



**NO.307**  
**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**PETITION NO. 1 OF 2012**

**IN THE MATTER OF ARTICLE 19, 20, 21, 22, 23 AND 165 OF THE CONSTITUTION, 2010**  
**AND**  
**IN THE MATTER OF THE EDUCATION ACT, CAP 211 OF THE LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF NYAIKURO SDA SECONDARY SCHOOL**  
**AND**  
**IN THE MATTER OF CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND**  
**PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)**  
**HIGH COURT PRACTICE AND PROCEDURE RULES 2006**

**AND**  
**IN THE MATTER OF SECTION 19 (SIXTH SCHEDULE) OF THE CONSTITUTION 2010**

**BETWEEN**  
**M/S SEVENTH DAY ADVENTIST CHURCH E.A. LIMITED .....**  
**PETITIONER**  
**AND**  
**HON. ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**  
**PROVINCIAL DIRECTOR OF EDUCATION, NYANZA PROVINCE.....2<sup>ND</sup>**  
**RESPONDENT**

**RULING**

1. The notice of motion before me is dated 3<sup>rd</sup> January 2012 and is brought under **Rules 20 and 21** of the **Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of Individual) High Court Practice and Procedure Rules 2006** and **Articles 22 and 23** of the **Constitution of Kenya, 2010** as well as **Schedule 19 (Sixth Schedule)** of the **Constitution of Kenya, 2010** and

**Order 40 Rule 2** of the **Civil Procedure Rules, 2010** and all enabling provisions of the law. The Petitioner/Applicant seeks the following orders:-

(a) This application be certified as urgent and the same be heard ex-parte at first instance.

(b) Pending the hearing and determination of this application, a temporary injunction do issue against the respondents herein by either themselves or their agents and/or servants and any person acting on their behalf from implementing the decisions of transferring both the Principal and Deputy Principal of Nyaikuro S.D.A. Secondary School and/or conducting the handing over/taking over exercise for the aforesaid Principal and Deputy Principal.

(c) Pending the hearing and determination of this suit, a temporary injunction do issue against the respondents herein by either themselves or their agents and/or servants and any person acting on their behalf from implementing the decisions of transferring both the Principal and Deputy Principal of Nyaikuro S.D.A. Secondary School and/or conducting the handing over/taking over exercise for the aforesaid Principal and Deputy Principal.

(d) Costs of this application be provided for.

2. The application is supported by the sworn affidavit of Pastor Shem Bundi Ngoko dated 3<sup>rd</sup> January 2012 and is also premised on the following grounds:-

(a) That Nyaikuro S.D.A. Secondary School is a public school sponsored by the Petitioner.

(b) That the Education Act, Cap 211 of the Laws of Kenya, requires that the deployment of the Principal and the Deputy Principal of the said school, should be done by the respondents with consultation with the Petitioner which was not done.

(c) That the decision to transfer both the Principal and Deputy Principal is likely to be implemented by conducting the handing over/taking over exercise any time from now.

(d) That unless the respondents are restrained by this Court's orders, they are likely to proceed to conduct the handing over/taking over exercise which actions will further grossly affect and/or undermine the rights of the petitioner which have already been violated/infringed and is likely to affect the smooth running and operations of Nyaikuro S.D.A. Secondary School.

(e) That the granting of these orders will in no way seriously affect the Respondents.

(f) That unless the Respondents are restrained the petitioner stands to suffer irreparable loss or damage which will not in any way adequately be compensated by costs and/or damages.

3. The main ground upon which the Petitioner has anchored its case is that the Respondents did not involve the Petitioner in the process of deploying both the Principal and the Deputy Principal of Nyaikuro S.D.A. Secondary School. The said school, though public is sponsored by the Petitioner. The Petitioner contends that unless the order of injunction issues against the Respondents as prayed, the said respondents are likely to proceed to conduct the handing over/taking over exercise which actions will further grossly affect and/or undermine the rights of the Petitioner which rights have already been violated/infringed and is likely to affect the smooth running and operations of Nyaikuro SDA Secondary School.

4. The application was duly served upon both the Provincial Director of Education, Nyanza Province and the Provincial Litigation Counsel on the 4<sup>th</sup> January 2012, but inspite of the service, the Respondents did not file any replying papers to the application. The Respondents did not also appear at the hearing hereof on the 16<sup>th</sup> January 2012, so the application proceeded exparte.

5. Counsel appearing for the Petitioner submitted that since the Respondents had filed no answer to the Petitioner's application, then the orders sought ought to be granted in terms of prayer (c) of the application.

6. The facts giving rise to this application are that the applicant established and still runs Nyaikuro SDA Secondary School as part of its wider mandate of establishing and running educational institutions and/or offering sponsorship to designated schools. The Petitioner contends that according to the **Education Act, Cap 211 Laws of Kenya**, the deployment of teachers including the Principal and Deputy Principal is done by the Teachers' Service Commission together with the Ministry of Education. The Petitioner states that the deployment of the Principal and Deputy Principal should be done in consultation with the Petitioner and the School Board of Governors. On the 29<sup>th</sup> December 2011, the Second

Respondent, without any consultation whatsoever with the Petitioner unilaterally and/or in contravention of the provisions of the Education Act, Cap 211, decided to transfer the Principal, Mr. Jacob Kimai Tinega and the Deputy Principal M/s Dorothy Muthoni Ikobe, which actions the Petitioner says are illegal and unconstitutional. The Petitioner further says that the said actions by the second respondent have deprived the Petitioner of the rights and freedoms as provided under the Education Act, Cap 211 Laws of Kenya, and that if not curtailed, the said actions are likely to affect the smooth operations and running of the school.

7. The petitioner did not cite any specific section of the Education Act, Cap 211 Laws of Kenya or any rule made thereunder to support its case. I have however perused the Act and find in particular sections 10 and 11 of the Act which provide for the establishment, constitution and functions of the Board of Governors. Under **section 11(a)** of the Act, the Board of Governors “**shall exercise the duty of management of the school or schools, subject to the Act, the Teachers Service Commission Act, Cap 212 and regulations made under this Act and subject to any regulations made under this Act and to any limitations or restrictions that may be imposed by the order.**”

8. The Teachers’ Service Commission Act, Cap 212 is said to be “**An Act of Parliament to provide for the establishment of a Teachers’ Service Commission; to provide for the registration of teachers, for regulating the teaching profession and for cancelling registration in cases of misconduct; to provide for the determination of remuneration of teachers; and for purposes connected therewith**”.

9. It would appear to me that the posting of teachers is among the purposes connected with all the other matters set out in the short title of Cap 212.

10. The question that now arises for determination is whether in light of the above provisions, the applicant has met the conditions set out in **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358** for the granting of the order of injunction sought. The conditions to be fulfilled by the applicant are:-

(a) the applicant must show a prima facie with a probability of success;

(b) an injunction will not normally be granted unless the applicant must otherwise suffer irreparable injury;

(c) when the court is in doubt, it will decide the application on the balance of convenience.

11. The main ground put forward by the Petitioner herein is that it was not consulted when the Respondents decided to transfer the Principal and the Deputy Principal of Nyaikuro Secondary School. I am in doubt as to whether the consultations would sway the Respondents’ decision to effect or not effect the transfers in question. In the circumstances, I am not satisfied that the Petitioner has met the threshold established by the **Giella Cassman case**. The provisions of the Education Act, Cap 211 and the Teachers’ Service Commission Act, Cap 212, make provision on numerous matters touching on teachers, one of such matters in my view, is deployment of teachers.

12. For the reasons above stated, I find that the prayer sought by the Petitioner cannot be granted. Accordingly, the Petitioner’s application for injunction be and is hereby dismissed but with no orders as to costs.

13. It is so ordered.

**Dated and delivered at Kisii this 20<sup>th</sup> day of January, 2012**

**RUTH NEKOYE SITATI  
JUDGE.**

In the presence of:

Mr. Soire for Petitioner/Applicant

N/A for 1<sup>st</sup> Respondent

N/A for 2<sup>nd</sup> Respondent

**RUTH NEKOYE SITATI**  
**JUDGE.**

***PETITION NO. 1 OF 2012***