REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 404 OF 2016

IN THE MATTER OF THE LAW REFORM ACT (CAP 26), LAWS OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE BASIC EDUCATION ACT NO. 14 OF 2013

AND

IN THE MATTER OF THE CHILDREN'S ACT, CAP 141, LAWS OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI BY T O S, T A A, J N M, J N AND K K, THROUGH THEIR PARENTS, A M O, S P A, N M, J M N AND P G

REPUBLIC……...…APPLICANTS

-VERSUS-

THE PRINCIPAL, S S S……1ST RESPONDENT

S S S…….....…….2ND RESPONDENT

THE BOARD OF MANAGEMENT, S S S.……...……3RD RESPONDENT

EX PARTE

1. A M O

2. S P A

3. N M

4. P G

5. J M N

RULING

Introduction

1. The ex parte applicants herein, **A M O, S P A, N M, P G** and **J M N**, filed an application by way of Chamber Summons dated 2nd September, 2016 seeking the following orders:

a. That this application be certified be and is hereby certified urgent and had in the 1st instance.

b. That the applicants herein *M/s* A M O, S P A, N M, P G, J M N, be and are hereby granted leave to apply for an order of *Certiorari* to remove into this honourable court, the proceedings in the respondence office at Sun Shine secondary school, for the purposes of being quashed, and quash proceedings and the charge sheet therein.

c. That the applicants herein *M/s* A M O, S P A, N M, P G, J M N, be and are hereby granted leave to apply for conservatory orders restraining/ stopping the respondents from to continuing with the suspension of the students, *T O S, T A A, J N M, J N and K J K* pending hearing and determination of this application.

d. That the applicants herein *M/s* A M O, S P A, N M, P G, J M N, be and is hereby granted leave to apply for an order (Prohibition) directed at the respondents prohibiting them from continuing with the suspension of the students, *T O S, T A A, J N M, J N and K J K* pending hearing and determination of this application to be filed herein upon leave being granted.

e. That the applicant, *M/s* A M O, S P A, N M, P G, J M N, be granted an order at the 1st instance prohibiting the respondents from respondents from to continuing with the suspension the suspension of the students, *T O S, T A A, J N M, J N and K J K* pending hearing and determination of this application until further orders of this court.

f. That the grant of leave herein do operate as a stay or as conservatory orders retraining the respondents from continuing with the suspension of the students, *T O S, T A A, J N M, J N and K J K* pending hearing and determination of this application.

a. Costs of this application be provided for.

2. According to the applicants, the students herein are minors (hereinafter referred to as "the subjects), who are students of Sun Shine Secondary School (hereinafter referred to as "the School") in the following classes:

a. T O S, Admission No: [……] ……..…Form 1[……]

b. T A A ……. Admission No: [……] ……Form 3[……]

c. J N M …. Admission No: [……] ……Form 3[……]

d. J N…… Admission No: [……] ……..…Form2[……]

e. K J Ka……... Admission No: [……] ……Form3[……]

3. The applicants averred that sometimes in the month of July, they were charged before the Children's Court at Nairobi vide criminal case number 409 of 2016 and released on bail pending the hearing and determination of this application (sic). However on the 29th day of August 2016, the respondents convened a board meeting while the said criminal case is still pending, without giving the subjects an opportunity to be heard, and made a decision to suspend them. When the subjects reported to school for 3rd term at various times thereafter, and after payment of 3rd term school fees, they were issued with letters suspending them pending the hearing and determination of the aforesaid criminal case.

4. According to the applicants, the subjects have a constitutional right enshrined in Article 53 of the Constitution, and section 7 of the ***Children's Act***, Cap 141, Laws of Kenya, to free and compulsory education. According to the applicants, in the said criminal proceedings the respondents herein are the complainant. To them the decision to suspend the subjects during the pendency of the criminal proceedings is unlawful and against the laid down provisions of the law as it amounts to subjecting them to double jeopardy

5. It was further contended that the suspension coming immediately after the payment of school fees was malicious and interferes with the subjects' education in particular those students who are in form three. In the applicants' view, to allow the students pay fees for the 3rd term and then suspend them indefinitely is malicious hence this Court ought to interfere as the decision is unreasonable and negates the provisions of the law.

6. The said suspension, it was disclosed is indefinite as it is pegged on the conclusion of a criminal case whose outcome is itself indefinite. According to the applicants the said decision is both a violation of the subjects' constitutional rights to education and their right to be heard. Further the said decision contravenes section 35(2) and (3) of the ***Basic Education Act***.

7. It was averred that this Court has unfettered discretion/jurisdiction to issue conservatory orders directing the respondents from excluding/continuing to exclude the subjects from school/class it`s Charge sheet against me in court pending the hearing and the determination of my application for judicial review orders herein.

8. The Court was urged to take judicial notice, that if the indefinite suspension of the subjects continues then the education acquisition of the students will suffer irreparably and their future life destroyed beyond repair.

Respondents' Case

9. In response to the application, the Respondents averred that the subjects listed in these paragraphs are no longer students of the 2nd Respondent. According to them, their parents submitted requests for their transfer on 2nd September, 2016 which request the school accepted and subjected the subjects to mandatory clearance procedures and in the end, issued each of them with a letter of clearance. According to the Respondents, as at 2nd September, 2016, the 2nd Respondent had received fees for third term from the 3rd and 4th *Ex Parte* Applicants but not from the 1st, 2nd and 5th *Ex Parte* Applicants contrary to the averments made on behalf of the subjects. It was averred that upon request for clearance, the 2nd Respondent refunded the said fees together with any overpayments for the 2nd term. It also refunded the sum of Kshs. 5000.00 being caution money to the 1st, 2nd, 3rd, 4th and 5th *Ex Parte* Applicants receipt of which all the *Ex Parte* Applicant's acknowledged by signing a copy of the payment vouchers.

10. According to the Respondents, the decision to exclude the subjects from school pending the hearing and determination of the Criminal case was made purely on safety grounds since the charges preferred against them are heinous and the Court is yet to determine their guilt or otherwise. Since the 2nd Respondent hosts more than 1000 students, it is important for the 3rd Respondent to secure the safety of the over 1000 students of the 2nd Respondent as well as its property.

11. To the Respondents, the suspension of the subjects is definite since it will determine once the Criminal Proceedings have been concluded and if deemed necessary, the *Ex parte* Applicants can request the trial court to dispose of the criminal proceedings expeditiously.

12. It was the Respondents' belief that at the time of clearing from the school, the *Ex Parte* Applicants had found suitable schools for the subjects and it was confirmed from the Principal of [particulars withheld] Academy, **Mr. Gerry Mandu** that **J N** had been admitted to the school while the Principal, [particulars withheld] School, **Mr. Amos Mzenge** confirmed that that **T A A** and **K J K** had been admitted the school.

13. It was therefore averred that the Orders sought at prayer (f) of the Application are incapable of being granted.

Determinations

14. On 6th September, 2016, this matter came before me for leave and stay as set out in the prayers hereinabove. I granted leave to commence judicial review proceedings but taking into account the nature of the orders sought, I deferred the hearing of the limb for directions that the leave so granted do operate as a stay for hearing *inter partes* pursuant to the proviso to provisions of Order 53 rule 1(4) of the ***Civil Procedure Rules.*** It is that limb that is the subject of this ruling.

15. However the mere fact that the application discloses a *prima facie* case does not automatically warrant the grant of stay of proceedings in question. The Court, despite a finding that the applicant has established a *prima facie* case must proceed to address its mind on whether or not to direct that the leave so granted ought to operate as a stay of the proceedings in question and that determination is no doubt an exercise of judicial discretion and hence like any other judicial discretion must be exercised judicially and not capriciously or whimsically.

16. The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallised over a period of time in this jurisdiction. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since where a decision has been implemented stay is nolonger efficacious as there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation that stay may be granted. See **George Philip M Wekulo vs. The Law Society of Kenya & Another Kakamega HCMISCA No. 29 of 2005.**

17. Therefore even where the leave is granted, it was held in **Jared Benson Kangwana vs. Attorney General Nairobi HCCC No. 446 of 1995** that in considering whether the said leave ought to operate as a stay of proceedings the Court has to be careful in what it states lest it touches on the merits of the main application for judicial review and that where the application raises important points deserving determination by way of judicial review it cannot be said to be frivolous.

18. In my view, it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding.

19. **Maraga, J** (as he then was) in **Taib A. Taib vs. The Minister for Local Government & Others Mombasa HCMISCA. No. 158 of 2006** was of the view that:

> **"…as injunctions are not available against the Government and public officers, stay is a very important aspect of the judicial review jurisdiction…I also want to state that in judicial review applications like this one the Court should always ensure that the *ex parte* applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application. Therefore where the order is efficacious the Court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that the stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose**

of stay orders in the judicial review jurisdiction? The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some people think. It encompasses the administrative decision making process *(if it has not yet been completed)* being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body *if it has been taken*. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act. With this legal position in mind I now wish to turn to the facts of this case and decide whether or not the Ex parte Applicant's case is deserving of a stay order. The Ex-parte Applicant seeks:

> **"THAT the grant of leave do operate as a stay stopping each and all the Respondents from restraining the Applicant from the exercise of his office, functions, duties and powers as the Mayor of Mombasa and as a nominated councilor in the Municipal Council of Mombasa."**

Can I grant this prayer in view of the scope and purpose of the stay order as stated above? I think not. Not as it is framed. To grant it as prayed would be compelling the Respondents to reinstate the Ex-parte Applicant to his position as Mayor before hearing them. Even in the cases cited by Mr. Orengo stay orders were not granted in the circumstances and terms as sought in this case. As I have already said, however, when dealing with applications like this the court should always ensure that the applicant's application is not rendered nugatory. Having considered all the circumstances of this case I am satisfied that the Ex-parte Applicant is deserving of a stay order but not as prayed in the application. What I think is an appropriate order to make in the circumstances of this case is to direct, which I hereby do, that the leave granted shall operate as a stay to restrain the Respondents jointly and severally from nominating or causing to be nominated another councilor or to hold the elections or elect the Mayor of Mombasa until this matter is heard and determined." [Emphasis added].

20. As this Court held in Miscellaneous Application No. 363 of 2013 **In Re: Meridian Medical Centre**;

> **"....it is only where the imminent outcome of the decision challenged is likely to render the success of the judicial review nugatory or an academic exercise that the Court would stay the said proceedings the strength or otherwise of the applicant's case notwithstanding...It must be shown that the probability of a determination being made in the challenged proceedings, are high and such probability cannot be said to have been achieved on mere conjecture and speculation. It follows that the stage at which the said proceedings have reached may be crucial in determining whether or not to grant the stay sought though that is not the determinant factor."**

21. As was held in **Taib A. Taib vs. The Minister for Local Government & 3 Others** (supra) the purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. In other words, stay is meant to prohibit the continuation of the decision making process where the process is still ongoing. Where however the decision has been made, the implementation thereof can still be stayed where the same is yet to be implemented.

22. However where the decision has been implemented to grant the stay would be meaningless where the effect is to maintain the *status quo* if the *status quo* would be that the decision remains in force. On the other hand where a stay is granted after the decision has taken effect, its upshot may well be to reverse the decision made by the Respondent. Ordinarily as stated above orders of stay in judicial review as opposed to conservatory orders in Constitutional Petitions are not to be granted if the result would be in the nature of mandatory injunctions. In this case, a decision to suspend the subjects has already been made. Therefore the effect of the orders of stay would be to temporary nullify the said decision pending the

hearing and determination of these proceedings. In this case, the applicants seek that by granting the stay, the Respondents would be directed to allow access to the subjects to continue with their studies. In other words, the Respondents would be compelled to facilitate the subjects' education. Such an order would obviously not be prohibitory in nature but would be mandatory and such orders are only to be granted in exceptional circumstances at an interlocutory stage. This was the position adopted by **Dyson, LJ** in **R (H) vs. Ashworth Hospital Authority [2003] WLR 127** at 138 where the Lord Justice held that:

> **"The purpose of a stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In *Avon*, Glidewell, LJ said that the phrase "stay of proceedings" must be given wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in *Vehicle and Supplies*, would appear to deny jurisdiction even in case A. That would indeed be regrettable and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review…Thus it is common ground that "proceedings" includes not only the process leading up to the making of the decision but the decision itself. The administrative court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect."**

23. Whereas this Court appreciates that in certain cases a stay may be granted even where its effect may be to temporarily reverse the decision, that remedy may only be resorted to in exceptional cases and the onus is upon the applicant to prove that such exceptional circumstances exist. It is in this light that this Court understands the decision of **Gladwell LJ** in **Republic vs. Secretary of State for Education and Science, ex parte Avon County Council (No. 2) CA (1991) 1 All ER 282** where he said that:

> **"An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay."**

24. As held by the High Court in Kaduna in **Econet Wireless Limited vs. Econet Wireless Nigeria Ltd and Another [FHC/KD/CS/39/208]** the decision to grant a stay involves:

> **"a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order of stay is granted, destroy the subject matter or foist upon the Court…a situation of complete hopelessness or render nugatory any order of the…Court or paralyse in one way or the other, the exercise by the litigant of his constitutional right…or generally provide a situation in which whatever happens to the case, and in particular even if the applicant succeeds…there would be no return to the status quo."**

25. I therefore agree that parties who have invited the Court to adjudicate on a matter which they are disputing over ought not to create a situation whereby the decision to be made by the Court would be of no use. In that event as held by the Nigerian Court of Appeal in **United Cement Company of Nigeria versus Dangote Industries Ltd & Minister of Solid Mineral Development [CA/A/165/2005]**, the Court ought to ensure that:

> **"appropriate orders are made to prevent acts which will destroy the subject matter of the proceedings or foist upon the court a situation of complete helplessness or render nugatory any judgement or order."**

26. In this case the Respondents have averred which averments are supported by documentary evidence that the applicants requested for the clearance of the subjects from the school which requests were not only accepted and facilitated but the fees paid refunded. As a result at least some of the subjects have already secured admission to other schools. The applicants did not deem it fit to controvert these damning

averments by way of further affidavits. Accordingly, the averments made on behalf of the Respondents have remained uncontested by way of legally acceptable evidence.

27. It follows that to grant the orders sought herein in light of the fact that the subjects are nolonger students of the school and their fees and caution money have already been refunded to them and some of them have secured educational places in other institutions of learning would clearly be unjust.

28. In the premises I decline to exercise my discretion by granting the stay in the manner sought herein. In other words the directions in the nature of stay are denied.

29. Orders accordingly.

30. The costs of these proceedings will be in the cause.

Dated at Nairobi this 23rd day of September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Olando for Mr Terer for the Respondents

Mr Okoth for Mr Mariaria for the ex parte applicants

CA Gitonga