



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**JUDICIAL REVIEW NO. 113 OF 2010**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS FOR CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF APPLICATION FOR ORDER PROHIBITING  
CLOSURE/INTERFERENCE OF NAIVASHA ORPHANS**

**RESCUE AND REHABILITATION CENTRE BY THE RESPONDENTS**

**BETWEEN**

**THE TRUSTEES OF NAIVASHA ORPHANS RESCUE AND REHABILITATION CENTRE**

**MARY MWIHAKI KIMANI.....1<sup>ST</sup>  
APPLICANT**

**GEORGE MWANDIME.....2<sup>ND</sup>  
APPLICANT**

**VERONICA MWENDE.....3<sup>RD</sup>  
APPLICANT**

**JOSEPHINE WANGARI KAMARA.....4<sup>TH</sup>  
APPLICANT**

**GEOFFREY THAITINGA.....5<sup>TH</sup>  
APPLICANT**

**VERSUS**

**THE MINISTER FOR GENDER, CHILDREN & SOCIAL DEVELOPMENT.....1<sup>ST</sup>  
RESPONDENT**

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

**RULING**

By an Application brought by way of a Chamber Summons dated 23<sup>rd</sup> November 2010 and filed on 25<sup>th</sup>

November 2010, the Trustees of Naivasha Orphans Rescue and Rehabilitation Centre (*the Applicants*), sought leave of court under the provisions of Order 53, Rules 1 and 2 of the Civil Procedure Rules 2010 and Sections 8 and 9 of the Law Reform Act, (*Cap. 26, Laws of Kenya*) for -

- (1) *Leave of court to commence proceedings of judicial review for orders of certiorari and prohibition against the Minister for Gender, Children and Social Development or her officials and/or suited descriptions restraining her against closing and ordering closure of the Applicant's institution known as Naivasha Orphans Rescue and Rehabilitation Centre and consequently smooth operations of the Subject institutions without undue and/or necessary interferences,*
- (2) *that the decision of 17/05/2010 of closing the Applicants institution be quashed and set aside since it is discriminative, excessive and contrary to law,*
- (3) *that all the necessary declaratory directions to facilitate the smooth running of the suit institution be given,*
- (4) *that the costs of this application be provided for but abide the result of the substantive motion.*

The application was supported by the Statement of Facts and the Affidavit Verifying the Facts sworn by one Mary Mwhaki Kimani, a Trustee of the Applicant.

On 25<sup>th</sup> November 2010 I directed that the application be served upon the Respondents which was duly done, and the Attorney General filed an Appearance both on his own behalf as 2<sup>nd</sup> Respondent, and on behalf of the Minister, the 1<sup>st</sup> Respondent.

In opposition to the Application, Mr. Ahmed Hussein, the **Director of Children Services and Secretary for Children Services in the Ministry for Gender, Children and Social Development** swore a **Replying Affidavit on 22<sup>nd</sup> February 2011**, and it was filed on 24<sup>th</sup> February 2011.

Counsel for both the Applicant and the Respondents filed Skeletal Arguments in support of their respective positions.

The Application here is for leave of court to the Applicants to institute judicial review proceedings for orders of certiorari and prohibition against the 1<sup>st</sup> Respondent. It is not the duty of the court at the leave stage, to consider the nature of the reliefs sought or whether indeed they will or will not be granted by the court which would ultimately decide the question past the leave stage, or when the substantive motion is brought to the court.

The duty of the Judicial Review Court at the leave stage is to consider whether the Applicant has established an arguable case which would enable the court to infer a breach on the part of the 1<sup>st</sup> Respondent of any legal rule governing the operations of the Applicant and therefore require the Respondent to rebut that inference of breach. See the case of **NJUGUNA & OTHERS vs. MINISTER FOR AGRICULTURE [2001] E.A. 184.**

In this matter the Applicant's case is that, the institution was registered on 5<sup>th</sup> December 2007 pursuant to the provisions of Section 60 of the Children Act 2001, although the Applicants claim that the institution had been in existence for over ten years.

In law, the implication of registration under any statutes means that the recipient of the Registration Certificate, will be subject to all the provisions, and the regulations of that statute. The relevant statute here is the Children Act, 2001 (*No. 8 of 2001*).

The Applicants herein are a charitable institution established and granted approval by the 1<sup>st</sup> Respondent through a council, to manage programmes for the care, protection, rehabilitation or control of children.

The National Council for Children Services is established as a body corporate under Section 30 of the Children Act, and has power under Section 32(2) (q) thereof, to establish Area Advisory Councils (*which specialize in various matters affecting the rights and welfare of children*).

The functions of an Area Council are set out in Regulation 3(4) of the Children Charitable Children's Institutions (Regulations, 2005). Regulation 3(4) (b) empowers the Area Council, if after inspection, it finds that requirements of the Third Schedule have not been complied with, to -

(i) *make recommendations as for improvement to the administering authority, for implementation before the next inspection, if the continued operation of the institution does not pose a danger to the welfare of the children, or*

(ii) *recommend to the Director for the immediate closure of the institution and make arrangements for placing the children accommodated in the institution in other institutions.*

And that if a decision is made under paragraph (ii), the administering authority may within thirty (30) days from the date of closure appeal to the Minister.

I hasten to say, the right to judicial review is not subject to the availability of any other remedy. The appellant was correct in approaching the judicial review court. The only question is whether he or they are entitled to leave - before bringing it a substantive motion.

As already observed above, for the Applicant's to be granted leave, they must show an arguable case, as defined above. In this case, the applicant's must show either, that the Area Council had no jurisdiction to close the institution, and relocate the children, or that the Area Council breached some provision of the Regulations governing its mandate.

The Area Council's Inspection Report showed deficiencies in (i) Children's Records (*not maintained*), (ii) Staffing (*staff not qualified*), (iii) Diet (*inadequate and poor facilities for preparation and storage of food, and an unbalanced diet*), (iv) fitness (*premises not fit to hold children*) (v) Health needs of children (*sanitary facilities not properly provided, no First Aid Kit*), (*a terminally ill girl taken to hospital after she became bedridden*), (vi) Recreational facilities (*inadequate*), (vii) Water and Sanitation (*poor and inadequate water facilities, and poor sanitation facilities*), (viii) Education of children (*five children were not going to school*), and (ix) Guidance and Counseling (*no qualified social worker*).

For the court to grant leave, the applicants needed to show that these considerations are not within either the mandate of the Area Council, or that the considerations are not within the contemplation of the Third Schedule to the Regulations, or the provisions of Regulation 3(4) of the Children (*Charitable Children's Institutions*) Regulations, 2005, or Section 32 of the Act.

I am unable to say both from the Application and the Affidavit of the Trustee, Mary Mwihaki Kimani or the Applicant's Counsel's submission that there is any material upon which to base a case for granting leave to bring judicial review proceedings.

Indeed it is clear from Annexure 4 to the Trustee's Mary Mwihaki Kimani's Affidavit, that the inspection was carried out between 12<sup>th</sup> -13<sup>th</sup> May, 2010, and the decision to close the institution was not made until 17<sup>th</sup> May 2010, some 4 days later. More so, the decision was not made by the 1<sup>st</sup> Respondent's officers alone, but with the Inspection Report by the Area Council. I cannot therefore say that the decision was taken in breach of the rules of natural justice, and I can see no ground for the claim of either bias or malice.

For those reasons, I must conclude that the Applicants have not established an arguable case for the grant of leave to bring judicial review proceedings for any of the reliefs sought.

The Application dated 23<sup>rd</sup> November 2010, and filed on 25<sup>th</sup> November 2010 is dismissed with a direction that as this is essentially public interest litigation, each party shall bear its own costs.

There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 3<sup>rd</sup> day of June 2011**

**M. J. ANYARA EMUKULE**  
**JUDGE**