



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 472 of 2009

IN THE MATTER OF: AN APPLICATION BY ZEDEKIAH ORIOKI, NOBERT OLATO, MEDO MISEMA, KEVIN OCHELLE, FRANCIS NJOROGE, HARUN KURIA, MARY ALUDO, ZAINABU ALI AND ANDREW OKWOME MILIMANI PRIMARY SCHOOL COMMITTEE FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND

IN THE MATTER OF: THE CITY COUNCIL OF NAIROBI

AND

IN THE MATTER OF: THE LOCAL GOVERNMENT ACT CHAPER 265 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE EDUCATION ACT CHAPTER 211 OF THE LAWS OF KENYA

BETWEEN

**THE MILIMANI PRIMARY SCHOOL
COMMITTEE.....APPLICANT**

VERSUS

**THE CITY COUNCIL OF
NAIROBI.....RESPONDENT**

EX-PARTE

THE MILIMANI PRIMARY SCHOOL COMMITTEE

JUDGEMENT

The Ex-parte Applicant (**hereinafter referred to as the Applicant**) is the school committee of Milimani Primary School established under Section 9 of the Education Act Chapter 211 of the Laws of Kenya while the Respondent is the local authority governing the City Council of Nairobi.

Pursuant to leave of the court granted on 7th of August 2009, the Applicant commenced judicial review proceedings against the Respondent through a Notice of Motion dated 28th August 2009 seeking the following orders;

- 1. An order of certiorari to remove into the High Court and quash the notice of eviction dated 31st July 2009 made by the City Council of Nairobi served upon the head master of Milimani Primary School.**
- 2. An order of prohibition to remove into the High Court and prohibit the City Council of Nairobi from evicting the headmaster of Milimani Primary School from the headmaster's house situated within the school.**
- 3. That costs of the application be provided for.**

The application is supported by the supporting affidavit of Zedekiah Orioki dated 28th August 2009, a statement of facts and a verifying affidavit both dated 6th August 2009.

It is premised on grounds that;

1. That under Section 9 of the Education Act, the school committee is mandated to advise the Local Authority on matters relating to the management of the school and to represent the local authority and the community served by the school.
2. In making decisions on the management of the school, the Respondent is required to take into account the views of the school management committee.
3. The respondent acted *ultra vires* its powers under the Education Act and was actuated by malice, bad faith and ulterior motives in demanding rent and issuing an eviction notice against the school's Headmaster.

The application is opposed through a replying affidavit sworn on behalf of the Respondent by Joseph M. Mue, the Acting Director of City Education Department, City Council of Nairobi dated 18th November 2009.

The brief background against which the application was filed is that on 31st July 2009, the Respondent issued a notice to the school's head teacher demanding payment of arrears of rent amounting to Ksh.152 900 in default of which the Respondent threatened to evict him from the school house which he had occupied for five years. The notice gave the head teacher 48 hours to vacate the house.

The Applicant's case is that the Respondent did not have any right or authority to issue the eviction notice since it had not participated or funded the construction of the headmaster's house. It is the Applicant's contention that the school is partly funded by the Government of Kenya and the School community and does not receive any financial support from the respondent.

The Applicant alleged that the head teacher's house, Administration block, toilets and other buildings were constructed in 1988 and 1990 by the Milimani Primary School community which is composed of parents of children enrolled in the school. The Respondent's only contribution was the land on which the house was constructed. The purpose of constructing the head teacher's house within the school compound was to provide accommodation to the head teacher in a nearby and convenient place to enhance management of the school besides providing a safe haven for children who were not picked on time by their parents in the evening or after school trips. The Applicants contend that the presence of the head teacher in the school compound had greatly contributed to improvement of the school's academic performance.

It is the Applicant's case that since 31st March 2008 when the Respondent started harassing the head

teacher with eviction threats, the Applicant had made several visits and complaints to the Respondent about the threatened eviction but the Respondent instead of taking corrective measures had persisted in its intention to actualize its threat to evict the headmaster from the school house.

The Applicant's position is that the eviction notice was not issued in good faith and was motivated by ulterior motives to unlawfully acquire the land on which the head teacher's house is located as had happened in 1993 when the Jehovah Witnesses allegedly grabbed a huge part of the school's land with the connivance of the Respondent. To demonstrate this point, the Applicant averred that it was only the head teacher's house at the Milimani Primary School which was singled out for demands for rent payment by the Respondent since other City Council Schools like Olympic Primary, Visa Oshwal, Utawala GSU, Aga Khan, Our Lady of Mercy, South B among other Primary Schools whose head teachers lived in houses constructed by parents in the school compound were not being charged house rent by the council but by the school. It is the Applicant's contention that it is the correct party to charge any rent it found appropriate on the headmaster's house which can then be applied to the benefit of the school.

The Applicant complained that the Respondent was biased against its head teacher and its actions were oppressive and against the public interest which the court should protect by intervening and granting the prayers sought.

In opposing the application, the Respondent stated that Milimani Primary School belongs to it but all teachers working in the school were employed by the Teachers Service Commission. The commission was responsible for payment of teacher's salaries and other allowances which included house allowance and therefore the head teacher at Milimani Primary School was required to utilize his house allowance by paying rent to the Respondent.

The Respondent maintained that the head teacher's house was erected on its land and that it was entitled to receive rent from it at the prevailing market rates and that in any event, there was a circular from the Government ordering all people living in institutional houses to pay house rent at the prevailing market rates. The head teacher was not therefore entitled to free accommodation. It is worth noting however that the alleged Government circular was not exhibited for the court's perusal by the Respondent.

The Respondent asserted that the notice issued to the head teacher on 31st July, 2009 was legally binding and urged the court not to grant the reliefs sought in the Applicant's application.

Having considered the pleadings herein and the written submissions filed by the parties, I find that only three issues emerge for this court's determination which are the following:-

- (1) Whether the eviction notice issued by the Respondent on 31th July 2009 was ultra vires the provisions of the Education Act.
- (2) Whether the Respondent's decision to issue the said notice was arbitrary, unreasonable, and oppressive or was actuated by bad faith and ulterior motives.
- (3) Whether the Applicant is entitled to the reliefs sought.

I will consider all the three issues together since they are all interrelated.

Starting with the first issue, the Applicant submitted that the notice was ultra vires Section 9 of the Education Act since the Respondent failed to take into account advice given to it by the Applicant regarding the management and control of the headmaster's house.

The Respondent on its part submitted that the notice of 31th July 2009 was validly issued since as the owner of the land on which the house was constructed, it was entitled to demand payment of rent from the house at the current market value. The Respondent also claimed that the head teacher was not entitled to free accommodation since he was not its employee and he was also receiving house allowance from his employer.

Having perused and considered the material placed before me in this case especially the documentation attached to the affidavit sworn on the Applicant's behalf, I concur with the Applicant's submission that the Respondent evidently failed to consider the school's committee's advice relating to the need to continue housing the head teacher in the school compound for the proper management of the school and for the comfort and security of the school's pupils who may have the misfortune of being picked late from school. The Respondent did not also apparently take into account the Applicant's advice to the effect that if any rent was payable from the house, the Applicant was entitled to determine the amount of rent to be paid and collect the same to be applied for the benefit of the school.

It is important to note that the Respondent did not deny the applicant's claim that the house in question had been constructed by the school community without any financial contribution from it and that the Respondent was not demanding rent from headmasters occupying similar houses in other Primary Schools falling under the management of the City Council of Nairobi.

Section 9(1) of the Education Act (the Act) is very clear. It provides for the establishment of School Committees by local authorities in every Primary School maintained and managed by a Local Authority.

Section 9(1) proceeds to specify the role of such a committee which is to advise the local authority on matters relating to the management of the school.

Though the section does not state that such advise would be binding on the local authority, Section 8(4) of the Act requires the local authority to give due weight to the wishes of the parents of a school. It is clear from Section 9(2) of the Act that parents of a school form part and parcel of the school committee.

Section 8(4) states:

“In determining what are the wishes of the community served by a school, the local authority or the Minister shall give due weight to the wishes of the parents of the children at the school”.

Parents of the school needless to say constitute the community served by the school together with their children.

It is clear that in this case, the school community's wish was that the Respondent should not demand rent from its headmaster for the house it had constructed for his occupation for the benefit of the school community. It was also its wish that it should be allowed to charge rent if any was payable and apply the same for the school's benefit.

It is apparent from the material placed before me that the Respondent did not give any consideration to the wishes expressed by the school community. Though Section 8(4) does not provide that the Respondent was bound to follow the wishes of the school community, I think that it created a statutory obligation that required the Respondent to consciously consider and give due weight to the wishes of the school community regarding the school's management and implement them unless there was good reason for not doing so. The principles of good governance and transparency which are the bedrock of good public administration required that if such reasons existed, the same should be communicated to the Applicant in order for them to engage the Respondent on how best to amicably sort out the issue of the head teacher's accommodation.

The Respondent had the onus of proving that it had complied with this provision of the law and it could only do so by demonstrating that it had consulted with the applicant or the school community and given due consideration to its wishes e.g. by producing minutes of meetings held with the applicants. The Respondent did not offer any such evidence.

It is therefore my finding that in failing to show that it gave any weight to the Applicant's wishes, the Respondent acted ultra vires Section 8(4) of the Education Act and the decision to demand rent and to issue the eviction notice of 31st August 2009 was consequently null and void abinitio.

It is also my finding that the Respondent's decision to demand house rent backdated for 5 years without prior notice or consultation with either the head teacher or the school committee who had allowed the head teacher occupation of the said house and giving the teacher 48 hours to vacate the house was both oppressive and unreasonable within the meaning of "**Wednesbury unreasonableness.**" I find that no reasonable Local Authority would have reached the same unilateral decision as the Respondent requiring payment of substantial amounts of money in accumulated rent for a house it did not participate in its construction in default of which the subject of the notice was to organize for alternative accommodation in 48 hours only. Where and how would such accommodation be found at such a short notice?

If the Respondent was indeed entitled to demand rent from the house, it would ideally have done so from the time the head teacher moved into the house and would not have waited for five years to start demanding immediate payment of accumulated rent for five years. This action by the Respondent appears to have been an afterthought motivated by ulterior motives other than a genuine desire to receive rent from the premises. It does not appear to have been made in good faith considering that the Respondent has not denied that it was not charging rent from other head teachers occupying school houses built by parents in other Primary Schools managed by the Respondent.

Further, in making its decision, the Respondent failed to take into account relevant factors such as the need to have the school's head teacher living in the school compound to enhance better management of the school, to have continued improvement of the school's academic performance and to secure the comfort and security of its pupils.

It instead took into account irrelevant considerations such as that the head teacher was employed by the Teacher's Service Commission and was receiving house allowance for which he was not paying rent obviously failing to appreciate the fact that it is the school committee which had constructed the house and put him in its occupation after taking into account the interest of the school community. The Respondent also failed to appreciate that the head master had not refused to pay rent and that the Applicant had expressed its willingness to charge rent on the house and apply it for the benefit of the school.

As a Local Authority making decisions that were bound to adversely affect the rights of citizens such as the decision to issue an eviction notice against the head master in this case, the Respondent had a duty to not only observe the principles of good governance in the management of its affairs but also to treat persons subject to its authority fairly. The purpose of judicial review is to ensure that individuals are treated fairly by the authorities to which they are subjected. In this case, I have no doubt in my mind that the Respondent did not treat the Applicant and more so the head teacher who was more directly affected by the Respondent's decision fairly. He was not consulted prior to the issuance of the eviction notice and he was given an unreasonably short time to look for alternative accommodation.

It has been suggested by the Applicant that the decision to issue a quit notice to the school's head master was motivated by a desire to facilitate the grabbing of the land on which the house in question stood. It is not open to this court to cast aspersions as to what could have motivated the making of such a decision by the Respondent but it is apparent from the material placed before the court that the said decision was not made in good faith having the interest of the children, their parents and the entire school community in mind.

In view of the foregoing, I am satisfied that the Applicant has ably demonstrated that it is entitled to the reliefs sought in this case. I therefore find merit in the application dated 28th August 2009 and I hereby allow the same in terms of Prayers 1 and 2. I also award costs of this application to the Applicant.

DATED, DELIVERED and SIGNED by me this 28th day of November 2012.

C.W.GITHUA

JUDGE

In the presence of:

Florence – Court Clerk

M/S Munyasa for Applicant

No appearance for Respondent