



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**JUDICIAL REVIEW NO. 1 OF 2015**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**MINISTRY OF EDUCATION**

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

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

**THE SEVENTH DAY ADVENTIST ..... 3<sup>RD</sup> RESPONDENT**

**WESTERN KENYA CONFERENCE**

**SCHOOL COMMITTEE KAKIPTUI**

**PRIMARY SCHOOL ..... EX-PARTE APPLICANT**

**RULING**

1. The application for determination by this court is the Notice of Motion dated 30<sup>th</sup> April, 2015 expressed to be made under **Order 51 Rule 1** of the **Civil Procedure Rules 2010**, Sections **3, 3A** and **63(c)** of the **Civil Procedure Act** and any other enabling provisions of the law. The substantive prayer in the application is that the headmaster of Kapkiptui Primary school *Mr. Cleophas Arusei* be committed to civil jail and his property be attached and sold for disobedience of a court order issued on 3<sup>rd</sup> March, 2015.

2. The application is supported by an affidavit sworn by *Mr. Stanley Kemboi* the Chairman of the Exparte applicant which is the school committee of Kakiptui primary school. It is premised on the following three grounds;-

1. The Hon. Judge Githua C.W in ELDORET JR. MISC.CIVIL CAUSE NO. 1 OF 2015 made an order on the 12<sup>th</sup> day of March, 2015 compelling the 1<sup>st</sup> Respondent herein to maintain the status quo that is the name used for registration of the students in the year 2014 Kenya National Examination which is centre number 29540235 Kapkiptui be maintained pending the hearing and determination of the main motion.

2. Despite being duly served with the said order and notice of penal consequences, the Respondent have failed, and/or refused to comply and persist in such refusal.

3. The blatant refusal to obey a valid court order is in contempt of court.

3. The background against which the application was filed is relevant. The *ex parte* Applicant instituted Judicial review proceedings against the three respondents seeking the following reliefs;

(a) That an order of Certiorari be issued removing into this Honorable Court for purposes of being quashed the decision to change the sponsorship of Kakiptui Primary school from District Education Board to Seventh Day Adventist and the re-registration of Kakiptui primary school to Kakiptui Seventh Day Adventist Primary school.

(b) That an order of Mandamus be issued compelling the Ministry of Education to cause cancellation of Certificate of Registration of school for Kakipui SDA Primary School issued on 7<sup>th</sup> August, 2014.

(c) That an order of prohibition be issued against the SDA church from interfering with the management and sponsorship of Kakiptui primary school.

4. In the statutory statement and the verifying affidavit filed in support of the application for leave to commence the instant proceedings, the *Ex parte* applicant contended that Kakiptui primary school had been operating as a public school under the sponsorship of the community and the District Education Board; that in the month of September, 2014, the school received a letter from the Seventh Day Adventist church Western Kenya Conference forwarding a provincial Registration certificate dated 28<sup>th</sup> December, 2005 and a full registration certificate issued by the Ministry of Education, Science and Technology dated 7<sup>th</sup> August, 2014 showing that the name of the school had been changed from Kakiptui primary school to Kakiptui SDA Primary school.

The *Ex parte* Applicant complained that the said change had been procured without following requisite procedures and the due process of the law.

5. On 3<sup>rd</sup> March, 2015, all the parties in the matter entered into a consent which resulted in the issuance of a court order in the following terms;

***“That the status quo prior to institution of these proceedings be maintained that is the name used for registration of the students in the year 2014 Kenya National Examination which is Centre number 29540235 Kapkiptui be maintained pending the hearing and determination of the main motion”.***

6. In the affidavit sworn on behalf of the *Ex parte* Applicant by Stanley Kemboi, it is deposed that despite being notified of the court order, the school’s Headmaster Mr. Cleophas Arusei (Mr. Arusei) in blatant disobedience of the court order registered pupils of the school for the 2015 Kenya Certificate of Primary Education with the name of Kapkiptui SDA Primary School and that he therefore ought to be punished for contempt of court.

7. The application is opposed through a replying affidavit sworn by the alleged contemnor Mr. Arusei on 24<sup>th</sup> July, 2015. He denied that he disobeyed the court order as alleged and averred that the application was

frivolous, mischievous and unmeritorious and ought to be dismissed. He maintained that he could not have breached the court order of 3<sup>rd</sup> March, 2015 since at the time the order was issued, the school’s change of name to Kakiptui SDA Primary school had already been effected vide certificate of

Registration dated 7<sup>th</sup> August, 2014 and that all he did was to submit the names of the pupils online for registration of the 2015 Kenya Certificate of Primary Education through Code No. 29540235.

8. The application was prosecuted by way of oral submissions. Learned counsel *Mr. Maritim* appeared for the Exparte Applicant. In his submissions, he re-iterated the depositions in the supporting affidavit and in addition asserted that in order to preserve the integrity of the court and the validity of court orders, the court should cite *Mr. Arusei* for contempt of court and proceed to punish him accordingly.

9. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not participate in the application as their counsel, learned state counsel *Mr. Wambwire* chose not to participate citing conflict of interest considering the relationship between the Exparte Applicant and the 1<sup>st</sup> respondent.

On behalf of the 3<sup>rd</sup> respondent, learned counsel *Mr. Miyienda* submitted that the application was incompetent as it had been filed under the wrong provisions of the law; that an application for contempt of court can only be

made under **Section 5** of the **Judicature Act** and not under the provisions of the **Civil Procedure Act**. Counsel further submitted that no act of contempt had been committed by *Mr. Arusei* since in his view, the order required the name of the school existing prior to the filing of the Judicial Review proceedings to be maintained pending the hearing and determination of the substantive motion and this is the name *Mr. Arusei* used to register the school's pupils for the examinations in the year 2015.

10. I have considered the notice of motion, the affidavits filed by the parties and the oral submissions made by *Mr. Maritim* and *Mr. Miyienda*.

Whereas I wholly concur with *Mr. Miyienda* that applications for contempt of court ought to be filed under **Section 5** of the **Judicature Act** which donates to the court the jurisdiction to punish for contempt of court, it is my view that the wrong citation of the provisions of the Civil Procedure Act in this matter did not render the application fatally defective as the applicant also sought to rely on other enabling provisions of the law which in my view would include the relevant sections of the Judicature Act. Besides, the said citation only went to the form of the application as opposed to its substance and as the prayers therein were clear and concise, it is my opinion that the said anomaly did not occasion the Respondents any prejudice and ought to be disregarded under **Article 159 (2) (d)** of the **Constitution** which I hereby do.

11. That said, I now wish to turn to the merits of the application. I find that the only issue that arises for my determination is whether the Exparte Applicant has proved or demonstrated to the required legal standard that *Mr. Arusei* while aware of the existence of the order issued on 3<sup>rd</sup> March, 2015 proceeded to breach its terms in the manner in which he registered pupils in the 2015 Kenya Certificate of Primary Education. Put another way, should *Mr. Arusei* be cited for contempt of court?

12. The term 'contempt of court' is defined in Blacks Law Dictionary 8<sup>th</sup> Edition at Page 336 as follows:-

***“Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”***

In the celebrated case of ***Hadkinson V Hadkinson (1952) 2 ALL ER 567*** the court held that ***“a party who knows of an order, whether null and void, regular or irregularly, cannot be permitted to disobey it ....it would be most dangerous to hold that the suitors or their solicitors could themselves judge whether an order was null and void, whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question, that the course of a party knowing of***

***an order which was null and irregular and who might be affected by it was plain. He should apply to the court that it might be discharged. As long as it existed, it must not be disobeyed...***

13. In this case, it is not disputed that *Mr. Arusei* was aware of the consent order issued on 3<sup>rd</sup> March, 2015. It is also common ground that the order is still in force as it has not been varied, set aside or discharged. The only issue that is contested is whether he breached the said order. It is important to dissect the said order to determine what it entailed in order to find out whether or not it was disobeyed in the manner alleged.

A reading of the said order shows clearly that the status quo existing prior to institution of the judicial review proceedings with regard to the name of the school was to be maintained pending the hearing and determination of the substantive motion. Parties went further to clarify what they meant by status quo with respect to the school's name and this was included as a term of the consent order. They specified that the name to be maintained was the name used for the registration of students in the year 2014 Kenya National Examinations being centre number 29540235.

14. What then does the phrase "status quo" mean? The term is defined in Black's Law Dictionary 8<sup>th</sup> Edition at page 1448 as "***the situation that currently exists***". In this case, it is not disputed by the Exparte

Applicant that the school's change of name was complete by 7<sup>th</sup> August, 2014 when a final certificate of Registration was issued by the 1<sup>st</sup> respondent on 7<sup>th</sup> August, 2014 vide registration No. G/PE/14216/14 – See annexure marked 'C' to the 3<sup>rd</sup> respondent's replying affidavit. It therefore logically follows that at the time the consent order was issued on 3<sup>rd</sup> March, 2015, the status quo then prevailing was that the school's name was Kakiptui SDA Primary school. The document annexed to the Exparte Applicant's supporting affidavit marked as exhibit "SK 2" depicting the online registration of the school's pupils for the 2015 examinations shows clearly that the number used for the said registration was the Centre number which had been used in the year 2014 Kenya National Examinations which according to the consent order was meant to further define the name of the school pending determination of the substantive motion.

15. In view of the foregoing, I am unable to see how *Mr. Arusei* breached the court order when he registered the pupils for the 2015 Kenya National Examinations on line. Contrary to the Exparte applicant's assertions, it is my considered view that the said registration was actually done in compliance with the court order since the judicial review proceedings are still pending determination.

In the circumstances, i am satisfied that the Notice of Motion dated 3<sup>rd</sup> March, 2015 is devoid of any merit. The motion is consequently dismissed with costs to the 3<sup>rd</sup> respondent as the 1<sup>st</sup> and 2<sup>nd</sup> respondents neither opposed nor participated in the application.

It is so ordered.

**C.W. GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 24<sup>th</sup> day of November 2015**

In the presence of:

Ms Mululu for the Exparte Applicant

Ms Naomi Chonde Ct Clerk

No appearance for the Respondents .