



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CRIMINAL APPLICATION NO.78 OF 2013**

**IN THE MATTER OF THE PRINCIPAL MAGISTRATE’S COURT AT KEHANCHA**

**IN THE MATTER OF MISCELLANEOUS CRIMINAL APPLICATION NO. 13 OF 2013**

**IN THE MATTER OF REPUBLIC**

**VERSUS**

**BRIDGE INTERNATIONAL ACADEMY MABERA AND KEHANCHA**

**IN THE MATTER OF KEHANCHA CHILDRENS CAUSE NO. 26 OF 2013**

**IN THE MATTER OF:**

**JOHN GISIRI MWANA..... 1<sup>ST</sup> APPLICANT**

**JANE WANJIKU ..... 2<sup>ND</sup> APPLICANT**

**BRIDGE INTERNATIONAL ACADEMIES LIMITED ..... 3<sup>RD</sup> APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RULING**

1. The Notice of Motion dated 1<sup>st</sup> October 2013, arises out of the orders issued by the Ag. Principal Magistrate Kehancha Law Courts, Hon. A.P. Ndege, by which orders he closed down and ceased enrolment in two (2) schools belonging to the 3<sup>rd</sup> Applicant. The application is brought under **Sections 362 and 365 of the Criminal Procedure Code Chapter 75 of the Laws of Kenya** seeking the following orders that:-
  1. *That this application be certified as extremely urgent and the same be heard ex parte at first instance.*
  2. *That, pending the hearing and determination of this application, this honourable court be pleased to vacate the interim ex-parte orders dated 20<sup>th</sup> September, 2013 for closure of Bridge International Academies of Mabera and Kehancha respectively.*
  3. *That, pending hearing and determination of this application interpartes this honourable court be pleased to Order Stay of further proceedings in Kehancha Principal Magistrate Miscellaneous Criminal Application No.13 of 2013 and Children’s Cause No.26 of 2013.*

4. *That, there be stay of proceedings in Kehancha PM Miscellaneous Criminal Application No.13 of 2013 and Kehancha Children's case No.26 of 2013.*
5. *That, the Orders of temporary injunction issued against the 3<sup>rd</sup> Applicant under Order 40 of the Civil Procedure Rules be revised and vacated.*
6. *That, the proceeding against the Applicants in its current form be terminated.*
7. *That, this Honourable Court be pleased to revise an order dated 20<sup>th</sup> September, 2013 and vacate the same.*

2. The application is premised on the grounds that the Ag. Principal Magistrate Kehancha issued orders of injunction under **Order 40** of the **Civil Procedure Rules** notwithstanding the fact that he was handling a Miscellaneous Criminal Application. Further that the learned acting Principal Magistrate Kehancha gave adverse orders of closure of Bridge International academies of Mabera and Kehancha without any material application or charges filed in court. That subsequent to the closing down of the schools there was an order ceasing enrolment in the two (2) schools belonging to the 3<sup>rd</sup> Applicant without him (the Ag. Principal Magistrate) substantively hearing the parties herein, and that no charges were preferred and no application was argued before the court.
3. It is the applicants' further ground that the learned Ag. Principal

Magistrate ceased to be an impartial arbiter when he chose to be an active participant on the part of the prosecution all to the applicants' detriment. That he based his decision on only limited facts of the prosecution not permitting the applicants an opportunity for proper response to any allegations, and failing to consider the third party rights, interest and those affected by such decision. The injunction ceasing operation and the one prohibiting the other school to enroll new students has thus affected six hundred and twenty five students. Where parents have paid the fees required but the Ag. Principal Magistrate Kehancha has declined to vacate his orders even after the applicants sought an opportunity to clarify the issues on the 29<sup>th</sup> September 2013. The applicants add that if the orders sought herein are not granted, the applicants will suffer irreparable loss and harm that may not be adequately compensated by damages.

4. The application is supported by the affidavit dated 1<sup>st</sup> October, 2013 of John Gisiri Mwana a resident of Kehancha town within Migori County. He is the manager for Bridge International Academies Limited and says he has sworn the said affidavit on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants. To his affidavit he has annexed the proceedings in Miscellaneous Criminal Case No.13 of 2013 being exhibit "**JAM1**" and has given a detailed narration of the events which led to the issuance of the adverse orders against them.
5. In summary, he states that he was summoned together with the Academy manager Mabera the 2<sup>nd</sup> applicant by the Ag. Principal Magistrate Kehancha, and that Bridge Academies Limited Headquarters which is the official registered office in Nairobi was not served despite indication by the 1<sup>st</sup> and 2<sup>nd</sup> applicants that they had no authority to accept service on their behalf.
6. He states that apart from the summons received he was not served with any other application, summons to enter appearance or even a charge sheet to guide him on what charges were being made against him and the 2<sup>nd</sup> and 3<sup>rd</sup> applicants.
7. The deponent states that together with the 2<sup>nd</sup> applicant and in response to the summons, he appeared before the Ag. Principal Magistrate Mr. A.P. Ndege together with his advocate Mr. Kisia, when the advocate applied for time to prepare for defence and also requested to be supplied with documents and/or charge sheet on the allegations against the deponent. No such particulars were supplied to the deponent, and instead, he was ordered to proceed with the Notice to show cause.
8. The deponent adds that the Ag. Principal Magistrate proceeded there and then to take down evidence under oath while the court was leading him (1<sup>st</sup> applicant) despite protests from his advocate. The same was also done against the 2<sup>nd</sup> applicant. He states in his affidavit that he was intimidated by the Ag. Principal Magistrate by the manner and style of taking evidence from him under oath without even according his advocate a chance to explain what was going on. After taking evidence from the 2<sup>nd</sup> applicant, Mr. Kisia advocate requested for more time to respond to

- the allegations that were made in the absence of the 1<sup>st</sup> respondent on the 18<sup>th</sup> September 2013.
9. That without any application by the prosecutor the court proceeded to order that Mr. Kisia Advocate be served with a report and the application and also that the Kehancha School do remain closed and the Mabera school be restricted from enrolling new students until the matter was finalized. That on the 24<sup>th</sup> September 2013 the same court on an application by the prosecution ordered for a notice to show cause why the 1<sup>st</sup> applicant cannot be committed to civil jail despite the fact that he had not been served with any application or order.
10. The deponent also avers that from the information he got from his advocate on record there were no charges or any application filed against him or the other applicants requiring him or them to respond thereto. That the proceedings are an affront to natural justice as they amount to shifting the burden of proof from the prosecution to the applicants.
11. He adds that from the information he received from his advocate on 24<sup>th</sup> September 2013, the Honourable Ag. Principal Magistrate upon hearing submissions from Mr. Kisia Advocate ordered that the proceedings herein be changed from Miscellaneous Criminal Application to a Children's Cause No.36 of 2013 without any clear charges or any specific breaches or allegations. He states that his advocate further informed him that the prosecutor ought to have applied to amend the Miscellaneous Criminal Application to a Children's Cause and not the court. Further the Ag. Principal Magistrate Kehancha issued on 24<sup>th</sup> September 2013 orders ex-parte in chambers to the District Education Officer in the absence of the applicants advocate requiring him (the 1<sup>st</sup> applicant) to show cause why he cannot be committed to civil jail despite his (Ag. Principal Magistrate's) knowledge that the 1<sup>st</sup> applicant's advocate was waiting in open court for further proceedings. The deponent feels that the actions of the Ag. Principal Magistrate show that he ceased being an impartial arbiter in the proceedings and instead chose to be an active participant in favour of the prosecution.
12. He states further that the continued closure of the schools impacts negatively upon the six hundred and twenty five (625) students who are enrolled in the Kehancha School and restricts enrollment for all those students in the community in these schools. That the parents of the enrolled students have paid school fees and each day that the students do not go to school is a cost incurred by the parents and with each day the school is closed the students lag further behind in their studies.
13. He adds that no child or parent has moved to court or even complained to warrant the filing of a children's cause No.26 of 2013 by the trial magistrate. That it is the parents who have been requesting that it is in the best interest of the children that the Kehancha and Mabera Schools stay open and continue to enroll students.
14. He states in his affidavit that he knows that the Basic Education Act 2013 came into effect in 2013 but the Migori County Education Board had not been established. He further states that he knows that the 3<sup>rd</sup> applicant had already submitted its registration application for the Kehancha and Mabera schools to the County Director of Education and the County Education Board once established shall consider the 3<sup>rd</sup> applicant's application for registration.
15. When the application which was brought under certificate of urgency first came up for hearing on the 1<sup>st</sup> October 2013 it was certified urgent and the interim ex-parte orders dated 20<sup>th</sup> September 2013 for closure of Bridge International Academies of Mabera and Kehancha were respectively vacated pending the hearing and determination of the application. The court also stayed the proceedings in Kehancha Principal Magistrate Miscellaneous Criminal Application No.13 of 2013 and Children's Cause No.26 of 2013 and the orders of temporary injunction issued against the 3<sup>rd</sup> applicant under **Order 40** of the **Civil Procedure Rules** were revised and vacated.
16. The applicants were to serve the application upon the respondents forthwith for inter parties hearing on 15<sup>th</sup> October 2013 and the Deputy Registrar was to immediately call for the lower court file from Kehancha Principal Magistrate's court.
17. On the 15<sup>th</sup> October 2013 when the application came up for hearing, Mr. Imbali was present for the State while Mr. Abisai was present for the applicant. The application was removed from the day's cause list and stood over to the 18<sup>th</sup> November 2013 and the respondent ordered to file and serve the replying papers (if any) within 14 days and interim orders extended until that date.

18. On 18<sup>th</sup> November 2013 Mr. Abisai was present for the applicant while Mr. Shabola appeared for the State. Mr. Shabola was not ready to proceed and the matter was again removed from the cause list and a last adjournment granted with orders that the respondent do file their response within 7 days and interim orders extended until 16<sup>th</sup> January 2014.
19. On 16<sup>th</sup> January 2014 the state had not filed any response and as stated by the court that since court orders are not granted in vain, the order granted on 18<sup>th</sup> November 2013 granting the state the last adjournment was put into effect. An application for adjournment was refused and the application dated 1<sup>st</sup> October 2013 proceeded.
20. Mr. Abisai for the applicant made oral submissions and sought for orders in terms of prayers 4-7 of the application dated 1<sup>st</sup> October 2013 since prayers 1-3 were already spent. He submitted that the temporary injunction issued by Kehancha SPM's court vide Kehancha PM's Misc. Cr. Application No.13 of 2013 be revised and vacated. Further that the trial magistrate who ordered for an injunction against the respondent under **Order 40 of the Civil Procedure Rules**, notwithstanding the fact that he was dealing with a criminal Miscellaneous Application had no jurisdiction to make such orders.
21. Secondly that nobody had applied for the said orders. He urged court to look at the last page of annexure "**JGM1**" where the court ordered in the second last paragraph that the school be closed and that the temporary injunction be enforced as in civil cases. Counsel submitted that the said court orders were an affront to procedure as no charges were read or made against the applicants. Counsel also argued that jurisdiction in criminal cases starts with a charge sheet but in the instant case the complainant testified in the absence of the applicants and without any charge having been preferred against the applicants who in any event were never called upon to appear except to show cause why they could not go to jail or why the school could not be closed.
22. He submits that this was a judicial misadventure which this court has power to probe and correct. He concludes by submitting that the application is not opposed and humbly prays for the orders which are supported by the grounds on the face of the application and the affidavit sworn by John Gisiri Mwana the 1<sup>st</sup> applicant.
23. Mr. Wainaina who appeared for the state made no submissions on the issues raised and instead left the matter to the court.
24. Having considered the pleadings by the applicants, counsel's submissions and the proceedings from the lower court and the sentiments by the state counsel, the following questions/issues come alive for determination:-
1. *Whether a trial court in this case the Ag. Principal Magistrate court Kehancha can issue orders of injunction under the Civil Procedure Rules in a criminal case.*
  2. *Whether a trial court has jurisdiction to issue orders without any application/charge brought before it and*
  3. *Whether the Ag. Principal Magistrate had jurisdiction to order the closure of the schools and under the said circumstances.*
25. On the first issue the answer would be in the negative. Looking at the circumstances of the application filed in the lower court being Miscellaneous Criminal Case No.13 of 2013 it can be seen that there was no formal application or charge sheet for that matter. Therefore the court had nothing to base its findings on or even come up with a ruling or judgment. In the case of **Meme – vs- Republic & another [2004] 1 KLR 637 at page 678**, the Court described the phrase, abuse of court process in the following terms:-

**“An abuse of the court’s process would, in general, arise where the court is being used for improper purpose, as a means of vexation and oppression, or for ulterior purposes, that is to say, court process is being misused.”**

26. This is one such of a case where the court process is being abused. The Ag. Principal Magistrate was wrong in issuing injunctive orders in a criminal case where the said orders had not been prayed for. The process of the court must be used properly, honestly and in good faith and must

- not be abused. This means that the court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being misused as a means of vexation or oppression. It follows therefore that where there is an abuse of the court process there is a breach of a party's right to a fair trial. The court has a duty to stop such abuse of the justice system.
27. I agree with the applicants counsel's arguments that the order as granted by the acting principal magistrate Kehancha was a judicial misadventure. In the circumstances, it is the duty of this court to exercise its inherent jurisdiction so as to prevent its process being used to perpetrate injustice or otherwise as an abuse of its process. The courts have held that the High Court is entitled to exercise its jurisdiction to avert abuse of power, discretion or process. See **Githunguri -vs- Republic [1985] KLR 91.**
28. The Ag. Principal Magistrate Kehancha Law Court should not have taken sides with the prosecution in proceeding with the case by issuing orders not sought for and/or ceasing to be an arbiter in the whole process and instead jumping into the arena of the fight. There should have been a charge sheet for the applicants herein to answer and defend themselves or an application for that matter. It is a principle of natural justice that a party should be condemned unheard. The applicant herein were condemned unheard and thus the orders issued against them were illegal, irregular and improper and the same cannot be allowed to stand.
29. Lastly the Ag. Principal Magistrate Kehancha had no jurisdiction to order the closure of the schools. First and foremost there was no application made to that effect. Secondly no quality assessment report compiled by the Ministry of Education was brought before the Honourable Ag. Principal Magistrate Kehancha to inform him of the need for the closure of the said schools and/or stop the enrollment of students. The District Education Boards are established under **Section 28** of the **Education Act**, appointed by the Minister for each District. The function of the Boards according to **Section 31**, is limited to submitting to the Minister such reports as the Minister may require:-
- *to superintend the management of public school and*
  - *to fulfill such other functions as may be prescribed by the Minister.*
30. **Regulation 14** of the **Regulations** under the **Education Act** donates to the boards, powers to do anything that helps in the promotion of education and maintenance of standards. The power to close schools is retained and exercised only by the Minister in terms of **Section 16** of the **Act**. The Principal Magistrate's court Kehancha therefore had no power to issue orders of closure and/or stop enrollment of students since the same was not brought before his court. There was no justification for the Ag. Principal Magistrate to act on his own motion and issue orders.
31. Having said the above, the application dated 1<sup>st</sup> October, 2013 is hereby allowed in terms of prayers 4-7 thereof. The orders made by the lower court in connection with this matter are thus set aside. This court is limited in granting the orders sought by the applicants in their application.

**Dated and delivered at Kisii this 27<sup>th</sup> day of February, 2014**

**R.N. SITATI**

**JUDGE**

In the presence of:

Mr. Nyagwencha h/b for Abisai for Applicants

Mr. P.O. Ochieng for Respondent

Mr. Bibu - Court Clerk