



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CONSTITUTIONAL & JUDICIAL REVIEW DIVISION
PETITION NO. 26 OF 2016

IN THE MATTER OF: ARTICLE 22, 23, 43(1) (f) ARTICLE 47 AND ARTICLE 53 (1) (B) OF THE
CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: SECTION 7 SECTION 22(1) OF THE CHILDRENS ACT 2001

AND

IN THE MATTER OF: SECTION 30 OF THE BASIC EDUCATION ACT

AND

IN THE MATTER OF: CONTRAVENTION OF THE PETITIONERS FUNDAMENTAL RIGHTS OF
THE CONSTITUTION, THE CHILDRENS ACT 2001 AND THE BASIC EDUCATION ACT
REGARDING RIGHT TO EDUCATION, RIGHT TO FAIR ADMINISTRATIVE ACTION AND THE
RIGHT FROM BEING DISCRIMINATED AGAINST

AND

IN THE MATTER OF: UNLAWFUL SUSPENSION AND/OR EXPULSION OF THE PETITIONER
FROM SCHOOL

BETWEEN

B M A (Suing through the father B U A as

the Next of Friend)..... PETITIONER

AND

1. JAMES MWADIME

2. [PARTICULARS WITHHELD] SECONDARY SCHOOL

3. HON. ATTORNEY-GENERAL.....RESPONDENTS

RULING

1. In their Notice of Preliminary Objection dated 30th May, 2016, the Respondents contend that the Petition herein dated and filed on 23rd May, 2016 be struck out because –

- (a) it is an abuse of the process of court;
- (b) that there exists an alternative and adequate remedy in a statute, that is, the Basic Education Act;
- (c) the student, the subject matter of the Petition has neither been expelled nor suspended from the school;
- (d) the entire Petition therefore lacks any foundation, basis or substratum and should be struck out and dismissed **in limine** as a waste of judicial time.

2. In his Petition, the Petitioner, B M A (the minor student) petitioning through his father B U A), sought the following reliefs –

- (a) an order to issue compelling the First and Second Respondents to reinstate and readmit the Petitioner back to school to continue with his studies;
- (b) a declaration that the Petitioner's right to education and to fair administrative action were infringed by the Respondent, and the constructive suspension and/or expulsion was an infringement of his fundamental right to education;
- (c) an order directing the Respondent whether by its employees, servants or agents or any of them or otherwise howsoever from further discriminating the Petitioner in any manner whatsoever following his reinstatement and re-admission to the school;
- (d) exemplary damages and costs of and incidental to the Petition.

3. Together with the Petition was filed a Notice of Motion in which the Petitioner sought interim orders, pending the hearing of the Petition.

4. On 24th May, 2016 I declined to grant any interim orders and directed that the Petition and the Notice of Motion be served upon the Respondents. Following service of the Petition and the Notice of Motion upon the Respondents, counsel for the Petitioner and the Respondents attended court on 31st May, 2016.

5. Counsel for the School and the Principal thereof, that is to say, the First and Second Respondents, informed the court that issues concerning the student Petitioner, were of a social-parental disagreements, nature, and were not justiciable by the court in the form of the Petition. Counsel submitted that apart from the question of fees, the student Petitioner required counselling to enable him settle down to his studies and eventually write his terminal secondary school examinations.

6. This situation was nodded to and was acknowledged by counsel for the Petitioner, and counsel for the Third Respondent.

7. Understanding therefore that the issue was anxiety by the student Petitioner that he might not write his final secondary school examinations due to both lack of parental guidance and delay in payment of fees (which the School Principal/School demanded), the student Petitioner had fallen into erratic behaviour by **inter alia** seeking to move out of school without leave of the school authorities hence the precautionary measures by the school authorities to exclude the student Petitioner from school until the

matter bordering on indiscipline was resolved through attendance by the Petitioner's father upon the school authorities and the payment of the balance of the outstanding school fees by the student's father.

8. Upon appreciation of the above situation, the court made the following orders on 31st May, 2016 –

- (1) the Petitioner's father was to pay the balance of the school fees within seven(7) days;
- (2) the student Petitioner to be re-admitted to school immediately, and be counselled to help him settle down and write his final examination (the Secondary School Examination);
- (3) the student Petitioner's father to attend the Principal of the school within ten (10) days of the date of these orders, and
- (4) the matter be mentioned on 15th June, 2016.

9. On 15th June, 2016, counsel for the school and the school Principal (the First and Second Respondents) reported that the balance of the school due and outstanding were paid the previous day on 14th June, 2016, and the matter was again fixed for mention on 28th July, 2016.

10. On 28th July, 2016, the Petitioner's counsel did not attend court. Counsel for the First and Second Respondents submitted that the Petitioner and his counsel had lost interest in the Petition and asked the court to dismiss the Petition. I declined to make such a drastic order when the matter had merely been fixed for a mention with a view to making further directions if counsel for the Petitioner was present. I however directed that the objection by way of a Preliminary Notice that the Petition was an abuse of the court process be served and heard on 3rd October, 2016.

11. On 3rd October, 2016, counsel for the Petitioner failed to attend court but counsel for both the First and Second Respondents and the Third Respondent were present in court. These counsel were unanimous that the Notice of Preliminary Objection on a point of law, dated and filed on 30th May, 2016, be allowed by dismissal of the Petition with costs to the Respondents.

12. To help the court determine the Preliminary Objection and indeed the Petition, I directed counsel to supply the court with copies of the authorities cited and relied upon by the Respondents within two (2) days as the Ruling on the Preliminary Objection would be delivered on 14th October, 2016.

13. In this regard the First and Second Respondents' counsel's authorities had already been dated and filed on 30th May, 2016. The Petitioner's counsel's submissions dated 7th October, 2016 were filed on the same day. I have perused the respective submissions and the authorities. The issues raised in the Notice of the Preliminary Objection are whether –

- (1) the entire Constitutional Petition is an abuse of the court process;
- (2) whether there was an alternative remedy under both the Children's Act (2001) and the Basic Education Act, 2015 (No. 4 of 2015).

The First and Second Respondents' Case

14. These Respondents' case is that there is no issue of a constitutional nature raised in the Petition. These Respondents contend that the Petitioner has not challenged directly or indirectly the mandate of these Respondents under Section 59 (a) to (q) of the Basic Education Act, 2013.

15. These Respondents contend that they have not expelled the Petitioner's child from the school, and that the entire Petition lacks any foundation, basis or substratum and should be struck out and dismissed **in limine** as a waste of judicial time.

The Third Respondent's Case

16. The Third Respondent's counsel supported the submissions of counsel for the First and Second Respondents and urged the court to dismiss the Petition with costs.

The Petitioner's Case

17. The Petitioner's case in reply to the Preliminary Objection is set out in the submissions of counsel for the Petitioner dated and filed on 7th October, 2016. The Petitioner's contention is that the Preliminary Objection raised by the Respondents is not a true Preliminary Objection as defined in the **locus classicus** case of **MUKISA BISCUITS MANUFACTURING COMPANY LIMITED VS. WEST END DISTRIBUTORS COMPANY LIMITED [1969] E.A. 696** where Sir Charles Newbold. P. said at page 701, AB –

“The first matter relates to the increasing practice of raising of points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and on occasion, confuse the issues. This improper practice should stop.”

18. And earlier, in his judgment, Law, JA said at page 700 line DE...

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

19. Counsel for the Petitioner argued that none of these situations obtained in the Respondents' Preliminary Objection, that the facts relating to the Petition need to be inquired into and ascertained and that consequently, the Preliminary Objection was neither feasible or sustainable, and that the Preliminary Objection should be dismissed with costs to the Petitioner.

Analysis

20. It is correct that the Respondents have not filed either grounds of opposition or reply to the Petition. This however, is not surprising in light of the oral submissions by counsel for the First and Second Respondents, out of which the court made the orders I have referred to at the beginning of the Ruling, that the Petitioner's son be re-admitted to school, and he be counselled at the school, and that the Petitioner do pay the balance of the fees.

21. I have over the years observed with trepidation the alacrity and speed with which counsel find a breach of the Constitution at every instance of an administrative infraction by servants of the Republic, be they in the County Councils or Local/Central Government of old, or the National/County Government in the new dispensation under the Constitution of Kenya 2010.

22. The Constitution of Kenya 2010, places quite correctly a lot of emphasis on the peoples **“rights”**. We hear chants of **“haki yetu”** – (Our rights), in every street corner of our country. This indeed is how it should be, but it makes no sense to talk and chant about **rights** without also talking about responsibilities.

23. Rights are not merely what the Constitution has tabulated. Rights have to come from somewhere, and they come from the community, the people. In return, all of us have a responsibility to the community, to the people. Your rights stop where my rights begin. It is thought this should be common

sense – a phenomenon that is most uncommon, even among the learned and erudite.

24. Many a time we ignore the exhortation set out in Article 24 (Limitation of rights and fundamental freedoms), and in particular Article 24(1) (d) that rights and freedom may be reasonably and justifiably limited in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

“(a) – (c)

(d) the need to ensure that enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others,...”

25. Article 53 (1) grants every child basic rights including the right to “**free and compulsory basic education**” and declares the paramountcy of the rights of the child in Article 53(2) -

“a child’s best interests are of paramount importance in every matter concerning the child.”

26. In a school or college situation, the rights of every child in school or college is subject to the rights of every other child, that is why there are rules and regulations as to how those rights and/or freedoms are to be enjoyed or exercised, and more particularly how the schools or institutions of basic education will be managed. In this regard Section 59 of the Basic Education Act, 2013 sets out the functions of the Board of Management of such institutions. The functions of a Board of Management of a school shall be to –

(1) (a) to promote the best interests of the institution and ensure its development;

(b) – (e)

(2) determine cases of pupils’ discipline and make reports to the County Education Board;

(3) facilitate and ensure the provision of guidance and counselling to all learners;

(4) provide for the welfare and observe the human rights and ensure safety of the pupils, teachers and non-teaching staff at the institution.

27. Where issues of indiscipline arise in an institution of basic education, it is most unlikely that the issue relates to breach of the right to education for even the right to education is exercised by every child in conformity with the rights of every other child to basic education, in an atmosphere which encourages a culture of dialogue and participatory democratic governance, promotes the spirit of cohesion, integration, elimination of hate speech and elimination of tribalism at the institution.

28. In this regard again, Section 35 of the Basic Education Act 2013 requires every institution of basic education to give every pupil appropriate incentives to learn and complete basic education and prohibits the holding back (repeat classes) and expulsion except upon hearing of the child and parent.

29. From the oral submissions by counsel for the Respondents it was clear to me that the Petitioner’s child required counselling to enable him complete his basic education. The child had been sent home to call his parent (father), to have a discussion with the Respondent’s management as to both the child’s welfare and the outstanding fees, which latter issue, was apparently causing the child anxiety, leading to deviant behavior or acts such as stepping out of the school premises without leave of the Respondent’s management.

30. Remonstrations by the Respondents’ Management against deviant behavior cannot be regarded as a breach of the child’s fundamental right to education, and cannot be subject of a Constitutional Petition. Indeed I would agree, and reiterate the holding by the Privy Council in an appeal from the Court of Appeal of Trinidad and Tobago in **KEMRAJH HARRIKISSOON vs. ATTORNEY-GENERAL OF**

“...the notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution of redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedure for invoking judicial control of administrative action. In an originating application to the High Court under Section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

31. Article 22 of the Constitution removes the question of **locus standi** and grants every person, the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. And Article 23 confers upon the High Court jurisdiction in accordance with Article 165, to hear and determine applications for the redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

32. Like Section 6(1) of the Constitution of Trinidad and Tobago, the mere fact of an allegation that a right or fundamental freedom in the Bill of Rights (Chapter IV of the Constitution), of the Petitioner has been or likely to be denied, violated or infringed or so threatened, is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under Article 23. It has to be apparent from the Petition, that the allegation is neither frivolous nor vexatious or an abuse of the process of the court as being made solely to avoid the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

33. It is clear to me it would be stifling to Schools Boards of Management every time they had an issue with a pupil, the issue would constitute an infringement of a right to education and which would only be resolved by the courts through a Constitutional Petition. In my view the issue raised by the Petitioner herein is merely administrative in nature, and would have been resolved in the usual or normal way by either an action for unlawful administrative action, which would question adherence to the Basic Education Act, 2013, and not invoke a claim of contravention of basic right or fundamental freedom.

34. In the circumstances, I am of the considered view that the Petition herein is not only without basis or foundation, but is an abuse of the constitutional jurisdiction of the court. It is also vexatious to the Respondents who have a huge responsibility in managing a National School with a large number of pupils. It raises no issue of a constitutional nature.

35. For those reasons the Preliminary Objection on a point of law, dated and filed on 30th May, 2016, succeeds, and the Petition dated 23rd May, 2016, is hereby dismissed with a direction that this being public interest litigation, each party shall bear its own costs.

36. There shall be orders accordingly.

Dated, Signed and Delivered in Mombasa this 14th day of October, 2016.

M. J. ANYARA EMUKULE, MBS

JUDGE

In the presence of:

Miss Chala for Petitioner

Mr. Makuto holding brief Opolu for Respondents

Mr. Silas Kaunda Court Assistant