



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

JR APPLICATION NO. 144 OF 2016

**IN THE MATTER OF APPLICATION BY J K (suing on behalf of K K M-a minor) TO APPLY
FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS
UNDER THE LAW REFORM ACT CAP 26 CIVIL PROCEDURE RULES, CAP 21**

AND

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

AND

IN THE MATTER OF M B H S

BETWEEN

REPUBLICAPPLICANT

AND

M B H SRESPONDENT

EX PARTE : J K (suing on behalf of K K M - a minor)

JUDGEMENT

Introduction

1. By a Notice of Motion dated 29th March, 2016, the applicant herein **J K**, who instituted these proceedings on behalf of **K K M**, (a hereinafter referred to as Minor), seeks the following orders:

1. That an order of prohibition be directed to prohibit the respondent M B H S from proceeding with the intended cancellation of his registration as a student eligible to sit for his KSCE examination within the institution.

2. That in the alternative, an order of mandamus be directed to compel the respondent to register the applicant as a student eligible to sit for his KCSE examinations within the institution.

3. That an order of certiorari to quash the decision of the respondent expelling him from the

institution.

4. That the costs of this application be provide for

Ex Parte Applicant's Case

2. According to the applicant, the minor was a form four student at the respondent institution and subsequent to the release of the 2015 examination results by the Cabinet Secretary, the student body found out that the lot of students who sat for the examination in 2015 had not performed to the standard that was expected as a result of which the student body held demonstrations against the poor results which led to the student body being sent home to allow the respondent time to have control of the situation and pending the normalcy.

3. However, after the resumption of the School activities, the minor herein was then yet again set home by the institution on 17th March, 2016 with instructions to return to the institution with his parent on 24th March, 2016. According to the applicant, as at the 17th March, 2016, the minor had began the process of registration to sit for the 2016 KCSE examinations at the respondent school and had filled all the relevant forms and had his photographs taken.

4. It was averred that the minor then called on 19th March, 2016, a Saturday, to return to the respondent institution on 21st March, 2016 together with his guardian but on arrival at the respondent institution, the minor's father (K M) was issued with a letter transferring the applicant to any institution which letter stated that "the parent of the above named has requested to transfer his son to a school of their choice and we have no objection". The applicant averred that the parent of the applicant made no such request and this letter is an attempt by the respondent to show that there was a semblance of paper trail.

5. It was further averred that the minor was also informed that he had been expelled from the school for participating in the demonstrations against poor results which action was taken without the applicant being granted any hearing of sorts. Further, the Minor was verbally informed by one **Mr. Kisilu**-the deputy principal that he would make all the possible efforts to ensure that the applicant was not registered to sit his KCSE examination within the respondent institution or that he will ensure that the said registration is cancelled.

6. The Minor was therefore apprehensive that if the registration was cancelled or not completed, he would not be able to sit for his KCSE examination come end on 2016 when the same is scheduled to be conducted. The Minor was further apprehensive that in the event that he is not allowed to continue his preparation for the examination within the respondent institution, he would not have been adequately prepared as at the time that he will be sitting the KCSE examinations and that it would be next to impossible for an institution to assimilate the applicant in its program as a form four student as most would only take him in as a form three student hence making him loss a year of his studies.

7. It was contended that unless this Court protects the applicant, he will be a victim to un-procedural and prejudicial proceedings by the respondent and its officers which will have far reaching effects hence it is in the interest of justice that the respondent is prohibited from stopping the registration of the minor and if they stopped the same, compelled to register him. Further, that the decision of the respondent to expel applicant from the respondent institution be quashed to allow the applicant complete his education.

Respondents' Case

8. In response to the application, the Respondent averred that whereas the ex parte applicant's child was a student in the respondent school until 21st March, 2016, the Minor was not expelled from the respondent school as alleged. It was contended that following the release of the Kenya Certificate of Secondary Examination results for the years 2015 on 3rd March, 2016, the students were not satisfied with the results and that the students through their school captain informed the administration that the registration for the Kenya Certificate of Secondary Examination 2016 should be stopped until the students consult with their

parents whether to be registered in the respondent school or to be transferred to another school.

9. The administration of the respondent school advised the students, that since their parents were visiting on 12th March, 2016, to be patient until then when the school would discuss the issue with them. However, on 5th March, 2016 at around 12.00 midnight some of the form four students went on a rampage whereby they broke down window panes in their dormitories and ran away from school and among the students who ran away from school on that night was minor herein.

10. According to the Respondent, the school administration did its own investigations and established that the Minor was among the students who destroyed the school property and on 6th March, 2016, after consultations with the sub-County Director of Education it was agreed that all the students from form one to form four should be sent home for one week with the form fours reporting back to school on 14th March, 2016 while those in form two and one were to report on 15th March, 2016 accompanied by their parents. The Minor child being in form four reported to school on 14th March, 2016 accompanied by his parent one **S K M**. On 17th March, 2016, the administration invited the ex parte applicant to the school and duly informed him that his son was among those who did not wish to be registered for the KCSE Examination in the respondent school whereupon the ex parte applicant decided to take his son home with him for further consultation and were to report back to school on 2nd March, 2016. On the said date, the father wrote a handwritten letter requesting for a transfer letter of his son from school of which the school administration accepted and thereafter the ex parte applicant's child was given a clearance sheet and he cleared with the school. Further, the administration issued the father with a transfer letter for his son from the school as requested.

11. It was therefore the Respondent's position that the ex parte applicant's child is the one who chose not to be registered in the respondent school for his KCSE examinations for 2016 and that his allegations that he was expelled from the school are baseless. Since he was not expelled there was no need for a fair hearing as alleged since he is the one who told his parent to transfer him from the respondent school. It was however averred that the ex parte applicant on realizing that no institution was willing to register his son for the KCSE Examination 2016 whose deadline was on 31st March, 2016, has decided to approach the Court by lying that his son was expelled whereas the truth is that he sought for a transfer of his son to another school. The Respondent therefore averred that the Minor was no longer a student of the respondent school and was not entitled to any of the reliefs sought.

Determinations

12. I have considered the application herein.

13. The parameters of judicial review were set out by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which it was held that:

“Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision.”

14. In this case, it is clear that the parties are not agreed on the circumstances under which the Minor left the Respondent's institution. In order for this Court to make a finding as to whether the vacation of the Respondent's institution by the Minor was unprocedural, this Court would have to resolve the conflicting factual averments and arrive at a decision that the said vacation was not voluntary on the part of the Minor and his father.

15. Before me are not only oral evidence but documentary evidence as well which tend to show that the minor's father did in fact seek a transfer of the minor from the Respondent's institution. In judicial review proceedings, the Court is concerned with the process followed in arriving at the impugned decision and therefore will not dwell on whether the documents held by either of the parties are genuine or otherwise. That is an issue which can only be resolved in a merit hearing before a civil Court.

16. Therefore this Court cannot, based solely on the affidavit evidence, make a decision as to whether the minor was expelled or chose on his own volition to move away from the institution in light of conflicting averments by the parties herein. Those conflicting issues can only be resolved in a full-fledged hearing where parties would be afforded an opportunity of being heard in which their evidence would be tested by cross examination.

17. In the premises it is my view and I so hold that this is not a proper case for judicial review.

18. Consequently the Notice of Motion dated 29th March, 2016 fails and is dismissed but with no order as to costs.

Dated at Nairobi this day 16th September, 2016

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Anyona for Mr Otieno for the Applicant

Miss Maina for the Respondent

Cc Mwangi