REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR MISC APPLICATION NO. 40 OF 2016

IN THE MATTER OF AN APPLICATION BY MUSAU NDUNDA, GENARD NYAGA & RACHAEL ODUOR (AS NATIONAL OFFICIALS OF THE NATIONAL PARENTS ASSOCIATION)

JUDICIAL REVIEW PROCEEDINGS

AND

IN THE MATTER OF PROVISIONS OF ARTICLES 10, 36, 73 (1) (F) AND 53 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF PROVISIONS SECTION 4(L),55(1),55(2) AND THE 3RD SCHEDULE OF THE BASIC EDUCATION ACT NO. 14 OF 2013.

AND

IN THE MATTER OF ARBITRARY REVOCATION OF AUTHORITY OF PARENTS ASSOCIATIONS IN PUBLIC SCHOOLS AND OF THE APPLICANT TO FORM PARENTS ASSOCIATION VIDE THE 1ST RESPONDENT'S LETTER REF NO. MOE.HQS/3/8/10 DATED 25TH JANUARY 2016 AND THE 2ND RESPONDENT'S LETTER REF NO. MOE.HQS/3/8/10 DATED 27TH JANUARY 2016 AND ARBITRARY INTERMEDDLING BY THE RESPONDENTS IN THE SELF-REGULATING SCHOOL PARENTS ASSOCIATION, SUB COUNTY, COUNTY AND THE APPLICANTS ASSOCIATION IN THE INTERNAL SELF-MANAGEMENT IN THE SELF-REGULATING AND SELF-REGULATION CONTRARY TO PROVISION OF THE THIRD SCHEDULE OF THE BASIC EDUCATION AND DENIAL OF PARTICIPATION BY THE SCHOOL PARENTS IN THE AFFAIRS AND MANAGEMENT OF THEIR SCHOOL PARENTS ASSOCIATIONS, SUB COUNTY PARENTS ASSOCIATIONS, COUNTY PARENTS ASSOCIATIONS AND NATIONAL ASSOCIATIONS.

AND

IN THE MATTER OF ARBITRARY INFRINGEMENT BY THE RESPONDENTS OF FUNDAMENTAL RIGHTS OF SCHOOL PARENTS GUARANTEED BY ARTICLE 13.3 AND 13.4 OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS GUARANTEEING TO PARENTS THE RIGHT TO PARTICIPATE IN THE GOVERNANCE AND MANAGEMENT OF BASIC EDUCATION OF THEIR CHILDREN.

REPUBLIC OF KENYA……..……..APPLICANT

AND

THE CABINET SECRETARY, MINISTRY OF EDUCATION

SCIENCE AND TECHNOLOGY.....1st RESPONDENT

PRINCIPAL SECRETARY,

STATE DEPARTMENT OF EDUCATION.....2ND RESPONDENT

EX PARTE: MUSAUNDUNGA]

GENARDNYAGA]

RACHAEL ODOUR]

Suing as National Official of the]

KENYA NATIONAL PARENTS ASSOCIATION]

JUDGEMENT

Introduction

1. By an amended Notice of Motion dated 24th February, 2016, the *ex parte* applicants herein, **Musau Ndunda**, **Gerald Nyaga** and **Rachael Oduor**, who instituted these proceedings in their capacity as the national officials of the **Kenya National Parents Association** seek the following orders:

A. Order of prohibition do issue directed to and prohibiting the respondents or any of them or their servants, agents from,

i. howsoever revoking or purporting to revoke the right and authority of the school parents to form school parents associations under the supervision of the applicants association.

ii. interfering with the applicants right to convene or conduct meetings, conventions, seminars, campaigns or other functions at the school or any other level, affiliating or recruiting school Parents Associations at school level or other levels whether at special general or annual meeting or conventions.

iii. howsoever implementing any decisions or actions aimed at barring the applicants from participating in activities of school parents associations as threatened by the 1st respondents letter Ref No. MOE.HQS/3/8/10 dated 25th January 2016 and the 2nd respondents Letter Ref No. MOE.HQS/3/8/10 dated 27th January 2016 and intermeddling with the management and self-regulation or governance of parents associations at the school, sub county, county or the applicants association.

iv. deny the applicants association the right of participating in elections of executive or other organs affiliated to the applicant whether by nominating the school parents association representatives to the respective boards of management, county education boards, sub county education boards and Kenya institute of curriculum development council and participating in all education forums, consultative meetings, taskforce committee meetings and any other education stakeholders meetings organized by any of the respondents or their servants or agents.

v. howsoever purporting to register or deregister or vet or grant accreditation to any school parents association or society whether at the school level, sub county level, county level or at the national level or purporting to regulate their constitution, membership, procedure, registration or management or activities.

vi. preventing parents associations at all level from freely exercising their right to freedom of associating and participating in the activities and functions of their school parents associations, sub-county, county and their national parents association.

vii. interfering with or preventing the applicants association its right of entry or exit from premises in public schools where parent's association meetings are held or elsewhere or from participating in open meetings or conventions of sub county, county or national parents association at any venue.

b. An order of mandamus directed to the respondents their servants or agents the principals, head teachers and board of management of public schools compelling them

i. to delink, and remove from the school funds and keep separate school parents association funds from funds raised by school parents for their activities and to facilitate within twenty one (21) days from the date of the order opening of school parents association bank accounts out of the levies made by school parents in the name of parents association/parents Teachers association funds or in any other name held or operated for and on behalf of parents and the accounts so opened to be operated by the respective school parents association chairperson, vice chairperson, treasurer and the principal or head teacher as signatories under the framework of respective school parents association constitutions.

ii. not to obstruct the right of school parents associations of financing their own activities and those of the applicant association including management of the school parents association funds.

iii. to appoint within twenty one (21) days from the date of the order the school parents association representative nominated by the applicants association to the boards if management, the county education boards, sub county education boards and the governing council of Kenya Institute of Curriculum Development.

c. An order of certiorari directed to the respondents to move the court and to quash the 1st respondent and 2nd respondent's letter Ref No. MOE.HQ/3/8/10 dated 25th and 27th January 2016 respectively

d. The honourable court be pleased to make further or other orders within its inherent jurisdiction

e. Costs occasioned hereby be awarded to the applicant

***Ex Parte* Applicants' Case**

2. According to the applicants, who claimed to be officials of **Kenya National Parents Association** (hereinafter referred to as "the Association") which, according to them, is a registered society that serves as the umbrella body of all the school parents association.

3. The applicants averred that on 26th January 2016 they received a letter from the 1st respondent revoking the formation or establishment of parents associations in schools and on 27th January 2016 the 2nd respondent wrote a circular letter to all his agents instructing them not to attend the applicants' meetings or allow schools to make any financial contribution to the applicant's organization.

4. Based on legal advice, it was contended by the applicants that parents associations are created under section 55(2) of the ***Basic Education Act***, No. 14 of 2013 (hereinafter referred to as "the Act") and as such the respondents have no power donated to them under the Act or under any other written law to arbitrarily revoke the formation of parents associations in schools or interfere with the self-regulating activities and financial management of the parents association. To the applicants, the two letters of revocation issued by the respondents have in effect denied the parents associations their statutory right of nominating their representatives in the boards of management, National Education Board, County Education Board, Sub County Education Board, and in the Governing Council of the Kenya Institute of Curriculum Development and further scuttled the operations and activities of the school parent's association committees and in effect turned off funding of the applicants association from the school parents associations. It was the applicants' case that parents' associations are legal bodies established by the Act and section 57(2) and Regulation 7(3f) of the ***Basic Education Regulations 2015*** (hereinafter referred to as "the Regulations") published under legal notice No. 39 of 8th April 2015 recognize the parents associations as one of the nominating entities during the constituting the boards of management.

5. It was averred the school parents associations have for many years been denied by the respondents and their agents an opportunity of opening and operating the school parents association bank account which is supposed to be used to deposit all contributions and donations made by the school parents. According to the applicants, the school parents have over the years been invariably imposing a levy on themselves to fund their activities and those of the applicants association but those levies are invariably collected and banked together with the school fees thus denying the school parents association their rights to operate their own bank accounts and managing their own finances.

6. participation in the boards of management the six (6) parents representatives elected pursuant section 56(1a) of the Act and the three (3) co-opted members elected pursuant to section 2(4) of the Third Schedule to the Act. It was averred that the Act does not have a provision for the 1st respondent or any other person or agency to regulate the activities of the parents associations, because section 4 of the Third Schedule is very clear in that "the parents association shall regulate their own procedures and affairs" which include their meetings and their finances from the school to the national level. It was their position that the school parents associations are regulated by their constitutions.

7. It was contended that whereas the 1st respondent published the school fees structure under gazette notice number 1555 of 10th March 2015, the same gazette notice did not include funds collected by the school parents associations to finance their functions which are donated under section 2(6) of Third Schedule to the Act and of which the said funds are still irregularly deposited in the school fees bank accounts. To the applicants, the 1st respondent's powers to regulate school funds are only limited to the gazettement fee structures published under legal notice No. 1555 of 10th March 2015 but has no power whatsoever under the Act or under any other written law to control or give any direction on how school parents associations funds were going to be utilized since the applicants association is not funded by schools from the government grants or from the gazetted school fees but it instead receives funding from the school parents association funds which are provided for under the constitution of the school parents association.

8. The applicants therefore were of the view that unless the respondents their servant, their agents or any other person working under them are restrained by this Court from interfering with the activities of the applicants association then the activities and operations of the parents associations in schools would be scuttled for good and their participation in the governance of their schools would just be a pipe dream.

Respondents' Case

9. In response to the application, the Respondents filed the following grounds of opposition:

> **1. That the applicants have not advanced any grounds in their amended statement dated 24th February 2016 to warrant the grant of the judicial review orders of certiorari, mandamus and prohibition as sought.**

2. That the application as drawn is a non-starter and fatally defective; the orders sought in the motion application are at variance with those sought in the amended statement dated 24/2/2016.

3. That the issues raised in this application have already been determined by a court of competent jurisdiction in Nairobi- HC Constitutional Petition No. 424 of 2014 Kenya National Parents Association (through the Secretary General – Musau Ndunda) versus the Cabinet Secretary, Ministry of Education Prof. Jacob Kaimenyi& 2 Others vide a judgment date 5th February 2016.

4. That the 1st and 2nd Respondents were within their powers in issuing the letter dated 25th January 2016 and 27th January 2016 respectively and there is therefore no basis for having the same quashed.

5. That the applicant lacks the locus standi to institute the present proceedings as it is not the national parents association envisaged under section 55 and the Third Schedule to the Basic Education Act; the applicants are busybodies who do not have a basis for purporting to manage the running of public schools in Kenya.

6. That this application is bad in law, has no merit, is ambiguous, an abuse of the process of this court and does not deserve favourable exercise of discretion by this honourable court and the same should be dismissed with costs to the respondents.

Determinations

10. I have considered the issues raised in this application.

11. The first issue for determination is whether the applicants herein through the association have *locus standi* to institute these proceedings. Whereas Articles 22 and 258 of the Constitution have expanded the issue of *locus standi* in constitutional matters, in this case, the applicants have moved this Court on the basis that they are the national officials of the Kenya National Parents Association, which according to them is the body established pursuant to section 55(2) of the Act as read with section 5 of the Third Schedule to the said Act.

12. The issue of the applicants' locus as the officials of the said body was the subject of the **Kenya National Parents Association vs. the Cabinet Secretary Ministry of Education & Others Petition No. 424 of 2014** in which **Mumbi Ngugi, J** expressed herself as follows:

> **"The correct position in law being as set out above, and the petitioner therefore not being the national parents association contemplated under section 55 and the Third Schedule to the Basic Education Act, one would have to agree with the respondents that the petitioner and Mr. Ndunda are busybodies who cannot claim to have a basis for purporting to manage the running of public schools in Kenya, and to, in essence, seek to usurp the powers of the Cabinet Secretary in charge of education in the running and management of schools…While Mr. Ndunda is at liberty to form and join any association, he is not, given the requirements of the Basic Education Act, entitled to form the national parents association contemplated under the Act. He can form any organization he wishes, but he does not have a right to insist that his organisation is the organisation contemplated by, and that is vested with various statutory mandates under, the Basic Education Act, and whose formation and election of members into is specifically provided for under the said statute…Further, the levying of charges to parents and schools, which the petitioner has been doing for the last three years or so as is evident from its pleadings, is unsupported by the law and is, in a sense, a fraud on the public. Regrettably, it has been perpetrated under the watch of the Ministry of Education which seems totally unaware of its duties under the Basic Education Act and whose officials seem to have gone along with every demand by the petitioner, without making reference to the law or seeking to understand what the law vests in or requires from**

the Ministry.

13. That decision still stands as there is no evidence that it has been set aside by an appellate Court or by review.

14. This Court appreciates that the findings in that case, being a Court of concurrent jurisdiction is not binding on this Court. However the said decision is persuasive and if it reflects the true legal position there would be no basis for this Court to form a different opinion. **Benjamin Cardozo's,** in ***'The Nature of the Judicial Process',*** **New Haven; Yale University Press (1921) p. 149** opines:

> **"In these days, there is a good deal of discussion whether the rule of adherence to precedent ought to be abandoned altogether. I would not go so far myself. I think adherence to precedent should be the rule and not the exception. I have already had occasion to dwell upon some of the considerations that sustain it. To these I may add that the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."**

15. The House of Lords similarly held in **R vs Knuller (Publishing, Printing and Promotions) Ltd (1973) A.C 435** :

> **"It was decided by this House in Shaw vs Director of Public Prosecution [1962] A.C 220 that conspiracy to corrupt public morals is a crime known to the law of England…I dissented in Shaw's case. On reconsideration I still think that the decision was wrong and I see no reason to alter anything which I said in my speech. But it does not follow that I should now support a motion to reconsider the decision. I have said more than once in recent cases that our change of practice is no longer regarding previous decision of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act… I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament."**

16. I also associate myself with the decision of **Lord Wilberforce** in **Fitzleet Estates vs. Cherry (1971) 1 WLR 1345**, where he expressed himself as follows:

> **"Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected …[D]oubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. It requires much more than doubts as to the correctness of such opinion to justify departing from it."**

17. Accordingly, a Court ought only to depart from its earlier findings, if there is a substantial cause and in exceptional circumstances.

18. The decision whether or not to grant judicial review reliefs is no doubt exercise of discretion. As is stated in ***Halsbury's Laws of England*** **4th Edn. Vol. 1(1) para 12 page 270:**

> **"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. *The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief*. Undue delay, unreasonable or unmeritorious conduct,**

acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. *Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment*. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders." [Emphasis added].

19. This position was reiterated by this Court in **Joccinta Wanjiru Raphael vs. William Nangulu – Divisional Criminal Investigation Officer Makadara & 2 Others [2014] eKLR** where it was held that:

> **"… it must always be remembered that judicial review orders being discretionary are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles...The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders. Since the court exercises a discretionary jurisdiction in granting judicial review orders, it can withhold the gravity of the order where among other reasons there has been delay and where the a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realized, even if merited. The Court would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance."**

20. Similarly, it was held in Newton Gikaru Githiomi & Anor vs AG/Public Trustee Nairobi HC JR 472 of 2014 that:

> **"It must be remembered that judicial review orders are discretionary. Since they are not guaranteed, a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. Further, as the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised."**

21. In light of the foregoing decision, it would be an improper exercise of this Court's discretionary power for this Court to ignore the decision made on facts similar to this one. I therefore agree with the respondents that following the delivery of the decision in the said petition, the applicants if they were minded to proceed with the appeal should have sought to stay these proceedings or withdrawn the same.

22. In my view, these proceedings are incompetent.

Order

23. Consequently, the amended Notice of Motion dated 24th February, 2016 fails and is struck out but with no order as to costs.

24. Orders accordingly.

Dated at Nairobi this 22nd day of July, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr F N Wamalwa for the applicants

Miss Maina for the Respondents

Cc Mwangi