



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

PETITION NO. 16 OF 2014

IN THE MATTER OF ARTICLES 19, 20 21 23(3), 40 & 165 OF THE CONSTITUTION OF 2010

AND

IN THE MATTER OF VIOLATION OF AND INFRINGEMENT OF THE RIGHTS OF THE PETITIONER

AND

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

AND

IN THE MATTER OF THE BOARD OF GOVERNOR NYARIACHO MIXED SECONDARY SCHOOL

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL HIGH COURT PRACTICE AND PROCEDURE RULES

AND

IN THE MATTER OF SECTION 19 (6TH SCHEDULE) OF THE CONSTITUTION 2010

BETWEEN

CHRISTOPHER MOGAMBI OMONYANA)

TERESIA MOKEIRA NYACHUBA.....)......PETITIONERS

AND

HONOURABLE ATTORNEY GENERAL..... ..)......1ST RESPONDENT

THE COUNTY EDUCATION BOARD NYAMIRA).....2ND RESPONDENT

RULING

1. The petitioners **Christopher Mogambi Omonywa and Teresia Mokeira Nyachuba**, in their petition dated 12th May 2014, seek a declaratory order to the effect that the decision and order of the County Education Board Nyamira vide Minute No. 3/4/2014 disbanding the Nyariacho mixed secondary school board of management was improper, irregular, illegal and unconstitutional hence null and void as the said County Education Board does not have the mandate under the **Basic Education Act** i.e. **Act No. 14 of 2013** to do so.

Also being sought by the petitioners is a permanent injunction order to restrain the said County Education Board, Nyamira, from disbanding and/or removing from the office said board of management of the said Nyariacho Mixed Secondary School appointed in September 2012, whose term is three (3) years from the 28th September 2012.

2. In the petition, it is averred that the petitioners are parents at Nyariacho Mixed Secondary School, a public school within the meaning of the **Basic Education Act No. 14 of 2013**. It has a board of management appointed in September 2012, by then Minister of Education. The board was inaugurated sometime in January 2013 for a term of three (3) years from the 28th September 2012 and having so been appointed and inaugurated the board discharged its obligation up to the 7th May 2014, when the County Education Board Nyamira, vide a letter Ref. No. NCEO/1/1/124, informed all the appointed members of the board that following Minute No. 3/4/2014 of the County Education Board, the management board of Ngariacho Mixed Secondary School had been disbanded from the date of the letter i.e 7th May 2014. The principal of the school was advised to immediately lay modalities of appointing a new board.

3. The petitioners aver and contend that the action of the said County Education Board was irregular, unlawful, improper and unconstitutional as the board was not conferred any mandate under the Basic Education Act to disband a duly appointed and constituted board of management of a public school and that the action of the County Education Board would seriously hamper and affect the academic and other programmes of the school considering that the previous principle was transferred in December 2013 and that the financial operations of the school were not considered as some of the signatories of the accounts included some members of the board and the chairman of the board.

4. The petitioners further contended that being parents and stakeholders in the school, they were likely to suffer infringements of their legal and constitutional rights in ensuring that their children and all others at the school were accorded full and fair rights to education and educational opportunities as established in the Constitution. Consequently, the petitioners pray for the orders sought in the petition as against the Attorney General of the Republic of Kenya (**first respondent**) and the County Education Board Nyamira (**second respondent**).

An affidavit in reply to the petition was filed on 30th May 2014, by the second respondent through its Chairman, **Charles Nyandusi Mottanya**.

5. The first respondent, through the learned litigation counsel, **Stafford Nyauma** deponed in an affidavit dated 9th June 2014, in support of the second respondent's opposition and reply to the petition. The second respondent in the replying affidavit avers that it has the mandate to appoint and revoke the appointment of the board of management under the **Basic Education Act 2013**, and that under the **Education Act (Cap 211 Laws of Kenya)** the minister had power to suspend and/or dissolve the board of governors of schools and that these powers have since been devolved to the County Education Board in the **Basic Education Act, 2013**.

6. It is also averred by the second respondent that the board of management Nyariacho Secondary School was appointed in September 2012, comprising of ten (10) members but from time to time complaints were received from the principals of the school concerning the conduct of business by the said board. Complaints were also received concerning unpaid creditors whom the board had neglected and/or refused to pay hence exposing the school to legal action. There were also complaints concerning the sacking of

staff without following laid due procedures as well as board meetings which were taking place too frequently contrary to the provisions of the Basic Education Act such that between February and March 2014, four (4) meetings were held. It was also alleged that some of the meetings were held outside the school compound contrary to the law.

7. The second respondent further avers that due to the complaints aforementioned, it authorized the quality, standard, assessment office Nyamira to carry out an inspection and avail of the school on 18th February 2014 which exercise confirmed the complaints and recommended certain measures to be undertaken with immediate effect. The inspection revealed among other things that one Manson Mareka Monyenye was arbitrarily included as a member of the board without appointment by the appointing authority. A recommendation for the removal of the said person was made together with the recommendation to dissolve the entire board of management and appointment of new members.

8. The second respondent contends that it was bound to act on the recommendations by the quality standards, assessment office as contained in its report pursuant to the provisions of the **Basic Education Act, 2013 (i.e. Section 66 of the Act)**. It is also contended by the second respondent that the subject board of management was a stumbling block to the growth of the school due to accumulated debt, inability to effectively and freely work with principals and inaccessibility of Ministry of Education Officials to the school.

9. In a supplementary affidavit undated but filed on 19th June 2014, the petitioners aver that no evidence of the alleged complaints against the board was exhibited and that the Basic Education Act does not provide for a limit on the number of meetings a board can hold in any given year. The petitioners contend that the person Manson Moreka Monyenye was co-opted as a member of the board to guide the board on some issues as allowed by the Basic Education Act. The petitioners reiterate that the second respondent did not have the mandate under the said Act to dissolve the board.

10. The petition was argued by way of written submissions and in that regard the petitioners filed their submission through the firm of **J.O. Soire & Co. Advocates**, while the respondents did so through the Honorable Attorney General of the Republic of Kenya. The said submissions have been given due consideration by the court on the basis of the grounds in support of the petition and those against as may be deciphered from the averments contained in both the supporting and replying affidavits.

Basically, the main issue for determination is whether the respondents and in particular the second respondent acted within its lawful mandate when it dissolved the management board of Nyariacho Mixed Secondary School.

11. There was no dispute that the board was appointed in September 2012 for a period of three years with effect from 28th September 2012. There was also no dispute that the board was dissolved by the second respondent on the 7th May 2014, prior to the expiry of its legal term. The petition was presented on 12th May 2014 meaning that the actual time of the board had already expired. Be that as it may, the reason for the premature dissolution of the board was essentially mismanagement even though the petitioners did not admit the fact and claimed that they were likely to suffer an infringement of their constitutional rights in ensuring that their own children and all other children at Nyariacho Mixed Secondary School are accorded full and fair rights to education and educational opportunities.

12. This court has jurisdiction under **Article 23(1)** of the Constitution to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of rights and under **Article 19(2)** the purpose of recognizing and protecting human rights and fundamental freedom is to preserve the dignity of individuals and communities and to promote social justice and the realization of the potential of all human beings.

13. Under **Article 23(3)** of the Constitution, the relief which may be granted by a court include a declaration of rights, and injunction, a conservatory order, a declaration of invalidity of any law, an order for compensation and an order of judicial review.

Herein the reliefs sought are a declaration for invalidity of a decision made by the second respondent and an injunction to restrain the second respondent from dissolving the board of management of Nyariacho Mixed Secondary School. These reliefs are however not available to the petitioners as they did not invoke the provisions of **Article 22** of the Constitution in bringing this petition. In any event, they did not demonstrate that any of their fundamental rights have been threatened with violation by the respondents. Besides, they have not shown or proved that their children rights to education and education opportunities have been compromised by the dissolution of the management board of the said school. If anything, the facts giving rise to this petition are more ideal for a judicial review cause rather than a Constitutional petition. This petition is to that extent misconceived.

14. With regard to the legality of the second respondent's action of dissolving the subject board, the guiding law is the **Basic Education Act No. 14 of 2013**, whose objective is to give effect to **Article 53** of the Constitution and to promote and regulate free and compulsory basic education, to provide for accreditation, registration, governance and management of institutional of basic education to provide for the establishment of the National Education Board, the Education Standard and Quality Assurance Commission and the County Education Board and or connected purposes.

The Act commenced on 25th January 2013 and provides for the establishment of County Education Boards as agents of the National Education Board. It also provides for establishment of board of management for every public school. The composition of such board is provided for under **Section 56(1)** of the Act which also mandates the County Education Board to appoint members of the board.

15. Revocation of appointment of a members or members of the board is expressly spelt out under **Section 5(1)** of the Fourth Schedule to the Act. Thus, the appointment of a member to a board of management shall be revoked and the member shall vacate office if the member "*inter-alia*" has his appointment revoked by the nominating body. Herein, the nominating body was the Minister for Education acting under **Sections 10,11 and 12** of the **Education Act (cap 211)** which was repealed by the coming into effect of the **Basic Education Act No. 14 of 2013**, which therefore took over all acts and appointments done under the repealed act. Indeed, **Section 101(1) of the Basic Education Act No. 14 of the 2013** provides that:-

"Notwithstanding the repeal of the Acts under all acts directions, orders opportunities, requirements, authorizations, decisions or other things given, later or done under and all funds, assets and other property acquired or disposed of by virtue of the repealed Acts shall, so far as are not inconsistent with this act be deemed to have been given, taken, done or acquired or disposed of under this Act."

16. So, it must herein be deemed that the appointment of the subject board by the then Minister for Education was effected by the current appointing authority i.e the County Education Board. Therefore, the action taken by the second respondent in dissolving the entire board of management of Nyariacho Mixed Secondary School to pave way for the appointment of new board members was proper and lawful.

Being the current appointing and/or nominating authority, the second respondent has the power or mandate to revoke the previous appointment of the board of management undertaken by the then Minister for Education.

Consequently, this petition is lacking in merit and is hereby dismissed with costs to the respondents. It is intriguing that the petitioners filed this petition yet none of them was even a member of the dissolved board of management. In any event, their first port of call should have been the Education Appeals Tribunal by dint of **Section 93 (2)** of the **Basic Education Act No. 14 of 2013**. Coming to this court was rather ill advised, premature and a misconception.

J.R. Karanja

Judge

(Ruling dated, signed and delivered at Kisii this 17th day of November, 2015).

J.R. Karanja

Judge