



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

PETITION NO. 98 OF 2012

IN THE MATTER OF: CHAPTER FOUR (4) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ARTICLES 22 AND 40 OF THE CONSTITUTION OF KENYA

**IN THE PETITION OF: PETITION BY FRANCIS JOMO ON BEHALF OF THE BAPTIST
CONVENTION OF KENYA CHALLENGING INFRINGEMENT OF THEIR
CONSTITUTIONAL RIGHTS BY CONTINUED USE OF ALL THAT PROPERTY KNOWN AS
PLOT NO. 91 SECTION II MN BY THE RESPONDENTS**

BETWEEN

PASTOR FRANCIS JOMO.....PETITIONER

VERSUS

1. THE HON ATTORNEY-GENERAL

2. MINISTRY OF EDUCATION

3. MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENTS

JUDGMENT

The Petition

1. The Petition before the court is dated and filed in court on 11th October, 2012, by the Petitioner, who describes himself as a Pastor and a registered trustee of the Baptist Convention of Kenya who is the beneficial owner of all that property known as Subdivision No. 91 of Section II Mainland North registered in the names of the Southern Mission Board of the Southern Baptist Convention.

Brief facts of the Petition

2. Sometimes in 1986 the Baptist Convention of Kenya through Kisauni Baptist Church established a student centre with a vision of establishing a private pre-primary and primary schools. The Petitioner

alleges that at all material times the government acknowledged that the institute belonged to the Convention and was ready to assist by providing teachers who were employed by the Teachers Service Commission. The assistance by the government as stated above did not in any way divest the Baptist Convention of Kenya the right to own and run the centre as a private institution. Sometimes in 2003, following the introduction of free primary school education the Baptist Convention of Kenya through Kisauni Baptist Church was informed that the school could not operate as a private school unless it was registered as such with the Ministry of Education. The Baptist Convention of Kenya through Kisauni Baptist Church made a formal application for the registration of the school as a private institution and complied with all the necessary requirements. The Ministry of Education communicated their willingness to register the school as a private school but insisted that the 3rd Respondent first approves the same. The Petitioner's case is that the 3rd Respondent has without any legal justification or any reason at all refused to approve the registration of the school as a private institution thus infringing on the Petitioner's and the Baptist Convention of Kenya's constitutional rights to run the school as a private institution. The 3rd Respondent's refusal to approve the registration of the school in the manner hereinabove stated is allegedly motivated by a desire to compulsorily acquire the subject property without observing the provisions of the Constitution. The Petitioner states that the 3rd Respondent is currently running the school at the exclusion of the Petitioner Baptist Convention of Kenya or Kisauni Baptist Church, thereby infringing on the Petitioner's constitutional right to own property as enshrined in Article 40 of the Constitution. It is alleged that the 3rd Respondent is actually interested in acquiring the subject property having made the request through the Foreign Mission Board which request was ultimately turned down.

3. Pursuant to the foregoing the Petitioner prays for the following orders:

(a) A declaration that all that property known as Kisauni Baptist Church Student Centre on Plot No. 91/II/MN and the school being run thereon belongs to the Baptist Convention of Kenya through the Foreign Mission Board of the Southern Baptist Convention.

(b) A declaration that the Respondents have no proprietary interest in all that property known as Plot No. 91/II/MN.

(c) A declaration that the Baptist Convention of Kenya being the beneficial owner of all that property known as Plot No. 91/II/MN has a legal right to determine how the school is to be run and more particularly to determine that the same be run as a private school to the exclusion of the Respondents.

(d) Since Baptist Convention of Kenya has complied with the statutory obligations and requirements necessary for the running of a private school, this honourable court be pleased to order the Respondents to register Kisauni Baptist Church Student Centre as a private school and that the same be run exclusively by Baptist Convention of Kenya in accordance with the relevant statutory requirements and in the following manner:-

(i) That the pupils currently in the institution's nursery school be allowed to complete the nursery programme for the year 2012 where after the nursery school be handed back to the Baptist Convention of Kenya.

(ii) That the pupils currently enrolled in Kisauni Baptist Primary School (standard one to eight) be allowed to continue and complete their education in the institution under the free primary school education programme.

(iii) That all new admissions/enrolments in the Kisauni Baptist Primary and Nursery schools, beginning with the nursery and standard one intake for the year 2013, be done by the Baptist Convention of Kenya, which owns the school, as a private institution.

(e) An order that the Respondents do pay the costs of this Petition.

4. The Petition is supported by affidavit of the Petitioner sworn on 11th October, 2012. In the affidavit, the Petitioner states that he is a trustee of the Baptist Convention of Kenya who is the registered owner of the property known as Plot No. 91/II/MN Kisauni on which Kisauni Baptist Student's Center lies together with the buildings and developments thereon. The said Kisauni Baptist Students Center comprises of pre-primary and primary schools all of which were initiated built and developed by the Baptist Convention of Kenya.

5. At the time the school was established and several years thereafter the government had categorized schools into two categories that is Private, Assisted Private and Public schools. The aforesaid school fell under the category of the private but assisted school, the assistance by the government being limited to provision of teachers through the Teachers Service Commission. Sometime in 2003 or thereabouts the government abolished the category of private and assisted schools and the Petitioner was advised to make a formal application for the registration of the school as a private school. The Petitioner annexed to the Petition copies of documents evidencing their application to have the school registered as a private school. Thereafter the Petitioner received a response from the Ministry of Education Science and Technology urging them to liaise with the 3rd Respondent's education committee. However, the Petitioner alleges that the 3rd Respondent failed to comply with the direction. In the meantime, The Petitioner tried to sort out the issues with the Provincial Administration. (copies of correspondence are annexed and marked as "D" to the Petition. However the Petitioners were surprised when on the 16th day of January, 2004 the 3rd Respondent illegally sent its employees and/or agents to demolish the Plaintiff's walls and take charge of the institution, despite the fact that the suit property belongs to the Petitioner exclusively. In taking charge of the institution as hereinabove stated, the 3rd Respondent allegedly demolished the schools, concrete wall and destroyed other properties and thereby subjected the Petitioner to a loss currently estimated at Kshs. 300,000/=. It is alleged that the 3rd Respondent's agents are still occupying the said school and have banned the Petitioner from entering the said school and or managing the same. The Petitioner's case is that the 3rd Respondent's actions are illegal and it is just and fair that the orders sought herein granted. In the event that the 3rd Respondent remain in the said school, the Petitioner will be subjected to irreparable loss as they have been effectively dispossessed of their property.

6. Further to the foregoing, the 3rd Respondent illegally threw out the teachers employed by the Petitioner from the school without due regard to the pupils. The Petitioner urges the court to hold that the Respondents have no right to the suit property and further that the Petitioner's right and ownership of the said property is protected by Article 40 of the Constitution of Kenya. The Petitioner states that the 3rd Respondent's action is not informed by good intentions noting that the 3rd Respondent has in the past tried to persuade the Petitioner to sell the property to them.

The Response

7. The Petition is opposed by the 1st Respondent vide a replying affidavit of **Francis W. Tsuma** dated and filed herein on 4th December, 2012 and a replying affidavit of **Abdikadir M. Kike**, sworn on 14th March, 2013 by the 2nd Respondent. The Respondents' case is that the Petition is incompetent for lack of authority by the deponent to the supporting affidavit, to commence these proceedings. The Respondent deny that plot No. 91/11/MN belongs to the Baptist Convention Centre but that the same belongs to the Foreign Mission Board of the Southern Baptist Convention (hereinafter referred to as 'the church') as is evidenced by Annexure A in the Petitioner's Affidavit. The Respondent state that in 1986, the Municipal Council of Mombasa was approached by members of the Church who wanted the government assistance to build a school. The Council obliged and funded the Church and together they built Kisauni Students Centre (hereafter referred to as 'the school'). The Respondent deny that the school was solely built by the Church as alleged in the petition. The Respondents' case is that since the schools inception on 1986, the government through the Municipal Council of Mombasa has constructed several buildings including 14 classrooms, a staffroom, 1 office, 1 store, 19 toilets for both boys and girls, costing to millions of shillings. The government further provided teachers including the Head teacher from the Teachers Services Commission (TSC) and paid their salaries. In view of the above, the school is a public school as envisaged in section 2 of the Education Act Cap 211 Laws of Kenya. After the inception of free Primary

Education in 2003, the school being a Public School, received funds directly from the Government which said funds were restricted and monitored. This angered some individuals who became dissatisfied with the new order hence an application to register the school as private was lodged with the Ministry of Education Science and Technology. Consequently, the 3rd Respondent could not comply as the school had already been issued with a code way back in 1988 and was recognized to be a public school for the last 26 years. The 3rd Respondent deny ever demolishing the Petitioner's wall or employing its agents to deny the Petitioner access as alleged in the petition.

8. Further the 3rd Respondent denies encroaching on the petitioner's property or infringing any of their constitutional Rights as alleged in the petition. The Respondents' case is that due to the fact that the Government through the 3rd Respondent has for the past 23 years invested millions of shillings both in infrastructure and manpower, it is only fair and just that the 3rd Respondent be granted a beneficial interest in the school. Denial of the same would amount to unjust enrichment of the Petitioner. The Respondents' case is that if the orders sought in the petition are granted, thousands of children will be effected as they would have to pay school fees to attend the school contrary to what they were made to believe when they joined the school. It is alleged that the petitioner's action are causing great anxiety and distress to many students most of whom are poor and depend on free primary education. If the orders sought herein are granted and the School is converted to a private school thousands of children will lose the right to free basic education which is provided for in Articles 53 of the Constitution.

Submissions

9. Parties agreed to dispose off the Petition by way of written submission. **Mr. Wameyo** Counsel for the Petitioner submitted that the church is the beneficial owner of all that property known as subdivision No. 91/II/MN. In 1986 the church through Kisauni Baptist Church established a student centre with a view to establishing private pre-primary and primary schools. The school was eventually build by the church. The church did not receive any funding from the government or the public for the venture. There was therefore no dispute to the fact that the school was owned by the church. Indeed as early as 2004, the 3rd Respondent had even made a formal request to the church to sell to it a portion of the aforesaid property which the 3rd Respondent clearly acknowledged as owned by the church. Counsel submitted that during this time there existed three categories of schools, namely: Private schools, Private assisted schools and Public schools.

10. The church operated the pre-primary school as a private school. The primary section was however run as a Private Assisted School. The government assisted the church by providing teachers through the Teachers Service Commission. There was no dispute or disagreement on who was the owner of the school. In 2003 the government introduced free primary school and abolished Private Assisted Schools as a category in the education sector. The church was given an option to either operate as a public school or apply to be registered as a private school. The church chose to apply for the registration of the school as a private school thus terminating its relationship with the government. The application for registration is dated 19th May, 2003. By a letter dated 22nd May, 2003, the 3rd Respondent through the Municipal Education Officer instructed the Public Health Officer to inspect the school for purposes of registration. The inspection was carried out on 1st July, 2003 and by a letter dated 14th July, 2003 and addressed to the 3rd Respondent, the Deputy Chief Public Health Officer recommended that the school be registered, licensed and operated. However the 3rd Respondent failed to implement the aforesaid recommendations thus leaving the church with no alternative but to complain to the 2nd Respondent. **Mr. Wameyo** submitted that the 2nd Respondent had no objection to the application but urged the church to liaise with the 3rd Respondent. It was not until sometime in 2004 that the 3rd Respondent informed the church that the application for registration had been rejected. No reason was given for the rejection. The recommendation to register the school was thus ignored without any reason. The church was not given a hearing to respond to any concern on the part of the 3rd Respondent. In fact the 3rd Respondent did not communicate to the church such concerns. **Mr. Wameyo** submitted that in view of the foregoing, the rejection of the church's application was capricious, arbitrary and discriminatory. The rejection of the application was not communicated to the church. However the same was communicated to the

Petitioner's counsel in 2004 in CMCC No.5635 of 2003. The explanation for the rejection of the registration offered by the 3rd Respondents was that all such applications were rejected in Mombasa. There was thus no enquiry on the circumstances of the church's case, the recommendations following the inspection and the consideration of the fact that the school had never been a public school but a private assisted school.

11. **Mr. Wameyo** submitted that in any event the explanation offered is also incorrect. Other schools within Mombasa such as MM Shah Primary School and PCEA Makupa Primary School had all been restored to the management of the sponsors. Why the discrimination? Counsel submitted that it is also noteworthy that the 3rd Respondent had as early as 1984 requested the church to sell to it a portion of the aforesaid property. By rejecting the application for registration, Counsel submitted that the 3rd Respondent was singularly driven by a desire to finally acquire the property. Their previous request to purchase the same had been rejected by the church. The church had complied with all legal requirements and there was no reason for the rejection of the application.

12. **Mr. Wameyo** submitted that it is not in dispute that the church is the beneficial owner of the suit property. It is also not in dispute that the school was built by the church. All subsequent developments in the school were carried out by the church. It is also not disputed that the government assisted the school by deployment of government teachers. It is also not disputed that following the introduction of free primary school education in 2003, the church applied for the registration of the school as a private school. Counsel submitted that by its conduct, the church did not donate or surrender the property and the school thereon to the Respondents. Counsel referred court to Article 40 of the Constitution in which the church's interest or right to the property is protected. Under Article 260 of the Constitution, such rights cover school buildings and other fixtures on the land which are all recognized as property under the said Article. Counsel submitted that the Respondents on other hand do not have any proprietary interest in the property. Consequently, the takeover of the property by the Respondent and the exclusion of the church from the management and running of the school constitute an infringement in the church's right to own property. Mr. Wameyo submitted that to maintain, as Respondents do, that whereas the land belongs to the church, the school and the property thereon is a public school would result in an absurdity. In construing Articles 40 and 260 of the Constitution, Mr. Wameyo urged the court to apply a purposive approach to Constitutional interpretation and embrace a presumption against absurdity – meaning that the court should avoid a construction that leads to absurdity or produces unworkable or impractical result. Counsel urged the court to apply a purposive and generous interpretation of the aforesaid Articles that best ensures the enjoyment of the right to own property as protected thereunder.

13. On his part **Mr. Ngari**, Counsel for the 1st Respondent submitted that the foreign mission board of the southern Baptist convention is the registered owner of the suit property and the same is held in trust for them by the (5) five registered trustees appearing on page two of annexure "A" of the petitioners supporting affidavit. Counsel submitted that it follows therefore that prayer (a) of the petition should fail as the suit property herein is clearly registered in the name of the Foreign Mission Board of the Southern Baptist Convention and is run by the Baptist Convention of Kenya registered trustees. The names of the trustees are clearly shown and it is quite evident that the petitioner is not one of the trustees.

14. Further, Mr. Ngari submitted that it is important to note that the petitioner has not adduced any evidence to show that he has the authority of the registered trustees named in the certificate of incorporation at page 2 of annexure "A" in the supporting affidavit to the petition, to file and prosecute this petition. In short Counsel submitted that the petitioner's affidavit is sworn without necessary authority and in the circumstances Counsel urged the court to find that it is incompetent and the same should be expunged from the record. If that is done then the petition is fatally and incurably defective and the same should be dismissed with costs to the respondents.

15. As to whether the Respondents have any interest in the suit property, Mr. Ngari submitted that at paragraph 8 and 16 of the affidavit dated 4/12/2012 sworn by Francis N Tsuma, which is uncontroverted, the developments carried out on the suit parcel of land by the Government through the defunct 3rd respondent are clear. Counsel referred to the affidavit of Abdikadir Kike sworn on 14/3/2013 at paragraph

11 which reiterates the fact that the Government has incurred a huge financial outlay in construction and automatically has beneficial interest in the school which sits on the suit parcel of land the subject of this petition. Counsel submitted that any decision affecting the school has to be made through the prism of the best interest of the children in the school currently.

16. **Mr. Ngari** referred to Article 53 (1) (b) of the Constitution which he submitted guarantees every child the right to free and compulsory basic education. Counsel also referred to Article 28 of the Convention of the Rights of the Child, where State parties are enjoined to recognize the right of the child to education. Further, Article 26 of the Universal Declaration of Human Rights provides that everyone has the right to education, that education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Mr. Ngari submitted that it is not in dispute that the right to education is paramount in the development and well-being of a child. Counsel cited in the case of **John Kiplangat Barbaret & 3 others v Attorney General & 4 others [2014] e KLR**, where it was observed that:

“Education is in a sense, the bedrock of the development of society. It provides for means by which an individual is able to pursue happiness, free himself from the bonds of poverty and ignorance and effectively participate in the governance and development of the State.”

17. Based on above Articles **Mr. Ngari** urged the court to find that the State has a beneficial interest in the suit land the subject of this petition and to decline to grant the orders sought by the Petitioners. **Mr. Ngari** also submitted that the court cannot order the registration of the school as a private institution. Counsel submitted that the Kisauni Baptist Centre has for over 24 years been run by the Municipal Council of Mombasa, the 3rd Respondent herein. Counsel submitted that it is uncontroverted that the Government constructed several buildings in the school including but not limited to classrooms, the staffroom and toilets and so government has a beneficial interest in the school.

18. Mr. Ngari also submitted that during the pendency of this petition, the law changed. The Education Act was repealed by The Basic Education Act. The manner or process of converting public schools to private school changed. Section 43 of the Basic Education Act is in the following terms:

“43. (1) Basic Education institutions shall be categorized as-

Public schools which are schools established, owned or operated by the Government and includes sponsored schools;

Private schools which are schools established, owned or operated by private individuals, entrepreneurs and institutions.

(2) A public basic education institution shall not be converted to a private basic education institution or to other private status without consultation with the National Education Board and approval of the Cabinet Secretary.”

19. Mr. Ngari submitted that pursuant to above new law the Petitioner now has an avenue to apply for the conversion of the school in the proper manner as set out in the law and as such this court, under the current law, has no jurisdiction to grant prayer (D) as sought in the Petition. Counsel also submitted that the Petitioner is not entitled to costs in any event. Mr. Ngari urged the court to dismiss the petition with costs.

The Determination

20. I have carefully considered the petition and opposition to it. I have looked at the issues for determination as raised by the parties. In my view, the following are a reconciliation of the said issues, and I raise them for determination of the petition herein.

(1) Whether the Petitioner has a *locus standi* to commence the petition.

(ii) Whether the Petitioner or the church is entitled to an order for registration of the school as a private school

(iii) Whether the church's right to property, or that of the Respondents, have been infringed.

(iv) Costs.

21. I will address all the above issues simultaneously. The first issue is whether the petitioner has *locus standi* to bring this petition on behalf of the Baptist Convention of Kenya. Mr. Ngari for the 1st Respondent had submitted that the petitioner is not listed as one of the trustees for the Baptist convention of Kenya and further that in any event the Petitioner did not secure the authority of the other trustees to bring this Petition. Mr. Wameyo for the Petitioner dismissed the said allegations. Pointing out, correctly in the view of this court, that at page 2 annexure 'A' the name of the petitioner is clearly stated as a trustee. I have looked at the said documents and I have seen that the petitioner is indeed a trustee of Baptist Convention of Kenya.

22. The other issue is whether the petitioner had the authority of his fellow trustees to file the petition. I have perused both the petition and supporting affidavit. It is clear that the petitioner has not attempted to secure the authority of his co-trustees to bring the petition. Even in the supporting affidavit, the petitioner merely state that he is a trustees of the Baptist convention of Kenya. Nowhere has he stated that the petition is authorized by the other trustees or that he brings the petition on behalf of the other trustees. I think this was a material omission, the basis of which the entire petition may stand dismissed. It is also a material negligence on part of the petitioner and the said the Baptist convention of Kenya, for which they must be penalised in one way or the other. However, this court is empowered to save proceedings which other than for want of form, could have merit. Indeed the petition herein seeks to enforce rights to property which are protected in the Bill of right under Article 40 of the Constitution. In the enforcement of the bill of Rights, Article 22 states that every person has the right to institute court proceedings claiming that a right or fundamental freedom on the bill of rights is under threat. Article 2(2) state that

(2) In addition to a person acting in their own interests, court proceedings shall be instituted by

a) a person acting on behalf of another person who cannot act in their own name.

b) a person acting as a member of, or in the interest of, a group or class of person,

c) a person acting in the public interest.

Under Article 22(3) b, formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum, and in particular that the court shall, if necessary entertain proceedings on the basis of informal documentation.

Paragraph (d) states

d) the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities.

23. Indeed Article 159 (2) (d) now demands of this court the need to administer justice without undue regard to procedural technicalities, while section 1A, 1B and 3A of the Civil Procedure Act now demand that the court administers justice having in mind the overriding objective which is to do justice.

24. Pursuant to above observations it is the finding of this court that in the interest of justice the petition shall stand. This is more so because the benefits to be derived from this petition cannot accrue to the petitioner as a person, but only to the Baptist Convention of Kenya. However, this is not to say that this court encourages negligence and lethargy in drafting legal proceedings, and the petitioner must be penalized for this glaring lethargy.

25. The second issue is whether the petitioner is entitled to an order for registration of school as private school. In answer to this issue, this court has found out that the process of registration was already underway, and that the same should be completed. The change of law did not affect what was already under consideration. A law does not operate retroactively unless it is clearly so stated. What we have is a situation where public servants who are under statutory duty to perform their duties, fail to do so causing the state to suffer. There are several private schools in this country. Others are still being registered. There is no reason to discriminate against the petitioner given that approval had already been filed by the 1st Respondent. The 1st Respondent's case is that it had contributed to the buildings in the school. However, no evidence of such contribution was tendered in evidence. The only evidence of contribution by the 1st Respondent is in providing T.S.C teachers to the school. It is therefore not true that the 1st Respondent's right to property is infringed. It is not shown when such rights to property accrued given that the title to the school is exclusively in the name of the Baptist convention of Kenya. When it comes to building or construction, the Respondents have not shown what they have contributed in terms of building materials, finances or in any other manner. It is the findings of this court that the petitioner is the owner of the school and the infrastructure thereon.

26. That notwithstanding, the structured manner in which the petitioner has proposed to register the school as private institution, which this court agrees with, will ensure that the Respondents recover prorata whatever their investments may have been in the school. According to that structure, the Respondents interest in the school will progressively wane, culminating into nothing, in the last primary year of the standard one pupils admitted on the year the school is registered as a private institution. That will, accruing to this finding, be this year 2017. This means that the Respondents interest shall remain for the duration of a complete generation of a primary school calendar whether under the 8.4.4. System or a new system to be established.

27. I am therefore satisfied that the petitioner has proved his case on a balance of probability and that he is entitled to prayers sought in the petition.

28. In the upshot, Judgment is hereby entered in favour of the Petitioner against the Respondents jointly and severally as follows;

a) It is hereby *declared that all that property known as Kisuani Baptist Church Student Centre on Plot No. 91/11/MN and the school being run thereon belong to the Baptist Convention of Kenya through the Foreign Mission Board of the Southern Baptist Convention.*

b) *It is hereby declared that the Respondents have no proprietary interest in all that property known as plot No. 91/11/MN.*

c) *A declaration is hereby made that the Baptist Convention of Kenya being the beneficial owner of all the property known as plot No. 91/11/MN has a legal right to determine how the school is to be run and more particularly to determine that the same be run as a private school to the exclusion of the Respondents.*

d) *Since Baptist Convention of Kenya has complied with the statutory obligations and requirements necessary for the running of a private school, this court now hereby orders the Respondents to register Kisauni Baptist Church Students Centre as a private school and that the same be run exclusively by Baptist Convention of Kenya in accordance with the relevant statutory requirements and in the following manner:-*

i That the pupils currently in the institution's nursery school be allowed to complete the nursery programme for the year 2017 where after the nursery school be handed back to the Baptist Convention of Kenya.

ii That the pupils currently enrolled in Kisauni Baptist Primary School (standard one to eight) be allowed to continue and complete their education in the institution under the free primary school education programme.

iii That all new admissions/enrollments in the Kisauni Baptist Primary and Nursery schools, beginning with the nursery and standard one intake for the year 2018, shall be done by the Baptist Convention of Kenya, which owns the school, as a private institution.

29. To penalize the Petitioner for failure of formalities referred to in this Judgment, each Party shall bear own costs of this Petition.

Dated, Signed and Delivered in Mombasa this 20th day of April, 2017.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Wameyo for Petitioner

No appearance for Respondents

Mr. Randu Court Assistant