



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF ELDORET**

**JUDICIAL REVIEW NO. 1 OF 2015**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**IN THE MATTER OF ARTICLE 47 AND 50 OF THE KENYA CONSTITUTION 2010**

**BETWEEN**

**REPUBLIC..... APPLICANT**

**VERSUS**

**THE MINISTRY OF EDUCATION,**

**SCIENCE AND TECHNOLOGY.....1<sup>ST</sup> RESPONDENT**

**THE HON ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**WESTERN KENYA CONFERENCE.....3<sup>RD</sup> RESPONDENT**

**SCHOOL MANAGEMENT COMMITTEE**

**KAKIPTUI PRIMARY SCHOOL ..... EXPARTE APPLICANT**

**JUDGMENT**

**1.** Pursuant to leave granted on 2<sup>nd</sup> February 2015, the Exparte applicant, *the school committee of Kapkitui Primary School* moved this court through the Notice of Motion dated 3<sup>rd</sup> March 2015 seeking the remedies of certiorari, mandamus and prohibition against the respondents namely the *Ministry of Education, Science and Technology (1<sup>st</sup> Respondent)*, *The Hon. Attorney General (2<sup>nd</sup> Respondent)* and *the Seventh Day Adventist Western Kenya Conference (3<sup>rd</sup> Respondent)*.

**2.** The prayers sought by the Ex-parte Applicant (the applicant) were in the following terms;

**i)** An order of certiorari to quash the decision to change the sponsorship of Kakiptui Primary School from District Education Board to Seventh Day Adventist and re-registration of Kakiptui Primary School to Kakiptui SDA Primary School.

**ii)** An order of mandamus compelling the 1<sup>st</sup> respondent to cause cancellation of certificate of registration of School for Kakiptui SDA Primary School issued on 7<sup>th</sup> August 2014 and order of

prohibition prohibiting the SDA church from interfering with the management and sponsorship of Kakiptui Primary School.

iii) That the respondents be condemned to bear the costs of the proceedings.

3. In the statutory statement dated 3<sup>rd</sup> March 2015 and the verifying affidavit sworn by *Stanley Kemboi*, the chairman of the applicant, the applicant contends that Kakiptui Primary school has been operating as a public school under the sponsorship of the community and the District Education Board since 1978; that in the month of September 2014, the school received a letter from the Seventh Day Adventist Church (SDA church) western Kenya Conference forwarding a provisional certificate dated 28<sup>th</sup> December 2015 and later a full registration certificate dated 7<sup>th</sup> August 2014; that the School Committee was not consulted nor was due process followed in effecting change of the school's name from Kakiptui primary School to Kakiptui SDA Primary School.

4. In a surprise turn of events, the 1<sup>st</sup> respondent who was represented in the proceedings by the Hon Attorney –General supported the motion instead of opposing it. Learned state counsel *Mr. Dennis Otieno Wabwire* swore a supporting affidavit on 17<sup>th</sup> June 2016 on behalf of both the 1<sup>st</sup> and 2<sup>nd</sup> respondents in which he deposed that Kakiptui Primary School (the school) was a public institution established under the sponsorship of the District Education Board; that its running and development was being funded by the community and the Government

through capitation grants for free primary education programs; that the addition of the name SDA to the name of the school was done secretly and irregularly without involving the relevant stakeholders including the applicant, the area Education Officer, the National Education Board and without following the procedures enumerated under the Basic Education Act; that the 1<sup>st</sup> respondent does not have any records showing how the change of name was effected; that the change of the school's name was tainted with illegality and it was in the interest of justice that the application be allowed.

5. The application is opposed by the 3<sup>rd</sup> respondent vide a replying affidavit sworn on 25<sup>th</sup> February 2015 by its Executive Director *Mr. Christopher Misoi*. In the affidavit, besides averring that the application was incompetent, the deponent contended that it was the SDA church (the church) which established the school on or about 1981 but that it allowed the District Education Board (DEB) to run it as a public institution; that the church is the sponsor of the school since it owns the land on which the school is built; that it is the school committee which applied for the issuance of the impugned certificate of registration of the school and it cannot now turn around and complain against its issuance ; and, that it has not been disclosed how the 3<sup>rd</sup> respondent was interfering with the management of the school.

For the above reasons, the 3<sup>rd</sup> respondent invited the court to dismiss the Notice of Motion with costs for lack of merit.

6. By consent of the parties, the motion was canvassed by way of written submissions; those of the applicant were filed on 21<sup>st</sup> June 2016 while those of the 1<sup>st</sup> and 2<sup>nd</sup> respondent were filed on 29<sup>th</sup> June 2016. The 3<sup>rd</sup> respondents written submissions were filed on 19<sup>th</sup> July 2016.

The submissions were highlighted before me on 21<sup>st</sup> March 2017 by learned counsel *Mr. Maritim* for the applicant, *Mr. Wabwire* for the 1<sup>st</sup> and 2<sup>nd</sup> respondent and *Mr. Miyiinda* for the 3<sup>rd</sup> Respondent.

On the same date, upon application by *Mr. Maritim* for the applicant, prayer 1 of the application which sought the remedy of certiorari was marked as withdrawn.

7. I have carefully considered the substantive motion, the affidavits filed by the parties, the oral and written submission made by counsel on behalf of the parties and the authorities cited.

In his written submissions on behalf of the 3<sup>rd</sup> respondent, learned counsel *Mr. Miyiinda* raised a

preliminary objection to the competence of the motion stating that it was incompetent as it was filed before leave to institute judicial review proceedings was obtained. But in his oral submissions, counsel conceded that leave was in fact granted but in his view, the same was not valid as it had been granted by a judge of the Environment and Land court who did not have jurisdiction to grant such orders.

8. Before outlining the issues which in my view fall for my determination, I wish to address the preliminary issue raised by *Mr. Miyienda* right away so that we can get it out of the way.

The court record confirms that leave to institute the instant proceedings was duly issued on 2<sup>nd</sup> February 2015 and though it is true that the leave was granted by *Hon. Obwayo J* who is a judge of the Environment and Land Court, the 3<sup>rd</sup> respondent though aware of this fact did not subsequently move the court to set it aside on grounds that it was granted by a judge who did not have jurisdiction to grant the same.

9. The leave was in force on the date the Notice of motion was filed and has not been set aside to date. The motion was filed on the basis of the existence of that leave and having failed to apply to have it set aside, the 3<sup>rd</sup> respondent cannot purport to challenge the validity of that leave in the hearing of the judicial review application. In the premises, I find that the motion was competent and was properly before the court.

10. Turning now to a consideration of the other issues which emerge for my determination, I find that as the applicant has abandoned the prayer for the remedy of certiorari, the only issue that I need to determine is whether the applicant has demonstrated that it is entitled to the remedies of mandamus and prohibition.

11. As was well articulated by the Court of Appeal in *Kenya National Examination Council Vs Republic Exparte Geoffrey Gathenji Njoroge & 9 others (1997)eKIR* when discussing the scope and efficacy of the remedy of mandamus, the court said the following concerning the order;

***“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 and 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”.***

12. In this case, the applicant has urged the court to issue an order of mandamus to compel the 1<sup>st</sup> respondent to cancel the certificate of registration of the school in the name of Kakiptui SDA Primary school issued on 7<sup>th</sup> August, 2014 as the effect of this registration was to change the name and public status of the school unprocedurally and in violation of the law.

13. The 1<sup>st</sup> respondent has supported the applicant’s position that the school is a public institution funded by the Government through the 1<sup>st</sup> respondent and that the change in its sponsorship and issuance of the impugned certificate of registration was irregular as none of

the relevant stakeholders were consulted and the procedures enumerated in the *Basic Education Act* were not followed. The 1<sup>st</sup> respondent stated that it did not have any record concerning how the application for issuance of the said certificate was issued or processed yet being the regulator in the Education Sector, it was supposed to be the custodian of such documents.

14. The 3<sup>rd</sup> respondent in its riposte alleged that it is the applicant who applied for registration of the school in the name of Kakiptui SDA Primary School and that the certificate of registration was issued

legally. The 3<sup>rd</sup> respondent did not however avail any evidence to substantiate this claim.

15. It is not disputed that before the impugned certificate was issued, the school was registered with the 1<sup>st</sup> respondent as Kapkitui primary school since this was the name that was used to register its candidates for the Kenya Certificate of Primary Education though it would appear that no formal certificate had been issued to that effect.

*Section 43(2) of the Basic Education Act provides that “A public basic education institution shall not be converted to a private basic education institution or to any other private status without consultation with the National Education Board and approval by the Cabinet Secretary.* In the absence of evidence that the 3<sup>rd</sup> respondent followed the procedural steps set out in *Section 43(2) of the Basic Education Act*, the court must agree with the applicant and the 1<sup>st</sup> respondent that the certificate of registration was obtained in a process that was procedurally flawed and contrary to the law.

16. The 3<sup>rd</sup> respondent has claimed that it owns the land on which the school is built and that therefore, it was the school’s sponsor and the issuance of the certificate adding the church’s name to the school’s former name was lawful. I have noted that the church’s ownership of the said land is contested by the residents of Kakiptui area given the contents of the petition dated 2<sup>nd</sup> February 2015 annexed to the 3<sup>rd</sup> respondents replying affidavit. The petition was addressed to the Chairman of the National Land Commission and the Cabinet Secretary in charge of the Ministry of Lands. But even if the court was to assume that the church actually owned the land on which the school is located, this did not exempt it from following the law and due process in effecting the change of the school’s name through the issuance of the challenged certificate of registration.

17. Though it is clear from the pleadings that the 1<sup>st</sup> respondent was aware of the illegality in the issuance of the said certificate, instead of taking appropriate action to remedy the situation, the 1<sup>st</sup> respondent chose to fold its hands and do nothing about it though it is the organ of Government through which the Cabinet Secretary functions in licensing, registering and regulating all institutions that offer Basic Education in our country.

18. Having realized that the certificate aforesaid had been issued irregularly and contrary to the law, the 1<sup>st</sup> respondent being the regulator of the education sector owed the Kenyan citizens including the applicant’s school community a public duty to correct any errors or irregularities that may have been committed by its officers in the course of the performance of their duties immediately the errors or irregularities were brought to its attention. The 1<sup>st</sup> respondent did not have to wait to be sued in order to express its willingness to do what it ought to have done in the first place. It failed to perform its public duty and it is now the duty of this court to compel it to do so.

19. In view of the foregoing, it is my finding that this is a suitable case for the issuance of the remedy of mandamus as sought. I therefore allow the first limb of prayer 2 of the Notice of Motion and direct that an order of mandamus do issue to compel the 1<sup>st</sup> respondent to cancel the certificate of registration issued on 7<sup>th</sup> August 2014 in the name of Kakiptui SDA primary school.

20. In the second limb of prayer 2, the applicant sought an order of prohibition to issue against the 3<sup>rd</sup> respondent to prohibit it from interfering with the management and sponsorship of the school. As I held in ***Republic V The Industrial Court & William Muga Aketch Exparte Rev. Joel Kandie Chebii & Another JR. Misc Civil Appn. No 327 of 2010*** Judicial review is a challenge on administrative function. And consequently, judicial review remedies can only be issued against public or statutory bodies, public officers, tribunals or courts inferior to the High Court where it is claimed that any of them has either abused its or their powers by acting either arbitrarily, unreasonably, illegally or in excess of their jurisdiction or where they

have failed to perform their public duties.

Private entities or individuals sued in their private capacities are not amenable to judicial review – See also **Republic V Gerald Muthee & 3 others Exparte Kithaka Kiragacha (2007) eKLR.**

21. In this case, the 3<sup>rd</sup> respondent is obviously not a public or statutory body. It is a private entity within the SDA church. It is therefore clear that it was wrongly sued in these proceedings as a respondent since as a private entity, it is not amenable to judicial review. It ought to have been enjoined to the proceedings as an interested party. In the premises, it is my finding that the remedy of prohibition as prayed against the 3<sup>rd</sup> respondent is not available to the applicant in this case. The prayer for an order of prohibition is therefore not merited and it is hereby rejected.

22. In the end, the Notice of Motion dated 3<sup>rd</sup> March, 2015 partially succeeds with respect to the prayer for an order of mandamus.

23. On costs, even though the 3<sup>rd</sup> respondent was wrongly sued as a respondent, I find that it is not entitled to an award of costs considering that it was its irregular or illegal actions that necessitated

the institution of the instant proceedings. And as the motion has partially succeeded, I shall not make any order as to costs.

Each party shall bear its own costs.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 27<sup>th</sup> day of July, 2017**

In the presence of:

Mr. Miyianda for the 3<sup>rd</sup> Respondent

No appearance for the Exparte applicant and the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Mr. Lobolia court clerk