two requirements needed to be satisfied. *First*, the body under challenge must be a public body whose activities Judicial Review can control. *Secondly*, the subject matter of the challenge must involve claims based on public law principles not the enforcement of private law rights.[2]

14. However, in a modern society, the State has to undertake a multitude of socio-economic activities. This in turn results in transferring its obligations to other bodies and at the same time retaining certain control over them. This gives a great impetus for the public and private bodies to acquire gigantic concerns, and thereby exercise monopoly power over its activities, which are so akin to governmental function. However, the fundamental rights of the citizens are at times violated by these activities.[3]

15. It is therefore paramount for the courts to pronounce themselves on the question whether private bodies performing public duties can be brought within the purview of 'judicial review.' Such an innovative step if taken by the judiciary would open new vistas to the meaning of 'State' and thus stimulate the judiciary to protect the fundamental rights not only from the clutches of legislature and executive but also from 'public' and 'private' bodies. Judicial review is now extended against private bodies, which are entrusted with public duty. A striking example is *R. v. Panel on Take-overs and Mergers, Exparte Datafin pl*c[4] where the court held that in determining whether the decisions of a particular body were subject to judicial review, the court was not confined to considering the source of that body's powers and duties but also had to look to their nature. Accordingly, if the duty imposed on a body, whether expressly or by implication, was a public duty and the body was exercising public law functions, the court had jurisdiction to entertain an application for judicial review of that body's decisions.

16. The amenability of Judicial Review jurisdiction against private associations was also decided by the Court of New Zealand in *Finnigan* v. *New Zealand Rugby Football Union"**[5]*** where the court while evaluating the impact of `judicial review' over private concerns observed:-"... the boundaries between public and private law and their respective supervisory functions are breaking down, and that principles of good administration which bear a strong resemblance to the substantive rules of judicial review were applied to a private body...'[6]

17. Section 2 of the Fair Administrative Action Act[7] defines an **"administrative action"** to include—the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or any act, omission or decision of any person, body or authority that affects the legal

rights or interests of any person to whom such action relates.

18. Judicial Review in now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa. In *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others,*[8] the South African Constitutional Court held that:-

> "*the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts."*

19. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy.

a. *First,* parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights.

b. *Second*, the right to access the Court is constitutionally guaranteed.

c. *Third*, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article **23(3) (f).**

d. *Fourth,* section **7** of the Fair Administrative Action provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section **7 (2)** of the act provides for grounds for applying for Judicial Review.

20. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

21. The use of the words:- " any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates" must receive a liberal meaning for the purpose of enforcement of fundamental rights under Article 22 which guarantees the right to approach the court and Article 23 which confers powers on the High Court to issue judicial review orders.

22. The words "Any person, body or authority" are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body concerned is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owed by the person or authority to the affected party no matter by what means the duty is imposed. If a positive obligation exists, *Mandamus* cannot be denied.[9]

23. On the question whether the *ex parte* applicant has demonstrated grounds to warrant the order sought, the applicant's counsel relied on his pleadings and added that the decision is irrational and arbitrary. He also stated that the decision is not based on reasons. He contended that the decision is drastic and that no reasons were supplied for the decision. He also contended that there was no evidence that the minor was secretly transferred from the school. Lastly, he urged the court to exercise its discretion and grant the orders.

24. The Respondents' counsel contended that illegality was not proved. She argued that the child was secretly transferred to another school. She argued that his mother admitted this fact. She contended that there was no illegality, and, in any event, it is the parents who should have considered the best interests of the child before transferring him.

25. The *ex parte* applicant seeks an order of *Mandamus* to compel the Respondents to re-admit the minor at their school. An order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.[10] *Mandamus* is a judicial command requiring the performance of a specified duty, which has not been performed.

26. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way, nor to direct the retraction or reversal of action already taken in the exercise of either.[11]

27. *Mandamus* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised based on evidence and sound legal principles.

28. The test for *mandamus* is set out in *Apotex Inc. vs. Canada* (*Attorney General*),[12] and, was also discussed in *Dragan vs. Canada* (*Minister of Citizenship and Immigration*).[13] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. *The Applicants have satisfied all conditions precedent; and*

b. There must have been:

I. *A prior demand for performance;*

II. A reasonable time to comply with the demand, unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv*) No other adequate remedy is available to the Applicants;*

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

29. This is a case where the *ex parte* applicant is said to have transferred his child from the school. I find no serious contest to this assertion. This is not a case of expulsion for the court to determine the legality of the process. It is not a case where the child was subjected to disciplinary proceedings for the court to examine the legality of the decision. Re-admission to a school after withdrawing a child is not as of right. The *ex parte* applicant is under a duty to demonstrate that the Respondents have a duty to re-admit the child. He has a burden of establishing breach of the duty. There is no evidence to prove the existence of such a duty or breach of the duty nor do I find any.

30. Additionally, *Mandamus* is a remedy of last resort. It must be granted in exceptional circumstances, and, where an applicant has no other remedy. It has not been shown that this is the most efficacious remedy in the circumstances of this case. In fact, it is said that the child is already in another school. The *ex parte* applicant confirmed this in court even though he baptized it as "remedial classes."

31. The discretionary nature of the Judicial Review remedy sought in this application means that even if a court finds a body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable. In this case, the minor's mothers admitted that they transferred the minor to another school. The transfer was done without the courtesy of informing the school. They cannot turn round and blame the school after the child refuses to settle in the new school.

32. Judicial Review orders can be refused where the applicant has acted in bad faith or unreasonably. In this case, it was an act of bad faith for the parents to transfer the child to another school without informing the school.

33. In addition, the court will decline to exercise discretion in favour of an applicant where a remedy would impede the authority's ability to deliver fair administration, or perform its functions. Compelling the Respondents to re-admit the minor under the circumstances of this case would amount to the court interfering with the Respondent's operations. The minor ceased to be a student the moment the parents transferred him from the school, and the Respondents have the right to re-admit him back or decline but the court cannot compel them to perform a duty they are not legally bound to perform.

34. Since the grant of the orders of *Certiorari*, *Mandamus* and *Prohibition* is discretionary, the court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders.

35. It is my view that the nature and circumstances of the decision fall into the category of areas, which are not disturbed by the courts unless the decision under challenge is constitutionally fragile and unsustainable. If the decision is legal and lawful, the reasonableness and propriety of the same may not be questioned by the courts. In other words, among the *Wednesbury* principles of *'illegality'*, *'irrationality'* and *'impropriety'*, if the decision can get over the first test, it may withstand the other two tests, unless it is shockingly unreasonable, perverse or improper.

36. The test of reasonableness is not applied in a vacuum but in the context of life's realities. I do not think it would be reasonable for the court to compel a child to be re-admitted in a school where the school has for good reasons decided not to admit him. Such an environment may not be the conducive for the best interests of the child.

37. As has been repeatedly pointed out by this court, the court should be extremely reluctant to substitute its own views as to what is wise, prudent and proper in relation to decisions formulated by educational institutions or professional bodies possessing the expertise and experience of actual day to day working of their institutions.

38. It will be wholly wrong for the court to make a pedantic and purely idealistic approach to a problem of this nature, isolated from the actual reality and circumstances of the case. In essence, the court must engage in a balancing exercise, arrive at a global judgment on proportionality, and not adhere mechanically to a sequential checklist. Further, the court should not lose sight of the ultimate values to be protected, that is, the best interests of the child. There is a compelling need to ensure that the child remains in an environment that is manifestly conducive to his wellbeing. I am afraid, much as the parents insist, the strain caused by this case as evidenced by the fierce arguments in court leave the court worried whether compelling a school to re-admit a child beautiful as it may be would be in the child's

interests. In the event of anything happening to the child while in school, courtesy of a court order, the parties will naturally approach the eventuality with great mistrust and suspicion. The court will have failed in its duty by failing to exercise its discretion properly and weigh the pros and cons of granting such an order.

39. In view of my analysis herein above, I find and hold that this is not a proper case for the court to grant the Judicial Review Order of *Mandamus*. Even if the applicant had established any grounds (which he has not), the court would have been reluctant to exercise its discretion in his favour in view of the circumstances of this case. The upshot is that the *ex parte* applicant's application dated **13th** March 2019 is hereby dismissed with no orders as to costs.

Signed, Delivered and at Nairobi this 29th day of April 2019.

John M. Mativo

Judge

---

[1] Andrew Le Sueur and Maurice Sunkin, *Public Law* 1 (ed) (1997) Longman, London, page 466.

[2] Ssekaana Musa, *Public Law in East Africa* (2009) LawAfrica Publishing, Nairobi, page 37.

[3] V. SATHISH, Private concerns with public duties: amenability to writ jurisdiction.

[4] {1987} 1 All E.R. 564.

[5] {1985} 2 N.S.L.R. 159.

[6] Dawn Oliver, "Is the *Ultra Vires* Rule the Basis of Judicial Review?" [1987] *Public Law* 543 at p.556.

[7] Act No. 4 of 2015.

[8] *2000 (2) SA 674 (CC) at 33.*

[9] A.I.R. 1989 S.C. 1607.

[10] See *Kenya National Examinations Council vs R ex parte Geoffrey Gathenji Njoroge & 9 Others* {1997} eKLR.

[11] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review, 53 GEO. IJ. 19, 25-26 (1964).

[12] 1993 Can LII 3004 (F.C.A.), [1994] 1 F.C. 742 (C.A.), aff'd 1994 CanLII 47 (S.C.C.), [1994] 3 S.C.R. 1100.

[13] 2003 FCT 211 (CanLII), [2003] 4 F.C. 189 (T.D.), aff'd 2003 FCA 233 (CanLII), 2003 FCA 233).